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175 Cal. 505

HALLIDIE v. ENGINGER. (S. F. 7269.)

(Supreme Court of California. June 21, 1917.
Rehearing Denied July 19, 1917.)

1. ATTACHMENT 🔑12—SCOPE OF REMEDY.

Rule that statutes authorizing a writ of attachment only in cases ex contractu deny it both in actions ex delicto and in actions where equitable relief as such is sought does not prevent attachment from issuing where the exercise of equitable powers, as in settling accounts and striking a balance, is incidentally involved, if in other respects the pleadings warrant an attachment.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 38, 39.]

2. ATTACHMENT 🔑7—RIGHT TO REMEDY—SUIT BY TRUSTEE FOR STOCKHOLDERS.

Code Civ. Proc. § 537, providing that an attachment may issue in an action upon a contract express or implied for the direct payment of money, did not authorize the issuance of an attachment in a suit by one as trustee for stockholders of a corporation which had forfeited its charter, where the complaint alleged that defendant while acting in a fiduciary capacity by grossly fraudulent misrepresentations and acts induced the corporation to sell to defendant shares of stock in another corporation for a mere fraction of their real value; it being an action ex delicto.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 24–29.]

Department 2. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Martha E. Hallidie, as trustee for the stockholders of the California Wire Works, a corporation, against Victor Enginger. From an order discharging attachment, plaintiff appeals. Affirmed.

Osgood Putnam and Wm. C. Crittenden, both of San Francisco, and Chas. C. Boynton, of Oakland, for appellant. Cushing & Cushing, William H. Gorrill, and Wm. S. McKnight, all of San Francisco, for respondent.

HENSHAW, J. The following statement of this cause of action is plaintiff's own:

"The plaintiff sues as the trustee for the stockholders of a certain corporation California Wire Works which has forfeited its charter. The complaint alleges facts showing in brief that the defendant while acting in a fiduciary capacity, by means of certain grossly fraudulent misrepresentations and acts, induced said California Wire Works to sell to defendant 75 shares of stock in another corporation known as the California Wire Cloth Company for a mere fraction of its real value; that the total amount paid by defendant for said stock was $35 per share, viz. $2,450 for said 75 shares; that within seven years thereafter defendant received $47,950 as dividends on said stock and sold said stock for a further sum of $54,250, making a total of $102,200 received by defendant on said 75 shares of stock so fraudulently obtained from said California Wire Works. Applying the rule of compound interest at the legal rate of 7 per cent. per annum swells the total amount due from defendant to something in excess of $190,000."

Under this complaint plaintiff levied a writ of attachment. Respondent moved to discharge the attachment; the motion was granted and this appeal followed. Section 537 of our Code of Civil Procedure provides that an attachment may issue (subd. 1) "in an action upon a contract, express or implied, for the direct payment of money." Appellant here contends that her action is upon an implied contract for the direct payment of money; that even if the action be considered an action in equity, still as it is upon an implied contract for the direct payment of money the attachment was legal.

[1] The fact that appellant seriously maintains this position shows the necessity for certain general observations to clear the way for a true comprehension of the matter. The first of these general observations is that the writ of attachment as now employed was unknown to the common law, is a creature of legislative enactment, and has the scope, and only the scope, which the Legislature has chosen to accord to it. In some states an attachment may issue in all cases, in some states it may be issued in actions ex delicto, in some states it may be issued against the property of the perpetrator of fraud, but in every state the limit of the right to the writ is found in the language of the statute itself. Therefore adjudications of sister states are valueless in a consideration of the question, unless it be shown that their statutes are in terms substantially identical with our own. The next general consideration is that Legislatures in establishing the simplified code pleading and in thus abolishing the forms of common-law actions did not destroy, and even if they had desired could not destroy, the essential characteristics of those

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

actions so long as the common law remains the basis of our jurisprudence. Anciently, no action at law could be brought without the permission of the king's writ, breve originalis, and the writ itself limited with rigidity the controversy over which the plaintiff was permitted to sue. If in a material respect his declaration which followed departed from the terms of the original writ the variance was fatal as the litigant was endeavoring to sue without the permission and sanction of the original writ. This inevitably resulted in the grouping of actions into kinds and classes whose limitations were defined by the precedents of the original writs. The narrow range of these original writs forced the adoption of the statute of Westminster II, allowing the issuance of such writs in cases similar to those in which they had previously been issued, thus giving rise to a great number of new forms of action, though in well nigh all, being actions at law, the redress sought was damages. One of the great divisions of these common-law actions was the division known as personal actions, including all those brought for specific recovery of goods and chattels, for damages or other redress for breach of contract, for wrongs or injuries of whatever description, and these personal actions in turn were divided into actions ex contractu and ex delicto, the former having to do with the redress for violations of contracts, the latter having to do with compensation for an infinite variety of personal wrongs which might be inflicted. "It is clear that before one is able to distinguish between an action ex contractu, or upon contract, and ex delicto, or in tort, he must understand the essential elements of each of these causes of action and their distinguishing feature. This distinguishing feature is not found in the means of accomplishing an injury, nor in the nature of the harm or damage inflicted, nor indeed is it indicated by the presence or absence of a contractual relation, because it may be necessary that a certain contractual relation exist between the parties in order that a particular course of conduct, e. g., a degree of care or negligence, be unlawful. The distinguishing feature of a tort consists in the nature of the obligation which is violated. A tort, in contemplation of English law, consists in a violation of a duty imposed by the general law upon all persons occupying the relation which is involved in a given transaction or res gestæ." Andrews, Stephen's Pleading, § 61. The remedies and recoveries in a common-law action varied greatly, depending on whether the action was ex contractu or ex delicto, and partly for this reason there grew up a series of legal fictions at common law under which in a limited class of cases the suitor was allowed to select his form of action. The development of these fictions lead to the creation and recognition of what are known as implied contracts. In some instances the action on implied contract does not in truth rest upon contract at all. In others, the contract may lie at the base of the wrong or may have enabled the perpetrator to have accomplished his wrong. Thus, where A. delivers goods to B. at B.'s request, even though B. never meant to pay for them, the law erects the legal fiction that he promised to pay, and he will not be heard to deny it in the action for quantum valebat in assumpsit. But, upon the other hand, if B. steal A.'s watch, A. could treat the theft as a contract of sale and sue in like manner ex contractu, though in fact there was no foundation whatsoever for the fiction other than the need of broadening A.'s remedies. Downs v. City of Baltimore, 111 Md. 674, 76 Atl. 861, 41 L. R. A. (N. S.) 255, 19 Ann. Cas. 644. Or again, if B. in the employ of A. misappropriates his money or property, while A. could sue ex delicto for the wrong, he could, on the other hand, waive the tort and sue, again depending upon the nature of the property converted, either for the value, for goods sold and delivered, or for money had and received. Lipscomb v. Citizens' Bank, 66 Kan. 243, 71 Pac. 583; Bank v. Fonda, 65 Mich. 533, 32 N. W. 664. Nevertheless, while in these limited kinds of cases the suitor might do either, he could not do both. He had to elect his remedy and stand upon his election. If he waived the tort and sued in contract his writ and declaration charged upon contract only. If he waived his contract and sued in tort, the writ and declaration charged in tort only. Next, let it be remarked that the common-law distinctions between actions ex contractu and actions ex delicto have not been changed by the permission to file rambling pleadings containing averments pertaining to both classes of actions, and even averments addressed to equity alone. And, finally, let it be remembered that our statute, and statutes like ours, grant a writ of attachment only in cases ex contractu, and therefore deny it, both in actions ex delicto and in actions where equitable relief as such is sought. Elliott v. Jackson, 3 Wis. 571; Thorington v. Merrick, 101 N. Y. 5, 3 N. E. 794; Ebner v. Bradford, 3 N. Y. Abb. Prac. (N. S.) 248.

With the foregoing in mind we may approach the consideration of our question with some hope of clear elucidation. Drake (Attachments, § 10, note) well says in discussing statutes limiting attachments to actions arising on contracts, express or implied, for the recovery of money only, as does ours, that this language "leaves no room for using it in actions founded in tort," and this most manifestly is true and is so declared in this state. Babcock v. Briggs, 52 Cal. 502; Walker v. McCusker, 65 Cal. 360, 4 Pac. 206; Mudge v. Steinhart, 78 Cal. 34, 20 Pac. 147, 12 Am. St. Rep. 17; Bechtel v. Chase, 156 Cal. 711, 106 Pac. 81.

In stating as we have done that the writ is unauthorized where the foundation of the action is a demand for equitable relief, we do not mean to be understood as saying that where some exercise of equitable powers, as in settling accounts and striking a balance, is incidentally involved in the action the attachment may not issue, if, in other respects, the pleadings warrant it. Our rule of decision is to the contrary. De Leonis v. Etchepare, 120 Cal. 407, 52 Pac. 718; Kohler v. Agassiz, 99 Cal. 9, 33 Pac. 741. Therefore in this complaint we will hold that the facts that an accounting as to the amount of money which the defendant received by way of dividends and from the sale of the stock is necessary to do justice between the parties, and that the plaintiff is suing as trustee for the benefit of those between whom another accounting of the funds of the judgment must be had, will not thereby transform the action into one purely in equity.

[2] Having thus declared what this action is not, it is extremely easy to state what it is. It is an action ex delicto for fraud. At common law it would have been an action of trespass on the case for damages for deceit, and all the matters pleaded touching moneys derived from dividends and from the sale of property would have been by way of proving special damage in the particular case. That it is such an action no doubt can be entertained. Kerr, Fraud, p. 330, note; Chitty, Pleading, *p. 137. True, there are allegations, and pertinent allegations, touching the contract of sale of the stock, but these allegations are useful and valuable only as showing the relationship of the parties by virtue of which the fraud was perpetrated, and not as establishing the nature of the action itself. So, too, the complaint charges the defendant, because of his fraud, as being in equity a trustee; but apart from the consideration that it requires a decree in equity to impose this trusteeship, by the very terms of its equitable designation it is a trusteeship arising in tort. That equitable designation is trustee ex delicto or trustee ex maleficio, which in reality means no trustee at all, and is merely a convenient equitable description of the exactions with which equity will force such a wrongdoer to comply.

A passenger to recover for injuries inflicted by a common carrier must plead the contract of carriage to establish the relationship, but for the injuries inflicted upon him his action is ex delicto and not ex contractu, precisely as here the contract of sale is pleaded only to show the method employed to accomplish the fraud. And it may be added that if appellant will not have it so, then has she pleaded herself entirely out of court, because, if she insists that this is an action ex contractu, the statute of limitations has long since run against it, for it is to be noted that our statute extending the time for the commencement of an action to within three years after the discovery of a fraud does not extend the time for enforcing contracts, express or implied, but extends the time for commencing actions "for relief on the ground of fraud." Anciently, while equity relieved and entertained bills where fraud and its recent discovery were pleaded, the common law was more slow to do so, and the rules and statutes limiting the time for the commencement of the action were enforced with much rigor, so that if the discovery of the wrong was delayed no action ex contractu would be entertained, and so it is that Chitty says:

> "And again, where there has been a fraud and it is supposed that the statute of limitations will be set up as a defense, an action for the fraud is preferable to the action of assumpsit, as there is reason to contend that the statute only begins to run from the time the fraud is discovered." Chitty on Pleading, *p. 144.

Wherefore it follows that the attachment was properly discharged. The order appealed from is therefore affirmed.

We concur: **MELVIN, J.; LORIGAN, J.**

175 Cal. 468

JACOBSON v. NORTHWESTERN PAC. R. CO. (S. F. 7105.)

(Supreme Court of California. June 14, 1917. Rehearing Denied July 14, 1917.)

1. MASTER AND SERVANT 🔑185(27)—WARNING GIVEN BY UNAUTHORIZED EMPLOYÉ — MASTER'S LIABILITY.

A master is not responsible for the consequences of bad advice given by a servant, whose duties do not include the giving of advice generally.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 418, 419.]

2. MASTER AND SERVANT 🔑321—SERVANT'S INJURY—PLACES FOR WORK—INVITATION TO USE LADDER.

A permanent ladder, erected solely to enable employés to reach a platform, where an employé of an independent contractor was told he should not go, was not an implied invitation for him to use the ladder, which required him to pass through a danger zone, and which was unnecessary for the purposes of his work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1262.]

3. NEGLIGENCE 🔑2—ACTION—NECESSITY FOR BREACH OF OBLIGATION.

To warrant the maintenance of an action by one for an injury due to negligence, there must exist some obligation toward plaintiff which defendant has left undischarged.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 3, 4.]

4. MASTER AND SERVANT 🔑330(3) — SERVANT'S INJURIES — CONTRIBUTORY NEGLIGENCE—SUFFICIENCY OF EVIDENCE.

Evidence *held* sufficient to show that death of an independent contractor's employé was due to employé's negligence in passing through a danger zone, regarding which he had been warned, and which was not necessary in performing his work, and that the employer was not in any respect negligent.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1272.]

5. NEGLIGENCE 🔑33(1)—CONTRIBUTORY NEGLIGENCE—LICENSEES AND TRESPASSERS.

There is no rule which protects those who go where they are not invited, but merely with express or tacit permission, from curiosity or motives of private convenience, in no way connected with their business.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 45.]

6. NEGLIGENCE 🔑136(5)—QUESTION OF LAW OR FACT.

Ordinarily, the question of negligence is one of fact; but where the undisputed evidence is such that only one inference can be drawn, or is so conclusive that the court should set aside a verdict not in accord therewith, the question is one of law, which warrants the court in directing a verdict.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 282–284.]

7. TRIAL 🔑168 — DIRECTION OF VERDICT — GROUNDS.

A directed verdict is proper whenever, upon the whole evidence, the judge would be compelled to set aside a contrary verdict as unsupported by the evidence; and it is not necessary that there should be an absence of conflict, but to deprive the court of the right to exercise such power, the conflict must be a substantial one.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 341, 376–380.]

8. MASTER AND SERVANT 🔑332(1) — SERVANT'S INJURY—DIRECTION OF VERDICT.

Evidence showing that the death of an independent contractor's employé resulted from his own negligence in passing through a danger zone, regarding which he had been warned, *held* sufficient to warrant a directed verdict for defendant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1274.]

Department 1. Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by Evelyn Jacobson against the Northwestern Pacific Railroad Company. Judgment for defendant, and plaintiff appeals from order denying motion for new trial. Affirmed.

M. T. Moses, of San Francisco, for appellant. Stanley Moore, of San Francisco, for respondent.

VICTOR E. SHAW, Judge pro tem. Plaintiff, as the widow and sole heir of John A. Jacobson, deceased, brought this action to recover damages for the death of her husband alleged to have been caused by the negligence of defendant. At the close of the evidence the jury, upon direction of the court so to do, rendered a verdict in favor of defendant in accordance with which judgment was entered. The appeal is from an order of court denying plaintiff's motion for a new trial.

The facts admitted by the pleadings and established by the evidence are as follows: Defendant owned a railroad in connection with which it maintained a power house at San Anselmo, where it received electric energy used in the conduct of its business and the operation of its road. At the time in question this power house was some 80 feet long, extending east and west, and 32 feet wide. Across the rear or east end thereof, and some 13 feet above the floor, was a platform joining the rear wall and extending out therefrom 12 feet and 6 inches. On this platform, and located 2 feet from the rear wall and parallel therewith, the defendant had installed three high tension oil sets. The space between the outer line of these sets and the front edge of said platform was some 7½ feet. Back of each oil set was a window through which, at a height of 5 feet above the platform, a high tension wire for conveying electric current entered, and, crossing over the 2-foot space, extended down into said oil sets. Except for a small wooden rod extending horizontally from each oil set to the edge of the platform, and 2 feet above the floor thereof, the 7½-foot space in front of the oil sets was free and unobstructed. On each side of the interior of the house, 18 feet above the floor, and within a few inches of the walls, was a runway consisting of a 24-inch I-beam upon which small rails had been secured for operating a crane. This runway, supported by iron posts or columns, extended from a point in line with the outer edge of said platform at the rear or east end of the building a distance towards the front of some 40 feet. At the end of the runway, on the south side of the building and next to the platform, the iron post used as a supporting column for the beam was provided with projecting spikes of iron as steps for a ladder, thus affording a means of reaching the platform. Defendant, desiring to extend the runway, upon which to operate the crane, from the point where it ended, 40 feet from the platform, to the front of the building, let a contract therefor to the Pacific Rolling Mills Company, which employed one Frederick A. Schauer as contractor to install the same. Among the men employed to do the work by Schauer was John A. Jacobson, the husband of plaintiff herein, who, with others, commenced the work of installation on January 9, 1912. On the morning of January 11th, Jacobson, under direction of the foreman, was engaged on the runway on the north side of the building, tightening the clips used to hold the rails on the beam. Another employé, Anderson, was doing like work on the south runway. In reaching their work they used an ordinary movable wooden ladder, the position of which was near the front of the building. About half an hour before the accident Jacobson was noticed at work adjusting the clips on the rail on the old runway, which it seems had been loosened in installing the extension or new runway. At this time he was at work about 14 feet from the end of the runway at the platform. Later his groans attracted the attention of Anderson, the employé working on the opposite side, who upon looking up saw Jacobson standing immediately back of the middle oil set in the 2-foot space between the row of oil sets and the rear wall of the building; his arm being against the high tension wire, which extended down into the oil set. At about the same time Jacobson raised his head, touching a wire extending through the window 5 feet above the platform, as a result of which he received the injury which caused his death.

It clearly appears that the platform was wholly disconnected with the work required in installing the extension of the runway, and that in performing the contract no occasion existed for any of the employés going thereon; that on the morning of January 9th, after the work had commenced, Mr. Hatch, defendants' superintendent, in conversation with the contractor's foreman, said to him, "That stuff up there [referring to the platform] you want to keep away from all the time;" and that Mr. Govann, the operator at the power house, in a conversation had prior to the accident with the contractor's foreman emphasized the fact that they should keep off the platform, because it was a 50,000-volt transmission, and would kill a person within a radius of 4 feet, admittedly an exaggeration, but well calculated to warn the employés of its dangerous character. It further appears that, prior to his completion of his task of adjusting the rail clips, Jacobson, actuated solely by curiosity or for his own convenience, and in the absence of any means provided for reaching the platform from the end of the runway upon which he was working, jumped or climbed therefrom to the front of the platform, and, as shown by his footprints in the dust, went in the narrow space immediately back of the middle oil set, where his arm came in contact with the descending wire, as a result of which he was electrocuted.

[1] Not only was deceased, through his employer's foreman, warned by defendant to keep away from the platform upon which were installed wires through which approximately 50,000 volts of electricity were conducted, but neither in the installation of the extension of the runway, for which his employer was the contractor, nor in the performance of duties imposed upon him as such employé, was there any occasion for his going upon the platform. As showing a want of warning, appellant directs our attention to the fact that, when the contractor and his foreman came to the power house on Sunday, before the Tuesday on which they began the work, one Galloway, employed by defendant as electrician, and who at the time happened to be there, told them that on Saturdays and Sundays the plant was operated all day, and that on week days it ran between the hours of 6 and 10 a. m. and 4 and 8 p. m., and that when in operation all the wires were hot, but there would not be any wires in operation *back there*, where they were going to do the work, except a 600-volt cable which came in. It is not shown that Galloway's position as an employé authorized him to bind defendant by the giving of warnings or advice in connection with work at the power house, which in fact was in charge of Hatch and Govann. "A master is not responsible for the consequences of the bad advice given by a servant whose duties do not include the giving of advice and counsel generally." Keating v. Michigan C. R. R. Co., 97 Mich. 154, 56 N. W. 346, 37 Am. St. Rep. 328; Lackat v. Lutz, 94 Ky. 287, 22 S. W. 218; Hall v. Poole, 94 Md. 171, 50 Atl. 703. Moreover, the advice given by Galloway, if in so doing he be deemed to have acted within the scope of his employment, referred, not to the conditions where the high tension transmission wires were installed on the platform, but to conditions existing in that part of the building where the work was to be done; added to all of which is the warning given by both Hatch and Govann at the time when the work was actually commenced.

[2] As heretofore stated, the iron column supporting the end of the runway next to the platform was constructed as a ladder for use in reaching the platform. Appellant insists that its maintenance was an implied invitation to deceased to use the column so provided with the spike steps in reaching the ground, rather than retrace his steps over the runway to the movable wooden ladder used in reaching the place of work. This permanent ladder, from its nature erected for the sole and specific purpose of enabling defendant's employés to reach the platform, where deceased was told he should not go, could not be deemed an implied invitation for him to climb or jump down from the runway on which he was working, and go through a danger zone 2 feet in width for a distance of 32 feet in order to gain the ground, even though that was his object, as to which the record is silent.

[3-5] To warrant the maintenance of an action by one for an injury due to negligence, there must exist some obligation towards the plaintiff which defendant has left undischarged. Schmidt v. Bauer, 80 Cal. 565, 22 Pac. 256, 5 L. R. A. 580. In the case at bar, no facts appear which tend to show any obligation of defendant to deceased which it failed to discharge. Indeed, the testimony of the contractor's foreman, to the effect that in the course of the work of installing the runway they had no occasion to go upon or use the platform, and that Jacobson's act in going upon it was not due to any order expressly given, nor to anything connected with the work in which he was engaged in doing, is not controverted. Having, as stated, for his own convenience and without invitation on the part of the defendant, intruded upon a place of danger, in which position as to defendant he was, if not a trespasser, at least a licensee, as to whom defendant owed no

duty for the violation of which it is liable, the injury suffered must be deemed to have resulted solely from his own negligence. As said in Kennedy v. Chase, 119 Cal. 637, 52 Pac. 33, 63 Am. St. Rep. 153:

> "We have found no support for any rule [speaking of licensees and trespassers] which would protect those who go where they are not invited, but merely with express or tacit permission, from curiosity or motives of private convenience, in no way connected with business or their relations with the occupant."

To the same effect are Means v. Southern Cal. Ry., 144 Cal. 473, 77 Pac. 1001, 1 Ann. Cas. 206, Belford v. Canada Shipping Co., 35 Hun (N. Y.) 347, Zoebisch v. Tarbell, 92 Mass. (10 Allen) 385, 87 Am. Dec. 660, and Thompson on Negligence, § 946.

[6, 7] While ordinarily the question of negligence is one of fact, to be determined by the jury, nevertheless, where the undisputed evidence is such that only one inference can be drawn therefrom, or it is of a character so conclusive that the court should in the exercise of its discretion set aside a verdict not in accord therewith, the question is one of law, which warrants the court in directing a proper verdict. Davis v. Cal. St. Ry. Co., 105 Cal. 131, 38 Pac. 647; Delaware, etc., R. R. Co. v. Converse, 139 U. S. 469, 11 Sup. Ct. 569, 35 L. Ed. 213. In Estate of Baldwin, 162 Cal. 471, 123 Pac. 267, it is said:

> "A directed verdict is proper, unless there be substantial evidence tending to prove in favor of plaintiff all the controverted facts necessary to establish his case. In other words, a directed verdict is proper whenever, upon the whole evidence, the judge would be compelled to set a contrary verdict aside as unsupported by the evidence. To warrant a court in directing a verdict, it is not necessary that there should be an absence of conflict in the evidence; but, to deprive the court of the right to exercise this power, if there be a conflict, it must be a substantial one."

[8] Applying this rule to the facts narrated, we entertain no doubt as to the correctness of the action of the court in directing a verdict for defendant.

The order appealed from is affirmed.

We concur: SLOSS, J.; SHAW, J.

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175 Cal. 423

STETTIN v. WILSON et al. (S. F. 7278.)

(Supreme Court of California. June 11, 1917. Rehearing Denied July 9, 1917.)

1. MECHANICS' LIENS 🔑128 — RIGHT OF CLAIMANT—LIEN ON FUND—STOP NOTICE.

A claimant to a fund in the hands of the owner was not precluded from sharing in the fund because he claimed only by virtue of stop notice which he did not follow by filing a lien claim; the filing of the notice in due time operating to impose a lien upon the fund, though not upon the realty.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 177.]

2. MECHANICS' LIENS 🔑113(2) — RIGHT TO LIEN—ABANDONMENT OF CONTRACT.

That the original contractors abandoned their contract before completion did not preclude a lien claimant from having and enforcing a lien created by the filing of a stop notice, against the fund in an owner's hands, which constituted the difference between the sum paid the original contractors and the value of the work and material which the contractors had furnished.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 148.]

3. MECHANICS' LIENS 🔑113(1) — RIGHT OF CLAIMANTS.

Where on appeal, in a mechanic's lien suit, it appeared that all the claimants had filed mechanics' liens except appellant, whose chose to rely on his stop notice, which gave him a lien on the fund in the owner's hands inferior to the liens of the other claimants, and that the other claimants, by failing to appeal, accepted an award of a less sum than they were entitled to, thereby leaving in the owner's hands a sum more than sufficient to satisfy appellant's claim, the fact that, but for such acceptance, the other claims would have depleted the fund did not prevent appellant from having his claim paid therefrom.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 148.]

Department 2. Appeal from Superior Court, City and County of San Francisco; W. M. Conley, Judge.

Action by H. Stettin, Sr., against William F. Wilson and others. From a judgment for defendants, plaintiff appeals. Judgment reversed, with directions, in so far as it affected plaintiff.

William P. Hubbard and Adolf Cahen, both of San Francisco, for appellant. A. D. Keyes and Herbert W. Erskine, both of San Francisco, for respondents.

HENSHAW, J. This appeal is by one of the plaintiffs in a consolidated mechanics' lien suit from the judgment and from the order denying his motion for a new trial. It presents an unusual situation. Wilson, as owner, made a contract with Finlayson and Stettin, general contractors, to do all of the work and furnish all of the materials here involved in the erection of a building in the city and county of San Francisco. The contract price was $77,211. The terms of payment were 75 per cent. of the value of the labor and material used in the construction of the building, to be paid on the first day of each month during the continuance of the contract and the remaining 25 per cent. payable 35 days after completion and acceptance, payments to be made on written certificates of the architect. The contractors abandoned their contract on February 15, 1911. At that time they had received $36,026.12. Before that time certain notices to withhold, or "stop notices," as they are commonly called, had been served upon the owner. Thereafter lien claims were filed by those who had served "stop notices" and by others. On February 20, 1911, Stettin, the appellant, served upon the owner a "stop notice" for $1,645.50. He filed no claim of lien and prosecuted his action, not therefor against the real property of the owner, but against the funds in the owner's hands. The court found the amount which had been paid to the contractors as above given, found the amount necessarily expended by the owner in the completion of the building as being $35,500, and concluded that the fund in Wilson's hands available to the lien claimants was the difference between the contract price and the two amounts above given, and was $5,684.88. It awarded this amount proportionately among the lien claimants, and excluded this appellant from participation therein. It found and adjudged that the total amount of the valid lien claims was $16,559.87, and it decreed that the sum of $5,684.88, the difference between the contract price and the total cost of construction, was all that was secured by liens on the property, and gave personal judgment against the contractors to the lien claimants for the balance, amounting to $10,874.99. As has been said, it refused to allow this appellant to share in the $5,684.88, and awarded him only a personal judgment against the principal contractors. This judgment was accepted by all the other plaintiffs saving this appellant, and so to them has become final. But (and here appears the singularity in this case) the court found that at the time of the abandonment by the principal contractors the value of the work and material done and furnished by the contractors, measured as near as possible by the standard of the whole contract price was $49,098.27. Now, as admitted and found by the court, the total amount paid to the contractors was the sum of $36,036.12, and it inevitably results that in contemplation of law there was in the hands of the owner, and available in payment of the demands of the successful claimants, the difference between these two amounts, or $13,072.15. Further, it is argued that as the court erroneously awarded to the lien claimants whom it allowed to share in the fund only $5,684.88, it necessarily results that in contemplation of law there is $7,387.28 in the hands of the owner, which money, at the instance of the lien claimants and this plaintiff, should have been subjected to the payment of their demands. And, finally, that as the other parties plaintiff to the action accepted the lesser amount and their acceptances have become final, the legal conclusion is unescapable that there is in the possession of the owner $7,387.27 subject to the lien which appellant acquired by virtue of his "stop order" for the amount which the court found to be due him, namely, $1,645.50.

Respondents, while conceding as they must under the authority of Ganahl Lumber Co. v. Weinsveig, 168 Cal. 664, 143 Pac. 1025, that the sum of $13,000 was in law applicable and should have been applied to the payment of the demands of the lien claimants make answer that this appellant in no event is entitled to share in that fund. Their reasons require consideration.

[1] First, they urge that the appellant is not entitled to share in the fund because he claims only by virtue of a stop notice, and did not follow that notice by the filing of a lien claim. This position is, however, untenable under our decisions. The filing of a stop notice in due time operates to impose a lien in favor of the claimant upon the fund in the owner's hands, and not at all upon his real property. If the stop notice be not filed in time so that there is no fund upon which it can operate, then, of course, the attempt to impose the lien is inefficacious, and if the claimant does not in addition file the lien claim contemplated by the law, he obtains no lien whatsoever upon the real property on which he has bestowed labor or for which he has furnished material. This has been expressly decided in Diamond Match Co. v. Silberstein, 165 Cal. 282, 131 Pac. 874, where the matter is discussed in detail. It is there declared that:

> "The right to a recovery of the money so garnisheed by the notice does not depend upon the establishment of a lien (on the real property). It 'is a cumulative remedy.' "

Reference may also here be made to Weldon v. Sup. Ct., 138 Cal. 428, 71 Pac. 502.

[2] Next, respondents contend that because the original contractors abandoned their contract, nothing was or could become due to them. However that may be as matter of general law in an action after abandonment by the original contractor against the owner, for the purposes of all subordinate to the original contractor, the mechanics' lien law itself fixes and declares the law, and in terms says that in case of abandonment the difference between the sum paid to the contractor and the value of work and material which the contractor has furnished and for which the owner has not paid shall be treated as a fund available to the lien claimants. Diamond Match Co. v. Silberstein, supra.

[3] Next, respondents contend that the appellant should not be permitted to share in this fund, because if the court had correctly declared the whole sum of $13.072.15 to be due to the lien claimants whose lien claims had priority over the demand of appellant, those claims in the aggregate would more than have absorbed all of this $13.072.15. Appellant's answer seems to be flawless; that what in fact the court did was to award a lesser sum, with which lesser sum, by virtue of their failure to appeal, the other claimants pronounced themselves satisfied, and that the matter, therefore, has received final disposition so far as they are concerned, but cannot be held to bind this appellant who did not consent and who here asserts and shows that there are many thousands of dollars in the hands of the owner out of which his lien

claim under the situation existing should be paid.

So much of the judgment as is here involved in the appeal of Stettin is reversed, with directions to the trial court to enter judgment in his favor against the owner or against his substituted representatives for the amount which the court found due. There being no attack upon that portion of the judgment in favor of this appellant and against the original contractors, it is not affected by this determination.

We concur: MELVIN, J.; LORIGAN, J.

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175 Cal. 474

SHELDON v. JAMES. (S. F. 7335.)

(Supreme Court of California. June 14, 1917.)

1. Municipal Corporations 🔑703(1)—Use of Streets — Automobile Ordinance — Construction.

An ordinance requiring vehicles to travel on the right side of streets and near the right-hand curb thereof must be reasonably construed, and does not prohibit chauffeurs in congested districts from backing their automobiles into limited parking space.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1509.]

2. Trial 🔑252(8) — Inapplicability to Evidence—Refusal.

In action for injury from an automobile accident, a request was properly refused which related to an ordinance not relevant to the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 603.]

3. Municipal Corporations 🔑705(1)—Use of Street—Automobile Accident—Negligence.

If a chauffeur backing car toward the curb did not look in that direction to ascertain if any one was traveling upon or crossing the street in the immediate vicinity, and in consequence ran into and injured a pedestrian, he was guilty of negligence.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1515.]

4. Trial 🔑267(1)—Refusal of Request—Modification.

Refusal of a request except in a modified form because it predicated negligence solely upon the backing of an automobile was proper.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 668–671.]

5. Municipal Corporations 🔑705(11) — Use of Street—Accident from Backing Automobile—Failure to Give Signal.

A pedestrian could not recover because of a chauffeur's failure to give signals or warning before backing car, unless his injury occurred because of such omissions.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1515.]

6. Municipal Corporations 🔑705(1)—Use of Street—Accident from Backing Automobile—Inability to See Pedestrian.

The mere fact that a chauffeur could not see over the back of his automobile would not convict him of negligence in backing the car if he took reasonable precautions by looking backward to the right and left or by standing up and looking.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1515.]

7. Municipal Corporations 🔑705(10)—Use of Street—Pedestrian's Duty in Crossing Street.

A greater degree of care is necessary upon the part of the pedestrian who undertakes to cross a congested highway other than at the established crosswalk, especially so if he pursues a long diagonal route.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1515, 1517.]

8. Municipal Corporations 🔑705(10) — Use of Street—Pedestrian's Duty in Crossing Street.

A pedestrian must use ordinary care in looking to the right and left during all of the time that he is crossing a street at other than the regular crossing, and such duty is not fully performed by merely looking to the left or right as he steps upon the street.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1515, 1517.]

9. Municipal Corporations 🔑706(5)—Use of Street — Backing Automobile — Contributory Negligence—Sufficiency of Evidence.

Evidence that a backing automobile made a loud noise sufficient to attract attention of people upon the opposite side of the street, and that a pedestrian in crossing street at other than the regular crossing did not look, although the noise was such as should have attracted his attention, before he put himself in a place of danger, *held* sufficient to justify a finding of contributory negligence.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518.]

10. Municipal Corporations 🔑706(8)—Use of Streets—Injury from Backing Automobile—Instructions.

Instructions upon general duty of pedestrian crossing street and of automobile chauffeur backing his car towards the curb *held* not erroneous.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518.]

11. Negligence 🔑134(1)—Sufficiency of Evidence—Contributory Negligence.

Where evidence is as consistent with a neglect of duty on the part of an injured person as it is with a neglect of duty on the part of the person charged with causing the injury, the injured party cannot recover.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 267.]

12. Appeal and Error 🔑1032(3)—Necessity of Showing Prejudice—Submission of Instructions.

Error assigned upon the court's disregard of a rule that instructions must be handed to the judge personally and a copy delivered to the adverse party, and that all instructions shall be settled between court and counsel before argument to the jury begins, must be shown to have been prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4050.]

13. Appeal and Error 🔑544(1)—Necessity of Bill of Exceptions—Submission of Instructions.

Appellant cannot complain of the court's disregard of rules regarding submission of instructions, on appeal from the judgment, where appeal is supported by no bill of exceptions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2412.]

14. APPEAL AND ERROR ⟹301—MOTION FOR NEW TRIAL—NECESSITY OF ASSIGNING ERROR.

Objection to court's disregard of rules regarding submission of instructions will not be considered on appeal from order denying new trial where it was not one of the errors relied on in support of the motion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1743, 1753–1755.]

15. APPEAL AND ERROR ⟹215(1)—HARMLESS ERROR—SUBMISSION OF INSTRUCTIONS—SURPRISE.

Appellant cannot complain of surprise in instructions submitted by court in disregard of rules, since he must have known before the instructions were given that they had not been submitted to him as required by such rules.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1309, 1310.]

Department 2. Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Tristam W. Sheldon against L. L. James. Plaintiff appeals from judgment for defendant and from order denying motion for new trial. Affirmed.

H. L. Clayberg and Clayberg & Whitmore, all of San Francisco, for appellant. Walter H. Linforth, of San Francisco, for respondent.

HENSHAW, J. This appeal is from the judgment and from the order denying plaintiff's motion for a new trial. The cause was tried before a jury, which gave its verdict for defendant. The action was to recover damages for personal injuries. The facts and circumstances are the following: Powell street runs northerly and southerly in the city and county of San Francisco. It is crossed to the north by Geary street and to the south by O'Farrell street. Plaintiff's office was in the Elkan Gunst Building, situated at the southwest corner of Geary and Powell streets. Plaintiff had eaten his lunch in a building at the northeast corner of O'Farrell and Powell streets, across Powell street and a block away from his office. He was late in keeping an appointment at his office at 1 o'clock of the afternoon, and so hurried back by a short cut. Thus he did not cross to the northerly side of Powell street by the crosswalk established for pedestrians at its junction with O'Farrell, nor yet did he walk along the east side of Powell street to the crosswalk for pedestrians at its junction with Geary street. To the contrary, he stepped into Powell street a short distance from the corner of O'Farrell and proceeded to cross Powell street at an acute angle and by a long diagonal. In so doing it is contended that he used all due care and was in the normal possession of all his faculties. Defendant's automobile, of the touring type, with hood lowered and projecting beyond the tonneau, had proceeded down or southerly on Powell street from Geary to about the middle of the block, where, in front of the Manx Hotel, situated on the west side, an occupant of the automobile alighted. The chauffeur was left alone in the car. It was his duty to await the return of the occupant. There was vacant space along the curb immediately to the rear of the place where the automobile had stopped, and the chauffeur proceeded to back his car into this space. While so doing, plaintiff, hurrying to his office and neither seeing nor hearing nor knowing of the presence of the backing automobile, was struck by the projecting hood and thrown down, sustaining the injuries complained of. It was a little after midday, the street carried a heavy traffic, and automobiles were parked along all of the west side of Powell street saving at the one available space which the chauffeur sought to occupy. Powell street descends sharply toward the south, and the grade up which the chauffeur was thus backing his car was from 7 to 10 per cent.

The foregoing sufficiently presents the facts necessary to an understanding of the complaints which appellant makes on this appeal. These complaints are directed to the instructions given and refused. Such other facts as may become pertinent to an understanding of the instructions will be presented as called for.

[1] The court refused to instruct the jury as requested by plaintiff that, if it found from the evidence that defendant's auto was driven "backward in a northerly direction on the west side of Powell street, etc., you may find defendant guilty of negligence from this fact alone." This instruction is predicated upon an ordinance of the city of San Francisco that every vehicle upon the streets of San Francisco shall travel on the right side of such streets and near the right-hand curb thereof. The instruction was properly refused. The ordinance is to be reasonably construed. Its terms have no reference to the right of chauffeurs in congested districts of the city where the parking area is limited and the vacant spaces in that area even more limited to back their automobiles into such a limited space, and it requires little knowledge of the operation of such vehicles to know that such backing is in many instances the only method by which the machine can be worked into the space and up to the curb of the street.

[2] Another section of this ordinance which is relied on declares it shall be unlawful to propel "any vehicle in a backward direction, if, by so doing, the free and uninterrupted passage of any vehicle or any street car or interurban car shall be impeded." This has absolutely no relevancy to the evidence and issues in this case, and could not, therefore, have been made with propriety the basis of any instruction.

[3] The court modified certain instructions proposed by plaintiff and gave them in modi-

fied form. As modified, the instructions were unimpeachable, they being in the following language:

> "In determining whether the defendant's chauffeur was guilty of negligence resulting in plaintiff's injury, you should consider all the facts of the case, the direction in which the car was traveling, the rate of speed it traveled, whether the chauffeur gave any signal or warning before turning, or while traveling backwards, the condition of the street, the situation and surroundings of the parties, the manner in which plaintiff was crossing the street, and what observation, if any, the chauffeur made while backing his car."
>
> "If the jury find from the evidence that the person in charge of defendant's automobile was driving the same backward in a northerly direction on the west side of Powell street, and did not look in the direction that said auto was running to ascertain if any one was traveling upon or crossing said street in his immediate vicinity, and, in consequence, ran into and injured the plaintiff, then the defendant was guilty of negligence."

[4-6] The court was justified in refusing to give the instructions except in the modified form—the first because it predicated negligence, as did the instruction which we first considered, solely upon the backing of the automobile, also it charged the jury specifically to find the defendant guilty of negligence if the chauffeur gave no signals or warning before starting backward and while going backward, and yet it is too plain to need discussion that, unless plaintiff was injured because of the absence of such signals, such negligence, even if it were proved, would not have been the contributing cause of his injury, and the jury's verdict could not have been founded upon it; and the second because it directs the jury to find that defendant's chauffeur was negligent if he backed his car when "he could not see over the back of said auto," yet the mere fact that the chauffeur could not see over the back of the automobile while sitting would not in and of itself convict him of negligence in the backing of his car if he took reasonable precautions before so doing by looking backward to the right and left, or by standing up and so looking over the back of his car.

The court instructed the jury at the request of the defendant as follows:

> "Ordinary care, or its opposite, neglect, are not absolute terms, but they have reference to times, places, and circumstances, and where a plaintiff is a foot passenger, crossing a street where vehicles are numerous, it is his duty to look both ways, and the same duty was imposed on defendant's driver in driving the car backward."

The complaint which appellant makes of this instruction is that it contains the unjustifiable declaration as a matter of law that it is the duty of a pedestrian in crossing a street to look both ways, that this duty is imposed upon the pedestrian when about to cross a street (Niosi v. Empire Laundry Co., 117 Cal. 257, 49 Pac. 185), and that no such duty is incumbent on him when actually on the thoroughfare. Further, appellant construes the instruction as asserting that "looking both ways" means looking backward as well as forward, and that such is distinctly not the rule of law as evidenced by cases like Raymond v. Hill, 168 Cal. 473, 143 Pac. 743. It is not overstating it to say that in the present day in the city of San Francisco vehicular traffic by automobiles is a hundred times as great as that by horse-drawn vehicles. Automobiles have ceased to be the mere playthings of the rich. They have become a part, and well-nigh an essential part, of the business life of a city. They make greatly for expedition in the transaction of business and in the accomplishment of this attain a speed far beyond that of horse-drawn vehicles. Business has adjusted itself to this new mode of transportation and would be as little inclined to abandon it as it would be to abandon the telephone. Municipal authorities have, and properly have, recognized the necessity of regulatory provisions controlling automobile traffic for the safety of pedestrians, upon the one hand, and at the same time, to the end that the traffic may not be unduly interfered with, have adopted regulatory provisions controlling the movements of pedestrians. The most familiar of these provisions is the one checking automobiles or bringing them to a full stop as they draw up to intersecting streets in the congested portions of the city, and here police officers are frequently stationed to regulate the traffic. It then becomes a necessity for the orderly and expeditious movement of this traffic in such congested districts that automobiles should be allowed to move at reasonable speed between intersecting streets. In many municipalities this is declared in terms without an express limitation upon that speed. In others, to the end that such movements may not be unduly impeded and interfered with, the right of crossing streets by pedestrians is limited to the established crosswalks.

[7] No such ordinance has yet been passed in the city of San Francisco, or at least we have not been advised of its passage, but, aside from the existence of such an ordinance, it is palpably true that, in the exercise of the due care for one's own protection which the law exacts of everybody, a greater degree of care is necessary upon the part of the pedestrian who undertakes to cross a congested highway other than at the established crosswalk, and especially so if in the act he does not essay a direct crossing, but pursues a long diagonal route.

[8] It is true that in so crossing the care required of this pedestrian was especially directed to the observation of vehicles going north on the easterly side of Powell street and south on the westerly side, but upon neither side of the street was he relieved from the duty of exercising ordinary care to protect himself against automobiles which might, as they had a perfect right to do, be backing into a vacant parking stand. The observa-

tion of ordinary care by such a pedestrian is not fully performed by merely looking to the left or right as he steps upon the street. The observance of that care is imperative upon him during all of the time that he is crossing. Scott v. San Bernardino, etc., Co., 152 Cal. 604, 93 Pac. 677.

[9] Here it is in evidence from plaintiff's own witnesses that the automobile in backing up the grade made an extremely loud and raucous noise sufficient to attract the attention of people upon the opposite side of the street and such as should have attracted the attention of the plaintiff before he put himself in a place of danger. If, then, under these circumstances, he did not look, the jury was justified in concluding that he was negligent in not having looked.

[10, 11] We do not construe the instruction given as meaning that it is the duty of a pedestrian to look backward, nor yet as an effort to standardize the law by declaring that a pedestrian must constantly and continuously be looking from right to left. We construe it to be no more than a declaration that in the exercise of ordinary care it is the duty of such a pedestrian to look to the right and to the left whenever he has voluntarily put himself in a position which may be one of peril coming from either direction, and in particular where he has received adequate warning of the likelihood of peril. The final objection to this instruction namely, that it declares the duty of the pedestrian and the duty of the driver to be the same, and that this is an erroneous statement of the law, is not sustainable. The court was not here attempting an elaboration of the duties of either or of both. It was not attempting to declare that in the exercise of the due care required of each the quantum which would measure up to due care was the same as to each. It was merely stating so far as the chauffeur was concerned the unimpeachable proposition, favorable in its terms to the pedestrian, that it was the duty of the chauffeur to look carefully about, "to look both ways," before backing his car.

The court instructed the jury as follows:

> "Where the evidence is as consistent with a neglect of duty or care on the part of the injured person as it is with a neglect of duty or care on the part of the person charged with causing the injury, the injured party cannot recover in an action for damages for the injuries sustained."

Appellant founds his objection to this in that it casts the burden of proof upon the plaintiff not only to show the negligence of the defendant, but to show his own absence of contributory negligence, and it is said that, while this instruction given in the case of Peterson v. Ballantine, 205 N. Y. 32, 98 N. E. 202, 39 L. R. A. (N. S.) 1147, is a sound declaration of the law because in the state of New York the burden of proving these things is on the plaintiff, the rule being to the contrary in California touching the burden of proving contributory negligence, the instruction was erroneous. The difficulty with this objection, however, is that the instruction has not the slightest reference to the burden of proof at all, but deals only in general and unimpeachable terms with the weight and effect of evidence.

It is contended that the instructions are inconsistent with each other. It would serve no useful purpose to set forth these asserted contrary instructions at length. So doing would only establish the hypertechnicality and unsoundness of the attack.

[12] Finally, a reversal is sought upon the ground that the court disregarded one of its own rules which provides that instructions proposed by either party shall be handed to the judge personally and a copy thereof delivered to the adverse party, and that all instructions to the jury shall be settled between court and counsel before argument to the jury begins. Aside from the fact that before appellant can justly ask a reversal upon this ground he must show injury from a nonobservance of the rule, and here shows none, it may be added that the asserted error is not before this court.

[13, 14] It cannot arise on the appeal from the judgment, for it is supported by no bill of exceptions. It cannot arise in the appeal from the order denying the motion for a new trial; as it is not one of the errors or irregularities relied on in support of that motion.

[15] Nor can appellant, charged with knowledge of this rule, since he here relies upon it, rest his contention upon any surprise, since he must have known before the instructions were given by the court to the jury that they had not been submitted to him.

The judgment and order appealed from are therefore affirmed.

We concur: MELVIN, J.; LORIGAN, J.

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175 Cal. 454

In re PILLSBURY'S ESTATE.

PILLSBURY et al. v. TITLE INS. & TRUST CO.

(L. A. 4399.)

(Supreme Court of California. June 13, 1917.)

1. Exemptions 🔑89 — Proceeds of Life Policies—Waiver.

Code Civ. Proc. § 690, subd. 18, enumerating, among property exempt from execution or attachment, all moneys, etc., arising from life insurance, and section 1465, declaring that on return of inventory, or at any subsequent time, the court may on petition set apart for the use of decedent's surviving minor children all property exempt from execution, do not work an exemption from execution, in favor of a decedent's minor children, of the proceeds of life insurance policies, but merely grant a privilege which the possessor may waive or exercise at his pleasure.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. § 112.]

2. ADOPTION ⟹21—STATUS OF ADOPTEES AS HEIRS.

Where the adoption of minor children followed the death of their father, it did not affect their status as his heirs.

[Ed. Note.—For other cases, see Adoption, Cent. Dig. §§ 35, 36, 38–40.]

3. EXEMPTIONS ⟹30—PERSONS ENTITLED.

On adoption after their father's death, minor children not only became members of the family of the adopting parents, but ceased to be of the family of their deceased father, so that they ceased to be of the classes for which property may be set aside as exempt from execution, the widow and family of deceased, and no consideration of hardship on the minors can operate to modify the legal effect of their changed status, the presumption being that the court of equity in its adoption decree acted for their best interests.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. § 34.]

4. PHYSICIANS AND SURGEONS ⟹18(1)—ACTIONS FOR MALPRACTICE—TORT.

An action for malpractice may have its basis either in a willful injury, an injury occasioned by negligence, or in the doing of that which is forbidden by positive law, sounding in tort in every instance.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 34.]

5. JUDGMENT ⟹273(5) — JUDGMENT NUNC PRO TUNC—DEATH—STATUTE.

Under Code Civ. Proc. § 669, declaring that if a party dies after verdict or decision upon issue of fact and before judgment, the court may render judgment, where a physician was sued for malpractice, filed answer, and moved for change of venue, which was denied, and did not appeal from the order of denial, and the time for appeal had expired before his death by accident, he having waived trial by jury and accepted notice of trial, but not having appeared or been represented at trial, which was concluded two days before his death, the trial court, ignorant of the death, entering judgment against deceased two days thereafter, on being advised of the death, the court, on plaintiff's motion, and against the opposition of the deceased physician's administrator, properly entered the same judgment for plaintiff nunc pro tunc as of the day of the submission of the cause for determination.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 529.]

6. EXECUTORS AND ADMINISTRATORS ⟹242 — DUTY TO HEIR.

A trustee, such as an executor or administrator, is under no duty to his beneficiary to seek to compel a creditor to accept less than his just demand.

In Bank. Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

In the matter of the estate of E. S. Pillsbury, deceased, wherein A. C. Pillsbury and wife, as guardians of Ernest Sargent Pillsbury and others, minors, filed objections and exceptions to the account as administrator of the Title Insurance & Trust Company, a corporation, and a petition asking that life insurance money collected by it be set apart to the minors as property exempt from execution. From decree refusing so to do, petitioners appeal. Affirmed.

William A. Nunlist, William C. Crittenden, and W. M. Simmons, all of San Francisco, for appellants. Lee C. Gates, Clarence L. Variel, Edmund W. Pugh, and O'Melveny, Stevens & Millikin, all of Los Angeles, for respondent.

HENSHAW, J. E. S. Pillsbury died intestate in an automobile accident in which also his wife was killed. He survived her and left surviving him three minor children, the eldest about the age of 14 years. His life was insured, the face values of his seven policies amounting to $27,000. They were all payable to his wife, and in the event of her predecease then to his executors, administrators, or assigns. The proceeds of these policies therefore fell into his estate, and upon them his estate realized over $24,000, which passed into the hands of its administrator.

A. C. Pillsbury, a brother of the deceased, applied for letters of administration on September 14, 1911, and his application was denied on October 6, 1911. On that date, however, A. C. Pillsbury and his wife were appointed guardians of the persons of the minor children of deceased, and the Title Insurance & Trust Company, the respondent herein, was appointed guardian of their estates. Then on November 13, 1911, these minors were legally adopted by A. C. Pillsbury at Oakland, in the county of Alameda, state of California. Thereafter, and on the 24th day of November, 1911, letters of administration were issued to the Title Insurance & Trust Company. This was the first and only appointment of an administrator. On December 28, 1912, this administrator filed its first and final account of its administration, which final account showed disbursements of a large part of the moneys derived from the insurance policies in payment of the approved claims of creditors. On September 25, 1913, A. C. Pillsbury and his wife, as guardians of these minors, filed amended objections and exceptions to this account, and on the same date filed an amended petition asking that the life insurance money collected by the administrator be set apart to the minors as property exempt from execution. This, after hearing in which testimony was taken, the court in probate refused to do, and this appeal has followed.

Appellants' first contention is that by force of our statutes this insurance money was set aside to the minor children of deceased; that the administrator, whose duty it was to collect it, had no other or further power of disposition over it than to see that it went to the minors as property exempt from execution. The sections of our Code of Civil Procedure which control the matter are section 690, subdivision 18, which, in enumerating the kinds of property exempt from execution or attachment, specifies "all moneys, benefits, privileges, or immunities accruing or in any way growing out of any life insurance," etc., and section 1465 of the same Code, which declares that "upon the return of the inventory, or at any subsequent time during the administration, the court may on petition therefor, set apart for the use of the surviving * * * minor children of the decedent, all the property exempt from execution."

[1] The construction of these laws for which appellants contend is that ex proprio vigore they work a setting apart, an exemption from execution, and that they operated with this force immediately upon the death of the deceased. But to this answer must be made that such a construction never has been given to these laws, but, to the contrary, they have always been construed as granting merely a privilege which the possessor of the privilege may waive or exercise at his pleasure. Thus in the early case of Borland v. O'Neal, 22 Cal. 505, it is said:

> "The exemption of property from sale on execution is a personal right which the debtor may waive or claim at his election."

To the same effect are Keybers v. McComber, 67 Cal. 395, 7 Pac. 838, and Stanton v. French, 83 Cal. 195, 23 Pac. 355. In the matter of the probate of an estate the governing principle in construing section 1465, Code of Civil Procedure, is the same in the case of all other exempt property as it is in the case of a homestead, and as to the homestead it has uniformly been declared that it is but a privilege, and a privilege which must be exercised in time. It is not a vested right, but one whose validity is to be determined in most instances by the conditions which exist at the time the application is made. Estate of Boland, 43 Cal. 640; Estate of Moore, 57 Cal. 446; Estate of Moore, 57 Cal. 437. "In no case can the right be said to be fixed before the date of the application." Estate of Heywood, 149 Cal. 129, 84 Pac. 834. The absolute identity in principle between the setting apart of a homestead under section 1465, Code of Civil Procedure, and the setting apart of all other property declared to be exempt from execution, is announced and established in Estate of Moore, 57 Cal. 446.

Appellants next insist that as the application on behalf of the minors to have this insurance fund set apart as property exempt from execution was timely made, in that it was made while the children were still minors and made before the settlement of any of the administrator's accounts, it is the duty of the court to treat the fund as still in the possession of the administrator and to order that it be set apart as prayed for. But to this respondent answers that the moment the children were legally adopted by A. C. Pillsbury and his wife they ceased to be of the family of E. S. Pillsbury, deceased, and therefore ceased to be of the classes for which alone property may be set apart as exempt from execution. Those classes, as defined in Estate of Boland, 43 Cal. 649, are "two classes; the widow and the family of the deceased." That the law contemplates that its beneficence in the matter of these exemptions shall be extended only to these classes, our decisions leave no doubt.

> "The objects of administration are: First, to support the family for a period; second, to set apart a homestead to the family; third, to pay the expenses of administration; fourth, to pay the debts of the deceased; fifth, to distribute the balance of the estate to those who take it by law." Estate of Moore, 57 Cal. 437. "The manifest object of the section (1465) is the support of the family, and to make provision for their support and maintenance. These demands of the family are deemed superior to those of heirs or creditors." Keyes v. Cyrus, 100 Cal. 322, 34 Pac. 722, 38 Am. St. Rep. 296. "When the widow, Grace U. Still, * * * intermarried with William Webb, she lost her right to have a homestead carved out of the property of the estate of her deceased husband; * * * and when all the minors except Samuel W. Still reached their majority without an application for a homestead having been made for or on their behalf, their rights were similarly lost." Estate of Still, 117 Cal. 509, 49 Pac. 463.

That insurance money stands in precisely the same category as other properties of an estate which may be exempted is also established beyond the reach of successful controversy. Thus in Estate of Miller, 121 Cal. 353, 53 Pac. 906, treating of insurance funds, it is said:

> "Although set apart under the statute, the money is administered upon, and until so set apart is a part of the estate. The order setting it apart is a species of distribution."

In Keyes v. Cyrus, supra, it is said that the authority to set apart property exempt from execution "implies that the property, when set apart, is exempt from execution." In Holmes v. Marshall, 145 Cal. 777, 79 Pac. 534, 69 L. R. A. 67, 104 Am. St. Rep. 86, 2 Ann. Cas. 88, where the widow had received insurance money from two sources, the one where she was the direct beneficiary of the policy, the other where the policy was, as here, payable to the executors, administrators, or assigns, and the court had set the latter apart to her, the argument was presented that only those funds which came to her directly were exempt, and this court said:

> "We can see no reason why the insurance money coming to her directly as beneficiary should be exempt from execution, and not that coming to her indirectly, through the estate and the order setting it apart. In either case it is exempt from execution. In one case, the instrument of life insurance gives her the title, in the other the law gives it to her."

[2, 3] Touching the time of the application of these minors to have this fund set apart to them, it is to be noted that it was made after they were legally adopted into the family of A. C. Pillsbury, and that this adoption was an accomplished fact before any administrator of the estate of the deceased had been appointed. Therefore no dereliction of duty can be charged against this respondent as guardian of the estate of these minors for not having itself caused this application to be earlier made, since by the language of section 1465 such an application can only be made "upon the return of the inventory" or thereafter, and at the time of the return of the inventory the minors were the adopted

children of A. C. Pillsbury. Thus we come to the fundamental question—the effect upon the rights of the minors of their adoption as children into the family of A. C. Pillsbury. Unquestionably, since this followed the death of their father, it did not affect their status as his heirs. Whatever rights as heirs had descended to them upon the death of their ancestor they still retained. But, upon the other hand, by virtue of their adoption the minors not only became members of the family of the adopting parents, but ceased to be of the family of the deceased, and this is formally declared in Estate of Jobson, 164 Cal. 312, 128 Pac. 938, 43 L. R. A. (N. S.) 1062, where it is said:

> "These various rulings seem to establish the doctrine that the effect of an adoption under our Civil Code is to establish the legal relation of parent and child, with all the incidents and consequences of that relation, between the adopting parent and the adopted child. This necessarily implies that the natural relationship between the child and its parents by blood is superseded. The duties of a child cannot be owed to two fathers at the same time."

No considerations of conceived hardship upon the minors can operate to modify the legal effect of this changed status. If it be said that by virtue of their adoption, they being in their helpless minorities and unable to exercise any independent judgment in the matter of the proceedings, they were wronged, it must be answered that by virtue of their tender infancy they are in an especial sense wards of the court in equity, and it must be presumed that in its adoption decree that court acted for the best interests of the minors. Of course, if a case shall arise where such a decree was procured and entered in fraud of the minors' rights, equity will grant its relief by a vacation of that decree upon proper bill for that purpose. But such is not the case here presented, and it must be concluded that the minors at the time of this application were not of the family of the deceased, but were of the family of the adopting parents.

[4] There remains to be considered their rights as heirs of the deceased, which rights, as we have said, stand unaffected. Herein it is contended that one payment which the administrator admittedly made was without warrant of law, and that consequently the amount of that payment must be treated as funds still in the estate. It appears that the deceased who, in his lifetime, was a physician and surgeon, had been sued for damages for malpractice. He filed an answer and made a motion for a change of venue, which was denied. He did not appeal from this order of denial, and the time for appeal had expired before his death. He had waived trial by jury, he had accepted notice of the trial, he had made an ineffectual attempt to secure counsel in Inyo county to represent him, and, failing in this, neither put in an appearance at the time of the trial, nor was he there represented. The trial was had and concluded two days before his death. Ignorant of that death, the trial court entered its judgment against deceased two days after his death. Several months thereafter and being advised of the death, the court upon motion of plaintiff in the action, and against the opposition of this respondent, entered the same judgment nunc pro tunc as of the day of the submission of the cause for determination. From this judgment so entered respondent took no appeal, and the amount of the judgment having been presented as a claim against the estate and having been approved by respondent and by the court in probate was paid in due course of administration. The amount of this claim was $9,018.32. The action resulting in this judgment, as has been said, was for malpractice. It was to recover damages sustained by plaintiff's wife for injuries inflicted upon her while she was the patient of the deceased. An action for malpractice may have its basis either in a willful injury, an injury occasioned by negligence, or, finally, in the doing of that which is forbidden by positive law. But in every instance the action sounds in tort. Abbott v. Mayfield, 8 Kan. App. 387, 56 Pac. 327; Rodgers v. Kline, 56 Miss. 808, 31 Am. Rep. 389; Tucker v. Gillette, 22 Ohio Cir. Ct. R. 664; Boor v. Lowrey, 103 Ind. 472, 3 N. E. 151, 53 Am. Rep. 519.

The question presented then is: Under the facts shown, did the right of the plaintiff in his damage suit to have the judgment entered after the death of the wrongdoer survive? Under the maxim, Actus curiæ neminem gravabit, courts of law and courts of equity from very early times exercised the power of entering judgments and orders nunc pro tunc in order that the rights of the litigant who was himself not at fault should not be impaired or lost. As a specific application of this maxim it is stated in Bacon's Abridgment, title "Abatement," F:

> "If the plaintiff or defendant die whilst the courts are considering of their judgment or after a special verdict or special case and pending the time for argument or for advising thereon, * * * they will permit the judgment to be entered up as of the term for which it might have been."

This power, it has been declared in this state, is inherent in the courts, and elsewhere it has been questioned whether it was within the power of the Legislature to deprive the courts of it, making as it does so manifestly for justice. Fox v. Hale & Norcross, 108 Cal. 478, 41 Pac. 328. Where the suitor is not at fault the determinative consideration moving the court is whether or not the action at the death of the party was ready for the rendition of final judgment. Freeman, Judgt. § 59. And says this court in Fox v. Hale & Norcross, supra:

> "A nunc pro tunc order should be granted or refused as justice may require in view of the circumstances of the particular case."

Our only statute bearing upon the question is section 669 of the Code of Civil Procedure, which declares as follows:

> "If a party die after a verdict or decision upon any issue of fact, and before judgment, the court may nevertheless render judgment thereon. Such judgment is not a lien on the real property of the deceased party, but is payable in the course of administration on his estate."

Appellants' first contention upon this proposition is that here is shown a limitation upon the power of our courts thus to enter nunc pro tunc judgments, and that limitation is that a verdict must have been rendered or a decision given, or the court is powerless to enter judgment. But in Fox v. Hale & Norcross, supra, this section was construed, and the construction put upon it is wholly antagonistic to appellants' view. It is there said that:

> The section "does not, however, do away with the rule that authorizes the court to direct that its decision, so far as the same shall be necessary to protect the rights of the parties, shall be entered nunc pro tunc, as of a day anterior to the death of the party."

The principle, as has been said, is founded upon the plainest considerations of justice. In an action ex delicto, which unquestionably before trial dies with the wrongdoer, it is the more important that the principle should be invoked than in cases where the right of action survives and the worst that can happen to the surviving litigant is a retrial or a change of forum. So it will be found without citing specific instances that the trend of legislation is to broaden even the common-law rule, and to provide that the right of action shall survive in cases ex delicto if the defendant has appeared or has been served with process while a brief consideration of the adjudged cases will show that nowhere is the principle enunciated denied application because the action is in tort. The quotation from Bacon's Abridgment, supra, it will be noticed, does not do so, and specifically declares that the party shall have relief if his adversary die "whilst the courts are considering of their judgment," which was precisely the situation here presented. Our own cases do not draw the distinction contended for, but state the principle broadly, as always elsewhere it is stated, and upon this precise question the Supreme Court of Connecticut has thus declared itself:

> "But it is needless to multiply cases; for it is conceded that this is law with respect to all cases which survive, and in which the executor may enter. But it is contended that the practice does not extend to cases of tort which do not survive. We find no such distinction made in the books. On the contrary, the general principle is laid down without such a limitation; and certainly we should not feel disposed to introduce such a limitation, as we do not think it founded in reason. On the contrary, we find that in cases which were of a character that they would not survive, this practice has been adopted." Brown v. Wheeler, 18 Conn. 199.

In Perry v. Wilson, 7 Mass. 393, where the action was ex delicto and the court took the case under advisement, the defendant having died before decision or judgment, a nunc pro tunc judgment was entered, the court saying that "they would always take care that no party should suffer by their delay." In Hocks v. Sprangers, 113 Wis. 143, 89 N. W. 117, the action being ex delicto for slander, the court applied the principle, declaring:

> "The foundation principle upon which the power rests is that no one should be allowed to lose the legitimate fruits of litigation to which he is a party by mere delay in the administration of the law, whether that delay be caused by the act of the court alone, or by the act of the party against whom relief is sought, or of his counsel."

In Dawson v. Waldheim, 89 Mo. App. 245, the action was ex delicto, and the circuit court rendered a judgment after the death of the defendant, and then, as here, entered a nunc pro tunc judgment upon being advised of the death. The Supreme Court declared that:

> "We * * * uphold the action of the circuit court on the broad ground that a court may, in the exercise of its common-law power, as a general rule when the state of the record or the minutes kept by the court or clerk show that a suitor was entitled to a particular judgment but that the judgment was not entered at the term when it should or might have been entered, at a subsequent term cause the proper judgment to be entered to relate back to the term when it should have been entered, provided the delay was not occasioned by the party applying."

And finally, in Mitchell v. Overman, 103 U. S. 64, 26 L. Ed. 369, it is said:

> "We content ourselves with saying that the rule established by the general concurrence of the American and English courts is, that where the delay in rendering a judgment or a decree arises from the act of the court, that is, where the delay has been caused either for its convenience, or by the multiplicity or press of business, either the intricacy of the questions involved, or of any other cause not attributable to the laches of the parties, the judgment or the decree may be entered retrospectively, as of a time when it should or might have been entered up. * * * A nunc pro tunc order should be granted or refused, as justice may require in view of the circumstances of the particular case."

[5] Wherefore it is concluded that the judgment entered against respondent's intestate was a valid judgment.

[6] It is finally urged that respondent was remiss, and therefore should be held to the amount of the judgment in having failed to appeal from it or to seek a compromise of it. No showing is made that an appeal if prosecuted would have been successful or would have resulted in anything other than the imposition of additional and useless expense against and on the estate, and we are cited to no law, and know of none, which makes it the duty of any trustee to seek to compel a creditor to accept less than his just demand. A subsidiary contention of appellant is that the fact that these minors were adopted cannot here be considered for the reason that the record of adoption was not formally offered and received in evi-

dence. An examination of the transcript shows this contention to be absolutely without merit. The papers were not only actually offered, but actually read in evidence.

Wherefore the decree appealed from is affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOSS, J.; MELVIN, J.

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175 Cal. 427

D. GHIRARDELLI CO. v. STUDENTS' EXPRESS & TRANSFER CO. et al.

(S. F. 7286.)

(Supreme Court of California. June 11, 1917.)

1. LANDLORD AND TENANT ⚷86(1) — CONSTRUCTION BY PARTIES.

S. leased the dead wall of its building to D. under a lease reciting that, "in consideration of painting my sign on building as agreed free of charge value $40, I hereby lease to undersigned, lessee," the wall of building located, etc., "for advertising purposes for a period of five years from date with privilege of said lessee to further use said space for a like consideration from year to year, not however to exceed five years." More than a year after the first painting, S. wrote to D.: "We hold your company's contract covering the painting of our warehouse in exchange for use of a certain portion of its side for advertising purposes. As the first and only work was done over a year ago we should be glad to have the work completed before our busy season commences." D. answered advising that it did not care to take advantage of the privilege of renewing the space leased. *Held*, that S. was warranted in accepting the reply as a rescission and in making a new lease.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 270, 271, 275.]

2. LANDLORD AND TENANT ⚷41—CONSTRUCTION BY PARTIES.

Nothing is of more value in construing a lease inartificially phrased than the construction given it by the parties.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 105.]

Department 2. Appeal from Superior Court, Alameda County; Everett J. Brown, Judge.

Action by the D. Ghirardelli Company against the Students' Express & Transfer Company and another. Judgment for plaintiff, and defendants appeal. Reversed.

St. Sure, Callaghan & Rose, of Oakland, for appellants. McDonald & Kennedy, of Oakland, for respondent.

HENSHAW, J. The Students' Express & Transfer Company leased the dead wall of its building to the Diamond Rubber Company under a writing which declared:

> "In consideration of painting my sign on building as agreed free of charge value $40.00 I hereby lease to undersigned, lessee," the wall of building located, etc., "for advertising purposes for a period of five years from date with privilege to said lessee to further use said space for a like consideration from year to year, not however to exceed five years."

The Diamond Rubber Company then upon this wall painted the advertising sign of the transfer company and its own advertising sign. This was in the latter part of 1911. In February, 1913, the transfer company wrote to the Diamond Rubber Company as follows:

> "We hold your company's contract covering the painting of our warehouse in exchange for use of a certain portion of its side for advertising purposes. As the first and only work was done over a year ago we should be glad to have the work repeated before our busy season commences."

The work referred to is admittedly the work of repainting the advertising sign of the express company. To this letter the Diamond Rubber Company made prompt reply as follows:

> "We are in receipt of your communication of the 20th inst., and would advise that on instructions from our factory we are discontinuing outdoor sign painting. Consequently we do not care to take advantage of our privilege of renewing the space leased from you last spring."

The transfer company treated this as an offer of recission and surrender of the lease, and in the following month made a new lease of this wall space to the Thos. H. B. Varney Company, a corporation engaged in the business of painting advertising signs. The Varney Company immediately took possession of the wall, repainted the transfer company's sign, painted out the Diamond Rubber Company's sign, and in its place painted the advertising sign of one of its patrons. These signs stood undisturbed from May 1, 1913, to February 26, 1914, though the Diamond Rubber Company was well aware of the change. On January 10, 1914, Whitehead, the agent of the Diamond Rubber Company, made a purported assignment of its lease to one Potter, who himself had executed the lease of the transfer company in the name and on behalf of the Diamond Rubber Company. Potter was in fact engaged in sign painting. He in turn assigned this lease to plaintiff, and under instruction of the plaintiff corporation he painted out the sign which the Varney Company had placed on the wall and painted thereon the sign of the plaintiff corporation. The Varney Company in turn painted out the Ghirardelli sign and replaced the earlier one. The Ghirardelli Company next painted out the Varney Company's sign and replaced its own and then commenced this action for an injunction. The court found in favor of the plaintiff, assessed its damages in the sum of $75, and granted it the perpetual injunction prayed for. From that judgment this appeal is taken.

[1] The underlying question turns on the true construction of the lease and on the legal effect of the action of the rubber company and of the transfer company as evidenced by their writings, and herein it clearly appears that the transfer company construed its written lease and its language "painting my sign on building as agreed free of

charge," and its further language "with privilege to said lessee to further use said space for a like consideration from year to year," to mean that the Diamond Rubber Company covenanted to repaint the transfer company's sign either every year, or at least so often as the wear of the weather made this necessary. This is clearly evidenced by its letter above quoted, which in courteous language demands the repainting of its sign and is supported by the language of the renewal clause—"a like consideration from year to year." It is noteworthy that the Diamond Rubber Company in its reply does not repudiate this construction nor deny the obligation which the transfer company asserted it had accepted with the lease, but merely declared that the company "had discontinued outdoor sign painting," and that "consequently we do not care to take advantage of our privilege of renewing the space leased from you last spring."

[2] Nothing is of more value in the construction of a written contract inartificially phrased than to learn the understanding which was given to it and acted upon by both parties, and here we have that accepted construction in unquestionable terms. Whatever ambiguity may be found in the original contract, it is cleared in this interchange of letters. Thus, the transfer company was quite justified in concluding that the rubber company desired to rescind and surrender its lease, and the language of its letter to the effect that it did not care to take advantage "of our privilege of renewing the space leased from you last spring" was a construction by the rubber company of the lease as meaning that their privilege of maintaining their wall space was dependent upon their repainting the transfer company's sign. Hence that company was warranted in accepting this offer of recission and evidencing that acceptance as it did by making a new lease to the Varney Company. Afterward, when the rubber company was advised of this and was about to make its assignment knowing that its own sign had been obliterated, it wrote to the transfer company as follows:

> "If you will refer to our lease, you will find that we had already paid for a five-year lease and reserved the privilege of renewing the lease for a further five years, if we desired. We did not mean by our letter of February 24th (above quoted) that we did not want our sign to remain for the period that our lease had been paid up for."

But the disingenuousness of this becomes apparent from the fact that the Diamond Rubber Company never made any effort to have its sign replaced, but assigned its interest to plaintiff, who caused to be put there with its knowledge an entirely different sign. Moreover, this letter is of no legal efficacy, since it is simply a letter attempting to change the effect of a writing which the transfer company had accepted and acted upon. The Diamond Rubber Company's last position is that it only meant that it did not "care to take advantage of our privilege of renewing the space" after the termination of the five years. On its face this is an untenable, if not a ridiculous construction, since its original lease (as it later attempted to construe it) was to continue for five years, and it was not incumbent upon it then or thereafter to give notice that it did not desire a renewal, while, finally, it may be added that, even if this belated construction contended for by the rubber company be accepted, nevertheless there remains its repudiated duty to repaint the sign of the transfer company, in its refusal to do which it violated its lease.

It follows herefrom that the court's findings, based upon its construction of these writings, are untenable, and the judgment appealed from is therefore reversed.

We concur: MELVIN, J.; LORIGAN, J.

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175 Cal. 431

KREBENIOS v. LINDAUER. (S. F. 7289.)

(Supreme Court of California. June 11, 1917.)

Limitation of Actions 🔑31—Limitation Applicable—Personal Injuries.

An action by an employé to recover for personal injuries alleged to be due to the negligence of the master is an action ex delicto, governed by Code Civ. Proc. § 340, subd. 3, barring such action in one year, and not by section 339, subd. 1, governing actions on contracts.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 142.]

Department 2. Appeal from Superior Court, City and County of San Francisco.

Action by Gust Krebenios against G. Lindauer. Judgment for defendant and plaintiff appeals. Affirmed.

F. W. Sawyer, of San Francisco, for appellant. Drown, Leicester & Drown, of San Francisco, for respondent.

HENSHAW, J. Plaintiff's complaint originally charged an ordinary action ex delicto. Upon September 28, 1914, he filed an amended complaint charging a violation of a contract of employment and seeking damages predicated upon this violation of the contract. The injury complained of is alleged to have been sustained on June 24, 1912. Defendant demurred, and upon demurrer urged the bar of the statute of limitations. Upon this appeal appellant contends only that, notwithstanding that he had pleaded a breach of contract the court sustained the demurrer on the ground that his action was in tort, and therefore barred by subdivision 3 of section 340 of the Code of Civil Procedure. He makes no mention of the fact that the demurrer also urged that the cause of action if regarded as ex contractu was barred by subdivision 1 of section 339 of the Code of

Civil Procedure. Such unquestionably is the case, for the breach of contract is laid as of June 24, 1912, and the complaint charging upon the breach was filed on September 28, 1914.

But aside from this the action is clearly one in tort and not in breach of contract. Appellant's industry has enabled him to discover several cases of malpractice by physicians and surgeons which amount to no more than declarations by the court that depending upon the circumstances pleaded the action will be regarded as one ex contractu or one ex delicto. Typical of these is Gillette v. Tucker, 67 Ohio St. 106, 65 N. E. 865, 93 Am. St. Rep. 639. There a surgeon had negligently left a sponge in the patient's wound, and had continued to treat her for some time thereafter. The statute of limitations of Ohio declares that an action for malpractice must be brought within one year. This action was brought more than one year after the sponge was left in the wound and within less than one year after the severance of the relation of surgeon and patient. The court discussed the continuance of this relationship, holding that the statute of limitations began to run only after the severance of that relationship, and declared "the removal of the sponge was a part of the operation, and in this respect the surgeon left the operation uncompleted." With no more relevancy to the question under consideration are the other cases cited by appellant, and they therefore need not be specifically mentioned. If appellant's research had led him to an examination of the cases in this state, this court would have been saved this appeal. Thus in Denning v. State, 123 Cal. 316, 55 Pac. 1000, a deckhand upon the state's tugboat sued to recover damages for injuries which he sustained by reason of having been given an unsafe place to work—a weak and defective ladder which he was compelled in the performance of his duty to climb, and which broke under his weight. Says this court:

> "This action, however, is in tort, and not upon contract. * * * Here the contract of employment has nothing whatever to do with the liability except to create a duty on the part of the employer, a duty not expressed in the contract, and for the violation of which the contract of employment furnishes no rule or standard for the estimation of damages; nor is the action grounded upon the contract, but upon the duty springing from the relation created by it, viz. that of employer and employé, and under the old system of pleading was always classed as an action ex delicto."

To the same effect is Basler v. Sacramento R. Co., 166 Cal. 33, 134 Pac. 993. There Mrs. Basler was injured while being carried as a passenger on a street car. It was, of course, a duty enjoined by law upon the street car company to carry its passengers safely so far as this could be done in the exercise of the highest care. The charge was that the injury arose from the negligence of the defendant. The action was brought more than one year after the date of the injury. It was contended that it should be regarded as an action ex contractu, so as to avoid the effect of the statute. It was declared:

> "In such actions where, as here, the breach of duty and the consequent injury to the passenger are set forth, such violation of its obligation by the common carrier is the gravamen of the action which arises ex delicto and not ex contractu."

The judgment appealed from is therefore affirmed.

We concur: MELVIN, J.; LORIGAN, J.

(175 Cal. 528)

RUNNELS et al. v. UNITED RAILROADS OF SAN FRANCISCO. (S. F. 5257.)

(Supreme Court of California. June 21, 1917. Rehearing Denied July 19, 1917.)

1. STREET RAILROADS 🔑85(4), 99(10)—ACCIDENTS ON TRACKS—DUTY OF PEDESTRIAN OR DRIVER OF VEHICLE.

The duty of stopping, looking, and listening made incumbent upon one about to cross the right of way of a steam railroad is not the rule governing the right of foot passengers and vehicle drivers in venturing upon, crossing, or using the tracks of a street railroad, but their duty is that of the exercise of reasonable care for their own protection, and no different in law from the duty of the company operating electric car, save in the one particular that because the car is confined to its tracks, vehicles and pedestrians must give way to clear its passage.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 193, 195, 215.]

2. STREET RAILROADS 🔑99(1) — ACCIDENTS ON TRACKS—DUTY OF PEDESTRIAN OR DRIVER OF VEHICLE.

A pedestrian or driver of a vehicle has the right to expect that those in charge of street cars will operate them at the speed which is customary at the particular place, and that they will give the usual warning signals, and take the usual precautions to avoid injury to others, and obey the law.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 210.]

3. STREET RAILROADS 🔑117(24)—ACCIDENTS ON TRACKS—JURY QUESTION.

In an action for damages for the death of the driver of a truck in collision with a street car, question of deceased's contributory negligence *held* for the jury.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 250, 255.]

Department 2. Appeal from Superior Court, City and County of San Francisco; Jas. M. Troutt, Judge.

Action by Allethia Runnels and others, minors, by Allethia Runnels, their guardian ad litem, against the United Railroads of San Francisco. From a judgment for plaintiffs, defendant appeals. Affirmed.

Wm. M. Abbott and Wm. M. Cannon, both of San Francisco (Kingsley Cannon, of San Francisco, of counsel), for appellant. Sullivan & Sullivan and Theo J. Roche, Jeremiah F. Sullivan, and Theo J. Roche, all of San Francisco, for respondents.

HENSHAW, J. This action was prosecuted by the heirs at law of John W. Runnels, deceased, to recover damages from the defendant for having unlawfully occasioned his death. The appeal presents but a single point. Herein the appellant contends that the evidence established as matter of law the contributory negligence of the deceased, and that the court therefore erred in not instructing the jury to that effect and directing its verdict.

The following are the facts: Defendant operates a double track line of electric street railway along Haight street in the city and county of San Francisco. Haight street extends easterly and westerly, and is bisected by Pierce street and to the west of Pierce street by Scott street, distant 412½ feet therefrom. The bisecting streets cross Haight street at right angles. The accident occurred on the night of January 4, 1912, near 6 o'clock p. m. It was dark. Deceased, who was a teamster, at the end of his day's work, was driving a gentle team of horses attached to a heavy sand wagon, coming from the north on Pierce street to cross Haight street. He had proceeded on his way until his horses were upon the southerly tracks of the electric line on Haight street, when apparently he became aware of danger from an approaching car of defendant. He urged his horses forward. They cleared the track. The car struck the wagon, and the impact hurled Runnels from his seat to the street, which striking he sustained injuries occasioning his death. The car was a heavy electric car, 20 minutes behind time, making its last trip for the day, and being driven at a high and unlawful rate of speed, some 25 or 30 miles an hour. As has been said, it was dark and also a "little bit foggy." The headlight of the car was not lit. No gong nor bell was sounded. But, on the other hand, it appears that the interior of the car was illuminated by the usual electric lights, and that the car in its progress made a loud roaring or rumbling noise. From his seat on the wagon as he moved into Haight street the deceased could have seen the car a block away, although immediately upon entering the street his view would have been somewhat interfered with by trees, telephone and trolley poles, but when clear of these his range of vision was uninterrupted. A lady standing on the northerly curb of Haight street some little distance to the west of Pierce street herself heard and observed the approaching car and noticed also that it was traveling at great speed. She further testifies that when she first noticed the car it was between Pierce and Scott streets, but nearer to Pierce street than Scott. It was traveling at such a rate of speed that she thought is not safe to cross the street afoot in advance of it and so waited for it to pass. At the time she saw the car she also saw defendant on his wagon, and at this time the horses were nearly over the northerly tracks; "the horses' heads and probably both their feet were on the southerly track the car was traveling on. That was the position of the horses and wagon at the time I first saw the car." (It will be remembered that the car which inflicted the injury was traveling eastward on the southerly tracks.) "The next I remember the car hit the wagon. I could not say how fast the car was going at the time, but it seemed to keep up the same rate of speed."

Appellant in thus urging that under these facts the evidence demonstrates the contributory negligence of the deceased as matter of law accepts to the full the indisputable rule and doctrine of this court often declared and stated with some elaboration in Zibbel v. S. P. Co., 160 Cal. 237, 116 Pac. 513. Its contention, however, is that the facts in evidence from the lips of plaintiffs' witnesses demonstrate beyond peradventure that the deceased did not exercise due care in placing himself in a position of danger from which he met his death. Herein it is conceded that the deceased's conduct when confronted by his imminent and deadly peril is not to be construed as in the slightest evincing this lack of care.

The bases of appellant's argument are these, that deceased could have seen the approaching car from a place of safety; that he could have heard the approaching car from a place of safety; that in thus hearing and seeing the approach of the car he should have known that it was traveling at an excessive rate of speed, and was not going to stop at the intersecting street. He should have known this, it is insisted, because the lady standing on the northerly curb of Haight street and further away from the car than was the deceased did see and hear and realize these things, and as has been said, concluded that it was unsafe for her to essay foot travel across the street until the car had passed. To these facts appellant adds the legal argument that the duty of the driver of a vehicle in crossing a street railroad track has become standardized, and that this duty requires him to look and listen before attempting to make the crossing. Furthermore, that the duty of the driver of a vehicle not to attempt to drive across a track when a car is known to be approaching at a dangerous rate of speed has also become standardized, and that this deceased failed to take the first precaution in looking and listening, and did recklessly drive in front of a rapidly approaching car in violation of this second duty, wherefore, it is argued, that for either and for both of these reasons his contributory negligence is established as matter of law.

[1, 2] As to the legal propositions thus advanced it must first be said that the duty of a foot passenger or of the driver of a vehicle in crossing the tracks of a street railroad has been standardized no further than is involved in the familiar declaration of law that in so doing he must exercise reasonable

care for his own protection. The duty of stopping, looking, and listening made incumbent upon one about to cross the right of way of a steam railroad is not the rule governing the rights of foot passengers and vehicle drivers in venturing upon, crossing, or using the tracks of a street railroad. The duty of such is no higher or different in law from the duty of the company operating the electric car, saving in the one particular so often pointed out that because the car is confined to its tracks, vehicles and foot passengers must give way to clear its passage. Shea v. Potrero, etc., Co., 44 Cal. 414; Swain v. Fourteenth St. R. R. Co., 93 Cal. 184, 28 Pac. 829; Driscoll v. Market St. R. R. Co., 97 Cal. 566, 32 Pac. 591, 33 Am. St. Rep. 203; Clark v. Bennett, 123 Cal. 278, 55 Pac. 908; Wahlgren v. Market St. Ry. Co., 132 Cal. 664, 62 Pac. 308, 64 Pac. 993; Schneider v. Market St. Ry. Co., 134 Cal. 488, 66 Pac. 734; Hamlin v. Pacific Elec. Ry. Co., 150 Cal. 776, 89 Pac. 1109; Scott v. San Bernardino Valley Co., 152 Cal. 610, 93 Pac. 677; Lawyer v. Los Angeles Pacific Co., 161 Cal. 53, 118 Pac. 237. Nor yet is it true that one about to cross the tracks of a street railroad is not entitled to act upon the belief that the operatives of the street railroad will upon their part obey the law and observe due care and caution. Indeed, the contrary is the rule, and it is needful to do no more than to quote briefly from Scott v. San Bernardino Valley Co., supra, as follows:

> "The foot passenger or driver of a horse has a right to expect that those in charge of street-cars will operate them in the manner and run them at the speed which is customary at the particular place, and that they will give the usual warnings and signals, and take the usual precautions to avoid injury to others."

[3] It is true that in cases such as this, the implied, if not the expressed, attitude of the company is that, foot passengers and drivers by reckless indifference invite peril and court death. It is equally true that the corresponding attitude of the injured person or his representatives is that the defendant company permits its cars to be hurled along the public thoroughfares like swift moving juggernauts, and that the only law of the highway which they recognize is that he may save himself who can. In individual cases one or the other is quite right. In the generality of cases the truth lies between. In the case at bar let it be assumed that the deceased did hear and see the approaching car. It was dark. The headlight was not lit. The fact that the lady standing upon the curb concluded that it was approaching at a speed too fast to warrant her attempting to pass in front of it is not conclusive as to the conduct of the deceased. He was not in law bound to believe that a car, though traveling at undue speed when he saw it half a block or more away, would continue to violate the law and not check its speed as it drew near an intersecting street. It was for the jury then to pass upon the question of the deceased's negligence, and not for the trial court or this court to declare that because he put himself in a place of peril under these circumstances and met his death thereby, his contributory negligence passed beyond the domain of questioned fact and is established as a matter of law. Quite similar in this respect is Bresee v. Los Angeles Traction Co., 149 Cal. 131, 138, 85 Pac. 152, 154 (5 L. R. A. [N. S.] 1059), and better cannot be done in finally disposing of this case than to quote at some length therefrom. The court had instructed the jury that:

> "It is not negligence on the part of such motorman to assume that a person will not attempt to cross the track in front of an approaching car, which is so near as to render a collision probable."

Concerning this instruction this court through Mr. Justice Shaw said:

> "The probability of a collision between a moving car and a vehicle crossing in front of it depends largely upon the speed of the car; and the action of a careful person attempting to cross, in choosing the distance at which to cross in front of such car, will depend upon his knowledge, and means of knowledge, of the speed with which the car is approaching him. There was evidence strongly indicating, if not absolutely demonstrating, that the car in question at the time of the accident was running at a speed of at least 25 or 30 miles an hour. This was in the nighttime and upon a street in the thickly settled portion of the city. With the car going at such tremendous speed, it is not unlikely that persons about to cross the track might choose a place so near as to make collision probable, and yet, from their point of view, it might seem entirely reasonable and safe for them to cross at the place selected. Their failure to perceive the danger might be entirely due to the excessive speed of the car, and to their inability in the darkness to detect it and comprehend the shortness of the time required for the car to pass over the distance between it and the place selected for the crossing. The motorman must be assumed to know approximately the speed of his car. Under such circumstances, and while running at such excessive speed, it cannot be said, as a matter of law, that the motorman ought not reasonably to have expected that persons might attempt to cross the track at a point which would in fact be dangerously near, but which to them would not appear so. The circumstances might be such as to charge him with knowledge of this likelihood. Due care would require him in that case to anticipate such probability reasonably arising from the consequences of his own gross carelessness. The court, therefore, should not have stated as a matter of law that the motorman, under the circumstances, had a right to assume that persons would not cross dangerously near in front of him. It should have been left to the jury to say whether or not his speed was so great that he should have assumed that persons might ignorantly attempt to cross so near as to make a collision probable."

The judgment and order appealed from are therefore affirmed.

We concur: MELVIN, J.; LORIGAN, J.

(175 Cal. 502)

SWENDSEN v. PACIFIC ELECTRIC RY. CO. (L. A. 3994.)

(Supreme Court of California. June 20, 1917.)

1. CARRIERS 🔑319(3)—INJURY TO PASSENGER—EXCESSIVE DAMAGES.

A verdict of $19,500 for injuries to a female passenger aged 29 years, earning a yearly income of $5,600, her condition at time of trial being worse than immediately after the accident, and it being doubtful if she would ever fully recover, and where she had been confined to her bed for nine weeks and had been in a sanatorium for three months and had incurred an expense of $900, *held* not excessive.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1344, 1345.]

2. NEW TRIAL 🔑44(3)—MISCONDUCT OF JURY—CONSIDERATION OF MATTER NOT IN EVIDENCE.

The fact that plaintiff in an action for personal injuries fainted and was carried from the courtroom, and that certain jurors had looked through the door and seen plaintiff lying unconscious under a physician's care, *held* insufficient misconduct to warrant a new trial, since this view of plaintiff gave the jurors no information beyond that which they would naturally have inferred from what had taken place in the courtroom.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 82-84.]

3. NEW TRIAL 🔑44(1)—DISCRETION OF COURT.

A motion for new trial on the ground of misconduct of the jury is addressed to the sound discretion of the court.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 80, 105.]

4. NEW TRIAL 🔑140(1)—AFFIDAVIT—SUFFICIENCY AND EFFECT.

The affidavit of an attorney on information and belief that jurors' conduct had a prejudicial effect on his client's case, being a mere matter of opinion, did not require the court to give any weight to it in considering the granting of a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 284, 285, 289, 306.]

Department 1. Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by Ingeborg Swendsen against the Pacific Electric Railway Company. Defendant appeals from judgment for plaintiff and from order denying motion for new trial. Affirmed.

Frank Karr, R. C. Gortner and A. W. Ashburn, Jr., all of Los Angeles, for appellant. Williams, Goudge & Chandler, of Los Angeles, for respondent.

SLOSS, J. A train operated by the defendant collided with one of its cars, in which plaintiff was riding as a passenger. The plaintiff was injured, and brought this action to recover damages. The defendant admitted liability, and the only matter in issue was the amount of damage. The jury returned a verdict for $19,500 in plaintiff's favor. Judgment for this sum was entered. The defendant appeals from the judgment and from an order denying its motion for a new trial.

[1] It is claimed that the verdict was excessive. There was testimony to show that, at the time of the accident, the plaintiff was 29 years of age. Her expectancy of life was 35 years or more. She was a young woman in perfect health, of unusual vigor and vitality, and had been earning, as a masseuse, a yearly income of $5,600. The trial took place 10 months after the accident. During the intervening period the plaintiff had been unable to do any work, and she remained incapacitated at the time of the trial. Her condition had not improved during the interval; on the contrary, it was, in some respects, worse than it had been shortly after the accident. She was afflicted with a twitching of the face. The sense of feeling had gone from her right arm, and from the right upper quarter of her body. Her power of speech was virtually lost. The sight of one eye was impaired, and she was unable to walk without the aid of a cane. One witness testified that she was not "like the same person in any particular"; another, that she seemed to be "a total wreck." From the testimony of medical experts, it remained doubtful how long the effects of the injury would last, or to what extent, if at all, there would be a recovery. She had suffered a great deal of pain, and was not free from pain at the time of the trial. She had been confined to her bed for nine weeks, had been in a sanatorium for three months, and had incurred an expense of over $900 for medical treatment and nursing. In this state of the evidence, it is idle to argue that the amount of the damages awarded was in excess of the amount which the jury might reasonably and fairly have found to have been sustained.

[2-4] During the trial the plaintiff fainted, and was removed from the courtroom to the witness room. The court ordered a recess for 10 minutes. When the trial was resumed, counsel for defendant asked that the jury be discharged, upon the ground that certain members of the jury had looked through the door into the room in which plaintiff was lying unconscious. The court denied the motion. The point was again raised upon motion for a new trial, the defendant presenting an affidavit of one of its attorneys, in which he deposed that, after plaintiff had fainted and been taken to the witness room, affiant had seen several members of the jury looking into said room, in which the plaintiff was lying and was being attended by a physician. The affiant states on information and belief that this action of the jurors constituted misconduct, and created in their minds a sympathy for the plaintiff, and a prejudice against the defendant, resulting in excessive damages. It is now argued that the court erred in denying a new trial upon the ground of this alleged misconduct. The appellant concedes that the mere fact that plaintiff fainted in the courtroom, a circumstance which was, of course, observed by the jurors,

did not, in itself, require the granting of a new trial. Indeed the defendant itself asked an instruction (which was given) that the jury had "a right to take into consideration the physical appearance of plaintiff while on the witness stand and in the courtroom." The only additional fact that appears, then, is that, after the plaintiff had thus lost consciousness, some of the jurors saw that she was receiving medical attention. We are unable to see that this gave to the jurors any information beyond that which they would naturally have inferred from what had taken place before their eyes. The motion for new trial was addressed to the sound discretion of the court, and it cannot be said that there was any abuse of discretion in refusing to disturb the verdict on the ground of this trivial occurrence. Chicago & E. R. Co. v. Meech, 163 Ill. 305, 45 N. E. 290. The statement of the affiant, on information and belief, that the conduct of the jurors had a prejudicial effect, was a mere matter of opinion, and the court was not bound to give any weight to it.

No other point is made.

The judgment and the order denying a new trial are affirmed.

We concur: SHAW, J.; VICTOR E. SHAW, Judge pro tem.

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175 Cal. 493

HERMOSA BEACH LAND & WATER CO. v. LAW CREDIT CO. et al. (L. A. 3966.)

(Supreme Court of California. June 19, 1917. Rehearing Denied July 19, 1917.)

1. VENDOR AND PURCHASER 🔑187—FORFEITURE FOR NONPAYMENT—WAIVER.

If, long after the final installment becomes due, the vendor accepts payments on account of interest on the unpaid balance, he waives his right to declare a forfeiture for failure to pay in time without first tendering a deed and putting the vendee in default.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 121, 374, 375.]

2. LIMITATION OF ACTIONS 🔑182(3)—PLEADING—BAR OF AFFIRMATIVE DEFENSE—NECESSITY OF REPLY.

In action to quiet title, where defendant set up a sale contract and prayed for specific performance, the new matter of the answer was under Code Civ. Proc. § 462, deemed controverted, and plaintiff could, without formal plea, show that the attempted defense was barred by the statute of limitations.

3. LIMITATION OF ACTIONS 🔑19(1)—VENDEES IN POSSESSION—CHARACTER OF POSSESSION.

Since the possession which will prevent the running of the statute of limitations against a vendee is an actual possession or occupation, not merely that constructive or presumed possession which may follow a right of entry, the vendee of a vacant lot could not, more than seven years after declaration of forfeiture for default in payment during which the lot was unoccupied, maintain an action to quiet title on the ground that the statute had not run against him.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 73, 80, 84, 85.]

Department 1. Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by the Hermosa Beach Land & Water Company against the Law Credit Company and others. Judgment for defendants and order denying new trial, and plaintiff appeals. Reversed.

Gibson, Dunn & Crutcher and Gurney E. Newlin, all of Los Angeles (W. W. Hyams, of Los Angeles, of counsel), for appellant. Tanner, Odell, Odell & Taft, of Los Angeles, for respondents.

SLOSS, J. Appeal by plaintiff from a judgment and an order denying a new trial.

The action was brought to quiet plaintiff's title to lot 32 in block 49 of the first addition to Hermosa Beach, in Los Angeles county. The defendant Law Credit Company answered, alleging that it was the successor in interest of one Stiles, who on February 15, 1902, had entered into a written agreement with the plaintiff for the purchase of the lot in question. The purchase price named in the contract was $135, of which $45 was paid in cash, and the balance was to be paid in two installments of $45 each, on October 2, 1902, and April 2, 1903, respectively, with interest on the deferred payments at the rate of 7 per cent.

The answer alleged that at the time of making the agreement Stiles entered into possession of the premises; that on October 23, 1902, he made the second payment of $45, with interest to October 2, 1902; that on March 22, 1904, he paid interest to February 15, 1904, and on December 14 he paid interest up to January 1, 1906. Plaintiff accepted all of said payments without objection. On February 3, 1906, Stiles tendered the final payment due, together with interest, amounting to $45.50. The plaintiff refused to accept the same, or to make conveyance. The answer set forth the fairness of the contract and the adequacy of the consideration, and asked judgment that plaintiff be required to accept the balance due, and to make a good conveyance of the land to the defendant. The court found in favor of the averments of the answer, and entered judgment that defendant deposit with the clerk the sum of $58.31, being the balance due on the contract, together with taxes paid by the plaintiff, and that plaintiff thereupon make, execute, and deliver a deed conveying the title to said premises to the defendant.

[1] It was alleged in the answer, and found by the court, that when the last payment of interest was made by Stiles, it was agreed between the parties that the time for payment should be further extended beyond January 1, 1906. The plaintiff attacks the finding. We need not inquire into this point, as we think the finding immaterial. It is undisputed that, long after the final installment

became due, the appellant accepted several payments on account of interest on the unpaid balance. Under these circumstances the vendor must be held to have waived its right to declare a forfeiture for the failure to pay in time, without first tendering a deed and putting the vendee in default. Boone v. Templeman, 158 Cal. 290, 110 Pac. 947, 139 Am. St. Rep. 126; Hayt v. Bentel, 164 Cal. 680, 130 Pac. 432.

[2] The defendant's answer asked, and the court by its decree granted, affirmative relief. In effect, the defendant prayed for and obtained a decree of specific performance. Under section 462 of the Code of Civil Procedure, new matter set up in the answer is deemed controverted by the opposite party. Plaintiff was therefore entitled to meet the defendant's averments by any evidence sufficient to overcome their force. Moore v. Copp, 119 Cal. 429, 51 Pac. 630; Brooks v. Johnson, 122 Cal. 569, 55 Pac. 423; Peck v. Noee, 154 Cal. 351, 97 Pac. 865. Accordingly, where the answer sets up an affirmative cause of action, the adverse party may, without formal plea, show that the attempted defense is barred by the statute of limitations. Bradbury v. Higginson, 167 Cal. 553, 140 Pac. 254.

[3] The appellant contends that the defendant's right to a conveyance under the contract of sale is thus barred. It appears that, in response to Stiles' offer of payment and demand for a deed, the plaintiff, on February 5, 1906, notified him in writing that his contract was "declared forfeited in accordance with the terms and conditions of said contract." This action was begun on March 15, 1913, more than seven years after such notification. The defendant's answer was filed some two weeks later. It is urged that the cause of action to enforce such contract was barred either by subdivision 1 of section 337 of the Code of Civil Procedure (an action upon a contract, obligation, or liability founded on an instrument in writing), or by section 343 (an action for relief not provided for in other sections of the Code). The respondent, on the other hand, relies upon the rule, well settled by our decisions, that the statute of limitations does not run against a vendee in possession who had paid the full purchase price. Love v. Watkins, 40 Cal. 548, 571, 6 Am. Rep. 624; Gilbert v. Sleeper, 71 Cal. 290, 294, 12 Pac. 172; Scadden Flat G. M. Co. v. Scadden, 121 Cal. 33, 53 Pac. 440; Fleishman v. Woods, 135 Cal. 256, 67 Pac. 276. The theory of these cases is that such vendee is the equitable owner of the land, and the vendor the trustee of a naked legal title. In harmony with the general rule regulating actions by a cestui against the trustee of an express trust, it is held that the statute of limitations does not run until there has been a distinct and unequivocal repudiation of the trust by the trustee. It has even been held that a mere repudiation by the vendor will not start the statute running, in the absence of an actual taking of possession or ouster by such vendor. Bennett v. Morrison, 120 Pa. 390, 14 Atl. 264, 6 Am. St. Rep. 711, cited in Luco v. De Toro, 91 Cal. 405, 418, 18 Pac. 866, 27 Pac. 1082. But where the vendee is not in possession, he must certainly bring his action within four years after the repudiation of the trust or obligation to convey is distinctly brought home to him (Cortelyou v. Imperial Land Co., 166 Cal. 14, 20, 134 Pac. 981), as it was in this case by the plaintiff's notice of forfeiture. The answer alleges that Stiles took possession upon the making of the contract. But the record discloses no evidence to support the finding that this allegation is true. The possession which will prevent the running of the statute of limitations against a vendee is an actual possession or occupation, not merely that constructive or presumed possession which may follow a right of entry. It may be conceded that the contract contemplated that the vendee should be entitled to go into occupation of the lot. The evidence, however, fails to show that he ever went into or ever had possession. It was stipulated at the trial "that the property was a vacant lot and had been for the last five years." The only witness who testified on the subject stated that for the five or six years prior to the trial the property had "not been inclosed in any manner or occupied by any residence or dwelling or building or for farming or other purposes." This evidence, far from showing that the vendee had been in possession of the land, showed the contrary. The case, then, is simply that of one who, having a contract to purchase land, tenders payment and demands a conveyance, which is refused, and then waits for seven years before seeking to enforce his right to a conveyance. In the absence of any possession by him, it must be held that the statute of limitations has run against his right to enforce the contract.

It may well be that the plaintiff, having once waived its right to declare a forfeiture without first tendering a deed and demanding payment, could not have its title quieted, without complying with such conditions as might be deemed, by the court, to be equitable. But this consideration cannot justify the granting of affirmative relief to the defendant on a cause of action which is barred. Upon the record as it stands the judgment in favor of the defendant cannot be upheld.

It is unnecessary, in view of what has been said, to discuss the other points presented.

The judgment and the order denying a new trial are reversed.

We concur: VICTOR E. SHAW, Judge pro tem.; SHAW, J.

175 Cal. 522

O. L. SHAFTER ESTATE CO. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (S. F. 8170.)

(Supreme Court of California. June 21, 1917. Rehearing Denied July 19, 1917.)

1. Master and Servant 🔑375(1) — Workmen's Compensation Act — Course of Employment.

Where plaintiff's decedent was employed to patrol defendant's ranch as gamekeeper, and was also expressly instructed to aid defendant's lessees in killing a deer, and in the course of the hunt he was accidentally shot by one of the lessees, the accident occurred in the course of the employment.

2. Master and Servant 🔑373—Workmen's Compensation Act—Out of Employment.

Where a gamekeeper was accidentally shot while aiding defendant's lessee in hunting a deer by express orders of defendant superintendent, the accident arose out of the employment.

3. Master and Servant 🔑361—Workmen's Compensation Act — Employments Excluded.

Workmen's Compensation Act (Acts 1913, p. 279) § 14, excluding from the beneficiaries thereof "any employé engaged in farm, dairy, agricultural, viticultural or horticultural labor, in stock or poultry raising," does not include a gamekeeper employed to patrol a ranch to eject poachers and to aid in hunting deer.

4. Master and Servant 🔑405(1) — Workmen's Compensation Act — Willful Misconduct—Evidence.

In proceedings under Workmen's Compensation Act to recover for the death of a gamekeeper accidentally shot while assisting in hunting a deer, evidence *held* not to show deceased guilty of willful misconduct.

5. Master and Servant 🔑362—Workmen's Compensation Act—Casual Employés.

Where a gamekeeper was accidentally shot while assisting defendant's lessee in hunting a deer by the express order of the defendant's superintendent, the employment was not casual, but in the usual course of the business conducted by the employer; the employer having usually provided game wardens for prior lessees.

6. Master and Servant 🔑386(1) — Workmen's Compensation Act—Computation of Compensation.

Where a gamekeeper was accidentally killed while engaged in hunting a deer under defendant's express orders, compensation *held* erroneously awarded on the basis of seven days a week instead of six, as provided for by section 17a, subds. 1 and 2, of the Workmen's Compensation Act (Acts 1913, p. 279).

In Bank. Proceedings by Mrs. Ruth Harrington against the O. L. Shafter Estate Company under the Workmen's Compensation Act. From the award the employer brings certiorari. Modified and affirmed.

Charles W. Slack and Chauncey S. Goodrich, both of San Francisco (Virgil M. Ariola, of counsel), for petitioner. Christopher M. Bradley, of San Francisco (Warren H. Pillsbury, of Oakland, of counsel), for respondent.

VICTOR E. SHAW, Judge pro tem. Certiorari to review the proceedings of the Industrial Accident Commission, wherein an award of compensation was made by it to Mrs. Ruth Harrington for the death of her husband while engaged in the employ of petitioner.

The commission in effect found that Sidney M. Harrington, husband of the applicant, was killed by reason of an accident arising out of and in the course of his employment by the O. L. Shafter Estate Company; that said employé was not engaged in an occupation falling within the exceptions specified in section 14 of the Workmen's Compensation Act; nor was the accident caused by the willful misconduct of deceased; all of which findings are attacked by petitioner for want of support in the evidence.

The facts material to the inquiry, as disclosed by the return to the writ, are as follows: Petitioner, at whose request the writ was issued, is a corporation and at the time in question was the owner of a large tract of land in Marin county known as the "Lake Ranch," upon which it maintained stock, including a number of dairy cows, which and the right to pasture the same thereon was leased to Palascini brothers, who operated a dairy. There was considerable wild game upon the ranch, and the season for hunting deer thereon opened August 1, 1916, and extended to September 15th following. During preceding years petitioner had let hunting privileges upon the ranch, requiring the lessees thereof to furnish a game warden. The leases having expired, petitioner, in July, 1916, acting through W. F. La Grange, its superintendent, employed Sidney Harrington as a game warden and keeper to patrol the ranch on horseback, look after and protect the game from poachers, and apprehend and eject trespassers, to which duties was thereafter added that of assisting the Palascini boys in killing a deer, which employment was to commence August 1st. About July 29th Harrington, finding that he would be unable to accept the employment, so notified La Grange, at whose request he secured one Parsons to take his place, it being agreed, however, that Harrington should work with Parsons from Tuesday, August 1st, to and including the following Sunday, August 6th. About August 2d or 3d, on the occasion of a visit to the ranch by La Grange, there being present the Palascini brothers, Harrington, and Parsons, the former said that the tenants were each entitled to a deer, and upon some one suggesting that the Palascini brothers were poor shots and not very good hunters, La Grange said to Harrington and Parsons, "I want to see them get a deer, and if they don't get it you boys see that they get it." Harrington, accompanied by Parsons, commenced work on August 1st, as he had agreed to do, and up to the time of his death they found a number of trespassers engaged in hunting on the ranch. On Saturday, August 5th, the day on which the accident occurred, Parsons was engaged in preparing a camp wherein to locate his family, and Harrington on the forenoon of said day patrolled the ranch alone. On his return to the house of Palascini brothers, with whom he boarded, and at about 1 o'clock p. m., he requested Antone Palascini to go with him on a ride in patrolling the ranch, and at the same time he referred to what La Grange had said in regard to seeing that Palascini got a deer. On this last trip Harrington, as was his custom, carried a rifle, as also did Palascini, and so far as shown the nature of the work done was the same and consisted of that usually performed in patrolling the ranch, except that in connection therewith he and Antone Palascini both shot at deer which they saw while engaged in such patrol and care of the ranch. After resting a couple of hours and at about 6 p. m., Harrington said to Antone: "Now we will go around and look and see if we can get a deer." Going up a canyon they found one at which Harrington fired without hitting it; thereupon he said to Palascini: "You go round one way and I will go round the other way. We will round up the deer, and we will make it come back this way. But when you get up the hill, don't go any farther ahead because if I see the deer, I am going to shoot, and you do the same." Palascini saw the deer and shot at it, thinking that Harrington was 200 or 300 yards behind, and after firing, and not seeing Harrington, he went to look for him, and discovered that he had shot him through the head, causing instant death.

In our opinion, the attack made upon the findings is without merit. The language concededly used by La Grange admits of no meaning other than that Palascini was authorized to hunt and kill a deer; and it is equally clear that Harrington and Parsons, as game wardens, were in express terms directed to see that he killed it. Under the instructions given, the duty of Harrington to aid and assist such authorized hunter in securing the deer was no less than the duty imposed upon him of protecting the game from trespassers and unauthorized hunters. Nor could it have been intended by La Grange, or understood by Harrington, that the latter should, in aiding Palascini, do less than when found drive or turn the animal in the direction of where Palascini was stationed, or kill it himself, in which endeavor he was engaged at the time he was shot.

[1, 2] That the accident occurred in the course of the employment seems clear from the fact that it occurred while Harrington was actually engaged in doing that which he was employed to do, that is, patrolling the ranch in quest of poachers and at the same time, in connection therewith, under express orders of his employer, and in the ordinary and usual manner, assisting an authorized hunter in finding and killing a deer. That it arose out of the employment appears from the fact that the accident followed as a natural incident of the employment, engagement in which exposed him to the danger of being accidentally shot, a hazard which he as a reasonable man must have contemplated when he undertook to perform the duties so imposed upon him. The rule is well stated in McNicol's Case, 215 Mass. 497, 102 N. E. 697, L. R. A. 1916A, 306, where it is said:

> "If the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises 'out of' the employment."

[3] Section 14 of the act excludes from the beneficiaries thereof "any employé engaged in farm, dairy, agricultural, viticultural or horticultural labor, in stock or poultry raising." We find no evidence in the record which tends in the slightest degree to show that deceased was engaged in any calling so excepted from the operation of the statute. It cannot be said that one employed as the keeper of hunting preserves whose duty it is to apprehend trespassers and protect the wild game from poachers, whose acts in hunting if permitted would expose domestic animals therein to the danger of being accidentally shot, is engaged in stock raising or any of the pursuits mentioned in said section 14.

[4] Neither is there any ground for the complaint made that deceased was guilty of willful misconduct. Conceding negligence on his part due to the fact that he proceeded to a point some distance in advance of that agreed upon between him and Palascini, except for which the accident would not have occurred, there is nothing indicating that he thus intentionally imperiled his life or recklessly sought a position of danger. North Pacific Steamship Co. v. Ind. Acc. Com., 163 Pac. 910.

[5] Petitioner also insists that at the time of the accident which caused the death of deceased he was engaged in an employment not only casual, but not in the usual course of the business conducted by the employer. As heretofore stated, petitioner had in previous years leased the hunting privileges of the ranch upon terms which required the lessees to provide a game warden whose duty was to prevent unlawful shooting of game by trespassers and protect the premises and stock thereon from exposure to injury incident to unlawful hunting. It thus appears that for the protection of the game preserves it was the usual course of petitioner, in the conduct of that branch of its business from which it derived a revenue, to employ through the lessees the services of a game warden. The leases having expired, it acted directly in employing Harrington as gamekeeper for a term of six days to perform services, which in the course of its business it had theretofore required. We attach no importance to the fact that in prior years the service was rendered through an agreement with the lessees of the hunting privileges.

[6] As to the compensation awarded the applicant the commission found that deceased had not worked substantially the whole of the preceding year in said employment, and that the earnings of an employé so working in the same neighborhood was the sum of $60 per month "working seven days per week" from which, as a conclusion of law, the commission found "that the average annual earnings of said employé at the time of his injury and death was the sum of $656.70; that the average weekly earnings were $12.53, and that 65 per cent. thereof equals $8.21," in accordance with which the award was made. Counsel for respondent undertake to justify the conclusion reached by the commission upon the ground that the employé whose earnings were properly taken as a basis for the earnings of deceased, as provided by section 17a, subdivision 2, of the act, worked seven days per week for which he received the sum of $60 per month, and therefore instead of multiplying the sum of $2 found to be the average daily earnings by 300, as provided in said section 17a, subdivisions 1 and 2, it should, they claim, by reason of such day labor performed exceeding six days per week be multiplied by 332, which respondent claims constitutes the average of working days in a year for employés working seven days per week. The lengthy and involved reasoning of counsel in support of the contention is not at all satisfactory. Indeed, upon this record respondent concedes an absence of evidence which, in ascertaining the average annual earnings, justifies the use of any number other than that specified in section 17a, subdivision 2, as a multiplier of the daily earnings, and upon the evidence presented we find no warrant in the act for the computation in the manner made.

The daily wage multiplied by 300 as provided by section 17a, subdivision 2, gives $600 as the average annual earnings of deceased, which sum divided by 52 (section 17a) gives $11.54 as the weekly earnings, 65 per cent. of which, being $7.50, constitutes the weekly indemnity payable to the applicant.

It is therefore ordered that the award be modified by the commission in accordance with the views herein expressed, and as so modified the proceedings are affirmed.

We concur: SHAW, J.; SLOSS, J.; HENSHAW, J.

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175 Cal. 420

LOOSEMORE v. BAKER. (L. A. 3835.)

(Supreme Court of California. June 11, 1917.
Rehearing Denied July 9, 1917.)

1. CHATTEL MORTGAGES 🔑138(1)—PRIORITY OF LIENS—ATTACHMENT.

The lien acquired by a creditor on personalty by the levy of a writ of attachment is superior to the lien given by a chattel mortgage which has not been recorded and is not accompanied by the required affidavits.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 228, 229, 231–236.]

2. ATTACHMENT 🔑375(3)—LEVY — DAMAGES RECOVERABLE—CHATTEL MORTGAGES.

Whether a judgment in favor of a sheriff against the mortgagee in an unrecorded chattel mortgage, under Civ. Code, §§ 3336, 3338, relative to the amount of recovery for conversion, should be for the value of the property levied on or only for the amount of the attachment lien, costs and expenses, plaintiff having regained the property by giving an undertaking after the levy, depended on whether the chattel mortgage was valid as between the mortgagee and owner and whether the mortgagee had taken possession of the property under his mortgage with the owner's consent, in which case the sheriff would be entitled to recover only the lesser sum.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 1382–1385.]

Department 2. Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by John Loosemore against T. A. Baker. From a judgment for defendant and denial of new trial, plaintiff appeals. Reversed, and new trial granted.

Emmons & Hudson and T. F. Allen, all of Bakersfield, for appellant. Thomas Scott and J. R. Dorsey, both of Bakersfield, for respondent.

HENSHAW, J. This appeal is from the judgment and from the order denying plaintiff's motion for a new trial. He sued defendant as sheriff of the county of Kern, who under a writ of attachment had levied upon and taken possession of certain personal property. Plaintiff offered to prove that the property was in his possession at the time of the sheriff's levy, and that his possession was based upon a chattel mortgage for a bona fide debt due to him from one Wygal, who had made default in the matter of the payment of the debt. After seizure by the sheriff plaintiff had given him an undertaking, and thus had regained possession of the property. The judgment was in favor of the sheriff for the return of the property or its value, found to be the sum of $3,000.

It was shown by respondent, and it is not controverted, that the chattel mortgage was never recorded, and that it was not accompanied by the affidavits of the parties thereto as required by law. One C. B. Alexander commenced his action against Wygal to recover the sum of $1,450 for hay sold by him to Wygal within two years next preceding the commencement of the action, which commencement was on the 13th day of October, 1911. The chattel mortgage bore date of the 23d of May, 1910. In this action the attachment was issued. Plaintiff in the present action admitted, however, that he was unable to prove that any part of this hay was so sold before the execution of the mortgage, the contrary being contended for by defendant, and that he was unable to prove that Alexander had any notice or knowledge of the existence of this mortgage until after the hay had been so sold and delivered.

[1] The judgment giving priority to the lien of the attachment under these facts comes strictly within the decisions of this court in Ruggles v. Cannedy, 127 Cal. 291, 53 Pac. 911, 59 Pac. 827, 46 L. R. A. 371, and Alferitz v. Scott, 130 Cal. 474, 62 Pac. 735. If it is thought that anything to the contrary to these decisions is held in Adlard v. Rodgers, 105 Cal. 327, 38 Pac. 889, it must be considered as superseded by the later decision of the court in bank above cited. Lemon v. Wolff, 121 Cal. 272, 53 Pac. 801, also relied on by appellant, contains nothing bearing upon this case. It declares the sound and familiar principle that even a chattel mortgage void for lack of recordation or void for defective verification and acknowledgment may still be good between the parties, and that a mere creditor at large is not in a position to attack it, it being said that:

> "Only a creditor who has acquired a lien upon the mortgaged property by virtue of some legal proceeding, or who is armed with some process authorizing a seizure of the property, can question the compliance with these formalities."

In this case the creditor had acquired a lien and was armed with process.

[2] Appellant contends that, as the attachment lien was only for $1,450, the maximum judgment which should have been given in favor of the sheriff was for that sum with "fair compensation for the time and money properly expended in pursuit of the property." Civ. Code, §§ 3338, 3336. Such unquestionably is the general rule. Pico v. Martinez, 55 Cal. 151; Wilkerson v. Thorp, 128 Cal. 225, 60 Pac. 679; 34 Cyc. p. 1568. Respondent makes answer that this case comes within the exception to the general rule in that he had taken the property from the owner and was responsible over to the owner for the excess in value of the property above the judgment and costs due to Alexander, and that, therefore, the judgment in the full amount of the value of the property was proper. Respondent's legal position is sound. Coos Bay R. R. Co. v. Siglin, 34 Or. 80, 53 Pac. 506; Bleiler v. Moore, 88 Wis. 438, 60 N. W. 792; Shahan v. Smith, 38 Kan. 474, 16 Pac. 749; Witkowski v. Hill, 17 Colo. 372, 30 Pac. 55. Respondent further argues that the findings show that he did in fact take the personal property from the possession of the owner. All this may be conceded, but the difficulty with the respondent's position arises over the ruling of the court in refusing to allow plaintiff to prove his mortgage and to prove that he was in actual possession of the personal property at the time of the respondent's levy, for if it be true, as appellant contends, that his mortgage was good as between himself and his mortgagor, and that he had taken possession of the property under his mortgage with the consent of the owner, then, notwithstanding the fact that by virtue of the attachment the respondent acquired a lien superior to that of the appellant, it was indisputably a limited lien for the amount sued for by Alexander and it would be to this appellant, and not to Wygal, the owner, that the respondent would be accountable for the excess in value over and above the sum sufficient to satisfy his lien. These issues, however, were not tried, and this judgment cannot stand until they have been tried and determined adversely to appellant's position. The judgment must be reversed, and upon the new trial permission should be granted to this plaintiff to establish, if he can, the validity of his mortgage as between himself and the owner, and that he was in possession of the property at the time of respondent's levy and seizure.

It is ordered accordingly.

We concur: MELVIN, J.; LORIGAN, J.

175 Cal. 543

AGOURE v. PLUMMER et al. (L. A. 3930.)

(Supreme Court of California. June 25, 1917. Rehearing Denied July 25, 1917.)

1. Landlord and Tenant 🔑139(2)—Rights of Sublessees—Emblements.

Under Civ. Code, § 819, providing that a tenant for years or at will, unless he is wrongdoer, by holding over may take the annual products of the soil, and section 820, providing that a tenant for years or at will has no other rights to the property than such as are given to him by the agreement or instrument by which his tenancy is acquired or by the previous section, a lease for a fixed term of years, with rent payable at stated times, terminated by the act of the lessee in failing to pay the rent when due, did not create an estate entitling a subtenant to claim the growing crops or emblements after such termination of the estate.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 495–505.]

2. Landlord and Tenant 🔑291(6)—Parties—Subtenants.

Code Civ. Proc. § 1161, subd. 2, provides that one is guilty of unlawful detainer who, in person or by a subtenant, continues in possession without permission of the landlord after default in payment of rent, and after 3 days' notice in writing requiring its payment shall have been served upon him, and, if there be a subtenant in actual occupation, also upon such subtenant. Subdivision 3 provides that within 3 days after service of notice any subtenant in actual occupation of the premises may pay the rent and save the lease from forfeiture. By section 1164 no other person than a tenant and subtenant, if there be one in the actual occupation of the premises, need be made parties defendant. *Held*, that a subtenant who had plowed, sowed, and cultivated part of the premises, but had not inclosed them and did not live thereon, was not a necessary party to an action of unlawful detainer.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 1234.]

3. Landlord and Tenant 🔑177½—Relief—Rights of Subtenant.

Code Civ. Proc. § 1174, provides that when the proceeding is for an unlawful detainer after default in the payment of rent and the lease under which the rent is payable had not, by its terms, expired, execution upon the judgment shall not be issued until the expiration of 5 days after the entry of the judgment within which time the tenant or any subtenant may pay into court for the landlord the amount found due for rent, with interest, whereupon the tenant shall be restored to his estate. Section 1179 provides for such relief upon proper showing made within 30 days after the judgment. A subtenant chargeable with knowledge of the terms of the lease was evicted for nonpayment of rent by the tenant, but failed to avail himself of the provisions of the statute. *Held*, that he could not avail himself of such right in an action of unlawful detainer.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 712.]

Department 1. Appeal from Superior Court, Los Angeles County; Geo. E. Church, Judge.

Action by John Agoure against E. R. Plummer and another. Judgment for plaintiff, and defendants appeal. Reversed.

Haas & Dunnigan, of Los Angeles, for appellants. Kemper B. Campbell and Frank P. Doherty, both of Los Angeles, for respondent.

SHAW, J. This is an action in claim and delivery involving certain personal property, consisting of 175 tons of hay and 709 sacks of barley originally harvested from the lands of the defendants. The court below gave judgment that plaintiff was entitled to the possession of said property, from which judgment and from an order denying a motion for new trial the defendants appeal.

On August 31, 1907, defendants were the owners of a tract of land designated as lot B, containing 1,767 acres, of the Rancho Los Virgenes. On that date they entered into an agreement with one Pierre Agoure, uncle of plaintiff, whereby the land was leased to Pierre for a period of 5 years from November 1, 1907, at a rental of $800 per annum, payable semiannually in advance on the 1st day of April and November each year. In November, 1911, Pierre entered into an agreement with the plaintiff, whereby the latter was to farm a portion of the land leased by Pierre being one tract of 95 acres and one tract of 65 acres, the plaintiff to receive three-fourths and Pierre one-fourth of any crop harvested therefrom. The hay and barley in controversy were produced under this agreement. Plaintiff plowed a part of the two parcels in December, 1911, and the remainder in March, 1912. The sowing was completed on March 24, 1912. On April 25th, and for three days and a half afterward, he was harrowing one of the parcels. There was no proof of cultivation at any other time. There was no house on the land or on the 1,767 acres of which it formed a part. Plaintiff resided in Ventura county two miles from the land. The parcels cultivated by plaintiff were not inclosed or in any way separated from the larger parcel. Plaintiff was not in actual possession or occupancy of the parcels, or any part thereof, except during the times aforesaid when he was plowing, sowing and harvesting the same. The installment of rent due on April 1, 1912, from Pierre to the defendants was not paid. On April 5, 1912, defendants served on Pierre Agoure a notice to quit within 3 days for nonpayment of rent. The rent was not paid, and thereupon the defendants, on April 23, 1912, brought an action in unlawful detainer against Pierre. At the time the notice was served and from that time until the action was begun John Agoure was not at any time in actual occupancy of any part of the land. In that action the defendants here, plaintiffs there, recovered a judgment for $650, being the amount of rent due and damages for withholding the property by Pierre, and on June 4, 1912, defendants were restored to the possession and occupancy of the land by a writ of restitution. The next day plaintiff entered upon the 95-acre tract, over the protest of the defendants, and cut and baled the 175 tons of hay here involved. Subsequently, defendants harvested the crop on the 65-acre tract, from which they realized the 709 sacks of barley here involved. All of said property remained in the possession of the defendants until claimed by the plaintiff in the course of this action.

[1] Appellants contend that the judgment in the action of unlawful detainer against Pierre Agoure is effectually binding upon the plaintiff herein so as to preclude him from claiming any right or title to the crops growing upon said lands. The respondent has filed no brief in this court, and it is not apparent from the record upon what theory the court below gave its judgment, unless it be upon the theory that in the proceedings in unlawful detainer, the present defendants having obtained a judgment for the full amount of the rent due to the end of the term for which the lease was to run and damages for the detention of the land, they were fully recompensed, and that in equity and good conscience the lessee and those claiming under him were entitled to the use and possession of the land for the remainder of the term, notwithstanding the judgment dispossessing Pierre and restoring the defendants to possession. The lease between Pierre and defendants being for a fixed term of years, with rent payable at stated times, and having been terminated by the act of Pierre alone, in failing to pay the rent when due, it did not create an estate that would entitle the tenant or subtenant to claim the growing crops or emblements after such termination of the estate (Civ. Code, §§ 819, 820; Tiedeman on Real Prop. § 59; 1 Washburn on Real Prop. [6th Ed.] § 259), and it does not appear from the record that such a claim was made.

[2] The action in unlawful detainer was carried to a successful conclusion by the defendants here (Plummer v. Agoure, 20 Cal. App. 319, 128 Pac. 1014), and there was a due compliance wtih all the provisions of the Code of Civil Procedure relating to such action. Section 1161 defines unlawful detainer, subdivision 2 thereof providing that one is

guilty of unlawful detainer who, in person or by subtenant, continues in possession, without permission of the landlord, after default in payment of rent and after 3 days' notice in writing requiring its payment, or the possession of the property, shall have been served upon him, and "if there is a subtenant in actual occupation of the premises, also upon such subtenant." The plaintiff in this action was, by his own testimony, not in the "actual occupation" of the premises, within the meaning of this statute. Subdivision 3 provides that within 3 days after service of notice the tenant, or any subtenant in actual occupation of the premises, may pay the rent and save the lease from forfeiture, of which opportunity for relief neither the plaintiff nor his lessor availed himself. By section 1164 "no person other than the tenant of the premises and subtenant, if there be one, in the actual occupation of the premises when the complaint is filed, need be made parties defendant," so that plaintiff herein, not being in the actual occupation of the premises, was not a necessary party to that action. The judgment in that action was given May 1, 1912, in accordance with section 1174. At no time within five days after such judgment did the plaintiff herein or Pierre Agoure offer to pay into court for the landlord the amount of rent and damages and the costs of the proceeding, thereupon to be restored to the possession of the premises, as provided in said section.

[3] Up to this point in the proceeding the plaintiff, as subtenant, is clearly bound by any judgment affecting Pierre Agoure. So far as any hardship may be deemed to have been visited upon plaintiff by the judgment both for the possession of the land and the rent due in full satisfaction of the terms of the lease, Pierre Agoure necessarily made the lease with full knowledge on his part of the provisions of our Code with reference to one guilty of unlawful detainer because of nonpayment of rent, and plaintiff, as subtenant or as cropping contractor with Pierre, must be charged with equal knowledge that the term under which he contracted might be terminated at any time for such cause. To prevent any hardship upon just such persons as the plaintiff herein the law throws about him the protection, not only of section 1174 under which the judgment was given and by which plaintiff herein could have paid the rent within five days after judgment and obtained possession of the land, but also of section 1179, wherein one so oppressed is afforded relief against such forfeiture, upon proper showing, if made within 30 days after judgment, which relief plaintiff did not see fit to claim. To allow the plaintiff to claim that which he did not avail himself of at the time the statute gave him the right to claim it would be to defeat and set at naught the very object of the above provisions of the statute, the restoration of the landlord to the possession of the premises (Arnold v. Krigbaum, 169 Cal. 143, 146 Pac. 423, Ann. Cas. 1916D, 370), with all rights to the use and occupation thereof, which would include the growing crops thereon, unless the lessee or those claiming under him see fit to obtain relief as provided in the statutes. It follows that the court erred in giving judgment for the plaintiff.

The judgment and order are reversed.

We concur: VICTOR E. SHAW, Judge pro tem.; SLOSS, J.

175 Cal. 565

DANZIGER v. BENSON et al. (L. A. 4028.)

(Supreme Court of California. June 25, 1917. Rehearing Denied July 23, 1917.)

1. DEEDS 🔑116—EFFECT AFTER ACQUIRED TITLE.

Under the direct provisions of Civ. Code, § 1106, a deed purporting to convey good title conveys the grantor's subsequently acquired title.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 330.]

2. VENDOR AND PURCHASER 🔑145—PERFORMANCE OF CONTRACT—ESTOPPEL.

Where an owner agreed with his optionee's purchaser to be bound by the contract between the optionee and such purchaser, the purchaser is entitled to the deeds upon making the payments specified in his contract, although they are less than those required by the contract between the owner and the optionee.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 276.]

3. VENDOR AND PURCHASER 🔑79—CONTRACT—CONSTRUCTION.

Under a contract providing that the purchaser should be entitled to any of four deeds upon making certain payments, but that the last deed should be delivered only upon full payment being made, the purchaser is entitled to delivery of a deed upon making the specified payments, irrespective of possible subsequent defaults.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 7, 8, 127–131.]

4. VENDOR AND PURCHASER 🔑186—CONTRACT—PERFORMANCE.

Where a contract provided the vendor should make good title as a condition to payments by the purchaser, which the vendor failed to do, the purchaser does not default by subsequently failing to make installment payments.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 341, 373.]

5. VENDOR AND PURCHASER 🔑143—CONTRACT—WAIVER.

The purchaser's waiver of a condition requiring the vendor to make good title as to part of the land covered by a contract does not waive the provision as to the remaining land.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 267–270, 311.]

6. APPEAL AND ERROR 🔑843(2)—REVIEW—FINDINGS.

If the facts found by the court below support the conclusions necessary to the judgment, inconsistent conclusions stated in the findings will be disregarded.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3331.]

7. Escrows ⊂⊃9 — Performance of Conditions—Forfeiture.

Under an escrow agreement forfeiting the purchaser's payments upon his default, etc., the purchaser lost all right to the deposited deeds by failing to make the required payments and not presenting any equitable ground for an extension of time.

[Ed. Note.—For other cases, see Escrows, Cent. Dig. § 11.]

Department 1. Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by J. M. Danziger against E. M. Benson and others. Judgment for plaintiff, and the named defendant appeals. Affirmed.

W. W. Kaye, of Bakersfield, for appellant. Borton & Theile, of Bakersfield, and N. P. Moerdyke, of Los Angeles, for respondents.

SHAW, J. On April 18, 1910, the defendants, Mushrush, Humphreys, and Sprague, were the owners of a section of land described as section 36, township 12 north, range 22 west, in Kern county. This case involves the rights of the respective parties under certain agreements for the sale thereof. It is a somewhat unusual complication that has caused the litigation. It may best be shown by a statement of the facts taken from the findings.

On the day above mentioned Benson, who had an option from Mushrush, Humphreys, and Sprague for the purchase of the land, agreed to sell and convey said section to Danziger for the sum of $22,400. The agreement provided that four deeds, each for a quarter section, should be signed and acknowledged by Benson and placed in escrow with the Bank of Bakersfield, together with $2,000 in cash; that the remainder should be paid in three installments, $3,760 in 30 days, $8,320 in 6 months, and $8,320 in 1 year. The agreement further provided that when Danziger should have paid as much as $5,600 of the price he should be entitled to have delivered to him one of the deeds for a single quarter section so put in escrow, and that for each subsequent amount of $5,600 paid he should be entitled to another deed for another quarter section, except that the last deed should be delivered only upon the full payment of principal and interest of the price. The deeds were signed and acknowledged, and the money and deeds and a copy of the agreement, together with written escrow instructions in accordance therewith, were placed in escrow with the Bank of Bakersfield.

Four days afterwards, on April 22, 1910, Mushrush, Humphreys, and Sprague, at the instance of Benson, signed and acknowledged four deeds, each purporting to convey a different quarter section of said land to Benson, and deposited the same with the Bank of Bakersfield, with written instructions to said bank to deliver said deeds to Benson upon payment of $12,160, of which $2,000 was to be paid on delivery of the abstract, $3,760 within 30 days, and four sums of $1,600 each were to be paid within 1 year from said date. The writing also instructed the bank to deliver any one of said deeds upon the making of any one of the $1,600 payments. Thus, it will be observed, Benson could not obtain a deed for any quarter section of the land until he had first paid the total sum of $7,360, whereas his vendee, Danziger, was entitled to a deed for a quarter section under the sale made to him by Benson, upon the payment of only $5,600.

After Danziger had made his first two payments for Benson, amounting to $5,760, he discovered this discrepancy. In order to obviate it he and Mushrush, Humphreys, and Sprague, on July 19, 1910, made an agreement, reciting the agreement between Benson and Danziger, and that Mushrush, Humphreys, and Sprague desired to join therein, and providing that in consideration of the sums already paid to Mushrush, Humphreys, and Sprague on account of the sale by them to Benson, they should be bound by all of the terms of the contract between Benson and Danziger as though they were originally parties thereto, and that they would allow all deeds deposited by them with the Bank of Bakersfield for Benson to remain on deposit with said bank so long as the said Danziger should comply with his agreement with Benson. This agreement, together with another copy of the agreement between Benson and Danziger, was also deposited with said bank as a part of its instructions from the parties to the agreement, as agent and escrow holder. Benson was not a party to this agreement, and did not join therein.

When Danziger paid the $2,000 and the $3,760 as provided in the agreement and escrow instructions between himself and Benson, as they amounted to more than $5,600, he thereupon become entitled to the delivery of one of the deeds deposited by Benson, as he should select. After having paid the said sums Danziger demanded of the bank the delivery of the deed from Benson to himself and of the deed from Mushrush, Humphreys, and Sprague to Benson for the southwest quarter of the section. The bank refused to deliver either of the deeds, except upon the payment of an additional sum of $1,600 required by the escrow instructions given to it by Mushrush, Humphreys, and Sprague upon the agreement between them and Benson. Mushrush, Humphreys, and Sprague approved this refusal, and repudiated the said agreement of July 29, 1910, with Danziger. They, and Benson also, thereupon claimed that Danziger had no right to a delivery of either or any of the deeds, except upon the additional payment of $1,600. Benson never paid, or offered to pay, either of the four installments of $1,600 provided for by the agreement between himself and Mushrush, Humphreys, and Sprague. The bank was also made a party to the action, but it made no active defense, and submitted the deeds to the jurisdiction and control of the court.

The court below gave judgment in favor of the plaintiff, directing that the deeds from Mushrush, Humphreys, and Sprague to Benson, and from Benson to Danziger, each for the southwest quarter of the section, be delivered to Danziger, that being the relief prayed for in the complaint. Benson alone has appealed; the other defendants being content with the judgment.

[1, 2] Upon the facts we have stated, the decision of the court below that plaintiff was entitled to the delivery of the two deeds required to perfect his title to the quarter section of land was sound. The agreement of Benson entitled Danziger to the Benson deed upon the payment of $5,600. It also bound Benson to convey a good title by that deed. But this was a condition which Danziger had the right to waive, if he chose. His right to the Benson deed cannot be denied. If this deed had been delivered, it would have vested all the right, title, and interest of Benson in Danziger, and its effect would be that any title afterward acquired by Benson under his agreement with Mushrush, Humphreys, and Sprague would pass by operation of law to Danziger. Civ. Code, § 1106. By his payment of $5,760 and his demand for the Benson deed, Danziger became fully entitled to it, and also became the equitable owner of the deed and of all of Benson's right, title, and interest, including Benson's right to complete the title by paying the additional $1,600 required by the agreement of Benson with Mushrush, Humphreys, and Sprague. Having already obtained their agreement to waive this payment and to allow their deed to be delivered on payment of the $5,600, which had then been paid to them, the equitable right of Danziger to both deeds was complete, and the delivery should have been made accordingly. Benson is estopped by his agreement, which contained a covenant for good title to Danziger. The other parties are estopped by their agreement with Danziger that he should have their deed upon compliance with the terms of his agreement with Benson. The act of Benson's vendors in making good his positive obligation to Danziger without requiring payment of the additional $1,600, though it did not relieve Benson of his obligation to pay them, was a benefit to him, since it performed for him his own contract to convey a good title to Danziger. No beneficial interest was left in Benson, and he had no right to object to the delivery.

[3-5] The fact that Danziger did not pay the installment of $8,320, due October 18, 1910, on his contract with Benson does not affect his right to the first deed. He had made the payments necessary to entitle him to that deed. Thereupon, at his election, the contract became a separate agreement for the sale of the quarter section he should select, and the price, as to that quarter, was fully paid. He was entitled to immediate delivery of the deed and to a good title. There is nothing in the contract, or in any of them, to the effect that a subsequent default in the remaining installments would terminate the right to the portion that is paid for. But there was no subsequent default. The contract required a good title, or the means of obtaining it, on the part of Benson, as a condition, either precedent to or concurrent with, the obligation of Danziger to pay anything more than the first $2,000. Benson, by his failure to pay any of the $1,600 installments of his contract with Mushrush, Humphreys, and Sprague, had failed to make his proffered title good, and he never became entitled to demand further payments from Danziger. Danziger's waiver of the defect as to the first deed, for which he had already paid, did not operate as a waiver as to the remaining land.

[6] It is immaterial whether the several conclusions of law stated in the decision of the superior court, whether formally stated as conclusions or not, are consistent with each other. The ultimate conclusions of the court below are those manifested by its judgment. If the facts found support the conclusions necessary to the judgment, inconsistent conclusions stated in the findings will be disregarded.

The action of the plaintiff is not, as plaintiff suggests, an action of detinue for the possession of the deeds. It is an action of an equitable nature to compel the performance of the contract so far as he was entitled thereto. As the case has been presented we do not perceive that this distinction is of any importance.

This disposes of the appeal, so far as the relief given to the plaintiff is concerned. Mushrush, Humphreys, and Sprague filed a cross-complaint against Benson and Danziger to quiet their title to the section of land in controversy. The judgment quiets their title to the three quarter sections remaining after the conveyance of the southwest quarter to Danziger as aforesaid.

[7] Upon the facts found, this was correct. The contract between these parties was in the form of escrow instructions to the bank, accompanying the deeds of Mushrush, Humphreys, and Sprague to Benson and deposited for delivery on compliance with the instructions. These instructions provided that "each payment of $1,600 shall entitle Benson to any one of the deeds herein inclosed," and that upon failure of Benson to make any of the payments at the times specified, the previous payments should be forfeited and the deeds should thereafter be held subject to the order of said vendors. Benson never paid, or tendered payment of, either of the installments of $1,600 as they fell due,

or at all. His right to the delivery of the remaining deeds has therefore terminated by the forfeiture, arising from his refusal to pay. Hicks v. Lovell, 64 Cal. 14, 27 Pac. 942, 49 Am. Rep. 679. He did not, even at the trial, tender further payment or present any equitable ground upon which to claim an extension of the time fixed.

The judgment is affirmed.

We concur: SLOSS, J.; VICTOR E. SHAW, Judge pro tem.

175 Cal. 497

COOK v. MILLER. (L. A. 4020.)

(Supreme Court of California. June 19, 1917.)

1. MUNICIPAL CORPORATIONS 🔑705(4)—USE OF STREET—VIOLATION OF ORDINANCE.

Where defendant was under no necessity of cutting across a corner with his automobile and the ordinance required him to go around to the right of the intersection, it was legal negligence for him to do otherwise, rendering him liable for resulting injuries to plaintiff, riding on a motorcycle, if plaintiff was not at fault.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1515, 1516.]

2. MUNICIPAL CORPORATIONS 🔑705(11) — COLLISION AT STREET CROSSING—CONCURRENT NEGLIGENCE.

In a collision between a motorcycle and an automobile at a street intersection, *held*, under the evidence, that disobedience of the ordinance by both parties was the proximate cause of the injury.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1515.]

3. MUNICIPAL CORPORATIONS 🔑705(5)—USE OF STREET—COMPLIANCE WITH ORDINANCE.

An ordinance fixing the maximum speed at 20 miles an hour was not a license to go at that speed at all times and places.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1515.]

4. MUNICIPAL CORPORATIONS 🔑705(10)—USE OF STREET—CONTRIBUTORY NEGLIGENCE.

In an action by plaintiff to recover for injuries sustained when his motorcycle collided with defendant's automobile at a street crossing, *held* under the evidence that plaintiff was not exercising ordinary care in running at a speed of 22 feet a second at a blind corner, and could not recover.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1515, 1517.]

Department 1. Appeal from Superior Court, Los Angeles County; Louis W. Myer, Judge.

Action by Harry H. Cook against Harry Miller. From a judgment for plaintiff, and from an order denying a motion for a new trial, defendant appeals. Transferred from the Second district to this court. Reversed.

U. T. Clotfelter and F. J. Heid, Jr., both of Los Angeles, for appellant. E. S. Janes, of Los Angeles, for respondent.

SHAW, J. Plaintiff recovered judgment against defendant for damages to his person and to his property. The defendant's motion for new trial was denied. The appeal is from the judgment and from an order denying the motion for new trial. The appeal was mistakenly taken to the District Court of Appeal of the Second District, which court, discovering the mistake, transferred it to this court.

The damages were caused by a collision between a motorcycle which plaintiff was riding and operating and an automobile driven by the defendant. It occurred in the city of Los Angeles at the intersection of Washington street, running east and west, and Griffith avenue, running north and south. The complaint alleges that the injuries which caused the damages were the result of the negligence of the defendant. The answer alleged contributory negligence on the part of the plaintiff. It cannot be seriously disputed that the evidence is sufficient to support the finding that the defendant's negligence was a proximate cause of the injury. The principal point made in support of the appeal is that the evidence showed that the plaintiff was also negligent in operating his motorcycle at the time of the collision, and that his negligence contributed to his injury and was one of the proximate causes thereof.

There was at that time an ordinance of the city of Los Angeles in force regulating the use and operation of vehicles, including motorcycles and automobiles, on the streets, in effect as follows: The person driving such vehicle on the street was required to do so "in a careful manner and with due regard for the safety and convenience of pedestrians or other vehicles on such street." Section 5. In overtaking and passing another vehicle on the street he was required to pass to the left of such vehicle, and not to drive again to the right until he was clear of such vehicle. Section 8. He was required to travel on the right-hand side of the street and as near the curb as possible. Section 6. In turning from one street into another he was to pass around to the right of and beyond the center of the street intersection. Vehicles traveling upon a street running northerly and southerly had the right of way over vehicles traveling upon a street running easterly or westerly. A driver of a vehicle running on an easterly or westerly street was required to allow the other vehicle such right of way. Section 40. The speed limit was fixed at not exceeding 20 miles an hour in the district embracing the place of collision. There does not appear to be anything in the ordinance requiring the sounding of a bell, gong, or horn at an intersection, although it does require such vehicles to have a bell, gong, or horn attached and in good working order.

The plaintiff was going east on his motorcycle along Washington street toward the intersection of Griffith avenue, intending to cross the same. The building of the Berlin Dyeworks occupied, up to the property line, the corner to the plaintiff's right, fronting north on Washington street and east on Griffith avenue. Along the Washington street curb line in front of this building there were four or five auto trucks, 12 feet long, belonging to the dyeworks, backed up against the curb. These trucks had canopy tops. The easterly truck was about 15 feet west of the corner. As he neared the corner, plaintiff saw that it was a "blind corner," that is, that his vision of persons coming up the avenue from the south was obstructed. A laundry wagon, drawn by a horse, trotting slowly, was ahead of plaintiff, going in the same direction. As the wagon entered upon the intersection, the plaintiff was a little behind it, and he swerved to the right to pass, instead of to the left, as the ordinance required. The defendant came up on Griffith avenue from the south at that moment, cutting across the intersection instead of going around to the right of the center of the intersection, as the ordinance required. Defendant was slowing down because the laundry wagon was going east in front of him and obstructed his passage momentarily. Plaintiff was going at the rate of 15 or 16 miles an hour, according to his own "estimate." The plaintiff, while on his swerve to the right and as he was passing the easterly truck, first saw the automobile, and at once swung to the left to avoid it, but, as he testified, "it was too late," and the two vehicles collided. The automobile, at the instant of collision, had come practically to a standstill. It was pointed to the northwest, and the laundry wagon had passed a little to the east. The front end of the motorcycle struck the front of the automobile diagonally. The plaintiff was pitched over 3 or 4 feet to the left toward the middle of the street, and received cuts and bruises. The front right spring of the automobile was twisted around toward the right to an angle of nearly 45 degrees by the force of the collision. The plaintiff testified that when he saw the automobile and tried to get out of the way by swinging to the left, "it [the automobile] was on me in a second, and I had no time." The foregoing is taken from the testimony of the plaintiff, supplemented by other uncontradicted evidence.

[1] The defendant was under no necessity of "cutting across the corner." The ordinance required him to go around to the right of the intersection, and it was legal negligence for him to do otherwise under the circumstances. Cragg v. Los Angeles Trust Co., 154 Cal. 667, 98 Pac. 1063, 16 Ann. Cas. 1061; Harrington v. Los Angeles Ry. Co., 140 Cal. 519, 74 Pac. 15, 63 L. R. A. 238, 98 Am. St. Rep. 85.

[2] The plaintiff was also violating the ordinance in swerving to the right to pass the laundry wagon instead of to the left. The field, he said, was clear, except for the laundry wagon, at the time he started to make the swerve. If he had not passed to the right of the wagon he would not have struck the automobile. So, also, if the defendant had turned the corner by going to the right of the intersection, his automobile would not have been struck by the motorcycle. The disobedience of the ordinance by both of them brought on this accident. It was the result of their concurrent negligence, the negligence of each was a proximate cause, and each contributed to the injury.

[3] Nor can it be said that plaintiff was free from negligence in crossing the intersection at a "blind corner," such as this, at the rate of 15 miles an hour, or 22 feet per second. The cause of plaintiff having no time to avoid the collision was not the speed of the automobile, for it had come practically to a stop at the instant of the collision. It was his own speed that shortened his time. The force of the impact broke the fastenings of the automobile springs, twisted them far to one side, as above stated, and carried the plaintiff several feet forward, landing him on the street, as he said, 3 or 4 feet to the right of the automobile. It is a strong probability, from these circumstances, that his "estimate" of his speed was much too low, but in view of the findings of the court we must accept his estimate as correct. A horse can travel at the rate of 15 miles an hour, and even faster, for a short time. But in the days of exclusively horse-drawn vehicles one who crossed a street at such a place going at 15 miles an hour would have been considered reckless. There have been city ordinances forbidding a team from crossing a street intersection faster than a walk. Stein v. United Railroads, 159 Cal. 371, 113 Pac. 663. Since our eyes have become somewhat accustomed to greater speed, the recklessness of 15 miles an hour may not seem so obvious, but the danger is the same. The ordinance fixing the maximum speed at 20 miles an hour is not a license to go at that speed at all times and places. Irwin v. Judge, 81 Conn. 492, 71 Atl. 572. The care required at any place on a public street is always that of a reasonably prudent person under the circumstances. Scott v. San Bernardino, etc., Co., 152 Cal. 610, 93 Pac. 677.

[4] There are occasions when a speed far below the maximum would constitute negligence. The ordinance recognizes and provides for this by requiring every person driving on the streets to do so "in a careful manner and with due regard for the safety" of other persons on the street. A speed which carries a person 22 feet in one second of time at a "blind corner," with standing auto trucks projecting 12 feet into the street, obstructing the vision of the intersecting street until the last truck is reached, and with a wagon ahead of him, is not that speed which a person exercising ordinary prudence would choose at such a place, out of due regard for his own safety, or that of others. Such speed may not be unusual at the present time, even

under similar circumstances. But the person who receives an injury from a collision, while going at that rate under the conditions here existing, should not expect the other person to pay him the damages caused thereby.

The judgment and order are reversed.

We concur: VICTOR E. SHAW, Judge pro tem.; SLOSS, J.

175 Cal. 615

ROBERT SHERER & CO. et al. v. INDUSTRIAL ACC. COMMISSION et al.

(S. F. 8258.)

(Supreme Court of California. June 30, 1917.)

MASTER AND SERVANT ⚷375(1)—WORKMEN'S COMPENSATION ACT — INJURIES OUTSIDE COURSE OF EMPLOYMENT.

Under Workmen's Compensation Act (St. 1913, p. 279) where a workman, whose duty required him to stay on a locomotive, was killed while in temporary charge of a steam shovel pursuant to a request of a person having exclusive charge of the same, there could be no recovery; as the servant was not at the time of the accident performing a service growing out of and in the course of his employment.

In Bank. Certiorari by Robert Sherer & Co. and another against the Industrial Accident Commission and another to review an award of compensation. Award annulled.

Redman & Alexander, of San Francisco, for petitioners. Christopher M. Bradley, of San Francisco (W. H. Pillsbury, of Oakland, of counsel), for respondent. W. D. Van Nostran, of Los Angeles, for Chas. F. Bowin.

VICTOR E. SHAW, Judge pro tem. Certiorari to review the proceedings of the Industrial Accident Commission, wherein an award of compensation was made by it to Charles F. Bowin, minor son of P. L. Bowin, for the death of the latter while in the employ of Robert Sherer & Co., contractors, who were engaged in constructing a railroad extending easterly from the city of San Diego.

In the performance of the work, the contractors during the daytime and as occasion required operated a locomotive engine. At the close of the day's work it was the custom of the crew in charge of this locomotive to deliver it to said P. L. Bowin, who was night watchman of the engine, and whose duties under his employment were "to stay on the engine at nights and keep it alive, keep steam in it, and have it full of water and oil in the morning ready for the day crew to go on the shift." The contractors also in connection with the work operated a steam shovel, in the care of which at night one Wilfong was employed as watchman, and whose duties with reference thereto were similar to those of Bowin in caring for the engine. On the night in question, when Bowin met his death, the superintendent of the contractor at the close of the day's work, having occasion to go to Tia Juana, some distance west of the camp at the point where work was being done, took charge of the engine, and at about 6 o'clock p. m. left for his destination, expecting to return at 10:30, during which interval Bowin was relieved from duty until the engine got back, though it appears that he did, for an hour or so, operate a donkey engine in pumping water into a tank from which a supply of water was obtained. While thus engaged, Wilfong, having in the course of his employment taken charge of the steam shovel and entered upon the performance of his duties in the care thereof, went to the tank, some 1,000 feet distant, where deceased was engaged, and told him that he (Wilfong) was going to camp where his wife had arrived that evening, and, in effect, requested Bowin to take his place at the steam shovel, stating that he would return about 10 o'clock, to all of which Bowin assented. Upon Wilfong's return at the hour named he found the dead body of Bowin lying on the floor of the platform upon which the steam shovel was installed, he having been killed by the use of a knife wielded by a hand other than his own. Whether upon reaching the steam shovel deceased discovered an intruder who killed him or by whom or for what reason the deed was committed is not made to appear, although the evidence clearly tends to show its purpose was not with the view of committing robbery.

Upon these facts, and conceding that "acting within the course of his employment," as defined by his contract, no duty whatsoever was imposed upon Bowin in connection with the care of the steam shovel, the exclusive control and care of which devolved upon Wilfong, for whose convenience and at whose request and without the consent of the employer, Bowin assumed the care and custody thereof, respondent insists that such substitution was in accordance with a known custom acquiesced in by the employer. This contention is based upon the testimony of the superintendent to the effect that, where substitution of employés was not detrimental to the interest of the company, permission therefor, when requested, was granted, but that they did not do much of it, and the employés generally asked his consent to such change of work. No request was made by either Bowin or Wilfong, and neither had ever acted for the other in the performance of their respective duties.

This evidence not only falls short of establishing a custom, but indeed negatives the existence of a course of business pursued by the employer as to Wilfong and Bowin under which the deceased, without permission could claim implied authority to enter upon Wilfong's duties. Clearly his act in so doing was unknown to his employer, whose implied orders he violated. Whether or not the superintendent would have consented to the substitution had request therefor been made is immaterial since no request was made.

Conceding Bowin's act in assuming the performance of Wilfong's duties to have been unauthorized by the express terms of his contract of employment, respondent nevertheless insists that at the time of his death he was engaged in the course of his employment, for the reason that the absence of Wilfong from his post of duty created an emergency which justified him in taking charge of the steam shovel without express orders so to do. This contention is answered by the fact that, if the suggested emergency existed, it was due to the arrangement between deceased and Wilfong, pursuant to which the latter should spend the evening in camp with his wife and the former should, during his absence, assume charge of the steam shovel as watchman thereof. This arrangement was not made in the interest of the employer, but solely for the convenience of Wilfong, whose duties the deceased, having, as shown, been relieved from all duty to his employer, for the time undertook to perform. In the case of Plumb v. Cobden Mills Co., 7 Butterworth's W. C. C. 1, it is said:

> "There are two sorts of ways of frequent occurrence in which a workman might go outside the sphere of his employment—the first one when he did work he was not engaged to perform; and, second when he went into a territory with which he had nothing to do."

In the case at bar the deceased, in assuming the duties of watchman of the steam shovel, not only undertook work which he was not engaged to do, but, since his employment did not require him to go upon the platform where the steam shovel was located, went to a place with which he had nothing to do. In the recent case of Northwestern Pac. R. R. Co. v. Ind. Acc. Com., 163 Pac. 1000, this court held that, in order to recover compensation, the employé must at the time of the alleged accident be performing a service "growing out of and in the course of his employment" and when the servant, "of his own accord and without the direction of the master, steps outside the scope of his employment, whether on the master's business or his own, the master owes him no duty as to the dangers he encounters and is not liable for any injury received." To the same effect see County of Modoc v. Ind. Acc. Com. (App.) 163 Pac. 685; McAllan v. Pertshire County Council, 8 Fraser, 783; and Willis on Workmen's Compensation (16th Ed.) p. 21. Our conclusion is that the injury which caused the death of deceased did not arise out of nor in the course of his employment. Indeed, the case presented is precisely the same as though deceased had at the close of his night's labor repaired to his home and while awaiting a return of the time to assume his duties he had been murdered.

The award is annulled.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; SHAW, J.; MELVIN, J.; HENSHAW, J.

(175 Cal. 481)

TEACHOUT v. BOGY et al. (L. A. 4003.)

(Supreme Court of California. June 18, 1917. Rehearing Denied July 16, 1917.)

1. EVIDENCE 🔑31—JUDICIAL NOTICE—CITY CHARTERS.

The court will take judicial notice of the charter of the city of Los Angeles; such charter having the effect of law and approved by the Legislature, thereby becoming an official act of the legislative department.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 40, 41.]

2. INTOXICATING LIQUORS 🔑103 — CONSIDERATION—LEGALITY.

A contract whereby defendants agreed to pay, in consideration of a liquor license and lease of the premises a stated amount per month and agreed to purchase the liquor used in the business from plaintiff, the license not being transferred to defendant, but held in escrow by a third party in the name of the plaintiff, is not enforceable, since it is in violation of the laws permitting the sale of intoxicating liquor; defendants actually carrying on business under plaintiff's license.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 108–112.]

3. CONTRACTS 🔑137(1)—CONSIDERATION—LEGALITY.

If any part of a single consideration for one or more promises be illegal, or if there are several considerations for one promise, some of which are illegal, the promise is wholly void.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 701, 706–712.]

4. INTOXICATING LIQUORS 🔑103—CONSIDERATION—LEGALITY.

Where defendants purchased a liquor license and a lease of the premises in consideration of a monthly payment and of purchasing their liquor from plaintiffs, the contract being held in escrow in the plaintiff's name, the fact that subsequently the license was surrendered, and a new one issued to defendant, did not validate such contract, void as being in contravention of the laws relating to the sale of intoxicating liquors, in that the license was in the name of plaintiff.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 108–112.]

5. INTOXICATING LIQUORS 🔑103—CONSIDERATION—LEGALITY.

Where a contract provided for the sale of a liquor license and a lease of the premises in consideration of monthly payments and of interest and rent, and of an agreement to purchase the liquor used in the business from plaintiffs, the license being subsequently surrendered and a new one issued to defendants, the fact that the contract was executed does not render payment made thereunder legal consideration for the contract subsequent to the issuance of the new license, since the defendant is still compelled to rely upon the alleged illegal contract.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 108–112.]

6. INTOXICATING LIQUORS 🔑103—CONSIDERATION—LEGALITY.

A contract for the sale of a liquor license and the lease of the premises, in consideration of monthly payments and of an agreement to purchase the liquor used in the business from plaintiff, being illegal as contravening the laws against the sale of intoxicating liquors without license, cannot be held valid as allowing performance thereunder legally; the full intent of the contract being based on the illegal transfer of the license.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 108–112.]

7. INTOXICATING LIQUORS 🔑103—CONSIDERATION—SEPARABLE CONTRACTS.

Under a contract for the sale of liquor license, and lease of the premises in consideration of an agreement to purchase liquors from plaintiffs, such lease covenant is not a separable part of the contract from the illegality of the transfer of the license; the transfer being an integral part of the contract.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 108–112.]

Department 1. Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by Frank S. Teachout against Leon J. Bogy and another. Judgment for plaintiff, and defendants appeal. Reversed.

Joseph Scott and A. G. Ritter, both of Los Angeles, for appellants. E. B. Coil, of Los Angeles, for respondent.

SHAW, J. The appeal is from the judgment, on the judgment roll alone. The plaintiff, as assignee of Adloff & Hauerwaas Company, a corporation, and Goldschmidt Bros., a partnership, sued to recover money alleged to be due upon a contract executed on August 7, 1908, between the plaintiff's assignors, as parties of the first part, and the defendants, doing business as Bogy Bros., as parties of the second part, and for damages for the breach of a covenant therein. The material parts of the contract are as follows:

> "For the consideration hereinafter expressed, to be paid in the manner and at the times hereinafter mentioned, said first parties agree to sell to said second parties that certain lease executed on the 1st day of July, 1908, by Mary A. Jauch to H. H. Goldschmidt, running for a period of four years from and after said date, the property covered by said lease being that heretofore occupied by the Casino Café, including billiard parlor, cigar stand, etc., and also the license for the conduct of a saloon business on said premises, now standing in the name of Adloff & Hauerwaas. The said lease and license, both signed in blank, to be left in the possession of William Preston; and for said lease and license, said second parties agree to pay the sum of sixteen thousand five hundred ($16,500.00) dollars, payable in installments of two hundred and fifty ($250.00) dollars per month, commencing on the 1st day of September, 1908. All deferred payments to bear interest at the rate of six (6) per cent. per annum, payable semi-annually."
>
> "And in addition thereto said second parties agree that they will pay the rent mentioned in said lease, at the time the same becomes due, and will otherwise comply with all the terms and conditions of said lease, and will pay any and all licenses as they fall due, necessary for the conduct of the business at said location."
>
> "And they further agree, during the lifetime of said lease, that they will purchase all draught beer used in and about their said business from the Adloff-Hauerwaas Company; and that all other bulk liquors, etc., they shall purchase for the same length of time from Goldschmidt Bros."
>
> "Should said second parties fail to make any of said monthly payments of $250, rent, license, or quarterly interest for 30 days after they become due, then said first parties reserve the right to cancel this agreement and recover possession of said premises, and said second parties shall thereupon forfeit any sums theretofore paid on account thereof as liquidated damages; but if said second parties shall comply with all the terms of this agreement and pay all sums of money herein provided to be paid, then and in that event the said lease and the said license shall be turned over to said second parties, and become their individual property."

In pursuance of this contract the defendants immediately thereafter took possession of the premises covered by the lease referred to therein and carried on the business of selling liquor in the premises from that time until the beginning of this action on January 15, 1913. They paid the installments of $250 per month due under the contract from September 1, 1908, to and including the payment falling due September 1, 1912, but paid no interest thereon. They refused, for a part of the period mentioned, to comply with the obligations of the contract requiring them to purchase bulk liquors from Goldschmidt Bros. This action was brought to recover the balance due upon the promise to pay the $16,500, with interest, in monthly installments, as aforesaid, and damages alleged to have accrued by reason of their refusal to buy from Goldschmidt Bros. the liquors used by them in said business. The court made findings and rendered judgment in favor of the plaintiff, both for the balance due on the price and for damages from the breach of the covenant to purchase liquors, amounting in all to the sum of $4,487.95.

The appellants contend that the contract is invalid and unenforceable because of the illegality of a part of the consideration. At the rate of $250 a month, the price of the lease and the saloon license would not be fully paid until February 1, 1914, a period of five years and five months after September 1, 1908. In the meantime, according to the agreement, the lease and license were to be left with Preston, and they were not to be delivered to defendants, nor to become their absolute property, until the end of the period. By the contract the defendants, in effect, agreed to carry on the business of a saloon for the sale of intoxicating liquors on the premises under the license of Adloff & Hauerwaas and pay the license charges thereon as they fell due. The findings show that the defendants did carry on the saloon in that manner until January 25, 1910, and that then, by consent of all said parties, the license was surrendered to the police commission, was canceled, and a new license issued to the defendants to conduct a saloon on said premises, and that on the same day the lease was formally assigned to defendants. It also appears that the premises were situated in the city of Los Angeles.

[1] At that time, and ever since, the charter of Los Angeles provided that the police commission of the city should have power to grant permits or licenses under and in conformity with the ordinances of the city to persons desiring to engage in the sale of liquors, and further that "without such permit no person shall engage in the business of selling liquor." Stats. 1903, p. 570, § 95a. Section 435 of the Penal Code then and ever since provided that every person carrying on a business without a license, where such license is required by any law of this state, is guilty of a misdemeanor, punishable by fine and imprisonment. This section applies to any person who carries on the business of selling liquor without a license in a city where the same is prohibited by the charter or city ordinance. Ex parte Bagshaw, 152 Cal. 703, 93 Pac. 864; Plumas County v. Wheeler, 149 Cal. 768, 87 Pac. 909. The respondent suggests that the charter of the city of Los Angeles was not introduced in evidence, and consequently that the court cannot take judicial notice of section 95a aforesaid. There is no merit in this suggestion. The charter has the effect of law; it was approved by the Legislature, and thereby became a public official act of the legislative department, of which the courts must take judicial notice. Code Civ. Proc. § 1875, subd. 3; Clark v. Los Angeles, 160 Cal. 45, 116 Pac. 722.

[2] A permit of this character is issued in the exercise of the police power as a means of regulating the business of selling intoxicating liquors. Such permit is personal to the licensee, and it authorizes him alone to carry on the business. There was no law authorizing a transfer of the permit. Hence a transfer of the paper issued as evidence of the permit did not carry to the transferees the right to conduct the business, nor exempt them from the prohibition forbidding any person to engage in the business without a permit. In so doing they would be guilty of a violation of the law to the same extent as if they had no permit. Black on Intoxicating Liquors, § 130; 23 Cyc. 154; 17 Am. & Eng. Ency. L. 232. The contract was therefore an agreement whereby the defendants were to carry on the saloon business in violation of express law.

[3] The Civil Code contains the following provisions as to the legality of such contracts:

> "The consideration of a contract must be lawful within the meaning of section 1667." Section 1607.
>
> "That is not lawful which is: (1) Contrary to an express provision of law; (2) contrary to the policy of express law, though not expressly prohibited." Section 1667.
>
> "If any part of a single consideration for one or more objects, or of several considerations for a single object, is unlawful, the entire contract is void." Section 1608.
>
> "All contracts which have for their object, directly or indirectly, to exempt any one from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law." Section 1668.

The effect of these principles is thus summarized by the author of the article on Contracts in the Cyclopedia of Law and Procedure:

> "If any part of a single consideration for one or more promises be illegal, or if there are several considerations for one promise, some of which are legal and others illegal, the promise is wholly void, as it is impossible to say which part or which one of the considerations induced the promise. Thus, if the consideration for a note or other promise to pay a certain sum of money be the sale of goods, some of which it is legal and some which it is illegal to sell, the note or promise cannot be enforced." 9 Cyc. 566.

See, also, 1 Elliot on Contracts, § 248; Moffatt v. Bulson, 96 Cal. 112, 30 Pac. 1022, 31 Am. St. Rep. 192; Vulcan P. Co. v. Hercules P. Co., 96 Cal. 510, 31 Pac. 581, 31 Am. St. Rep. 242; Humboldt Co. v. Stern, 136 Cal. 63, 68 Pac. 324.

The facts in Moffatt v. Bulson are similar to the case at bar. Moffatt sold to Bulson 560 acres of land and some personal property for the sum of $10,000. Bulson paid $5,000 on the price and executed a mortgage for the remaining $5,000. One tract of 160 acres was at the time held by Moffatt under a homestead claim from the United States upon which he had not then made final proof. For that reason the sale of that tract was illegal and void. Rev. Stats. U. S. § 2262. The court, quoting section 1608 of the Civil Code, held that the mortgage could not be enforced and that the fact that Moffatt had subsequently made the final proof and obtained the certificate of purchase for the homestead entry did not render the mortgage valid.

[4] The present case comes clearly within the rule. The promise was to pay $16,500 for the lease and the license. The consideration consisted of several things, one of which, the agreement to transfer the license, contemplating as it did the carrying on of the saloon business by Bogy Bros. without any other license, was illegal. The contract was, therefore, contrary to an express provision of law and contrary to the policy of express law as defined in section 1667. It had for one of its principal objects, indirectly, if not directly, the violation of law by defendants, and therefore it was, by section 1668, "against the policy of the law." The consideration was unlawful under sections 1607 and 1667; and, as a part of the consideration was unlawful, "the entire contract was void," as provided in section 1608. And under the doctrine stated in Moffatt v. Bulson, supra, the subsequent surrender of the license and the issuance of a new one to the defendants did not render it valid.

[5] The respondent cites cases to the effect that where the complaining party can

obtain his relief without aid from the illegal contract the rule above stated does not apply. There are many authorities to that effect, but they do not apply to the present case. The plaintiff is suing to enforce the promise contained in the illegal contract itself. He cannot prevail, except by means of that contract. For the like reason the case does not, as plaintiff claims, come under the rule that when an illegal contract has been executed the money or property which was the price of it may be a legal consideration for a subsequent promise. As to the part unperformed the contract is not executed and the plaintiff is endeavoring to enforce performance thereof.

[6] Respondent further suggests, very briefly, the application of the principle that where a contract can be performed in a legal manner as well as in an illegal manner, it will not be declared void because it was in fact performed in an illegal manner. It is conceivable that the defendants might have ignored the obvious intent and purpose of the agreement that Adloff & Hauerwaas were to retain some sort of control of the license, and might at once have procured a license to themselves under which to carry on the saloon and thus have carried it on legally during the life of the contract. But the principle stated is applied where the contract manifests no intent or purpose that it is to be performed in an illegal manner and where also the party complaining does not participate in, or co-operate with, the illegal performance. In other words, the illegal intent or act of the party in default, not essential to a proper performance, will not vitiate the contract, so as to affect the rights of the other party who was guiltless of any participation or co-operation therein. But here the contract clearly shows that the full right to the license was to be withheld from the defendants in order that it might afford security to the sellers for the payment of the money, while, in the meantime, the saloon would be carried on by the defendants on their own account and without any other license. That this was the understanding of the parties themselves as to the effect of the contract is shown by the fact that when, 16 months afterwards, the new license was obtained, the written consent of Adloff & Hauerwaas thereto was attached to the application for the change of license presented to the police commission, and that the new license was, as the court finds, issued "pursuant to said consent." The provisions of the contract show that a violation of law was involved in its performance and contemplated by both parties. In such a case, the fact that the business could have been carried on under a new license, for which no provision was made in the contract, and which would have prevented the effect intended by one of its provisions, does not make the contract valid.

It is not claimed that the contract required the defendants to carry on the saloon as the agents and servants of Adloff & Hauerwaas, the licensees. The contrary is necessarily implied from its terms. They were to purchase from Adloff & Hauerwaas Company the draught beer, and from Goldschmidt Bros. the bulk liquors, kept in the saloon. This beer and liquors constituted a part of their stock in trade. They would own it, and they were to sell it at retail for their own profit.

[7] It cannot be successfully claimed that the covenant to buy the beer and liquors from the parties of the first part was a separable part of the contract, free from the taint of the illegality arising from the contemplated violation of law. According to the intention of the parties it was this beer and liquor which the defendants were to sell in the saloon without a license in violation of the law. Moreover this performance of the covenant was a part of the benefit which the defendants were to render to the other parties in consideration of the transfer of the lease and license, a consideration therefor in addition to the $16,500 agreed to be paid. Consequently the covenant was as much affected by the illegality as the promise. The court below erred in holding the contract lawful.

The judgment is reversed.

We concur: SLOSS, J.; VICTOR E. SHAW, Judge pro tem.

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175 Cal. 563

BROWN v. STERLING FIXTURE CO.

(S. F. 7042.)

(Supreme Court of California. June 25, 1917.)

1. Appeal and Error ⚷105—Appealable Orders—Nonsuit.

In view of C. C. P. § 581, as amended in 1907, authorizing "judgment of nonsuit," which shall be "effective for all purposes," a judgment of nonsuit though not followed by the usual judgment of dismissal, is appealable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 717–723.]

2. Dismissal and Nonsuit ⚷67—Motion for Nonsuit—Requisites.

Notwithstanding C. C. P. § 581, as amended in 1907, a party moving for nonsuit must state in his motion precisely the grounds upon which he relies.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 161, 162.]

3. Appeal and Error ⚷127—Appealable Orders—Entry of Default.

An order refusing to enter defendant's default in failing to answer an amended petition is not appealable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 885–889, 891.]

In Bank. Appeal from Superior Court, City and County of San Francisco; Geo. E. Crothers, Judge.

Action by H. D. Brown against the Sterling Fixture Company. From a judgment of nonsuit and an order refusing to enter defendant's default, plaintiff appeals. Nonsuit reversed.

Arthur Crane, of San Francisco, for appellant. J. M. C. Murphy, of Hayward, and Jos. P. Lucey, of San Francisco, for respondent.

HENSHAW, J. Plaintiff appeals from the order or judgment of nonsuit given against him, and also from the order of court refusing to enter the default of the defendant arising from its failure to plead to the amended complaint filed by plaintiff with leave of court. The circumstances, in brief, are that plaintiff at the conclusion of the testimony which he offered sought and obtained leave of court to file an amended complaint to conform to his proofs. This permission was granted and under it the amended complaint was filed. Discussion arose between court and counsel, the attorney for the defendant insisting that without regard to the sufficiency of the amended complaint no evidence had been introduced to sustain its material allegations. Appellant's attorney declared that these statements were—

> "more like an argument for a nonsuit than a motion to strike out."
>
> "By the Court (to Mr. Murphy): Do you move for a nonsuit?
>
> "By Mr. Murphy: Yes, your honor.
>
> "By the Court: Motion to strike out amended complaint will be denied and motion for nonsuit will be granted."

[1] Section 581 of the Code of Civil Procedure, as amended in 1907, now declares that:

> "An action may be dismissed, or a judgment of nonsuit entered, in the following cases: * * * 5. By the court, upon motion of the defendant, when upon the trial the plaintiff fails to prove a sufficient case for the jury. * * * The dismissals mentioned in subdivisions three, four, and five of this section must be made by orders of the court entered upon the minutes thereof, *and are effective for all purposes when so entered.*"

The italicized words direct attention, first, to the fact that in terms our law recognizes "a judgment of nonsuit" as distinguished from a judgment of dismissal, and further declares that the order of nonsuit entered upon the minutes of the court constitute this judgment of nonsuit, since the law declares that such an order so entered is "effective for all purposes." In the present state of the law then it would appear that such a judgment of nonsuit, as distinguished from a judgment of dismissal usually following an order of nonsuit, is appealable.

[2] No change, however, has been worked in the uniform and settled law of this state that the party moving for a nonsuit must state in his motion precisely the grounds upon which he relies. Sanchez v. Neary, 41 Cal. 487; Coffey v. Greenfield, 62 Cal. 608; Shain v. Forbes, 82 Cal. 582, 23 Pac. 198; Bronzan v. Drobaz, 93 Cal. 650, 29 Pac. 254; Durfee v. Seale, 139 Cal. 607, 73 Pac. 435; Coghlan v. Quartararo, 15 Cal. App. 668, 115 Pac. 664. This was not done.

The judgment of nonsuit is therefore reversed.

[3] The appeal from the court's order refusing to enter defendant's default requires but the briefest notice. It is not an appealable order. It should be added that it is manifest that the trial court having both matters before it at the same time, and intending to grant the motion for a nonsuit, through inadvertence only, made the ruling complained of. In any future proceeding had before that court it will grant permission to the defendant to answer the amended complaint.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOSS, J.; MELVIN, J.; LORIGAN, J.

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175 Cal. 559

BETTENCOURT v. INDUSTRIAL ACCIDENT COMMISSION et al.

RECLAMATION DIST. NO. 900 v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.

(Sac. 2572, 2573.)

(Supreme Court of California. June 25, 1917.)

MASTER AND SERVANT ⇨364 — WORKMEN'S COMPENSATION ACT—"EMPLOYER"—"RECLAMATION DISTRICT."

Workmen's Compensation Act (St. 1913, p. 284) § 13, defining employers to mean the state, and each county, city and county, city, school district and all public corporations therein and every person, firm, voluntary association, and private corporation who has any person in service, does not include a reclamation district; such district being a mere governmental agent vested with limited powers to accomplish limited and specific work.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Employer; Second Series, Reclamation District.]

In Bank. Proceedings under the Workmen's Compensation Act by F. S. Bettencourt, opposed by Reclamation District No. 900 and the Hartford Accident & Indemnity Company. Award by the Industrial Accident Commission for petitioner, and both parties petition for writ of review. Award annulled.

John T. Pigott and O. G. Hopkins, both of Sacramento, for petitioners. Christopher M. Bradley, of San Francisco (Warren H. Pillsbury, of Oakland, of counsel), for respondents. Jesse H. Steinhart, of San Francisco, for Indemnity Co.

HENSHAW, J. The Industrial Accident Commission made its award in favor of one Bettencourt, the award being based on injuries which admittedly he sustained while in the employ of reclamation district No. 900. The district has petitioned for a review of the proceedings, presenting several material propositions for consideration. Only one of these, however, calls for determination as that determination will be decisive of the controversy. It is conceded that Bettencourt's wages were paid by the district, and that he was employed by the district, but these concessions in no wise determine the liability of the district. That determination rests upon the language of the Workmen's Compensation Act as applied to an employer of the character of this district.

Section 13 of the Workmen's Compensation Act, as it read at the time Bettencourt sustained his injury, defined employers as follows:

> "The term 'employer' as used in sections 12 to 35, inclusive, of this act shall be construed to mean: The state, and each county, city and county, city, school district, and all public corporations therein, and every person, firm, voluntary association, and private corporation (including any public service corporation) who has any person in service," etc.

It is manifest that this definition was advisedly and carefully framed, as much to include those who were meant to be included as to exclude those who were meant to be excluded. The state itself and all its political subdivisions existing at the time the act was adopted are all named. Districts, as such, were necessarily in the minds of the framers of this definition, since a district of a particular kind, namely, a school district, is expressly designated. And to the end that if there should be created by law any new forms, classes, or kinds of "public corporations," there might be no doubt but that they were included, as well as all public corporations which were specifically enumerated, it was in terms added and decreed that all such after-created public corporations came within the definition of employer. But a "public corporation" is a descriptive term not only of well-recognized meaning, but of absolute legal definition. Section 284 of the Civil Code defines public corporations as follows:

> "Public corporations are formed or organized for the government of a portion of the state."

Public corporations, therefore, under the controlling definition of the law are those corporations formed for political and governmental purposes and vested with political and governmental powers. There is another class, for convenience of description, called quasi public corporations, and such of those as are engaged in public service are included in this definition to remove the possibility of misunderstanding and contention. But reclamation districts organized as was this petitioner possess no political nor governmental powers, are not organized for political or governmental purposes, and are therefore not public corporations at all. Indeed, they are not in strictness corporations, public or private, but governmental mandatories or agents vested with limited powers to accomplish limited and specific work. Such has been the frequent and unvarying decision of the courts of this state. People v. Reclamation Dist. No. 551, 117 Cal. 114, 48 Pac. 1016; Hensley v. Reclamation Dist. No. 556, 121 Cal. 96, 53 Pac. 401; People v. Levee Dist., 131 Cal. 30, 63 Pac. 676; Reclamation Dist. No. 551 v. Sacramento, 134 Cal. 477, 66 Pac. 668; S. F. Sav. Union v. Reclamation Dist., 144 Cal. 639, 79 Pac. 374; People v. Drainage Dist., 155 Cal. 373, 103 Pac. 207; Reclamation Dist. No. 70 v. Birks, 159 Cal. 233, 113 Pac. 170; Reclamation Dist. No. 70 v. Sherman, 11 Cal. App. 399, 105 Pac. 277. In People v. Reclamation Dist. No. 551, supra, it is said:

> "Certainly, these districts were not municipal corporations, as that term is used in the Constitution, and I think it equally clear that they do not belong to any class of corporations defined in the Civil Code. Section 284 reads: 'Corporations are either public or private. Public corporations are formed or organized for the government of a portion of the state. All other corporations are private.'"

In Reclamation Dist. v. Birks, supra, it is said:

> "In People v. Sacramento Drainage Dist., 155 Cal. 373 [103 Pac. 207], the question of the political character of these reclamation districts is discussed in the light of the former decisions of this court, and it is held that they are, in strictness, not corporations at all, but quasi corporations, 'rather governmental agencies to carry out a specific purpose, the agency ceasing with the accomplishment of the purpose.'"

Of significance also is the fact that in this state are many districts similar in character to reclamation districts, levee districts, swamp land districts, drainage districts, protection districts no one of which class is enumerated, while school districts are specifically named. Of all such districts and their characters the Legislature, as it created many and provided for the creation of all, was fully advised, and it appears too plain for discussion that the omission to include these districts was with the design of excluding them. Further confirmation, if needed, is furnished by the language of the Workmen's Compensation, Insurance and Safety Act (Stats. 1913, p. 279). Section 46 of that act makes provision as follows:

> "Each county, city and county, city, school district or other public corporation * * * may insure against its liability for compensation * * * and the premium therefor shall be a proper charge against the general fund of each * * * political subdivision of the state."

Here is a construction by the Legislature itself of its own definition of employer. It uses the precise language of section 13 above quoted in defining employer, and provides that the premium for insurance shall be a "proper charge against the general fund of each such political subdivision of the state." A reclamation district is not a political subdivision of the state. A reclamation district has no general fund. Still further, it is quite a reasonable view to say that the design of the Legislature in excluding reclamation districts arose from the fact that they are empowered to raise money only for the benefit of lands within the district (Reclamation Dist. v. Goldman, 65 Cal. 635, 4 Pac. 676), and that their activities are vitally directed to the reclamation and bringing into use of agricultural lands. So as the employers of agricultural labor are in terms exempted from the operation of the act, it is reasonable to conclude that the same thought based upon the same reasoning controlled the framers of this law in excluding reclamation districts. But however this may be, it is too plain to admit of question that they are excluded, and the award is therefore annulled, and the proceeding under Bettencourt's petition is dismissed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; SHAW, J.; MELVIN, J.

175 Cal. 548

SAN DIEGO CONST. CO. v. MANNIX.
(L. A. 4039.)

(Supreme Court of California. June 25, 1917.)

1. Vendor and Purchaser 🔑50—Contract and Deed of Trust—Construction.

Where a declaration in a deed of trust referred to the contract of sale, and specified the means and manner in which the same should be performed, the two ought to be construed as parts of one contract; the later superseding the earlier one, wherever it is inconsistent therewith.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 81.]

2. Vendor and Purchaser 🔑46—Contracts—Construction.

In a contract for the sale of real estate, where all the other parts of the contract show that the words "more" or "exceeding" preceded the words "than 50 feet in width" in referring to lots, the word "less," when used in one place preceding such words, will be construed to mean "more," and is an obvious clerical error.

3. Vendor and Purchaser 🔑334(6) — Contract — Abandonment — Right of Purchaser.

Generally, where performance of a contract to convey land is due, and the vendor refuses or fails to perform on request, the purchaser may treat such breach as an abandonment and termination of the contract, and may then abandon it himself and sue at law to recover the amount he has paid in an action for money had and received.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 963, 973–975.]

4. Vendor and Purchaser 🔑334(1) — Contract — Abandonment — Right of Purchaser.

Where a contract for the sale of land is divisible and separable, so that full performance of one part may be made by both parties without affecting the subsequent performance or right of performance as to the remainder, and a breach of the separable part occurs, the purchaser is entitled to treat such part as abandoned and recover purchase money in an action for money had and received.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 959, 962, 964.]

5. Payment 🔑35—Evidence—Indorsement on Note.

Credit for payment by indorsement on secured note is in point of law a credit upon the principal of the indebtedness, without formal entry of the payment.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 15.]

6. Vendor and Purchaser 🔑341(3)—Remedies of Purchaser—Actions—Evidence—Admissibility.

In an action by the purchaser to recover installments paid on a land contract, upon the theory that the contract was ambiguous on the question whether the purchaser was entitled to deeds to lots when paid for before the filing of the subdivision map for record, evidence that the purchaser bought the land with the intention of subdividing it into small lots and selling them, and that this purpose was stated to the vendor at the time of the purchase, and that the contract was made and intended to aid in carrying out such plan, was admissible to explain it and show its true meaning.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 1012–1014.]

7. Vendor and Purchaser 🔑75—Contract—Construction.

In a land contract, the phrase "in the event said premises are subdivided by the beneficiary in the exercise of its option so to do, then the said payee will release," etc., did not declare that the purchaser should not be entitled to deed to lots for which payments had been made before the filing of a subdivision map, as the time of making the subdivision was not important to the vendor, and it is the right to make a selection of a lot that depends upon the previous making of a subdivision necessary to the identification of the lot selected, and not the right to have the money applied as payment for such lot when selected.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 113–118, 126.]

8. Contracts 🔑221(1)—Construction—Conditions Precedent.

Courts are disinclined to construe the stipulations of a contract as conditions precedent, unless compelled by the language of the contract plainly expressed.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1017, 1028–1032.]

9. Vendor and Purchaser 🔑79—Contract—Condition Precedent.

The provision of a land contract that the application of installments should first be made upon the secured note next maturing did not purport to declare a condition precedent, or refer to the effect of payment as conferring the right to convey a deed by stating the condition of that right, but should be construed as a mere directory provision for the application of payments, and not as a statement of conditions which would deprive the buyer of the benefits of a deed for a lot after he had paid the specified amount therefor.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 7, 8, 127–131.]

10. Vendor and Purchaser 🔑339 — Contract—Demand for Performance—Necessity.

Where a land contract provided that the purchaser should be entitled to have said lots released from a trust and to the conveyance of them on payment of a stipulated sum, and the declaration of trust provided that upon payment of such sum to the trustee said payee would release the lien on such lots, and that the trustee, upon the payment of such amount for the account and to the credit of the owner, was authorized to convey the lots so released to the said beneficiary, or order, and there was nothing, either in the contract or deed of trust declaring that a formal release should be executed by the vendor, or that anything more than a deed was to be necessary, and no other conditions were to be complied with by the purchaser, except the payment of the amount stated, a special demand for a release was not necessary to a suit by the purchaser for the recovery of the purchase money.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 994–1002; Contracts, Cent. Dig. § 233.]

11. Vendor and Purchaser 🔑147 — Contract — Performance — Necessity of Demand.

Where it was made to appear by the vendor's own act that a demand for the performance of a condition of a land contract would have been refused, as the vendor had proceeded to have the entire property sold by the trustee under the power of sale in the trust agreement, the vendor cannot be heard to object that no demand was made, as the law does not require the performance of a useless act.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 285–289.]

12. Vendor and Purchaser 🔑339 — Contract—Rescission—Demand.

No formal demand for rescission, other than the bringing of an action for the purchase money paid, is necessary, where the vendor has refused to convey on demand after full payment of the price, and no offer to restore is required, where there is nothing to restore.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 994–1002.]

13. Vendor and Purchaser 🔑214(1) — Contract—Assignment by Vendor.

Where a contract for the sale of land was assigned by the vendor without valuable consideration, his assignee can claim no greater rights against the purchaser under the contract than were available to the assignor.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 436, 437, 442.]

Department 1. Appeal from Superior Court, San Diego County; T. L. Lewis, Judge.

Action by the San Diego Construction Company against Mary S. Mannix. From a judgment for defendant, and from an order denying its motion for a new trial, plaintiff appeals. Reversed.

Tyrrell, Abrahams & Brown, of Los Angeles, for appellant. E. T. Lannon, John B. Mannix, and E. S. Torrance, all of San Diego, for respondent.

SHAW, J. The plaintiff appeals from the judgment in favor of the defendant and from an order denying its motion for a new trial.

The complaint asks for the recovery of $32,502.83, alleged to have been paid by the plaintiff as a part of the purchase price of a tract of land sold by John B. Mannix to the plaintiff. After the execution of the contract of sale, John B. Mannix made a gift to the defendant (his wife) of all his rights under the contract and in the real property which was the subject thereof. The decision of the case depends upon the meaning and effect of said contract. It will be necessary to state the provisions of the contract at some length.

[1] The agreement for the sale between Mannix and the plaintiff consisted of two documents; the first being a contract of sale signed by Mannix and the plaintiff, and the second a declaration of trust executed by Mannix and the plaintiff and Union Title & Trust Company, the latter being named as trustee. The contract of sale was executed December 19, 1912, and the declaration of trust on January 8, 1913. The declaration of trust referred to the contract of sale and specified the means and the manner in which the same should be performed. The two are to be construed as parts of one contract; the later superseding the earlier one wherever it is inconsistent therewith.

By the contract of sale John B. Mannix agreed to sell to the plaintiff the tract of land in San Diego at the price of $2,000 per acre. The tract contained something over 46 acres. A survey showed that the total purchase price was $92,636. Of the price, $1,000 was paid on the date of this instrument. A certificate was to be made by the Union Title & Trust Company, showing title to the property vested in Mannix free of incumbrances. A survey showing the acreage was to be made, after which Mannix was to execute a deed to the Union Title & Trust Company, vesting in said company the title to the property in trust for the performance of the agreement. Thereupon $11,500 more was to be paid on the price and a trust agreement was to be executed by all of said parties. The remainder of the price was to be paid in installments, $12,500 within six months from the delivery of said deed, and the balance in four equal payments, in one, two, three, and four years, respectively. For all these payments promissory notes to Mannix were to be given by the plaintiff. It further provided that the plaintiff should have the right to subdivide the property into building lots, and that the trust company, as holder of the legal title, should execute the plat thereof, so as to entitle it to be recorded in the office of the county recorder. The following is the clause of the agreement the meaning of which is disputed:

> "It is further agreed that said second party shall be entitled to have said lots released from such trust, and to a conveyance to them, on payment of $450 per lot for lots not to exceed 50 feet by 125 feet in size. All payments made for releases of such lots shall be credited on the said notes of said second party in the order of their maturity."

The declaration of trust recited that the preliminary payments amounting to $12,500 had been made; that the total price was $92,636, leaving $80,136 unpaid; that the Trust Company had accepted the deed from Mannix conveying to it the premises. It provided that of the remainder of the purchase price there should be paid $12,500 "on or before July 8, 1913," $16,909 "on or before January 8, 1914," and the balance in other installments at other times not material to this case. For each of these installments promissory notes were executed by the plaintiff. With reference to conveyances for lots, the declaration provided as follows:

> "It being also understood and agreed that, in the event said premises are subdivided by the beneficiary in exercise of its option to so do, hereinafter contained, then said payee will release from the lien of the indebtedness due to him as above recited, upon the payment to the said Union Title & Trust Company for his account of the sum of $450 per lot, for lots not exceeding 50 feet front by 125 feet depth in size; and the said trustee is by this instrument authorized, upon the payment to it for the account and to the credit of said payee of the sum of $450 per lot, to convey the lots so released to the said beneficiary, or order. All payments made pursuant to the terms of this paragraph shall apply to and be a credit upon said principal indebtedness due said payee as above set forth; application first being made upon the promissory note first next maturing."

[2] The clause referring to the right to subdivide was as follows:

> "That said property may be subdivided and improved by the said beneficiary in such manner as it may hereafter decide upon; that a map of the survey of said new subdivision be prepared by the said beneficiary, executed and acknowledged by the said trustee and shall be filed for record in the office of the county recorder of said San Diego county, the said trustee being hereby authorized to sign and acknowledge such map as proprietor and to dedicate to public use all of the streets and alleys shown on said map, it being understood and agreed that the land shall be subdivided into lots not *less* than 50 feet in width, and where practicable, 125 feet in depth."

The word "less" in the last quotation is obviously a clerical error. All the other portions of the contract and declaration show that the word "more," or "exceeding," was intended, instead of "less," and the contract should be so construed.

On July 3, 1913, after the transfer from John B. Mannix to the defendant, she and the plaintiff executed an agreement whereby the time for making the July payment of $12,500 was extended. It was provided therein that $7,000 should be paid on July 8, 1913, $1,654.08 on August 1, 1913, and $6,250 on October 8, 1913. These three payments were duly made; the last payment of $6,250 being made on October 1, 1913. The pleadings admit that the property was subdivided into lots and blocks and a map thereof completed on August 3, 1913, and that the same was approved by the city engineer on October 7, 1913, but that it was not filed for record until December 5, 1913, some two months after the last payment was made on the installment of July 8, 1913.

At the time of the making of the aforesaid payments nothing was said concerning a conveyance or release of any lot or lots in consideration thereof. Afterwards, however, on December 19, 1913, the plaintiff made a demand in writing upon the Trust Company for the conveyance by it to the plaintiff of certain lots, 27 in number, of the said subdivision. It was not disputed at the trial that these lots did not exceed the size mentioned in the agreement. As the record stands, we do not think the respondent can be permitted now to urge the objection that the size was not shown by the evidence, as she endeavored to do in her oral argument. The trust company did not execute any conveyance in compliance with the demand, or any conveyance whatever. The time for paying the installment of January 8, 1914, was extended at the request of the plaintiff for a period of 20 days; but the plaintiff failed to pay it. The trust deed empowered the trustee, after such failure, to sell the property to pay the purchase price remaining unpaid and thereby to foreclose all interest of the plaintiff in the property. In pursuance of this power, on March 4, 1914, the trustee sold the property to the defendant for the exact sum remaining due for the principal, interest and costs upon the agreement. Shortly thereafter the plaintiff began this action to recover of the defendant the amounts which it had paid upon the purchase price of the property. At the time of demanding the conveyance from the trustee in December, 1913, the plaintiff made no demand of the defendant for the release of the lots. The defendant was immediately informed of such demand on the company, and from the evidence and from her subsequent conduct it must be assumed that she acquiesced in the failure or refusal of the trust company to make the conveyance.

The findings declare that the contract of sale and trust agreement did not provide that for each $450 paid upon the $80,136 then remaining to be paid on the purchase price, and evidenced by the notes to be given therefor, Mannix would release and cause to be conveyed to plaintiff a lot of the size stated. The court also found that the payments made as aforesaid in satisfaction of the installment of July 1913, were "not credited upon the principal of the indebtedness as set forth in the contract and declaration of trust; but, on the contrary, the payment of said sum of $12,500 was made in satisfaction and payment of the promissory note for that amount due on or before July 8, 1913." It also found, in effect, that the plaintiff did not at any time demand of the defendant any release, or releases of lots on account of said payments, otherwise than by the demand upon the trust company for a deed for certain lots, as aforesaid. Its conclusion was that the failure to execute a deed in compliance with the said demand was not a breach of the agreement between John B. Mannix and the plaintiff and that the plaintiff was not entitled to recover any part of the money it had paid thereon.

[3, 4] The general rule, where performance of a contract to convey is due and the vendor refuses to perform it, or fails to perform on being duly requested to do so, is that the vendee may, if he chooses, treat such breach as an abandonment and termination of the contract and may then abandon it himself, and, "the contract having thus come to an end, he may sue at law to recover what he has paid, in an action for money had and received; for, the contract being at an end, the vendor holds

money of the vendee to which he has no right, and to repay which, therefore, the law implies his promise." Glock v. Howard, 123 Cal. 10, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17; Alderson v. Houston, 154 Cal. 12, 96 Pac. 884; 3 Elliott on Contracts, § 2095; 1 Sugden on Vendors, p. 357. Where the contract is divisible and separable, so that a full performance of one part may be made by both parties without affecting the subsequent performance, or right of performance, as to the remainder, and a breach of that character occurs as to a part thus separable, the rule above stated must be also applicable with regard to the money paid by the vendee upon such separable part. The respondent contends that the facts do not bring this case within the rule and the court below so decided.

[5] The court below erred in its finding, or conclusion, that the payment of the July installment of $12,500 was not credited upon the principal indebtedness. Credit therefor may not have been formally entered anywhere, except by indorsement on the note for that installment; but that was, in point of law, a credit upon the principal of the indebtedness of the plaintiff upon the agreement of sale.

[6] In support of the finding, or conclusion, that the contract did not provide for a release and deed of a lot for each $450, so paid on the remaining part of the price, the attorney for the defendant contends, as we understand him, that the meaning of the writings on this point is, first, that no payment made on the price prior to the filing of the subdivision map for record would entitle the plaintiff to such release or deed; second, that such release and deed were demandable only when a paymnt was made in advance of the maturity of one of the installments and when all installments previously maturing had been paid, and that they were not demandable upon a belated payment of any installment, or on account of installments already paid without a concurrent demand for such deed and release; and, third, that a request for such release and deed must be concurrent with the payment on account of which it is claimed, or the right thereto is lost.

Upon the theory that the writings might be deemed ambiguous on these points, evidence was introduced by the plaintiff to the effect that it bought the land with the intention of subdividing it into small lots and of selling such lots to others, that this purpose was stated to John B. Mannix at the time of the purchase, and that the clauses above quoted were inserted in the contract of sale and trust agreement in order to aid in carrying out the plan. Assuming that there is such ambiguity, the evidence would be competent and admissible to explain it and show the true meaning. The conversations at the time were, of course, not admissible to prove that there were terms of the contract different from those written therein. The evidence was not given for such purpose; and it may be added that the fact that these clauses were inserted for the purpose of facilitating the subsequent sale and conveyance of the lots of the proposed subdivision in fee to other persons is shown upon the face of the contract, without aid from extrinsic evidence.

[7] There is no provision of the contract of sale or trust agreement declaring that the buyer shall not be entitled to a deed for payments made before the filing of the subdivision map. Respondent argues that the phrase, "in the event said premises are subdivided by the beneficiary in the exercise of its option so to do, then, said payee will release," etc., in the paragraph of the trust agreement above quoted, relating to such deeds, was intended to express the idea that payments made before the event of the making of the subdivision would not be within the operation of that paragraph and would afford no basis for a claim made, either at the time of such payment or afterwards, to have a deed made in accordance with its provisions; that the provision should apply only to payments made after that event. This is not the natural meaning of the words, and it is contrary to the object and purpose of the provision for such deeds. The time of the making of the subdivision was not important to the seller. It would necessarily be a condition precedent to the selection of a lot by the buyer upon the price of which a payment should be applied. It is in this sense, only, that the clause purports to make the right conditional. It is the right to make the selection of a lot that depends upon the previous making of the subdivision necessary to the identification of the lot selected, and not the right to have the money applied as payment for such lot when selected.

[8, 9] There is nothing in either of the writings to the effect that a deed could not be obtained unless it was demanded at the time the money was paid, or that a failure to make such concurrent demand should operate as a waiver of the right to a deed. The contention that the contract gives no right to a deed for one of the lots, except on account of payments on one of the installments prior to its maturity, is founded upon the provision of the same paragraph that all payments made pursuant to the terms of the paragraph should be a credit upon the principal indebtedness, "application first being made upon the promissory note next maturing." This clearly does not declare the proposition contended for; but it is argued that such is the necessary implication therefrom, because, if a payment on account whereof a lot is selected must be applied on the next maturing note, then it would follow that such payment must be made prior to such maturity, and must be made expressly upon that note, and not upon a note already matured. This might be the effect of the language, if it were stated as a condition precedent to the right

to have the money applied as the purchase money of the lot. But it does not purport to declare a condition precedent, nor does it refer to the effect of the payment as conferring the right to claim a deed, or to state a condition of that right. "Courts are disinclined * * * to construe the stipulations of a contract as conditions precedent, unless compelled by the language of the contract plainly expressed." Front St., etc., Co. v. Butler, 50 Cal. 577; Deacon v. Blodgett, 111 Cal. 418, 44 Pac. 159. And particularly so when the result would be to work a forfeiture. Antonelle v. Lumber Co., 140 Cal. 315, 73 Pac. 966.

If the proposition contended for had been in the minds of the parties, it is difficult to believe that they would not have found clearer language in which to express it. The above-quoted phrase is reasonably susceptible of a different interpretation. The parties must be supposed to have made the contract in the belief that its terms would be fulfilled; that the payments stipulated would be made "on or before" the times provided. The clause in question is couched in apt words, if it were intended solely to provide for the application of payments made during the interval between the maturity of two installments and upon the presumption that the prior installments had been paid when due. If it was intended to express the condition contended for, or any idea other than that of declaring how intermediate payments should be applied, it is awkward and indefinite to the utmost degree. It should be construed as a mere directory provision for the application of payments, and not as a statement of conditions which would deprive the buyer of the benefits of a deed for a lot after he had paid the specified amount therefor.

We find no language that can be construed to declare that a deed or release could not be demanded on account of a payment made after maturity.

[10] The respondent further contends that, in order to lay a legal foundation for this action, it was necessary for the buyer to make a formal and personal demand upon the defendant for a release of the lot selected, and that, as the only demand made was the request for a deed made to the trust company, the plaintiff cannot prevail. The contract provides that the buyer "shall be entitled to have said lots released from such trust, and to a conveyance of them" on payment of the stipulated sum. The declaration of trust provides that, upon the payment of $450 per lot to the trust company, "said payee will release from the lien of the indebtedness due to him" one of the lots, and that "said trustee is by this instrument authorized, upon the payment to it, for the account and to the credit of said payee, of the sum of $450 per lot, to convey the lots so released to the said beneficiary, or order." The payment of each $450 was a complete settlement of the price for one lot, and entitled the buyer to a deed therefor. The deed of the trust company for such lot, under such circumstances, would vest title in the buyer free from any lien for the price. There is nothing in either writing which declares that a formal release should be executed by the seller, or that anything more than the deed was to be necessary to accomplish the release referred to. The only thing necessary to vest in the buyer the right to a deed for a lot was the payment of $450 to the trust company. No other conditions were to be complied with by the buyer, and no ground would then exist on which the seller could base a refusal. There was, therefore, no reason for a requirement that a special demand for a release should be made upon the seller or his assignee, in addition to the demand upon the trust company, the agent of the seller, vested with the title and empowered to convey it when a lot was released by such payment. In view of these conditions it might reasonably be said that no demand for a release was essential, other than the designation of a lot to the agent and the request that it execute the deed therefor.

[11] But, however this may be, it is clear that under the circumstances existing when the action was begun a further demand was unnecessary. "The law does not require the performance of a useless act, and when it is made to appear by the defendant's own act that the demand would have been refused, then they cannot be heard to object that no demand was made." Remy v. Olds, 88 Cal. 542, 26 Pac. 355; Parrott v. Byers, 40 Cal. 623; Wood v. McDonald, 66 Cal. 546, 6 Pac. 452. The defendant had received the payments and knew the amounts paid. She was informed of the selection of the lots and demand for the deed immediately after it occurred. Thereafter, notwithstanding such full payment for the lots selected, she proceeded to have the entire property sold by the trustee under the power of sale in the trust agreement, and she became the purchaser thereof for the full amount of the balance due for principal, interest and costs. And in this action she denies the right of the plaintiff to a deed on account of the payments so made, whether demanded or not, and clearly shows that she would have denied his right and would have refused to make any release on account thereof. The demand for a release was therefore unnecessary.

[12] That no formal demand for a rescission, other than the bringing of the action for the purchase money paid, is necessary, where the vendor has refused to convey on demand, after full payment of the price, and that no offer to restore was required where there was nothing to restore, as is the case here, are well settled propositions. Chatfield v. Williams, 85 Cal. 521, 24 Pac. 839; Thomas v. Pacific, etc., Co., 115 Cal. 142, 46 Pac. 899; Carter v. Fox, 11 Cal. App. 71, 103 Pac. 910.

[13] The defendant received the interest of

John B. Mannix by assignment from him without a valuable consideration. She can claim no greater rights against the plaintiff, under the contract, than were available to her assignor. The sum of $450 per lot for the lots for which a deed was demanded is the limit of the recovery to which the plaintiff would be entitled. The cash payment of $12,500 at the time of entering into the contract was a general payment on the price of the tract as an entirety, required in order to provide a margin sufficient to safeguard the seller against loss from the conveyance of one or more lots upon the subsequent payment of $450 per lot. With regard to any lot so selected for conveyance on account of such subsequent payment, that sum must be regarded as the price thereof. There are no other points that require discussion. Our conclusion is that the court below erred in its interpretation of the contract and trust agreement.

The judgment and order are reversed.

We concur: SLOSS, J.; VICTOR E. SHAW, Judge pro tem.

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175 Cal. 571

MALOOF v. MALOOF. (L. A. 4023.)

(Supreme Court of California. June 26, 1917.)

1. Divorce 🔑101—Pleading—Statute—"Extreme Cruelty."

In view of Civ. Code, § 94, providing that extreme cruelty is the wrongful infliction of grievous bodily injury, or grievous mental suffering, upon the other by one party to the marriage, in a wife's cross-action for divorce, where she alleged that her husband had treated her in an extremely cruel and inhuman manner, it was necessary to aver that the specified acts inflicted upon her grievous bodily injury or grievous mental suffering.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 322–327.

For other definitions, see Words and Phrases, First and Second Series, Extreme Cruelty.]

2. Appeal and Error 🔑1170(10)—Review—Findings.

In view of Const. art. 6, § 4½, providing that judgment shall not be set aside and new trials granted unless the court shall be of the opinion that it has resulted in a miscarriage of justice, failure to find on an issue is no ground for reversal, where the record discloses no evidence upon which a finding favorable to the complaining party could properly be made.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4066, 4544.]

3. Divorce 🔑147—Action—Jury Question.

In a divorce action, whether or not harsh treatment, unaccompanied by physical violence, has caused grievous mental suffering is a question of fact to be deduced from all the circumstances of each particular case.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 489–492, 493.]

4. Appeal and Error 🔑981—New Trial 🔑99—Review—Motion for New Trial.

A motion for new trial on the ground of newly discovered evidence is addressed to the discretion of the trial court, and its decision will not be disturbed unless an abuse of that discretion is clearly shown.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3876; New Trial, Cent. Dig. §§ 201, 207.]

5. Divorce 🔑151—Review—Discretion of Court—Abuse.

In a divorce case, in which the defendant filed a cross-petition for divorce for cruelty, and in which the judgment was for plaintiff, there being no pretense that plaintiff inflicted any bodily injury on the defendant, and in which the defendant did not testify that the acts found to have been committed by the plaintiff caused her any mental suffering, and in which the facts shown set forth a cause of conduct on the part of the defendant so seriously reprehensible that plaintiff's derelictions appear trivial, refusal of a new trial for newly discovered evidence tending to show that plaintiff had committed adultery was not an abuse of the court's discretion.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 509–513.]

6. Divorce 🔑151—Review—Motion for New Trial.

On motion for new trial in a divorce case, the court had a right to consider counter affidavits in order to determine whether a different result would be probable upon a new trial.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 509–513.]

Department 1. Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by Thomas S. N. Maloof against Zerefa Maloof. Judgment for plaintiff, and from an order denying a motion for new trial defendant appeals. Affirmed.

Earl Curtis Peck and Earl Rogers, both of Los Angeles (Otto G. Kuklinski and Charles Scholz, both of Los Angeles, of counsel), for appellant. Robert P. Jennings and Jennings & Horton, all of Los Angeles, for respondent.

SLOSS, J. This is an action for divorce. The court gave judgment in favor of the husband, who was plaintiff. The defendant appeals from an order denying her motion for a new trial.

The plaintiff sought a divorce on the ground of extreme cruelty, and his complaint specified a number of instances of violent and abusive conduct on the part of the defendant toward him. The court found in favor of these allegations, and it is conceded, as in view of the record it needs must be, that the evidence amply sustains the findings in this regard. It was further alleged and found that plaintiff had given the defendant "no just cause or provocation" for any of her acts of violence or cruelty. The appellant claims that this finding is without support. The claim is devoid of merit. Assuming that the issue thus tendered was material, the evidence certainly warranted the court in finding that the plaintiff had not been guilty of any conduct which could fairly be regarded as giving the defendant "just cause or provocation" for committing the acts charged and found against her.

[1] In her answer the defendant, in addition to denying the charges of cruelty contained in the complaint, set up, by way of recrimination (Civ. Code, § 122), a cause of action for divorce in her favor. She alleged that the plaintiff had treated her "in an extremely cruel and inhuman manner," and gave a number of instances of "the said cruel and inhuman treatment." The court made findings with respect to each of these alleged occurrences. There was, however, no finding on the introductory allegation that the plaintiff had treated the defendant in an extremely cruel and inhuman manner, nor upon the further (and necessary) averment that the specified acts inflicted upon defendant "grievous bodily injury and grievous mental suffering." See Civ. Code, § 94; Smith v. Smith, 124 Cal. 651, 57 Pac. 573.

[2] It is contended that the decision is "against law" for failure to find upon material issues. But an examination of the findings which were made, and of the evidence, shows that the claim of error has more plausibility than substance.

[3] The failure to find on an issue is not ground for reversal where the record discloses no evidence on which a finding favorable to the complaining party could properly have been made. White v. White, 82 Cal. 427, 452, 23 Pac. 276, 7 L. R. A. 799; Smith v. Smith, 119 Cal. 183, 190, 48 Pac. 730, 51 Pac. 183. There is no pretense here that the plaintiff inflicted bodily injury upon the defendant. The appellant's case must rest upon the inflicting of "grievous mental suffering." The specifications of misconduct by plaintiff, on which the court found in favor of the defendant, were that the plaintiff had said to friends of the defendant that she was a bad woman, and was not his wife, and that they should be ashamed to associate with her, that, in answer to her request, made at the taking of a deposition for use in this action, that he take her back, he had said angrily, "I don't want to talk to you," and that he had failed to reply to her letters asking a reconciliation. We are not called upon to say that these acts might not, under some conditions, warrant an inference that grievous mental suffering had been caused. Whether or not harsh treatment, unaccompanied by physical violence, has caused "grievous mental suffering" is a "question of fact, to be deduced from all the circumstances of each particular case." Barnes v. Barnes, 95 Cal. 171, 30 Pac. 298, 16 L. R. A. 660; Andrews v. Andrews, 120 Cal. 184, 52 Pac. 298; MacDonald v. MacDonald, 155 Cal. 665, 102 Pac. 927, 25 L. R. A. (N. S.) 45. But here the defendant herself did not even testify that the acts found to have been committed by the plaintiff had caused her any mental suffering. We shall not detail the facts found by the court in support of the plaintiff's charges against the defendant. It is sufficient to say that they set forth a course of conduct so seriously reprehensible that plaintiff's derelictions seem, in comparison, to be trivial. It is not conceivable that a judge could find that these acts of the plaintiff had caused grievous mental suffering to a woman capable of conducting herself as this defendant was found to have done. But, in any event, it is perfectly apparent, on the whole record, that the trial judge did not think that the defendant had established a cause of action in her favor, and that if, when he signed the findings, his attention had been directed to the specific issue under discussion, he would inevitably have made a finding on it against the defendant. We are satisfied that the omission to find did not result in a "miscarriage of justice," and the error must therefore be disregarded under the provision of section 4½, art. 6, of the Constitution.

[4, 5] One of the grounds on which a new trial was asked was that of newly discovered evidence. The defendant presented a number of affidavits tending to show that plaintiff had committed adultery. We may pass the question whether a new trial may be asked on the ground of the discovery of evidence relating to a matter that was not put in issue by the pleadings. A motion for new trial on the ground of newly discovered evidence is addressed to the discretion of the trial court, and the decision will not be disturbed unless an abuse of discretion is clearly shown. Spottiswood v. Weir, 80 Cal. 448, 22 Pac. 289; Harralson v. Barrett, 99 Cal. 607, 34 Pac. 342; Estate of Dolbeer, 153 Cal. 652, 96 Pac. 266, 15 Ann. Cas. 207. No such abuse appears here.

[6] The order denying the motion for a new trial shows that the judge of the trial court regarded the testimony contained in defendant's affidavits as improbable on its face. Under all the circumstances, this was a proper and reasonable conclusion. Furthermore, the plaintiff filed counter affidavits which contradicted every material statement made in support of the motion. The court had a right to consider these counter affidavits in order to determine whether a different result would be probable upon a new trial. Thompson v. Thompson, 88 Cal. 110, 25 Pac. 962; People v. Sing Yow, 145 Cal. 1, 78 Pac. 235.

We see no ground for interfering with the action of the court below.

The order is affirmed.

We concur: SHAW, J.; VICTOR E. SHAW, Judge pro tem.

175 Cal. 594

GLEASON et al. v. McPHERSON et al.
(L. A. 3792.)

(Supreme Court of California. June 29, 1917.)

1. FRAUD ⚷64(1)—MISREPRESENTATION IN SALE OF BONDS—QUESTION FOR JURY.

In an action for fraud in the sale of corporation bonds, a direction of nonsuit was proper as to one defendant, in view of evidence showing no misrepresentations on his part.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 65½, 67, 71.]

2. FRAUD ⚷58(2)—MISREPRESENTATION IN SALE OF BONDS—SUFFICIENCY OF EVIDENCE.

Evidence *held* insufficient to prove material misrepresentations made by defendants in the sale of corporate bonds.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 56, 57.]

3. FRAUD ⚷22(1)—MISREPRESENTATION IN SALE OF BONDS—FAILURE TO READ TRUST DEED.

A buyer of corporation bonds could not hold the sellers liable for false representations regarding matters contained in a trust deed which buyer had an opportunity to read.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 19, 20, 22, 23.]

4. FRAUD ⚷11(2)—MISREPRESENTATION IN SALE OF BONDS—EXPRESSION OF OPINION.

Sellers' statements that money invested in bonds sold to plaintiffs would be safe, and that bonds were "gilt-edge security," that they would command a ready sale, and that the interest and principal would be duly paid, were mere statements of opinion, not constituting actionable fraud, the parties not standing in confidential relation, and it not being shown that the opinions were not honestly held, or that they were given in bad faith.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 13.]

Department 1. Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by Fannie M. Gleason and husband against A. W. McPherson and others. Plaintiffs appeal from judgment for defendant rendered upon granting of motion for nonsuit. Affirmed.

Harold A. Gilman, Tanner, Taft & Odell, and Tanner, Odell & Taft, all of Los Angeles, for appellants. Fredericks & Hanna, Byron C. Hanna, Joseph Musgrove, Charles W. Lyon, Victor T. Watkins, Watkins & Blodget, and Chas. S. McKelvey, all of Los Angeles, for respondents.

SHAW, J. The plaintiffs appeal from a judgment in favor of the defendants rendered upon the granting of the defendants' motion for nonsuit. The action was to recover damages alleged to have been caused by false representations made by the defendants to the plaintiffs.

The complaint alleges, in substance, that the plaintiffs bought of one C. J. Proud and the defendant H. A. Landwehr certain bonds of the Bisbee Light & Power Company, of the par value of $30,000, and paid for the same by conveying to said Proud a certain lot in Los Angeles and to Landwehr certain other property, all of the value of $25,000; that to induce plaintiffs to make said exchange the defendants represented to plaintiffs that the bonds were "gilt-edge securities," that the net income of the Power Company was more than double the amount of the bond interest, that the bonds were guaranteed by Deane & Co. of Grand Rapids, Mich., that said guarantors were a large concern owing and operating plants all over the country, and their securities "gilt-edge," that there were only $210,000 of the bonds outstanding, and that the bonds were secured by a first mortgage on the property; that each and every of said representations were false, and were known by the defendants to be false at the time they were made; that the defendants made said representations in order to induce plaintiffs to exchange their property for said bonds; that plaintiffs at the time did not know that the representations were false, but believed them to be true, and that, relying thereon, they made the exchange aforesaid: that the said bonds in fact are worthless. The prayer is for $25,000 as damages for the deceit. The allegations concerning the alleged false representations are denied by the answers of the respective defendants.

The bonds once belonged to the defendants McPherson and Nordholt, who sold and transferred them to Proud in August, 1908, a few weeks prior to the transfer to the plaintiffs. Landwehr had acted as agent for McPherson and Nordholt in their deal with Proud, and in making that deal had obtained two letters, one from McPherson, and one from H. J. Englebrecht, cashier of the Bank of Santa Monica to himself, containing statements regarding the bonds. Landwehr acted as agent for Proud in the transaction with Gleason. The plaintiffs are husband and wife. The husband conducted all the negotiations. They sued Proud for a rescission of the contract and failed to recover. See Gleason v. Proud, 31 Cal. App. 123, 159 Pac. 885. This suit for damages involves the same transaction, and much of the evidence was a repetition of that given in the action against Proud. In the negotiations between Landwehr and the plaintiffs Landwehr showed to Gleason the letters above mentioned. At his suggestion Gleason also inquired of Nordholt and Englebrecht about the bonds of the power company and of Mr. McNutt who showed him a copy of the trust deed given by the power company as security for the bonds. He was given an opportunity to read it. These documents and the statements made to them by Landwehr and Nordholt constituted the representations upon which plaintiffs purchased the bonds.

[1] There was no evidence of any representations made by McPherson directly to the plaintiffs. He had no interest in the transaction with Gleason. So far as he is concerned, the only representations made were

in the letter aforesaid, which was exhibited to Gleason without the knowledge or consent of McPherson. There was no evidence to show that he was acting in concert with Landwehr in dealing with Gleason, or that he had any knowledge thereof. Obviously the nonsuit was properly granted as to him.

[2] The letter of McPherson, written for the previous deal between him and Proud, stated that the bonds were "backed" by Deane & Co.; that the power plant was a first-class one, paying net more than double the bond interest and had an output of almost $4,000 a month on January 1, 1908; that Deane & Co. was a large concern owning and operating big plants all over the country; and that their securities were "gilt-edge." There was no substantial evidence tending to show that either of these statements were false or that the defendants, or either of them, knew them to be false, or did not believe them to be true, or that their information on the subject did not warrant them in making the statements. So far as the charge of fraud is founded on these representations, therefore, the evidence was wholly insufficient.

The letter of Englebrecht contained a statement of the operating figures of the plant for the month of December, 1907. On January 1, 1908, it had been sold to the Bisbee Light & Power Company by another corporation. The statement, the letter said, was for the last month of operation by "the old company." It was to the effect that the net operating profits for that month was $2,382.92. This statement was made by Nordholt, and by him was given to Englebrecht prior to the former deal between him and Proud. Nordholt said to Gleason that the figures were correct. Gleason does not contend that they were false, and made no attempt to show their falsity. The statement in the Englebrecht letter was that this net operating profit was considerably "more than double the bonded interest on the $210,000 outstanding bonds." At 5 per cent. the annual interest on that sum would be $10,500. The monthly net profit of $3,382.92 would be $28,594 a year. The statement was therefore absolutely true. The charge, as to these particulars, wholly failed.

There were $130,000 of the bonds of the power company issued and sold. Other of said bonds, to the amount of $80,000, were deposited with the Los Angeles Trust & Savings Bank to be exchanged for a like amount of bonds of the former corporate owner then outstanding; $15,000 thereof had been so exchanged. No other bonds had been issued by the new company. The statement that the Bisbee Light & Power Company had issued only $210,000 of its bonds was therefore true.

[3] There was no proof that either of the defendants ever represented to Gleason that the $210,000 bond issue were first mortgage bonds. Hence the charge of fraud, so far as it is based on the allegation that they so stated, is without support. No inquiry on that point was made by Gleason. The fact that there was a prior bond issue of $80,000, and the deposit to exchange them above mentioned, was set forth in the trust deed which McNutt showed to Gleason, but he did not read that part of it. He cannot charge the defendants with this neglect. They did nothing to prevent him from reading it through.

[4] The statements of Landwehr and Nordholt to the effect that money invested in the bonds would be safe, that the bonds were "gilt-edge security," that they would command a ready sale, that they were a good investment, and that the interest and principal would be duly paid were all statements of their respective opinions, and they were avowedly based on the aforesaid statement for December, 1907, and the two letters of McPherson and Englebrecht, both of which were shown to Gleason as the foundation thereof. Landwehr expressly stated to Gleason that he had investigated all the available sources of information about the bonds, and that the two letters had been the result of his investigation. He did not profess to have other means of knowledge. Mere expressions of opinion of this character by a seller to a buyer, dealing at arm's length, do not constitute fraud, where the information on which they are founded is disclosed to the buyer with the statement of the opinion. The plaintiffs had no right to rely on such opinions. They did not stand in confidential relations to the defendants. The evidence does not even tend to show that the opinions were not honestly held, or that they were given in bad faith. Craig v. Wade, 159 Cal. 173, 112 Pac. 891; Lee v. McClelland, 120 Cal. 149, 52 Pac. 300; Choate v. Hyde, 129 Cal. 580, 62 Pac. 118; Rendell v. Scott, 70 Cal. 514, 11 Pac. 779. The court properly granted the motion for nonsuit.

It is claimed that the court erred in some of its rulings regarding the admission and exclusion of evidence. We find none of them of sufficient merit to deserve attention. A perusal of the evidence shows that, if the plaintiffs have suffered loss by reason of the transaction complained of it is not due to any deceit practiced upon them by the defendants, but to their failure to make due investigation before making the exchange.

The judgment is affirmed.

We concur: SLOSS, J.; LAWLOR, J.

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175 Cal. 575

CITY OF LONG BEACH v. LISENBY, Mayor, et al. (L. A. 5000.)

(Supreme Court of California. June 26, 1917.)

1. MUNICIPAL CORPORATIONS 🔑57—EXPRESS AND IMPLIED POWERS.

A municipal corporation possesses only such powers as are granted in express words, those necessarily or fairly implied in or incidental to express powers, and those essential to declared purposes of the corporation, not simply convenient, but indispensable.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 144, 148.]

2. Municipal Corporations ⇨58—Powers—Reasonable Doubt—Construction.

Any fair reasonable doubt concerning existence of municipal power is resolved by the courts against the corporation, and the power is denied.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 145–147.]

3. Municipal Corporations ⇨719(1)—Power to Improve Harbor—Construction of Statute—"Water Front."

Long Beach City Charter (St. 1915, p. 1659) art. 2, § 1, subd. 11, authorizing the city to "build, own, alter, and improve" the water front of said city, "and to build and improve wharves," etc., did not authorize improvement of the harbor by dredging, deepening, and improving the channels and slips, the words "water front" not including the water comprising the harbor and the underlying land as indicated by the other quoted words, since it is not appropriate to speak of "building" a harbor. The word ordinarily means land or land with buildings fronting on a body of water, and does not include the body of water itself.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1425, 1529.

For other definitions, see Words and Phrases, First and Second Series, Shore, or Water Front.]

4. Municipal Corporations ⇨911—Power to Improve Harbor—Statutes.

Under St. 1911, p. 1304, granting the city of Long Beach all state rights in tide and submerged lands with the right to use such lands for harbor construction, and page 1462, providing that any city whose corporate limits include or front upon any harbor, etc., may incur indebtedness for harbor improvements and issue bonds therefor, and that all provisions of law or charter of such city relating to issuance and sale of the bonds and mode of conducting elections authorizing the same shall apply to bonds issued for harbor improvements, and St. 1907, pp. 1182, 1185, being Long Beach City Charter, art. 1, § 3, subds. 4, 5, 28, giving the city power to receive and use property of all kinds and to exercise all powers necessary to complete control of municipal property whether such powers are therein expressly enumerated or not, except such powers as are forbidden or controlled by general law, and St. 1907, p. 1234, art. 15, § 9, providing that general laws of the state in force at the time shall constitute a part of the charter so far as applicable, the city could issue bonds for harbor improvements by dredging, deepening, and improving the channels and slips.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1899, 1901.]

5. Municipal Corporations ⇨719(1) — Lands under Water—Improvements.

A public trust in tide and submerged lands situated in a city, for purposes of establishing a harbor, improving the same, and managing such harbor to accommodate commerce and navigation, is not forbidden by any general law.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1425, 1529.]

6. Navigable Waters ⇨36(1)—Land under Water—Ownership and Control.

The title and control to tide lands and adjacent submerged lands of navigable waters is vested in the state impressed with a public use for navigation and commerce purposes, and the state as trustee may manage and control such use and improve such lands and waters in furtherance of such use.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 180–182, 184, 200.]

7. Navigable Waters ⇨37(3)—Lands under Water—Grant to Municipality.

The state may, for navigation and commerce purposes, grant control and management of tide and submerged lands to a local administrative agency, such as a city possessing the necessary powers.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. § 205.]

8. Navigable Waters ⇨37(3) — Improvement of Harbor—Grant.

A city can be given power to improve and control a public harbor within its limits to promote navigation and commerce.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. § 205.]

9. Municipal Corporations ⇨64—Legislative Control—Provisions of Charter.

The Legislature, by approving a charter which fails to make provision upon subjects pertaining to municipal affairs, cannot exempt the city from being subject to legislative control, and the city cannot secure such exemption by omitting to make such provision in its charter.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 156, 157.]

10. Mandamus ⇨172—Against Municipal Officers—To Compel Signing of Harbor Improvement Bonds — Questions Presented.

In mandate proceedings to compel mayor and treasurer to sign municipal bonds for harbor improvements, the question of whether the channels and slips were made by excavating uplands and did not go to the city by state grant of tide lands cannot be litigated.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 381–385.]

11. Judgment ⇨735—Conclusiveness—Unauthorized Use of Bonds — Taxpayers' Objections.

The decision in mandate proceedings to compel city officials to sign harbor improvement bonds will not estop a taxpayer from objecting to unauthorized use of the bond money.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1263, 1265.]

In Bank. Application for writ of mandate by the city of Long Beach against W. T. Lisenby, mayor of the City of Long Beach, and another. Writ ordered.

Geo. L. Hoodenpyl, City Atty., of Los Angeles, Wilber F. Downs, Asst. City Atty., of Long Beach, and Bordwell & Mathews, of Los Angeles, for plaintiff. Denio & Hart, of Long Beach, for defendants. Francis G. Burke, of Los Angeles, for interveners.

SHAW, J. This is a proceeding in mandate to compel the respondents to sign certain bonds of the city of Long Beach, amounting to $300,000, which have been prepared for issuance by the city in pursuance of a vote of the electors thereof at an election called for that purpose.

The bonded indebtedness in controversy was for the purpose of raising funds to pay the expense of improving the harbor of Long Beach "by dredging, deepening and improving the channels and slips therein and the water front thereof," and by opening a channel to connect said harbor with the inner harbor of Los Angeles in the bay of San Pedro.

[1, 2] Long Beach was organized and incorporated as a city in 1897, and has been operating under a freeholders' charter since February 26, 1907. Stats. 1907, p. 1178. A revision of said charter was adopted in 1915. Stats. 1915, p. 1656. The city fronts on the outer bay of San Pedro, and its boundaries extend three miles seaward from the shore. The question whether or not the city of Long Beach has power to make the improvement for which the bonds were voted as aforesaid is the only matter presented for determination.

> "A municipal corporation possesses and can exercise the following powers and no others: 1. Those granted in express words; 2. Those necessarily or fairly implied in or incidental to the powers expressly granted; and, 3. Those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation, and the power is denied." 1 Dillon, Mun. Corp. § 89.

This is the approved rule in this state. Von Schmidt v. Widber, 105 Cal. 157, 38 Pac. 682; Hyatt v. Williams, 148 Cal. 586, 84 Pac. 41; Oro Electric Corp. v. R. R. Commission, 169 Cal. 477, 147 Pac. 118.

> "If an express power to accomplish some result has been conferred, it will carry with it the authority to do such subsidiary acts as are incidental and necessary to the exercise of that power." Von Schmidt v. Widber, supra.

It is claimed that the power contended for has been granted to the city by its charter and also by statutes of the state.

[3] One provision of the charter relied on as conferring the power in question is subdivision 11, § 1, art. 2, where the city is given the power to "build, own, alter," and "improve, * * * the water front of said city," and to build and improve wharves, piers, bulkheads, retaining walls and chutes. Stats. 1915, p. 1659. If the meaning of the word "water front" includes the water comprising the harbor and the underlying land, this provision would confer the power. But we are referred to no definition which gives the word so broad a meaning. The other words above quoted indicate that it was not used in this sense, for while a harbor might be improved by dredging and deepening it, it is not, according to the common usage of our language, appropriate to speak of building a harbor. The word is said by Webster to mean "land, or land with buildings, fronting or abutting on a body of water." This is its ordinary meaning. We are aware of no authority holding it to include the body of water also. This provision, by the rule above stated, cannot be said to give power to improve the body of water or harbor, upon which the "water front" abuts, by dredging, deepening, enlarging or extending it.

[4] We think, however, that the provisions of certain statutes, taken in connection with other provisions of the charter, do confer that power. On May 1, 1911, two laws were enacted by the Legislature. The first one grants to the city of Long Beach—

> "all the right, title and interest of the state of California, held by said state by virtue of its sovereignty, in and to all the tidelands and submerged lands, whether filled or unfilled, within the present boundaries of said city, and situated below the line of mean high tide of the Pacific Ocean, or of any harbor, estuary, bay or inlet within said boundaries, to be forever held by said city, and by its successors, in trust for the uses and purposes, and upon the express conditions following, to wit:
>
> "(a) That said lands shall be used by said city and by its successors, solely for the establishment, improvement and conduct of a harbor, and for the construction, maintenance and operation thereon of wharves, docks, piers, slips, quays, and other utilities, structures and appliances necessary or convenient for the promotion and accommodation of commerce and navigation, * * *
>
> "(b) That said harbor shall be improved by said city without expense to the state, and shall always remain a public harbor for all purposes of commerce and navigation." Stats. 1911, p. 1304.

Section 1 of the other law provides that:

> "Any city, or city and county, whose corporate limits include or front upon any harbor, bay or estuary, or other navigable waters, whether the tidelands or water front thereof is owned or controlled by it or by the state, either in whole or in part, is hereby authorized to incur an indebtedness for the improvement, repair and maintenance of its harbor, * * * and such city, or city and county, for the purpose of providing a fund or funds for the payment of such indebtedness, is hereby authorized to levy and collect taxes therefor or to issue and sell its bonds therefor."

Section 2 declares that all provisions of law or of the charter of such city relating to the issuance and sale of bonds of such city and to the mode of conducting elections authorizing the same shall apply to the issue and sale of the bonds authorized by the act and to the conduct of the elections therefor. Stats. 1911, p. 1462. The charter then in force contained the following clauses:

> ""The said city * * * shall have the power: * * *
>
> "4th. To purchase, receive, have, take, hold, lease, use and enjoy property of every kind and description, both within and without the limits of said city, and control and dispose of the same for the general benefit.
>
> "5th. To receive bequests, devises and donations of property, both within and without the corporate limits of the city of Long Beach, in the manner and for the purposes, and upon such trusts and conditions as are now or may hereafter be in accordance with the general law. * * *
>
> "28th. To exercise all municipal and police powers necessary to the complete and efficient management and control of the municipal property, * * * whether such powers are herein expressly enumerated or not, except such powers as are forbidden or controlled by general law." Article 1, § 3, subds. 4, 5, 28; Stats. 1907, pp. 1182, 1185.
>
> "In all matters pertaining to municipal affairs, concerning which special provision is not made in this charter, the general laws of the state in force at the time are hereby declared to be, and shall be, a part of this chapter so far as the same are or may be applicable to the class

of cities to which this municipality may belong." Article 15, "Miscellaneous Provisions," § 9; Stats. 1907, p. 1234.

The word "chapter" is obviously a misprint for "charter," but the effect is the same, for the chapter is a part of the charter. All of these provisions were also incorporated in the chater of 1915. Article 2, § 1, subds. 4, 5, 28; Article 25, § 6; Stats. 1915, pp. 1658, 1659, 1661, 1709.

[5, 6] A public trust in tide and submerged lands situated in a city for the purpose of establishing thereon a harbor, improving the same, and of managing such harbor when so established, for the promotion and accommodation of commerce and navigation, is a trust not forbidden by any general law, but is in accordance therewith. The title to the tidelands, the adjacent submerged lands, and the control of the navigable waters within the limits of the state are vested in the state impressed with a public use for purposes of navigation and commerce. The state, as trustee, may manage and control such use and may improve such lands and waters in furtherance of the use. People v. California Fish Co., 166 Cal. 576, 138 Pac. 79.

[7, 8] It may, for that purpose, commit the execution of the trust in any specified territory to a local administrative agency, such as an incorporated city possessing the necessary powers. A trust to carry on a commercial enterprise, unaffected by any public use, would probably be void under the principles declared in Low v. Marysville, 5 Cal. 214, because the city could not be invested with power to administer it. But in this state it is now well settled that a city can be given power to carry on within its limits a public utility or to improve and control a public harbor within its limits for the promotion of navigation and commerce. Under subdivision 5 aforesaid, the city of Long Beach had power to accept the property granted to it by the state as aforesaid, upon any lawful trust and conditions. The trust, in itself, was lawful. The city, therefore, had power to accept the property upon the trust and subject to the use declared. To make the conditions requiring it to perform the duties of the trust lawful, it was, of course, necessary that the city should have already possessed, or that it should be given, power to do the necessary things. It being lawful, under subdivision 5, for the city to receive the donation of this property, it thereupon became municipal property subject to the public use. Subdivision 28 aforesaid gives the city the "powers necessary to the complete and efficient management and control" of municipal property. The language of these subdivisions is broad enough to include all property received by the city upon any trust, the execution of which may lawfully be committed to a city. The latter subdivision supplements the former, and, taken together, the two manifestly give the city the power to accept this property for the public use and manage and control it for the promotion of navigation and commerce. It does not so clearly appear that a gift of power to improve such harbor at the expense of the city is necessarily implied therefrom. It could be argued with greater force that such power is at least incidental to the power to manage and control the harbor. Apparently the Legislature of 1911 was not certain on this point, and to remove the doubt it passed the second statute from which we have quoted above. The two statutes pertain to the same subject and are to be construed together. By the latter, any city which owned a harbor, as Long Beach then did, was expressly empowered to incur the indebtedness necessary for its improvement and to issue bonds in the manner provided by law and sell the same to obtain funds wherewith to pay the expenses of such improvement. A grant of the power to make the improvement for which such money was to be paid is at least fairly to be implied from the gift of power to raise the money for that purpose.

The defendants refer to the statement in Hyatt v. Williams, supra, that the Bond Act of 1901 (Stats. 1901, p. 27), does not purport to give the cities of the state power to carry on public utilities, but merely confers power to issue the necessary bonds where, by other statutory or charter provisions, such power to carry on or construct a public utility is given. They suggest that the act of 1911 is of no greater effect than the act of 1901 in this respect. The provisions of the two acts are dissimilar on this point. The act of 1901 prescribes the mode of procedure for bond elections, bond issues, bond sales, and the letting of contracts for the works to be erected with the funds so obtained. It does not purport to give power to incur debts for any specific works. It refers to the "powers of municipality," in the exercise of which it may become necessary to incur a debt, evidently meaning the powers derived from some source other than the act itself. Its opening sentence expressly declares that such debt may be incurred "as hereinafter provided," thus showing, as also does the entire context, that the purpose of the act is to fix a mode for the exercise of existing powers, rather than to confer new or additional powers. The act of 1911 does not prescribe a procedure, but refers to other laws on that subject. It directly "authorizes" cities whose corporate limits include any harbor owned or controlled by it to "incur an indebtedness for the improvement * * * of its harbor." The statement in Hyatt v. Williams would not fairly apply to the act of 1911.

It is suggested in the briefs of respondents that the matter of improving the harbor is a municipal affair, that the Legislature cannot, by general laws, confer upon the city any powers respecting the same or interfere therewith at all, and that the city must find authority for so doing from the provisions of the charter alone. This objection seems to be sufficiently answered by the above-quoted section of the charter itself, which provides that in all matters pertaining to municipal affairs, where provision is not made in the charter, the general laws of the state in force at the time shall be a part of the charter. Section 6, art. 25, of Charter of 1915. The argument admits that the charter makes no provision for the powers here involved, and that they pertain to municipal affairs. It would follow, necessarily, by force of this section, that the general laws would control and would have the effect to confer upon the city such powers as are included in the terms of such laws.

[9] The additional argument is advanced that because of the fact that section 3, art. 1, of the charter of 1907, and section 1, art. 2, of the charter of 1915, covering the same subject, each set forth an elaborate enumeration of powers given to the city, among them being the power to improve the "water front" of the city, there is, by force of the maxim, "Expressio unius est exclusio alterius," an implied prohibition of any power to improve the harbor itself. This, it is contended, would prevent the Legislature from conferring power upon the city concerning any of its municipal affairs. It is assumed, for the purpose of this argument that the improvement of such harbor is a municipal affair of Long Beach, within the term as used in section 6, art. 11, of the Constitution, making the charter paramount over general laws in municipal affairs. We refer to section 6, art. 11, as it was prior to the amendment of 1914 thereto. As we have seen, the power to improve the water front does not include the powers to improve the harbor itself. The subject-matter of the two powers is not the same. On the principle invoked, the enumeration of the powers given would be the equivalent of an affirmative clause prohibiting the exercise by the city of any power over municipal affairs, other than those enumerated, and excluding all municipal affairs not mentioned from the operation of general laws. Our decisions not only do not support this conclusion, but are, in effect, contrary thereto. By section 6, art. 11, as first adopted, all provisions of a city charter were "subject to and controlled by general laws." Thomason v. Ashworth, 73 Cal. 77, 14 Pac. 615. By the amendment of 1896, the words "except in municipal affairs" were inserted. Referring to this amendment, Justice Harrison in his concurring opinion in Fragley v. Phelan, 126 Cal. 395, 58 Pac. 928, said:

> "It is not within the constitutional powers of the Legislature, by approving a freeholders' charter which fails to make provision upon subjects pertaining to municipal affairs, to exempt that city from being subject to legislative control in reference to those subjects, nor can the city secure exemption from such control by omitting to make such provision in its charter."

This rule has been consistently followed ever since. Fritz v. San Francisco, 132 Cal. 377, 64 Pac. 566; Law v. San Francisco, 144 Cal. 391, 77 Pac. 1014; Coffey v. Superior Court, 147 Cal. 531, 535, 82 Pac. 75; Fleming v. Hance, 153 Cal. 165, 94 Pac. 620; Nicholl v. Koster, 157 Cal. 421, 108 Pac. 302; Clouse v. San Diego, 159 Cal. 434, 114 Pac. 573. In each of the cities to which this rule has been applied the charter contained an enumeration of the powers thereby granted to that city, a list fully as elaborate and complete as that in the Long Beach charter. But it was held that the general law prevailed with respect to subjects on which the charter did not speak. The maxim, expressio unius, etc., was not held to make such enumeration a denial of legislative power as to subjects not enumerated.

That this has been the general understanding is shown by the amendment of section 6 in 1914, providing that cities thereafter organized under a freeholders' charter "are hereby empowered to make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters, and in respect to other matters they shall be subject to and controlled by general laws," but that a city theretofore organized under a charter could have such complete power and exemption from general laws only by an amendment to its charter so declaring. In the argument printed with the sample ballots for the election of 1914, upon this amendment, and mailed in advance to each voter, its advocates said that the object was to do away with the rule that such city was subject to general laws upon municipal affairs upon all subjects as to which its charter was silent, and that cities previously so organized would have to expressly amend their charters in order to come under the amended rule. Upon this argument the amendment was adopted by the voters. If an enumeration of powers granted had had the effect here contended for, the amendment would have been wholly unnecessary, for every freeholders' charter then in existence contained such an enumeration.

The new charter adopted for Long Beach in 1915 does not purport to bring it within the amendment of 1914. Instead it expressly provides, as above stated, that where "special provision" as to a municipal affair is not made in the charter, the general laws apply.

We have, so far, assumed that where the matter of improving and controlling a public harbor comprising a part of the navigable waters of the state, but situated within the corporate limits of a city, has been delegated by the state to such city, it thereupon becomes a municipal affair within the meaning of that phrase as used in section 6, art. 11, of the Constitution. We do not say that such a matter is a municipal affair. It may be that in its nature and origin it is primarily a matter of more general concern and a state affair, but we need not decide the point. The statement in section 6, art. 11, that "in respect to other matters they shall be subject to and controlled by general laws" plainly implies that such a public matter of general concern, not strictly municipal in its nature, may be committed by general laws to a city for its administration, in so far as such administration is confined to the territorial limits of that city. Fragley v. Phelan, supra, 126 Cal. 387, 58 Pac. 923. This being the case, if the power to administer it exists, it is immaterial whether its source is the charter or the general law, and also immaterial whether its local administration is, or is not, a municipal affair. The election was called to authorize a bonded debt exclusively for the purpose of improving the harbor of Long Beach and to acquire the property necessary therefor.

[10, 11] The question whether or not the channels and slips thereof, or some part thereof, were made by excavating upland, and consequently did not go to the city by the grant from the state of tidelands, cannot be litigated in this proceeding against the mayor and treasurer. If the city attempts to use the bond money for an unlawful or unauthorized purpose, this decision will not estop a taxpayer from raising the objection. Clark v. Los Angeles, 160 Cal. 37, 116 Pac. 722.

The conclusion is that the city has the power to improve the harbor, and that the bonds are valid. The defendants as officers of the city should have signed the bonds as provided in the charter.

It is ordered that a writ of mandate issue commanding the defendants, W. T. Lisenby, as mayor of the city of Long Beach, and H. L. Pillsbury, as treasurer thereof, to sign the bonds described in the petition herein.

We concur: SLOSS, J.; HENSHAW, J.; MELVIN, J.; LAWLOR, J.

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175 Cal. 607

SAN JOAQUIN & KINGS RIVER CANAL & IRRIGATION CO., Inc., v. JAMES J. STEVINSON. (Sac. 2309.)

(Supreme Court of California. June 29, 1917.)

1. NEW TRIAL 🔑167(1)—BILL OF REVIEW FOR NEW TRIAL.

A bill of review for new trial may be maintained, notwithstanding the remedy by motion for new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 246.]

2. NEW TRIAL 🔑167(3)—BILL OF REVIEW FOR NEW TRIAL—LACHES.

Failure for 12 years after commencement of action involving riparian rights to examine the records, which would have disclosed a deed conveying such rights of the adversary, is laches, defeating bill of review for new trial for newly discovered evidence, consisting of such deed.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 246–249.]

3. NEW TRIAL 🔑167(3)—BILL OF REVIEW—TIME FOR PROSECUTION.

While bill of review for new trial, for errors appearing on the record may not be instituted after expiration of the period allowed for appeal, such period does not commence to run against a bill for review for new trial for newly discovered evidence till after the discovery; but, though it is instituted shortly after the discovery, it will not be entertained, it not showing great diligence in using the means for discovery.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 246–249.]

Angellotti, C. J., and Henshaw, J., dissenting in part.

In Bank. Appeal from Superior Court, Merced County; J. A. Plummer, Judge.

Bill of review by the San Joaquin & Kings River Canal & Irrigation Company, Incorporated, against James J. Stevinson, a corporation. From an adverse judgment, plaintiff appeals. Affirmed.

Edward F. Treadwell, of San Francisco, for appellant. James F. Peck, of San Francisco, for respondent.

MELVIN, J. Plaintiff filed a pleading entitled "Complaint to Review Judgment," to which defendant successfully demurred. From the judgment, following the order sustaining the demurrer, this appeal is taken.

The complaint set forth in substance the following alleged facts:

Plaintiff was incorporated in Nevada in 1905, and has ever since that time been doing business in California. Defendant was incorporated in this state in 1903, and has ever since been transacting business in California. In 1871 there was incorporated the San Joaquin & Kings River Canal & Irrigation Company (plaintiff's predecessor in interest), the purpose of said corporation being the diversion of waters from the San Joaquin and Kings rivers, and in that year said corporation constructed a canal taking out of the west side of the San Joaquin river in the county of Fresno and built a dam across said river below the head of said canal. The canal is described in the complaint with details which we need not repeat here. For a part of its course this canal had a capacity of 1,200 cubic feet, but prior to August 15, 1894, and for many years theretofore, the predecessor of plaintiff had actually sold, distributed, and applied to beneficial uses 760 cubic feet of water per second through said canal. In 1896 the company constructed another canal, taking out of the original canal, at a point where its capacity was 1,200 cubic feet per second, and began to distribute that amount of water to certain inhabitants of Fresno, Merced, and Stanislaus counties.

On August 15, 1899, James J. Stevinson, an individual (predecessor of the defendant corporation), commenced an action against plaintiff's predecessor in the superior court of Merced county, alleging that he was the owner of a certain tract of land described is his pleading, that said land was riparian to the San Joaquin river, and that he was the owner of and entitled to the use and enjoyment of all the water flowing into said river. He asked for damages, and that plaintiff's predecessor be enjoined from the diversion of any of the waters of the San Joaquin river above his property. In March, 1900, James J. Stevinson filed an amended complaint, substantially the same as his original pleading, and thereafter in May of that year the San Joaquin & Kings River Canal & Irrigation Company answered, setting up its claim by prescriptive right to use 900 cubic feet per second of the waters of said river. By later amendments the corporation in that action (predecessor of this plaintiff) asserted a right to use the entire 1,200 cubic feet of water, averring that its later appropriation through its new canal had been made for the use of the public with Stevinson's knowledge.

Upon the issues thus joined the cause was tried, the court fixing the Canal Company's prescriptive right at 760 cubic feet of water flowing per second; but it was determined by the court that certain of Stevinson's land was riparian to the river and that he was entitled to the rights of a riparian proprietor. The Canal Company was enjoined from diverting more than 760 cubic feet of water from the San Joaquin river, and that corporation duly appealed to this court from the injunctive part of the judgment. On the 1st day of February, 1912, the judgment was affirmed.

On April 8, 1903, James J. Stevinson, a corporation, was organized, and the individual of that name transferred all of his land to said corporation, and on June 12, 1905, the "San Joaquin & Kings River Canal & Irrigation Company, Incorporated," took over the property of the original Canal Company, and in 1909 the new corporations were substituted as parties to the action then pending.

The complaint contains further averments that, for many years prior to the commencement of the action with reference to the amount of water the Canal Company was entitled to use, James J. Stevinson had occupied the land which he claimed on the San Joaquin river; that the officers and stockholders of the plaintiff corporation knew this; that they were aware, also, that Stevinson had obtained title to said property from the government; that they recognized a portion of said realty as swamp and overflowed lands bordering on the said river; that they had no reason to believe that the owner had conveyed away the riparian rights; and that they had no reason to suspect that James J. Stevinson, who was an old and respected citizen, was concealing from them the fact that he did not possess the riparian rights originally incident to his ownership of the land. It is alleged that for this reason the Canal Company was unable to produce on the trial any proof of its denial that Stevinson was not, by virtue of his ownership of the land, entitled to the flow of the waters of the river by, through, and over his property.

As a matter of fact (so are the allegations), James J. Stevinson had caused to be formed a corporation known as the East Side Canal & Irrigation Company, for the purpose of diverting water from the San Joaquin river miles below the other corporation's place of diversion, and conveying said water to riparian and nonriparian lands belonging to Stevinson. Prior to the commencement of his action against this plaintiff's predecessor, said Stevinson on March 21, 1898, had executed a conveyance to the East Side Company. This conveyance is set out in the complaint, and it is averred that by it the grantor, Stevinson, divested himself and his lands of all riparian rights in or to the waters of the San Joaquin river. It is further averred that Stevinson and his counsel were well aware that the officers and stockholders of plaintiff's predecessor were ignorant of this conveyance. There are further allegations that:

> "Upon the trial of the said suit of Stevinson v. The San Joaquin & Kings River Canal & Irrigation Company, the said Stevinson put in no proof of title and no proof of the riparian character of any of said lands, but rested upon the admission of the Canal Company that a small portion of said lands bordered upon the said river, although he then claimed, and still claims, that all of the lands described in said complaint were, in fact, riparian to said river, all of which was for the purpose of making it unnecessary for the Canal Company to examine the records pertaining to the title of said land."

There is also a statement that during the pendency of said suit another suit was tried between the East Side Canal & Irrigation Company and other parties, the same attorneys being engaged who represented the respective parties in the suit by Stevinson; that Mr. Peck, attorney for Stevinson in the other litigation, and for the East Side Company in the case then at bar, "did not on said trial introduce any notices of appropriation of the said water, for the purpose of preventing said attorneys from finding the said conveyance as aforesaid." Then follow allegations that in June, 1913, there was on file an action brought by the appellant herein against the respondent herein to acquire Stevinson's riparian rights by condemnation; that it became necessary in preparing for trial to investigate the title of the East Side Company to the water of the San Joaquin river, and that it was then discovered by an attorney representing appellant that Stevinson, and not the East Side Company, had filed the notice of intention to appropriate water at the exact point where the East Side Company's canal headed. Looking for evidence of conveyance by Stevinson of any rights thus acquired, this attorney discovered the conveyance to the East Side Company of all of Stevinson's rights to the waters of the San Joaquin. The date of this discovery is fixed as about June 15, 1913, and the complaint before us was verified November 1st of that year. It was averred that either Stevinson, the individual, or the corporation of that name, at all times owned all of the stock of the East Side Canal & Irrigation Company, and that in the litigation in which the last-named corporation was interested the notice of appropriation of the water for said company by Stevinson was concealed for the purpose of deceiving counsel for appellant in this case. It is further averred that plaintiff has no plain, speedy, and adequate remedy, in the ordinary course of law or otherwise, except by this action to review the judgment, and that the injury to plaintiff will be irreparable if said judgment shall remain in force. The prayer is that the judgment be set at large and that the court proceed to judgment upon proof of the facts alleged.

[1, 2] A bill of review in equity will lie in this state. The superior courts have complete and full jurisdiction of all cases in equity—the same jurisdiction as that possessed and administered by the High Court of Chancery in England. People v. Davidson, 30 Cal. 390. It is true, of course, that the Legislature may prescribe the mode of procedure in the exercise of that jurisdiction, and if a different form of action or procedure is provided as a substitute for the former bill in equity, the method provided by the statute must be followed. But the proceeding for a new trial at common law existed concurrently with the remedy in equity for a new trial. One is not a substitute for the other. Such bills have been frequently entertained in this state and treated as a proper subject of equity jurisdiction. Buckelew v. Chipman, 5 Cal. 399; Mulford v. Cohn, 18 Cal. 46; Butler v. Vassault, 40 Cal. 74; Allen v. Currey, 41 Cal. 318. The reason for the rarity of such actions is easily discernible from the decision in Mulford v. Cohn. It is perhaps surrounded by greater difficulties in the way of success than any other action known to the law or equity. Upon this subject the court there says:

> "It must be shown distinctly in such a bill that the facts are of controlling force; that they were not known to the defendants at the time of the trial; that the defendants used all proper diligence to prepare their case for trial, and to procure the evidence, and that they were unable without fault or negligence on their part, to procure it; that the testimony is now within their control, and that they will be able to procure it on another trial. The bill should state particularly the facts to be proved, the names of the witnesses, and show the bearing and relevancy of the proposed proofs. It should also show when and how the facts discovered came to the knowledge of the plaintiffs, and why no motion for a new trial was made in the court trying the case, and before the lapse of the term."

It is also necessary as a matter of course that all these facts should be fully proven in order to establish the right to such relief. Perhaps in the matter of diligence there is no method of procedure in which so high a standard is required, both in the pleading and the proof, to authorize the relief. In view of this peremptory requirement, we are of the opinion that the complaint lacks merit. It shows that the deed which constitutes the new evidence was recorded, but does not allege the time when such recordation took place. It was executed in 1898, before the action which resulted in the injurious judgment was begun. In order to make a proper showing to meet the demands of equity on the subject, the bill should have stated, either that it was not recorded until too late for its production at the trial, or it should have given the date of the record and shown facts which prevented the plaintiff from discovering it until too late to produce it at the trial.

The complaint of Stevinson against the plaintiff's predecessor in the action complained of directly alleged that Stevinson was the owner of the water rights which it now appears he had previously conveyed to a third person. It also prayed that his right to the water be declared by the judgment, and that the defendant, plaintiff's predecessor, be declared to have no right thereto, and to be enjoined from diverting the water from the river. Plaintiff's predecessor was therefore informed that this particular water right was the one thing in issue and that Stevinson founded his case upon his ownership thereof. It is not averred in the complaint when the conveyance from Stevinson to the East Side Company was placed of record, but, as all intendments are against the pleader, we must assume that the instrument was recorded at about the date of its execution in March, 1898. From that time until June, 1913, appellant had abundant means of ascertaining the truth. The action in which Stevinson's ownership of riparian lands was the essential fact, alleged by him and denied by this appellant, was commenced nearly a year and a half after the execution of the alleged conveyance of his rights. About nine months later appellant's predecessor answered, denying Stevinson's alleged ownership. Trial was had about five years after issue joined, and more than a year later the findings were filed. Six years later final judgment on appeal was given, and then a year and something more than four months passed before counsel for appellant made the belated discovery. A person cannot claim that he has exercised the diligence required in equity to enable him to have a judgment vacated and a new trial ordered because of the discovery of new evidence, where he has failed to examine the records concerning his adversary's title to the real property in controversy for a period of so many years after the action directly involving the evidence discovered was begun.

Counsel for the plaintiff states in his brief that it was not intended to allege a cause of action to set aside a judgment on the ground that there was fraud by the successful party in procuring it, but that the cause of action presented is in the nature of a bill of review for a new trial on the ground of newly discovered evidence. It is therefore unnecessary to discuss the question whether or not Stevinson's concealment of the transfer of his riparian rights amounted to fraud either intrinsic or extrinsic.

[3] We have reached the conclusion that the demurrer was properly sustained, because failure on the part of plaintiff's predecessor to examine Stevinson's title amounted, under the circumstances, to laches. Our conclusion is not based upon the declaration in Allen v. Currey, 41 Cal. 318–321, upon which in respondent's brief great stress is laid, that:

> "In respect to bills of review, courts of equity have adopted, as a reasonable period within which they may be prosecuted, the time allowed by law for the prosecution of an appeal or writ of error. Story, Eq. Pl. § 410; Smith v. Clay, Ambler R. 645; Cooper, Eq. Pl. 91; Thomas v. Brockenbrough, 10 Wheat. 146 [6 L. Ed. 287]."

The quoted statement is inaccurrate. Bills of review for a new trial are of two kinds: A review for errors appearing on the face of the record, and a review because of newly discovered evidence. With respect to a review for errors on the face of the record, it was settled in equity that they would not be entertained after the time allowed by the statute for an appeal had expired. Story's Eq. Pl. § 410; 3 Ency. Pl. & Pr. 583. The statement in Allen v. Currey was founded on the authority of section 410 of Story's Equity Pleading, which, as above stated, applies only to bills of review for errors appearing on the face of the record; whereas the case there involved was a proceeding for new trial because of newly discovered evidence. With respect to bills of review for newly discovered evidence, the rule is not the same. There are decisions holding that such a bill must be instituted within the time allowed for an appeal, but that the time begins to run only upon the discovery of the new evidence. The present case was begun within that period after the discovery. But with this exception the rule is that the time within which such an action must be begun is to be determined within the sound discretion of the court, and must not be an unreasonable period and will depend upon the circumstances of the particular case. Story's Eq. Pl. & Pr. 419; 3 Ency. Pl. & Pr. 585. But in such an action the rule undoubtedly is that the complaint must show great diligence in using the means for discovery, and that, unless it does so show, the fact that the discovery was not made until shortly before the action was begun will not avail.

The judgment is affirmed.

We concur: SHAW, J.; SLOSS, J.

ANGELLOTTI, C. J. I concur in the judgment; but I do not concur in the conclusion stated in the opinion that the remedy by bill of review on the ground of newly discovered evidence exists in this state. In the cases cited there is no discussion of this question, and in all of them the relief sought was denied on the assumption that, while such a proceeding lay, no case measuring up to the requirements of the old equity practice had been made. The old equity bill of review on this ground was in effect only a motion for a new trial on the ground of newly discovered evidence. This is a subject-matter which to my mind is covered, to the exclusion of all other remedies, by the provisions of our Code of Civil Procedure relative to new trials. This court has already held that a bill of review will not lie for errors appearing on the face of the record (the other ground under the old equity practice); the statute providing an appeal as the exclusive remedy. See San Francisco Sav. & Loan Soc. v. Thompson, 34 Cal. 76, 78. The same is true on principle as to a bill of review on the ground of newly discovered evidence. As to the power of the Legislature to make such provision exclusive I think there can be no question.

I concur: HENSHAW, J.

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175 Cal. 511

PASADENA PARK IMPROVEMENT CO. et al. v. LELANDE, County Clerk, et al.

(L. A. 3865.)

(Supreme Court of California. June 21, 1917.)

1. Levees ⟹5—Protection Districts—Nature of Organization.

A protection district, organized for the improvement of innavigable streams to protect overflows, etc., under St. 1895, p. 247 et seq., as amended by St. 1911, p. 446, authorizing the board of county supervisors to create an assessment district to the end that property in that district in proportion to benefits shall pay for improvement and rectification of the channels of innavigable streams and water courses, and for the prevention of overflows thereof by improving the same, is not a public corporation, and noncompliance with the statute cannot be excused on that ground.

[Ed. Note.—For other cases, see Levees, Cent. Dig. §§ 14, 15.]

2. Levees ⟹6—Protection Districts—Notice of Intention to Form—Sufficiency.

Under St. 1895, p. 247, §§ 1, 2, as amended by St. 1911, pp. 446, 447, providing that after board of supervisors has passed a resolution, declaring its intention to form a protection district, the clerk of such board, before the day fixed for the hearing of the matter, shall cause to be published a notice which is to be headed, etc., "Notice of Intention of the Board of Supervisors to Form a Protection District," a notice so entitled and reciting the resolution of the board "that it is the intention of the board of supervisors of the county of Los Angeles to improve and rectify the channel of the Rubio Canyon Wash, an innavigable stream, * * * in conformity with the act of the Legislature of the state of California entitling act to provide for the formation of protection districts in the various counties of this state, entitled," etc., was sufficient notwithstanding its inartificiality to convey to the property owners adequate information of what the board intended to do, and did not justify a conclusion that the district was illegally formed.

[Ed. Note.—For other cases, see Levees, Cent. Dig. § 16.]

3. Levees 🔑7 — Protection Districts — Right to Include Land Within Proper Limitations—Municipal Affair.

Inclusion of lands within the corporate limits of Pasadena in a protection district pursuant to St. 1909, p. 809, does no violence to city's reserved rights, although its charter has incorporated within itself all General Laws, including St. 1907, p. 126, providing a complete scheme for doing work of this character; the injurious effect of unrestrained innavigable streams extending beyond the boundaries of the city being more than a "municipal affair."

4. Levees 🔑6 — Protection Districts — Statute—Construction.

The declaration in St. 1895, p. 248 et seq., § 6, as amended by St. 1911, p. 448, § 5, that as soon as the protection district is formed, the board shall cause a survey to be made, etc., and shall adopt such survey, maps, plans, etc., and thereafter all such improvements shall be made in accordance therewith, contemplates merely a tentative and not a final adoption of the survey, plans, etc., in view of the provisos thereof, that the board may rescind or modify their action in adopting said survey, maps, plans, etc., and sections 15, 16, as amended by sections 6, 7, providing for a review on notice to property owners.

[Ed. Note.—For other cases, see Levees, Cent. Dig. § 16.]

5. Levees 🔑6—Protection District—Statutes—Construction.

St. 1895, pp. 250, 251, §§ 15, 16, as amended by St. 1911, p. 449, §§ 6, 7, providing that after the board of supervisors have adopted such survey, plans, etc., for the formation of a protection district, notice of and an opportunity to be heard shall be given property owners affected is mandatory, and noncompliance therewith renders further proceedings invalid.

[Ed. Note.—For other cases, see Levees, Cent. Dig. § 16.]

6. Estoppel 🔑110 — Estoppel in Pais — Pleading.

In an action to restrain the delivery and filing of an assessment by the board of supervisors for work in the formation of a protection district, where the only notice which the complaint declares and the only proceedings with knowledge of which plaintiffs are charged amounted to no more than information that certain work was to be done, it did not charge the plaintiff with knowledge of the nature or place of construction, making a defense of estoppel in pais available to defendants without a special plea by way of answer.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 300.]

7. Levees 🔑29—Illegal Assessments.

An action to restrain delivery and filing of an assessment by the board of supervisors for work in the formation of a protection district will lie, as it is an effort to prevent a cloud of the colorable lien being cast upon plaintiffs' property.

In Bank. Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by the Pasadena Park Improvement Company and others against H. J. Lelande, County Clerk, etc., and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

A. J. Hill and C. E. Haas, both of Los Angeles, for appellants. Hartley Shaw and T. C. Gould, both of Los Angeles, for respondents.

HENSHAW, J. Under the law of 1895 (Stats. 1895, p. 248 et seq.), as this law has been amended (Stats. 1909, p. 807; Stats. 1911, p. 446), the board of supervisors of the county of Los Angeles proceeded with the organization of the Rubio protection district of Los Angeles county, caused work to be done and an assessment for the payment of this work to be declared. That assessment, under the law, becomes a lien upon the property benefited when the county clerk as ex officio clerk of the board of supervisors places the proper documents in the hands of the county tax collector. This action was directed against the county clerk and the tax collector to restrain the one from delivering, the other from receiving and filing, these papers. In its essence, then, the action is to prevent a cloud from being placed upon the titles of plaintiffs' property by a colorable but unlawful assessment lien. A general demurrer was interposed to this complaint, and, being overruled, the defendants declined to answer. Judgment passed for plaintiffs accordingly, and defendants have appealed. Upon this appeal several questions are formally presented and argued. The determination of all is not necessary to a decision, but as the statute and proceedings here involved are public, it is plainly to the interest of every one concerned that each should be considered and disposed of.

[1] 1. Appellants' contention that protection districts organized under this law are public corporations is wholly untenable. A cursory reading of the act discloses that its whole scope is to authorize the board of county supervisors to create an assessment district to the end that the property in that district in proportion to the benefits it receives shall pay "for the improvement and rectification of the channels of innavigable streams and water courses, and for the prevention of the overflow thereof by widening, deepening, straightening, and otherwise improving the same." In all essentials is the power conferred by the act like that conferred upon city councils and boards of trustees to create assessment districts for the improvement of streets, etc. And, indeed, this has been declared in the case of reclamation districts where a much more permanent and continuous organization is contemplated than under the law under consideration and where more powers are granted. As to them this court has said:

> "The proceeding results in putting a burden upon property against the will of the owners, and the requirements as to proceedings of that

character cannot be evaded by calling the governmental agency through which the proceeding is conducted a 'corporation.' As remarked in People v. Reclamation Dist. 551, 117 Cal. 114 [48 Pac. 1016], the proceeding greatly resembles those in which property is assessed for local improvements in proportion to benefits, and I see no reason why the same rules as to essential requirements should not apply." Reclamation Dist. v. Burger, 122 Cal. 443, 55 Pac. 156.

Keech v. Joplin, 157 Cal. 3, 106 Pac. 222, upon which appellants rely and from which they quote the language: The (protection) district is a "corporation of a similar character to irrigation districts and reclamation districts"—has absolutely no bearing upon the question. The district there under consideration, while also called a protection district, was framed under an entirely different law from the one here under consideration, and all that this court said was that such a protection district so organized is "a * * * corporation of a similar character to irrigation districts and reclamation districts." Precisely the character which inheres in irrigation and reclamation districts has often been declared. Hensly v. Reclamation Dist., 121 Cal. 96, 53 Pac. 401; People v. Levee Dist., 131 Cal. 30, 63 Pac. 676.

[2] 2. Sections 1 and 2 of the act, as amended in 1911, provide that a board of supervisors deeming it proper to do such protection work, upon petition of landowners asking for the creation of a protection district and giving the boundaries thereof, "may pass a resolution declaring their intention to form a protection district under this act." Section 1. Having done so the clerk of the board, before the date fixed for the hearing of the matter, shall cause to be published a notice which is to be headed "Notice of Intention of the Board of Supervisors to Form a Protection District." The resolution of intention adopted by the board was, in its terms, "that it is the intention of the board of supervisors of the county of Los Angeles to improve and rectify the channel of Rubio Canyon Wash, an innavigable stream, etc., * * * in conformity with an act of the Legislature of the state of California, entitled an act to provide for the formation of protection districts in the various counties of this state, entitled," etc. Section 2. The notice published by the clerk was properly entitled "Notice of Intention of the Board of Supervisors to Form a Protection District," and in its recitals and declarations followed with accuracy the notice of intention. While it is unquestionably true that the resolution of intention adopted by the board should have in formal and precise terms stated that board's intention to form a protection district, yet, as the notice of intention declares not only the nature of the work which it was proposed to do, but also that it was proposed to do it in conformity with the protection district act whose title was set forth in full, it necessarily follows that the work could be done only upon the formation of the protection district, wherefore, we hold that notwithstanding its inartificiality the notice of intention conveyed adequate information to the property owner of what the board of supervisors intended to do, and that that declared intention necessitated the creation of a protection district. And it is concluded upon this point that the irregularity is a minor one in no way prejudicing the rights of the landowners and not sufficient, therefore, to justify a conclusion that the district was illegally formed.

[3] 3. In this district was included a large section of the city of Pasadena. Authority for such inclusion is found in the amendment to the act adopted in 1909 (Stats. 1909, p. 809). Respondents contend that the doing of work of this character within the corporate limits of a municipality is a municipal affair within the meaning of the Constitution reserving to the cities autonomy in all such matters. Further, that the charter of the city of Pasadena having incorporated within itself all general laws of the state upon the subject-matter, and thus having made a part of the charter section 2 of the Vrooman Act as amended in 1907 (Stats. 1907, p. 126), and as that provides a complete scheme for the doing of work of this character within the corporate limits of the city, the inclusion within the protection district of these lands within the municipality was violative of the municipality's reserved right under the Constitution. And finally herein, it is pointed out that the charter provisions were in full force at the time when the amendment of the protection district act authorizing the inclusion of lands within a municipality became law. Respondents' position here is unassailable whenever it is made to appear in any given instance that the affair is strictly municipal. But in this, as in many divers things, cases may arise where the matter is not simply and without complication a municipal affair, but where partaking of the characteristics of a municipal affair in that the municipality is interested therein it may essentially be much more than merely a municipal affair. Illustrative of this is the recent case of Civic Center Ass'n v. Railroad Commission, No. 5028, June 11, 1917, 166 Pac. 351. Thus it is quite apparent that a municipality and a municipality alone, may be injuriously affected by the unrestrained floods of some innavigable stream. Upon the other hand, the injurious effects may reach far beyond the boundaries of the municipality and even of the county, and in the latter class of cases it is more than a municipal affair. It is an affair in which the state becomes interested, and it does no violence to the reserved rights of municipalities to say that in such cases the state directly or through its mandatories may take steps to correct the evil and in so doing compel lands within municipalities to bear their due proportion of the burden. As this appeal presents but the complaint alone it is unneces-

sary to say more than this, for the point is not made in the complaint nor urged in argument that the work proposed to be done lay wholly within the corporate boundaries of the city of Pasadena.

[4, 5] 4. Respondents next contend that the work was prematurely done without warrant of law and that, therefore, no valid assessment in payment for it can be levied. The consideration of this necessitates setting forth at some length the provisions of the statute bearing on the question. They are sections 6, 15, and 16 of the act as amended in 1911. Section 6, so far as necessary to this consideration, declares as follows:

> "As soon as said district is formed, the board shall cause a survey of the contemplated improvements to be made, or adopt a survey already made, and shall also cause a map of such survey, and plans and specifications showing such improvements in detail, to be prepared, and *they shall adopt such survey, maps, plans and specifications, and thereafter all such improvements shall be made in accordance with the survey, maps, plans and specifications so adopted:* Provided, that at any time after the adoption of said survey, map, plans and specifications, and before the commissioner's report of assessment of benefits and award of damages has been finally adopted and confirmed by the board, said board may rescind their action in adopting said survey, map, plans and specifications, and may modify the same or adopt others in place thereof, in which case a new assessment shall be made, or may, by a four-fifths vote of the members thereof, abandon the contemplated improvement and dissolve the said protection district, in which case the expenses * * * incurred in behalf of such district shall be a county charge."

The italics are employed the better to call attention to appellants' construction of the statute.

Section 15 provides:

> "The report of such commissioners and the plat accompanying it shall be filed with the clerk of the board of supervisors, and said board shall thereupon fix a time for the hearing thereof, which shall not be less than four weeks after the filing thereof, and thereupon the clerk of said board shall give notice of such hearing by publication for at least three weeks in a newspaper of general circulation published and circulated in the said district, if such there be, or if there is no such newspaper, then in some newspaper of general circulation published in one of the counties in which said district is situated, said newspaper to be designated by the board."

Next follows the form of notice which is required to contain a declaration in terms as follows:

> "All persons interested are hereby required to show cause, if any they have, at the time fixed for said hearing, why such report should not be adopted and confirmed by said board of supervisors, and the improvements therein referred to constructed. All objections shall be in writing, signed by the person objecting, and filed with the clerk of said board at or before the time above mentioned."

Section 16 is in the following language:

> "Any person interested may file with the clerk of said board, at or before the time fixed for the hearing, a written objection to said report or any part thereof, or to the survey, map, plans, or specifications for the proposed improvements, or to the making of such proposed improvements. At the time fixed for such hearing or at any other time to which the hearing may be adjourned, the board of supervisors shall hear all objections so filed, if any, and pass upon the same, and shall proceed to pass upon such report, and may confirm, correct or modify the same, or may take such action in regard to the survey, map, plans and specifications as is authorized by section 6 of this act, or may order the commissioners to make a new assessment, report and plat, which shall be filed, heard and acted upon in the same manner and on like notice, as in the case of an original report. The action of the board upon the report and objections thereto, and upon the survey, map, plans and specifications, shall be final and conclusive as to all matters which they might have remedied or avoided; and no assessment shall be set aside, except upon such hearing, for any error, defect or informality therein or in the proceedings prior thereto, where the district has been legally formed and notice of the hearing of the report has been given as herein prescribed. When such report has been adopted and confirmed, said board may by order entered upon its minutes discharge said commissioners, and their authority shall thereupon cease."

The facts alleged in the complaint are that the work was all done prior to the making of the report of the commissioners and prior to the giving of any notice for a hearing upon those questions as to which the statute says the property owners may be heard. In support of the legality of the action of the board of supervisors in this respect appellants advance several propositions. (a) They contend that there is a conflict between the provisions of section 6 and sections 15 and 16, and that the portion of section 6 above italicized is controlling. Under no possible view can this be true: First, because the sections are to be read together and harmonized if possible, and such harmonization is quite possible. So harmonized and considering that the declaration in section 6 to the effect that the board of supervisors shall adopt such survey, maps, etc., is immediately followed by a most important limiting proviso, it is plain that section 6 contemplates merely a tentative and not a final adoption, an adoption amounting to nothing more than the supervisors' approval of the plans, etc.; and, second, because the subsequent sections 15 and 16 deal expressly and with great particularity with this precise question, and being a later expression control the general language previously used. (b) Appellants contend that the provisions of sections 15 and 16 are directory merely, and that a failure to comply at all or a failure to comply with them before the work is done, the provisions not being mandatory, does not invalidate the proceedings, herein supporting their contention by the following from 1 Elliott's Roads and Streets, § 614:

> "*Remonstrance by Property Owners.* Property owners whose property is assessed for the improvement must have notice and an opportunity to be heard at some stage of the proceedings; but where the question of the necessity or advisability of the improvement is left to the discretion of the local authorities it is not necessary that they should be given the right to remonstrate or to be heard upon that question, and it has been held that the failure to give them notice of the preliminary resolution of necessity and an opportunity to remonstrate and be heard upon that question does not render the

> proceedings absolutely void, although the statute provides for a remonstrance and a hearing thereon."

But this quotation, as well as another from Dillon (4 Municipal Corp. p. 2363), upon which appellants rely, have to do with the general subject of the constitutionality or unconstitutionality of the acts themselves, and have reference to the requisites which such acts must contain before they can be declared constitutional. The learned authors are not there discussing, though they do elsewhere, the effect of noncompliance with the rights given to property owners by the acts themselves and that is the only question here before us. Thus the quotation above given from Elliott is supported by the citation of two cases from Indiana (Barber, etc., Paving Co. v. Egerton, 125 Ind. 455, 25 N. E. 436; Bozarth v. McGillicuddy, 19 Ind. App. 26, 47 N. E. 397, 48 N. E. 1042), but in his footnote Mr. Elliott points out that by the vast weight of authority the principle and the rulings are to the contrary, and at volume 1, § 615, he says, in terms:

> "The right to file an effective remonstrance, as well as the effect it shall have, depends upon the governing statute."

And again, in section 666, he says:

> "It has been held that provisions of a statute delegating the authority to levy local taxes or assessments may, under the general rule upon the subject of mandatory and directory statutes, be considered as directory and not mandatory. The doctrine that the courts have a right to disregard the words of a statute upon the ground that they are merely directory is, at best, not easily defended; at all events, it is one that should be cautiously applied to cases where authority to impose a special burden upon the citizen is granted by the Legislature. In such cases it is difficult, if not impossible, for the courts to determine what the Legislature deemed important, and what immaterial, and the true course would seem to be to regard all the provisions as mandatory."

We have gone into the matter with this particularity only that it might not be thought that appellants' argument has been overlooked, but in truth our own decisions are convincing and conclusive upon the question, and here preliminarily it may not be amiss to remark that no court of last resort before which has come questions growing out of benefit assessments has failed to note and deplore the grave injustice and wrong which are frequently perpetrated upon the property owner and which the courts themselves regret their inability to redress. Reclamation Dist. v. Birks, 159 Cal. 233, 113 Pac. 170; Spring St. Co. v. Los Angeles, 170 Cal. 24, 148 Pac. 217. It is true that the rule that tax proceedings are in invitum, and that the methods prescribed shall be strictly followed has latterly been much relaxed, in some instances by force of statutes, in others by judicial interpretation. And this is so because anciently taxes were most unjustly and oppressively levied without regard to the equitable considerations of reasonableness and uniformity. It was to protect the property owner against onerous, inequitable, and unjust burdens that courts went to the extreme of invalidating assessments or levies for the lack of a dotted i or a crossed t, a decimal point or prefixed dollar mark. But as progressively the taxing power has aimed at equality, reasonableness, uniformity, and justice, so have the stringent rules been relaxed and courts generally and this court in particular in cases of general taxation will, wherever possible, refuse relief to a complaining taxpayer unless he has done or tendered equity, has paid or offered to pay, the amount fairly chargeable against him as a tax. But this relaxation has never reached the point even when the question is one of general taxation, far less than when it is one of special taxation for assumed benefits, of declaring that any provision which the law declares for the protection of the property owner the authorities may deprive him of and call the provision directory merely. While our authorities to this effect are numerous and some will be cited, we will content ourselves with quoting a late declaration of this court in Chase v. Treasurer, 122 Cal. 540, 55 Pac. 414. That was an action to enjoin the sale of plaintiff's property on a street assessment bond, and this court said:

> "'In proceedings where the property of a citizen is to be taken, every requirement of the statute having the least semblance of benefit to the owner must be complied with.' No one can doubt that the purpose of notice is to give the owner of property an opportunity to object to the proposed work, and that notice is for his benefit and is of benefit. Here the act required the council to designate the newspaper, and the ordinance directed the publication to be made in that paper. It was, we think, mandatory upon the council to designate the paper, and, being so, a publication in some paper not designated would not be a compliance with the statute, and would in effect be no publication."

And to the same effect are Haskell v. Bartlett, 34 Cal. 281; Dougherty v. Hitchcock, 35 Cal. 512; Hewes v. Reis, 40 Cal. 263; Burke v. Turney, 54 Cal. 486; Mulligan v. Smith, 59 Cal. 206; Brock v. Luning, 89 Cal. 317, 26 Pac. 972; Manning v. Den, 90 Cal. 614, 27 Pac. 435; Warren v. Chandos, 115 Cal. 382, 47 Pac. 132; Cal. Impr. Co. v. Quinchard, 119 Cal. 87, 51 Pac. 24; Kelso v. Cole, 121 Cal. 121, 53 Pac. 353; San Diego Investment Co. v. Shaw, 129 Cal. 273, 61 Pac. 1082.

Lent v. Tillson, 72 Cal. 412, 14 Pac. 71, upon which appellants place reliance is no wise in point for the reason above given. Its consideration is directed to the constitutionality of the act in not providing for due process of law. It did not deal with the question of the noncompliance with statutory requirements for the giving of notices.

After consideration of these legal principles coming next to a contemplation of the statute itself it must at once be apparent that to the property owner the notice with provision for a hearing is of very real significance. It is his one opportunity to correct errors, suggest improvements, and secure modifications of the plans. More than this, it gives him an opportunity by successful argument to secure a total abandonment of the contemplated improvements and the dissolution of the protection district. To say that in being denied these rights he is not injured because he may come before the board and protest after the work is done and his cause thus prejudged without a hearing is preposterous. As well might it be argued that a man under sentence of death and denied his right of appeal is not injured by his execution because perhaps his personal representatives might thereafter be allowed to prosecute that appeal and vindicate his memory.

[6] 5. Appellants urge an estoppel in pais against respondents as having stood by and without taking proper action allowed the improvement to be completed. Indisputably unless the facts establishing such an estoppel appear upon the face of the complaint itself the defense is not available to appellants without special plea by answer. Burk v. City of Santa Cruz, 163 Cal. 807, 127 Pac. 154. No such facts appear in the complaint. The only notice which the complaint declares and the only proceedings with knowledge of which plaintiffs are charged amount to no more than information that certain work was to be done. This work was the "construction of a conduit, pipe or gutters to carry off the storm waters from the Rubio Canyon Wash." This did not charge these plaintiffs with knowledge of the nature or place of construction. Sections 2643a, 4042, and 4043 of the Political Code provide for the doing of precisely the work above mentioned by the supervisors without the formation of an assessment district, paying therefor when necessary by a special tax. There is nothing in the complaint that charges the plaintiffs with knowledge that the work was not so done. In brief, this defense was only open to the appellants by plea, and they refused to avail themselves of their opportunity. Certainly, no estoppel is shown by the complaint. Hewes v. Reis, 40 Cal. 255; Manning v. Den, 90 Cal. 610, 27 Pac. 435; Heft v. Payne, 97 Cal. 108, 31 Pac. 844; Warren v. Chandos, supra; Chase v. Treasurer, supra.

6. There was no misjoinder of parties plaintiff. Code Civ. Proc. § 378; Churchill v. Lauer, 84 Cal. 233, 24 Pac. 107; Toomey v. Knobloch, 8 Cal. App. 585, 97 Pac. 529; Woollacott v. Meekin, 151 Cal. 706, 91 Pac. 612.

[7] 7. The argument that this is not a proper case for an injunction calls for no detailed consideration. It is an effort to prevent the cloud of a colorable lien being cast upon the plaintiffs' property. It is not such a case as Crocker v. Scott, 149 Cal. 575, 87 Pac. 102, where the lien was in fact imposed and an injunction was denied because of this circumstance coupled with the additional one that it would work a grave interference with the orderly collection of the general revenues of the state. To the contrary, this case is in principle like the case of Southwick v. Santa Barbara, 158 Cal. 14, 109 Pac. 610, Chase v. Treasurer, supra, Woollacott v. Meekins, supra, and Toomey v. Knobloch, supra, where injunctions were granted.

The judgment appealed from is therefore affirmed.

We concur: ANGELLOTTI, C. J.; MELVIN, J.; SLOSS, J.; LORIGAN, J.

175 Cal. 464

NOLEN v. F. O. ENGSTRUM CO.

(L. A. 3990.)

(Supreme Court of California. June 14, 1917.)

1. Master and Servant ⟹116(1) — Safe Place to Work.

It was the duty of an employer to make a scaffold strong enough to sustain the weight of workmen required to go upon it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 207.]

2. Master and Servant ⟹204(1)—Employers' Liability Act—Assumption of Risk.

Under St. 1911, p. 796, the Employers' Liability Act, a servant did not assume the risk arising from the dangers of the place in which he was to work or of the dangers incident to his service.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 544.]

3. Master and Servant ⟹265(5)—Injuries to Servant—Negligence—Evidence.

The fact that while a servant was at work on a scaffold it fell and precipitated him to the ground was sufficient evidence that the scaffold was defectively constructed; the doctrine of res ipsa loquitur applying.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 881, 898, 955.]

4. Master and Servant ⟹278(9)—Injuries to Servant—Negligence—Evidence.

From the testimony of a servant, injured while working on a scaffold, that he felt the supports giving way at the time of falling, there is a reasonable inference that the supports were insufficient, either because too weak or insufficiently nailed.

5. Master and Servant ⟹291(1)—Injuries to Servant — Instruction — Unintelligibility and Confusing Character.

In a servant's action for injuries, an instruction that, if the jury believed that either one of alleged acts of negligence were proven, they should return verdict for plaintiff, if they found such negligence was the proximate cause of the accident, and that plaintiff's negligence did not contribute, was not misleading as unintelligible and confusing.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1133.]

6. Master and Servant ⟹185(5)—Injuries to Servant — Negligence of Corporate Employer.

The negligence of a corporation's servants in constructing an insufficient scaffold for another employé of the company was in law the corporation's negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 390.]

7. TRIAL ⚿251(8) — INSTRUCTION — APPLICABILITY TO PLEADING.

In a servant's action for injuries, an instruction that the negligent acts of defendant corporation's servants were the negligent acts of the corporation itself, limiting its application to the acts of negligence "in the manner complained of," i. e., in the manner set forth in the complaint, was not erroneous as authorizing the jury to find for plaintiff if they believed that any employé of defendant had been negligent in some particular unconnected with the injury or with the allegations of the complaint.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 593.]

8. APPEAL AND ERROR ⚿1004(4)—REVIEW—EXCESSIVE VERDICT.

In a servant's action for injuries, the Supreme Court will not interfere with verdict for plaintiff on the ground that damages are excessive even if it supposes that the lower court might have reduced the verdict in furtherance of justice, where the evidence shows serious injury and severe and prolonged suffering and pain, since the court interferes only when the damages are so exorbitant as to suggest, at first blush, passion, prejudice, or corruption of the jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3946.]

Department 1. Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by A. J. Nolen against the F. O. Engstrum Company. From judgment for plaintiff and an order denying its motion for new trial, defendant appeals. Judgment and order affirmed.

Ben Goodrich, of Los Angeles, for appellant. Crouch & Crouch, of Los Angeles, for respondent.

SHAW, J. The defendant appeals from the judgment and from an order denying its motion for new trial.

The plaintiff recovered judgment for damages alleged to have been caused by the defendant's negligence. The complaint alleges that the plaintiff was employed by defendant to work as a carpenter in a building which the defendant was erecting, and was put to work upon a scaffold constructed in the building as a place upon which the workmen were to stand when at work on the building; that while plaintiff was so engaged the scaffold gave way, in consequence whereof he fell and received the injuries complained of. It is alleged that the defendant carelessly allowed the boards of the scaffold to become misplaced so that they would not support the plaintiff's weight; that because of defendant's neglect the braces supporting the scaffold were not sufficiently nailed and were not of sufficient strength, in consequence whereof they would not sustain the weight of the men put to work thereon; that the defendant had negligently failed to provide sufficient light to enable the plaintiff to see whether or not the boards of the scaffold were properly laid or supported; and that all of said acts of negligence caused plaintiff's injury.

[1] The defendant claims that there was no evidence of its negligence in the particulars charged in the complaint. This claim is without foundation. It was the duty of the defendant to make the scaffold strong enough to sustain the weight of the workmen who were required to go upon it. Reasonable care required this.

[2-4] Under the law in force when the accident happened the plaintiff did not assume the risk arising from the dangers of the place in which he was at work. Stats. 1911, p. 796. Scaffolds built for such purposes do not usually break or fall with the weight of the workmen, if properly constructed. The fact that while the plaintiff was at work upon the scaffold it fell and precipitated him to the ground was of itself sufficient evidence that the scaffold was defectively constructed. The plaintiff testified that he felt the supports giving way at the time of falling. From this there would be a reasonable inference that the supports were insufficient, either because they were too weak to sustain the weight, or because they were not sufficiently nailed. The doctrine of res ipsa loquitur applies. Penson v. Island, etc., Co., 73 Wash. 338, 132 Pac. 39, L. R. A. 1915F, 15; O'Connor v. Mennie, 169 Cal. 217, 146 Pac. 674.

There is no merit in the objections made to the rulings in giving or refusing instructions. Instruction No. 7, asked by defendant and refused, was erroneous because it declared that the plaintiff assumed the ordinary risk incident to the service in which he was engaged. As we have said, the doctrine that the workman assumes the risk of the dangers incident to his service and place of work was not at that time in force.

[5] It is claimed that instruction No. 12 given by the court was unintelligible and confusing. In effect it stated that, if the jury believed that either one of the alleged acts of negligence were proven, they should return a verdict for the plaintiff, if they found that such negligence was the proximate cause of the accident, and that plaintiff's negligence did not contribute thereto. We see nothing in this which would tend to mislead or confuse the jury.

[6, 7] Instruction No. 13 stated that the negligence of any employé of a corporation while acting in the ordinary scope of his duties is deemed in law to be the negligence of the corporation itself, and that, if the jury should find that the plaintiff was injured by any negligent act or omission of any employé in the manner complained of, while such employé was engaged in the scope of his duties, the plaintiff would be entitled to a verdict unless his own negligence contributed to the injury. It is not true that there was nothing in the evidence to warrant this instruc-

tion. There was a claim that the plaintiff himself had constructed the scaffold in question. His own testimony was that he had not done so and had no knowledge on the subject. It was the duty of the defendant to provide the scaffold in question. Being a corporation, it could act only by agents and servants. The instruction properly directed the jury that the negligence of such servants in constructing an insufficient scaffold was in law the negligence of the defendant. The criticism that the instruction authorized the jury to find for the plaintiff if they believed that any employé had been negligent in some particular unconnected with the injury or with the allegations of negligence in the complaint is unwarranted. The instruction itself limited its application to the acts of negligence "in the manner complained of"; that is, in the manner set forth in the complaint.

[8] The question of excessive damages is one which is first addressed to the trial court. The evidence shows a serious injury, and very severe and prolonged suffering and pain ensuing therefrom. Under these circumstances it is not for this court to interfere with the verdict, even if we supposed that the lower court might perhaps have reduced it in furtherance of justice. This court interferes only when the damages are so exorbitant "as to suggest, at the first blush, passion or prejudice or corruption on the part of the jury." Hale v. San Bernardino, etc., Co., 156 Cal. 715, 106 Pac. 83.

The judgment and order are affirmed.

We concur: VICTOR E. SHAW, Judge pro tem.; SLOSS, J.

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175 Cal. 433

GAYLORD v. CITY OF PASADENA et al.

(L. A. 3618.)

(Supreme Court of California. June 11, 1917.)

1. Electricity 🔑1 — Inspection — Delegation of Powers.

In determining whether the city council's delegation of duties and powers as to electrical equipment was warranted, the controlling consideration is, not that the power may be unreasonably or oppressively exercised, since every presumption is that it will be honestly and reasonably exercised.

2. Electricity 🔑1 — Inspection — Delegation of Powers by City.

Pasadena ordinance, requiring repairs to electrical equipment in private houses on written notice of the city electrician, if he determines that the equipment is dangerous to life or property without specifying the tests by which he shall determine such question, is not void as unwarrantedly conferring upon the city electrician judicial or legislative powers, nor because its terms are indefinite, arbitrary, or oppressive.

3. Injunction 🔑7—Relief Awarded.

Although in equity the court in making its decree adapts its relief to the state of facts existing at the close of the litigation, where an ordinance the enforcement of which it is sought to enjoin is amended so as to confer a right of appeal from the city electrician to the council, the plaintiff's mere failure to appeal does not foreclose his right to resort to the courts to restrain enforcement of the ordinance on the ground that it is void.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 6, 34.]

In Bank. Appeal from Superior Court, Los Angeles County; Chas. Wellborn, Judge.

Bill by Robert H. Gaylord against the City of Pasadena and others. From an order enjoining certain acts of defendants, they appeal on the judgment roll. Affirmed.

John Munger and J. H. Howard, both of Pasadena, for appellants. Porter & Sutton, of Los Angeles, for respondent. Percy V. Long and Maurice T. Dooling, Jr., both of San Francisco, amici curiæ.

HENSHAW, J. The city of Pasadena adopted an ordinance by virtue of the unquestioned power so to do conferred by its charter. It dealt with electricity, electric wires, and electrical appliances to be installed in buildings within the city. In recognition of the fact that many buildings were already equipped with such wires and appliances, it provided that whenever the city electrician should find any electrical wiring, connections, fixtures, appliances, apparatus, machinery, equipment or work installed which was dangerous to life or property, he should in writing notify the owner to cease using electrical current in or through such electrical wiring, and to have the indicated defects repaired within a reasonable time, not exceeding ten days. This notice to the owner was required to be in writing, and to specify the particulars in which the electrical installation was defective, and further to specify the necessary steps to be taken to remedy the defects. An appeal was provided from this determination of the city electrician to the city council, and if no appeal was taken, or if the city council upheld the determination of its city electrician, then within five days after the expiration of the time for appeal, or within five days after the council's ruling refusing to sustain the appeal, if the repairs were not made by the owner, the city electrician was to serve written notice upon the firm or corporation furnishing such electrical current to cease supplying it until such defects had been corrected. The provision touching the right to appeal from the ruling of the city electrician to the city council was added to the original ordinance by amendment, and it was before the trial court at the time of its hearing of this controversy.

This action was brought by a disaffected property owner upon whom such a notice had been served. He averred that the electric wiring in his house was in a good, safe, and proper condition, and that the ordinance was void, and he prayed an injunction restraining the city authorities, who are the defendants herein, from enforcing the ordinance against him. The court found the electrical apparatus in plaintiff's residence to be in a safe and proper condition, and not dangerous to life or property. It found the ordinance under consideration to be void "in so far as it purports to confer arbitrary power upon the city electrician to determine in the first instance whether or not any electric wiring, connections, fixtures, etc., are dangerous to life and property." As matter of law it concluded that the sections of the ordinance conferring this power were void, and granted plaintiff a permanent injunction as prayed for.

We do not understand that respondent contends, or that the court held, that if the municipal council of the city of Pasadena had gone in a body and had inspected the premises, and from this inspection had determined that the indicated defects existed, or even if sitting in a quasi judicial capacity they had taken the evidence of their city electrician, and upon that had found that these defects existed, and had thereupon directly served upon the property owner the notice which the city electrician served upon him, any violence would have been done to the law or to respondent's constitutional rights. The unwarranted, arbitrary, and illegal exercise of power, then, is found to lie in the fact that the city electrician was permitted, as the authorized agent of the city council, to pass his judgment and make his determination upon the question, and further because in passing his judgment and in making his determination he was inadequately controlled by specifications limiting his power, those specifications not particularizing what he must find before he could declare that the electrical appliances were dangerous to life or property, but leaving to the exercise of his discretion the determination whether or not in a given instance they were so dangerous to life or property.

This fairly presents the controversy. In support of the court's judgment reliance is placed upon In re Dart, 172 Cal. 47, 155 Pac. 63, L. R. A. 1916D, 905. But the broad distinction between the two cases will become at once apparent when it is pointed out that the Dart Case dealt with the control of charitable institutions and charities, and the decision of this court went, not alone to the unreasonable and arbitrary grant of power conferred by ordinance upon a charity commission, but to the fundamental proposition that the city council of Los Angeles had empowered this board to do acts which the city council itself, though as the source of power, could not legally do, while here we have manifestly the case of acts which the city council of Pasadena could legally do, and the only objection to the ordinance is that the council has conferred a certain power of direction and control upon one of its agents, which power of direction and control it is declared is arbitrary and unreasonable.

Even a casual observer of governmental growth and development must have observed the ever-increasing multiplicity and complexity of administrative affairs—national, state, and municipal—and even the occasional reader of the law must have perceived that from necessity, if for no better grounded reason, it has become increasingly imperative that many quasi legislative and quasi judicial functions, which in smaller communities and under more primitive conditions were performed by the legislative or judicial branches of the government, are intrusted to departments, boards, commissions, and agents. No sound objection can longer be successfully advanced to this growing method of transacting public business. These things must be done in this way or they cannot be done at all, and their doing, in a very real sense, makes for the safety of the republic and is thus sanctioned by the highest law. For, as the Supreme Court of the United States declares:

> "Indeed, it is not too much to say that a denial to Congress of the right, under the Constitution, to delegate the power to determine some fact or the state of things upon which the enforcement of its enactment depends would be 'to stop the wheels of government' and bring about confusion, if not paralysis, in the conduct of the public business." Union Bridge Co. v. U. S., 204 U. S. 364, 27 Sup. Ct. 367, 51 L. Ed. 523.

[1] Since, as has been said, the city council of Pasadena would have in any proper case the unquestioned right under the exercise of its police powers to compel a householder to make good the electric appliances upon his premises, the present problem narrows itself down to a determination whether or not in the method which they adopted they conferred upon a subordinate officer or agent unreasonable powers, and herein the controlling consideration is not that the power conferred may be unreasonably or oppressively exercised, for every presumption is that it will be honestly and reasonably exercised. "Laws are not made upon the theory of the total depravity of those who are elected to administer them; and the presumption is that municipal officers will not use these small powers villainously and for purposes of oppression and mischief." In re Flaherty, 105 Cal. 562, 38 Pac. 981, 27 L. R. A. 529; Ex parte McManus, 151 Cal. 331, 90 Pac. 702; Rode v. Siebe, 119 Cal. 520, 51 Pac. 869, 39 L. R. A. 342. Therefore, eliminating the possibility of an unjust and oppressive use of the power against which the courts will interfere (New York v. Van de Carr, 199 U. S. 552, 26 Sup. Ct. 144, 50 L. Ed. 305; Yick Wo v. Hopkins, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220), the question is, Can it be justly said that this delegated power is either in its terms illegally oppressive or in its terms lacks definiteness, thus allowing too great a play to the discretion of the city electrician? That an official charged with

such a duty as this may, and indeed must, exercise discretion precisely as he may or must exercise judgment is, of course, true, but this fact in no way militates against the validity of the law, for, as said in the Van de Carr Case, supra:

> "The authority sustained is the grant of power to issue or withhold permits in the honest exercise of a reasonable discretion."

A brief review of a few of the many cases will illustrate the nature and extent of powers exercised by inferior tribunals and officers whose grants of power have been upheld. The most familiar to which no citation of authority is necessary are the extraordinary grants of power, without express constitutional authority, by Congress and state Legislatures to interstate commerce and to railroad commissions. While recognizing that the Congress of the United States is the sole lawmaking power for all of its territory, the Supreme Court of the United States has held that the creation by Congress of a commission and the vesting in that commission of power to maintain a government in the Philippine Islands and to make necessary laws for that purpose was not an unconstitutional surrender by Congress of its legislative powers or an unconstitutional transference of those powers to an inferior board. Dorr v. U. S., 195 U. S. 138, 24 Sup. Ct. 808, 49 L. Ed. 128, 1 Ann. Cas. 697; U. S. v. Heinszen & Co., 206 U. S. 370, 27 Sup. Ct. 742, 51 L. Ed. 1098, 11 Ann. Cas. 688. A law of the state of Michigan which created a registration board of physicians empowered the board to say what physicians were duly and legally registered, and to forbid the practice of the profession to those not duly registered, was not, as held by the Supreme Court of the United States, an illegal nor unreasonable delegation of power; the court further saying that due process of law is not necessarily judicial process, and that the right of appeal is not essential to due process of law. Reetz v. Michigan, 188 U. S. 505, 23 Sup. Ct. 390, 47 L. Ed. 563. An act of Congress investing the Secretary of War and his subordinates with power to determine and declare whether a bridge over navigable waters is an unreasonable obstruction to navigation and to order its alteration or removal is a reasonable delegation of power, since Congress may clothe an executive officer with power to ascertain whether certain specific facts exist, and thereupon to act in a prescribed manner without in so doing granting in an unconstitutional sense legislative or judicial powers to such an officer. Monongahela Bridge Co. v. U. S., 216 U. S. 177, 30 Sup. Ct. 356, 54 L. Ed. 435. In the same way Congress, prescribing the qualifications necessary for aliens to possess to entitle them to admission, may lawfully delegate to executive officers the determination whether or not those qualifications exist. Turner v. Williams, 194 U. S. 279, 24 Sup. Ct. 719, 48 L. Ed. 979. And while inferior boards of tribunals cannot be invested with power to compel obedience to their orders or regulations by fine or imprisonment (Interstate Comm. Comm. v. Brimson, 154 U. S. 447, 14 Sup. Ct. 1125, 38 L. Ed. 1047) nevertheless it is within the power of Congress to authorize them to make such reasonable regulations and orders and itself to declare that a violation of them shall be punishable as a misdemeanor. U. S. v. Grimaud, 220 U. S. 506, 31 Sup. Ct. 480, 55 L. Ed. 563; Light v. U. S., 220 U. S. 523, 31 Sup. Ct. 485, 55 L. Ed. 570. The requirements of the state Legislature that no milk shall be received for sale or delivery to the city of New York without a permit in writing from the board of trade and subject to the conditions of such permit is a reasonable delegation of authority (New York v. Van de Carr, supra); and like delegated powers of censorship in permitting or prohibiting the display of moving picture films are held valid (Mutual Film Corp. v. Indiana Comm., 236 U. S. 230, 35 Sup. Ct. 387, 59 L. Ed. 552, Ann. Cas. 1916C, 296; Id., 236 U. S. 247, 35 Sup. Ct. 393, 59 L. Ed. 561; Mutual Film Corp. v. Hodges, 236 U. S. 248, 35 Sup. Ct. 393, 59 L. Ed. 561).

[2] It would unduly and unnecessarily prolong this consideration to cite the like adjudications which have been handed down by the state courts, and we may come immediately to a brief consideration of the ordinance before us. It does not define what conditions the city electrician must find to exist before he determines that the electrical apparatus is unsafe or dangerous. From the very nature and character of such apparatus it would be impossible for any ordinance so to do without working in many instances the very oppression which its language, necessarily general, is designed to prevent. As we have said, it is presumed that the city electrician will act fairly. It is also presumed that he is competent. An unnecessary liberality is shown in this ordinance in conferring, as it does, a right of appeal to the council, for the ordinance, if good at all, would unquestionably be good without such right of appeal, and the householder, conceiving himself to be injured, would be left to his action in court. This ordinance is peculiarly like the North Carolina statute construed by the Supreme Court of the United States in Red C Oil, etc., Co. v. Board of Ag. of N. C., 222 U. S. 380, 32 Sup. Ct. 152, 56 L. Ed. 240. The statute required only that illuminating oils "be safe, pure, and afford a satisfactory light," and gave to the state board of agriculture the power to establish rules and regulations and to determine what oils measured up to standard. The Supreme Court of the United States declared that this was not an illegal grant of legislative or judicial power and the requirements of the statute that illuminating oils should be "safe, pure and afford a satisfactory light established a 'sufficient primary standard.'" The matter is concisely and clearly stated in 2 Dillon (Mun.

Corp., 5th Ed.) § 598, where, discussing the question, he says:

> "The fact that the dispensing power was apparently valid without restraint or qualification has been regarded as arising merely from the difficulty of defining in advance upon what conditions the permit shall be given or the dispensing power exercised."

It is concluded, therefore, that the ordinance here under consideration is not void as unwarrantedly conferring upon the city electrician judicial or legislative powers, nor yet void because its terms are either indefinite, arbitrary, or oppressive. Ex parte Fiske, 72 Cal. 125, 13 Pac. 310.

[3] The court, as has been said, not only decreed the ordinance to be void in the particulars discussed, but found also that plaintiff's premises were not in an unsafe or dangerous condition. As has also been said, plaintiff was within his rights in resorting to the court for a determination of this question, and the finding of the court amounts to a declaration that in this particular instance the power of the city electrician was unjustly and oppressively used. This finding is sufficient to support the judgment, but only in so far as it relieves the plaintiff from the necessity of complying with the directions of the city electrician touching necessary changes and repairs. The argument of appellant that equity acts upon conditions as it finds them at the time of entering its decree, and that before this decree was entered an appeal to the city council was open to the plaintiff, and that for his failure to avail himself of this appeal he has lost his right to resort to the courts for relief, while well founded in principle, does not meet the situation here presented, where it was apparently not shown and certainly not found that the respondent was advised of this amended ordinance at such a time and under such circumstances as called upon him to avail himself of the permissive appeal to the council which it gave.

As the finding that plaintiff's electrical wiring and apparatus are not dangerous to life and property and are in a reasonably safe and proper condition is sufficient to support the judgment given, upon this ground, and upon this ground alone, it is affirmed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; SHAW, J.; MELVIN, J.; LORIGAN, J.

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175 Cal. 441

CIVIC CENTER ASS'N OF LOS ANGELES et al. v. RAILROAD COMMISSION OF CALIFORNIA. (L. A. 5028.)

(Supreme Court of California. June 11, 1917. Rehearing Denied July 9, 1917.)

RAILROADS ⟹99(4)—GRADE CROSSINGS—ESTABLISHMENT—POWER OF RAILROAD COMMISSION.

Const. art. 11, § 6, provided that all charters adopted under the Constitution, except in municipal affairs, should be subject to general laws, and, as amended in 1914, cities theretofore organized were authorized to amend their charters so as to enforce all laws as to municipal affairs. By a charter amendment in 1916, the city of Los Angeles obtained freedom from interference by general law. Const. 1879, art. 12, § 17, declared all railroads to be common carriers subject to legislative control. Section 22, as amended, provided that the authority of the Legislature to confer additional powers upon the Railroad Commission should be plenary and unlimited by any provision of the Constitution. Section 23, as amended, gave the Railroad Commission power to fix rates in municipalities, but did not impair the powers of the municipalities until such powers had been relinquished by popular vote. Public Utilities Act 1915 (St. 1915, p. 115) provides that the railroad commission shall have exclusive power to determine the manner of maintenance of grade crossings, and to alter or abolish them. *Held*, that the establishment of viaducts and the abolition of grade crossings of railroads running into the city of Los Angeles, being matters of public concern and not municipal affairs merely, and the power of the city in such respect being subject to control by general law, it was within the authority of the Railroad Commission to order the city to abolish such crossings.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 297, 300–303.]

In Bank. Application by the Civic Center Association of Los Angeles and others against the Railroad Commission of the State of California for mandamus. Writ granted.

Marshall Stimson and T. E. Gibbon, both of Los Angeles (Corbet & Selby, of San Francisco, of counsel), for plaintiffs. Douglas Brookman and Max Thelen, both of San Francisco, for defendant. Albert Lee Stephens, City Atty., and Chas. S. Burnell, Asst. City Atty., both of Los Angeles, amici curiæ.

SHAW, J. This is an application for a writ of mandate against the Railroad Commission to compel it to hear and determine the complaints of the plaintiffs, asking that the several railroads entering the city of Los Angeles be required to abolish grade crossings and establish and use a common union depot within said city.

Sections 60, 61, and 62 of the Public Utilities Act of 1915 provide that any corporation or person, municipal corporation, body politic, or any civic, commercial, or mercantile association may complain in writing to the Railroad Commission, "setting forth any act or thing done or omitted to be done by any public utility," that thereupon said Commission shall fix the time for the hearing of such complaint and give notice thereof to the public utility complained of, and that upon such hearing the Commission shall render its decision and order concerning the matter complained of. Stats. 1915, p. 157. Section 67 of said act provides that the writ of mandamus shall lie from the Supreme Court to the Commission in all proper cases.

In July, 1916, the three plaintiffs herein, in pursuance of these provisions, each filed a complaint with the Railroad Commission against the Southern Pacific Company, the Atchison, Topeka & Santa Fé Railway, and San Pedro, Los Angeles & Salt Lake Railroad Company. Each of these companies owns and operates an extensive system of railways, embracing several hundred miles of track in the state of California, each line running from other states into California and passing through the city of Los Angeles. Each company maintains in said city, on its own track, passenger and freight depots for its own use. The tracks running to each of these depots from outside the city cross numerous streets of the city of Los Angeles on the same level as the streets. These are the grade crossings referred to in the respective complaints made to the Commission. The Commission fixed the hearing for September 15, 1916, and gave due notice to the three railroad companies complained of. On October 21, 1916, the Commission decided that it had no jurisdiction over the streets of the city of Los Angeles, or over said railroads to direct them to cross the same by subways or viaducts below or above the street grades, and refused to proceed further in the matter.

It is proper to say that the members of the Commission believed that it had such jurisdiction, and that they took this course in order to bring about a speedy and authoritative determination of the question, being advised that the complainants would seek a writ of mandate to compel the Commission to hear and determine the matters in controversy. Accordingly this complaint was filed, praying this court to issue a writ of mandate commanding said Commission to proceed to hear and determine said complaints upon the merits.

The city of Los Angeles was not made a party to this proceeding. The city attorney has been allowed to appear, as amicus curiæ, on behalf of said city, however, and has filed briefs in opposition to the writ prayed for, so far as the crossings of the railroads above or below the streets are concerned. He concedes that the Railroad Commission has jurisdiction and power to order the several railroads above named to establish and maintain a common depot, and to cease the use of their respective depots as heretofore established and maintained. He contends that the Railroad Commission has no power to regulate or interfere with the use of public streets within the city of Los Angeles, that the exclusive control of such streets and railroad crossings is vested in said city, and that any order the Railroad Commission may make, directing the establishment or maintenance of crossings, on, above, or below grade, of any street in the city of Los Angeles would be subject to the power of the city to control and regulate the use of such street and crossing, and to improve or change the same to promote the public convenience in the use of them. This presents the question involved in the case.

The Public Utilities Act of 1915, in defining the powers of the Railroad Commission, provides that:

> "The Commission shall have the exclusive power to determine and prescribe the manner, including the particular point of crossing, and the terms of installation, operation, maintenance, use and protection * * * of each crossing of a public road or highway by a railroad or street railroad and of a street by a railroad or vice versa, * * * and to alter or abolish any such crossing, and to require where, in its judgment, it would be practicable, a separation of grades at any such crossing heretofore or hereafter established and to prescribe the terms upon which such separation shall be made and the proportions in which the expense of the alteration or abolition of such crossings or the separation of such grades shall be divided between the railroad or street railroad corporations affected or between such corporations and the state, county, municipality or other public authority in interest." Stats. 1915, p. 137, § 43(b).

The Public Utilities Act of 1911, of which the act of 1915 is a revision, contained precisely the same provision. Spec. Sess. 1911, p. 40, § 43(b).

There can be no doubt that the above-quoted language is sufficient, in effect, if taken alone, to give to the Railroad Commission the powers over railroad crossings of streets which the plaintiffs herein seek to have the Commission exercise. The contention of the city attorney is that the provisions of the city charter give the same powers to the city, and that the charter is paramount and superior to the Public Utilities Act as to the parts of the railroad lines lying within the city.

The conflicting provisions of the Constitution, the statutes and the city charter of Los Angeles bearing upon the subject, and the frequency with which they have each been amended, tend to complicate the problem. It will be necessary to give a brief history of these provisions and the amendments thereof from the time of the adoption of the constitutional amendments in October, 1911, amending section 22 and inserting section 23 in article 12 thereof.

As the mandate is sought to compel the Commission to exercise jurisdiction in the future, and no rights have accrued by reason of a previous exercise thereof over the subject-matter, our inquiry should extend to the law in force on the subject at the time of our decision. If in any respect the law relating thereto has been changed since this proceeding was begun, we should determine the jurisdiction of the Commission as it exists under the law in force when our judgment is given. It appears to be necessary to consider at some length the law as it existed when the proceeding was begun, and the effect thereon of certain subsequent amendments of the Los Angeles charter.

At and before the time of the election on constitutional amendments in October, 1911, section 6, art. 11, as amended in 1896, provided, with respect to cities operating under freeholders' charters of which Los Angeles was one, that:

> "All charters thereof framed or adopted by authority of this Constitution, except in municipal affairs, shall be subject to and controlled by general laws."

This amendment, being later in date of adoption, would, to the extent of its application supersede the provision of section 11, art. 11, limiting the powers of cities to enact local police regulations to such as did not conflict with general laws. Section 11, therefore, does not affect this case. By a series of decisions it had become settled that the matter of opening, laying out, and improving streets, and the regulation of the manner of their use, were municipal affairs upon which the charter of any such city, in so far as it made provision thereon, was paramount to general laws. Byrne v. Drain, 127 Cal. 667, 60 Pac. 433; Hellman v. Shoulters, 114 Cal. 149, 44 Pac. 915, 45 Pac. 1057; Sinton v. Ashbury, 41 Cal. 531; People v. Holladay, 93 Cal. 248, 29 Pac. 54, 27 Am. St. Rep. 186. With respect to matters not municipal, or municipal affairs upon which the charter was silent, the provisions of any general law pertaining thereto would control the subject. Fragley v. Phelan, 126 Cal. 395, 58 Pac. 923. But when the charter which was previously silent was amended so as to make a provision upon such municipal affair, that provision would immediately suspend the general law so far as the two were in conflict. Byrne v. Drain, supra. On the other hand, if the charter made provision upon a subject not municipal, upon which the general law was silent, a subsequent statute relating thereto would immediately supersede the charter, so far as it was inconsistent therewith.

With the law so established, the aforesaid amendments of October, 1911, to the Constitution were adopted. The amendment of section 22, so far as it directly gave power to the Railroad Commission, merely repeated the pre-existing provisions of the section giving the Commission power to establish passenger and freight rates for railroads and other transportation companies, to examine the books, records, and papers of such companies, hear and determine complaints against them, and prescribe a uniform system of accounts to be kept by them. It greatly enlarged the powers of the Legislature over the subject by providing that the Commission should have such additional powers of the same kind or different from those above mentioned, and not inconsistent therewith, as should be conferred upon it by the Legislature, and that "the authority of the Legislature to confer such additional powers is expressly declared to be plenary and unlimited by any provision of this Constitution."

Section 23 extended the power of the Railroad Commission. It named many kinds of public service enterprises, each of which it declared to be a public utility, including every common carrier. This, of course, would include railroads. It provided that all such public utilities should be "subject to such control and regulation by the Railroad Commission as may be provided by the Legislature," and that the right of the Legislature "to confer powers upon the Railroad Commission respecting public utilities is hereby declared to be plenary and to be unlimited by any provision of this Constitution." To this, however, there was added a proviso declaring that this section should not affect any "powers of control over [any] public utilities * * * vested in any city and county, or incorporated city or town," and that until the qualified electors of such municipality by popular vote at an election held for that purpose, determined to relinquish them, "such powers shall continue unimpaired." As common carriers were named in the list of "public utilities," it follows that the proviso includes powers vested in any city to control or regulate railroads. That this proviso was considered important is shown by the address to the people printed and distributed to the voters with the sample ballots previous to the election upon the amendments, in effect, stating that it was inserted to avoid opposition by voters residing in such cities who did not wish interference by the Legislature with the powers already vested in the cities and to induce them to vote for the amendment.

In 1914 this section was amended by changing the proviso aforesaid by eliminating the words, "such powers of control over any public utility, vested in any city, * * * or incorporated city or town," and substituting the words, "such powers of control over public utilities as relate to the making and enforcement of local, police, sanitary and other regulations, other than the fixing of rates, vested in any city and county or incorporated city or town." This excepted the matter of fixing rates from the operation of the proviso, but left all other vested municipal powers free from interference, as before, until relinquished by popular vote. As the power to fix rates is not here involved, this change is of no consequence to our discussion.

In 1914 sections 6 and 8, art. 11, of the Constitution were also amended by inserting important changes in the provisions thereof relating to the adoption of freeholders' charters and the effect thereof. In section 6 the provision relating to municipal affairs was changed to read as follows:

> "Cities and towns hereafter organized under charters framed and adopted by authority of this Constitution are hereby empowered, and cities and towns heretofore organized by authority of this Constitution may amend their charters in the manner authorized by this Constitution so as to become likewise empowered hereunder, to make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters, and in respect to other matters they shall be subject to and controlled by general laws."

In section 8 this clause was inserted:

> "It shall be competent in any charter framed under the authority of this section to provide that the municipality governed thereunder may make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws."

In December, 1916, when this proceeding was begun in this court, the city of Los Angeles had not availed itself of the privilege given to it by the aforesaid amendments to sections 6 and 8. Consequently, so far as its charter provided for municipal affairs, it was paramount to general laws, but upon municipal affairs for which it did not provide and upon affairs not municipal it was still subject to the operation of general laws. But all of the powers to regulate public utilities which it possessed in October, 1911, except rate fixing, whether in matters municipal or general, remained in it unimpaired, by virtue of the aforesaid proviso of section 23, art. 12, except in so far as its powers upon matters not municipal had been modified or taken away by general laws enacted, or charter amendments adopted, after October, 1911. We will presently state more fully the reasons for the last exception, as to the effect of general laws. The city charter in December, 1916, contained provisions giving the city power to lay out, open, and improve streets and crossings within its limits and to control the manner of the ordinary use and occupation thereof. Section 2, subd. 13, Stats. 1911, p. 2061; section 146, subd. 1, Stats. 1905, p. 984. These powers, as we have seen, come within the scope of municipal affairs upon which the charter is paramount, under section 6, art. 11, and which, by the aforesaid proviso of section 23, remain unimpaired. They include the power to lay out and open streets across railroad tracks within the city and to condemn for that purpose the estate of the railroad company in the land constituting the intersection, subject to the operation of such railroad thereover. Los Angeles v. Central Trust Co., 173 Cal. 323, 159 Pac. 1169. The charter also then contained provisions empowering the city to require the construction by such railroad companies of viaducts or subways at such crossings. Section 34, Stats. 1909, p. 1307.

At that time, however, certain amendments of the Los Angeles charter previously adopted by the people were awaiting approval by the Legislature. That approval was given on January 16, 1917, and on that day the amendments took effect. Section 2 was thereby amended by adding two subdivisions giving the city powers as follows:

> "51. To make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in this charter."
>
> "53. To require or provide for the elevation or depression, in whole or in part, of railway or railroad tracks. Nothing contained in this charter shall be construed as a prohibition or limitation of the right of the city to require or provide for such elevation or depression. * * *"

By subdivision 51, as will be observed, the city has brought itself within the conditions of the amendments of 1914 to sections 6 and 8, art. 11, of the Constitution. Thereupon, according to the terms of those sections of the Constitution, its powers over municipal affairs became all-embracing, restricted, and limited by the charter "only," and free from any interference by the state through general laws, including laws giving the Railroad Commission powers over public utilities. The result is that the city has become independent of general laws upon municipal affairs. Upon such affairs a general law is of no force with respect to Los Angeles. If its charter gives it powers concerning them, it has those powers; if its charter is silent as to any such power, no general law can confer it. Whether such powers heretofore conferred upon it by general law, if any there be, are now abrogated or suspended is a question we need not decide.

As these new constitutional provisions were adopted in 1914, at the same time as the proviso to section 23, art. 12, they are all of equal force in point of time. The effect of the several provisions where they are inconsistent is to be determined, as well as may be, by the established rules of statutory construction. If there is a special provision upon one branch of a subject, it will prevail over a general provision relating thereto, if the two are irreconcilable, unless the contrary intent appears from the context. 1 Suth. Stat. Const. § 275, p. 529. The provisions of sections 6 and 8, art. 11, relate particularly to municipal corporations. The provisions of section 23 giving the Legislature the right to confer additional powers upon the Railroad Commission are more general, and they only affect municipal affairs incidentally, and where the operations of railroads take place within the limits of a municipal corporation. The express provision of section 23 that the power to fix rates in municipalities shall be vested in the Railroad Commission, if conferred upon it by the Legislature, being a special provision on a specific subject, would, upon the rule of construction stated, be superior to the general provisions of sections 6 and 8 of article 11, exempting all municipal affairs from legislative control. But with respect to other municipal affairs the provisions of sections 6 and 8 of article 11 must prevail, and in all cities which have availed themselves of these provisions such municipal affairs will remain free from legislative interference, whether by means of an act giving power to the Railroad Commission or otherwise. The laying out, opening, and improving of streets and the ordinary uses thereof are municipal affairs, and therefore the provisions of the Los Angeles charter relating thereto are superior to those of the Public Utilities Act, as far as the two are inconsistent. Indeed, as the Constitution now reads, it is clear that, even if the charter were silent, the Legislature, after the amendment of 1917 to that charter, could not confer power upon the Railroad Commission to interfere with any municipal affairs of that city, other than rate fixing, and that any powers heretofore given to the Railroad Commission by the Legislature respecting such municipal affairs must yield to the charter, regardless of the effect prior to such charter amendment.

It follows that the right and power of the Railroad Commission, under section 43 of the Public Utilities Act, to require state railroads such as those here involved, to establish viaducts or subways at street crossings in Los Angeles, will depend upon the question whether these regulations are municipal affairs, or matters of general state concern. We are of the opinion that they come within the latter designation, that they are not properly municipal affairs, but always have been and still are affairs properly to be controlled and regulated by state authority within, as well as without, any particular municipality. A railroad of this character obtains its general franchise and charter from the state. It files its articles of incorporation, under section 291 of the Civil Code, stating therein the place from and to which it is intended to be run and thereupon, under the provisions of sections 465 to 494, inclusive, it becomes vested with the powers therein enumerated, subject to the specified limitations. These powers include the right to lay out its road upon the most advantageous route between the termini, and to construct, maintain, and operate the same. With respect to incorporated cities it is provided that the right to use the same as a part of the right of such railway must be granted by a two-thirds vote of the town or city authority from which such right must emanate. This originally was the only provision giving any municipal corporation any power respecting these railroads. These rights and powers were given by the general law, and were conferred for the general benefit of the state, and not for the exclusive or special benefit of cities or towns. This general railroad law was embraced in the Civil Code as enacted in 1872. The Constitution of 1879 (section 17, art. 12), provided that:

> "All railroad, canal, and other transportation companies are declared to be common carriers, and subject to legislative control. Any association or corporation, organized for the purpose under the laws of the state, shall have the right to connect at the state line with railroads of other states. Every railroad company shall have the right with its road to intersect, connect with, or cross another railroad, and shall receive and transport each the other's passengers, tonnage, and cars, without delay or discrimination."

This was the opening section of the part of the article relating to railroad and transportation companies, supervision of which was thereby given to the then newly created Railroad Commission. The context of these sections, from 17 to 22, inclusive, as originally adopted, show that the words "railroad and other transportation companies" as there used did not include street railroads or other transportation companies operating exclusively in a city for local purposes. R. R. Com. v. Market St. Ry. Co., 132 Cal. 677, 64 Pac. 1065; Western Ass'n v. Railroad Commission, 162 Pac. 391. The sections did include and particularly provide for the supervision of railroads of the character here involved. The declaration of section 17 that these railroads should be "subject to legislative control" shows that they are matters of state concern. As such railroads serve the people of the entire state as means of communication and transportation, it is apparent that it would not be to the interest of the state to leave them subject to the exclusive and unlimited control of every city through which they may pass, with respect to the construction, maintenance, and operation of the lines lying within such city, whenever the city may desire to free itself from control over municipal affairs by complying with the amendments of 1914 to article 11 of the Constitution. The effect of these sections of article 12 to make such railroad system state affairs is similar to that of article 11 with respect to the public school system. Article 11, we have held, "makes * * * the management and control of the public schools a matter of state care and supervision." Kennedy v. Miller, 97 Cal. 431, 32 Pac. 558. "The school system is a matter of general concern, and not a municipal affair." Hancock v. Board, 140 Cal. 561, 74 Pac. 46. The conclusion on this subject necessarily must be that the right of the Legislature, under sections 17, 22, and 23, art. 12 of the Constitution, to commit the regulation of these railroads, so far as they operate within the cities, to the exclusive control of the Railroad Commission, is not a matter which can be classed as a municipal affair, but is a matter of general concern, and the legislative declarations on the subject are paramount to any city charter.

It will be observed that the reservation in the proviso of section 23 to all cities of the powers theretofore vested in them is general and embraces all powers of local police regulation over public utilities, except rate fixing, then vested in such cities, including those relating to matters of general concern, as well as those relating to municipal affairs. From this it would follow that the powers of this character then vested in Los Angeles, by its charter, to regulate and control the state railroads in their operations and street crossings within the city, would also be reserved to the city and would remain unimpaired. Such power appears to have been vested in the city in October, 1911, by section 34, of its charter, above mentioned, and by subdivisions 30 and 38 of section 2 of its charter as amended on March 25, 1911. Stats. 1911, pp. 2063, 2065. (Section 15 of the act of February 9, 1911 [St. 1911, p. 17], so far as it relates to crossings of "public roads and highways," was, in our opinion, intended to apply only to crossings outside of cities, and it did not operate to divest Los Angeles of such powers within that city.) But notwithstanding this comprehensive effect of the proviso, if taken alone and literally, we think that when considered in connection with the language of section 6 of article 11, defining the tenure upon which which cities hold powers over matters not municipal in character, a clear distinction appears by virtue of which such powers may be divested by a general law. By the terms of sections 6, art. 11, powers vested in a city by a freeholders' charter, to regulate affairs not municipal in character, were not absolute, but were "subject to and controlled by general laws." Such powers, therefore, are granted upon the condition and subject to the qualification that they must yield to and be suspended by a general law inconsistent therewith, whenever such general law shall be enacted. The city holds its powers of this character subject to this condition. Such power would therefore be divested by the happening of the condition. So far as a power of this character is reserved to the city by the proviso of section 23, it is reserved with the conditions upon which it was granted inhering in it. The reservation was not intended to destroy or annul the terms of the grant by which such power became vested in the city, or remove the condition subsequent, but only to hold it as it was and leave the power, as before, subject to suspension upon the passage of a general law inconsistent therewith.

Herein is to be noted a distinction between the law involved in this case and the law existing when the case of Los Angeles v. Central Trust Co., supra, arose, and upon which it was decided. The Public Utilities Act of December 23, 1911, was the law then in force. Section 82 thereof made the same reservation of powers vested in cities over public utilities as that contained at that time in the proviso of section 23, art. 12, of the Constitution. Therefore that act did not suspend or supersede the charter provisions granting such powers to the city, but reserved them untouched. The Public Utilities Act of 1915 omits this reservation. Consequently, with respect to affairs not municipal, upon the rule just stated, it supersedes all grants of power by the city charter which are inconsistent with the act. It is to be further remarked that the case of Los Angeles v. Central Trust Co. did not involve the right of the Railroad Commission to order a railroad company to change or improve its crossing of a street, but only the right of the city to open a street across an existing railroad and to condemn the necessary property therefor, without first obtaining permission to do so from the Commission. It was the power of the city to open streets, and thus make a railroad crossing, that was there in dispute, and not the power of the Commission, then or afterwards to regulate the conduct of the railroad company at such crossings or to compel a change in the mode thereof. The opinion, properly understood, does not state any rule as to the latter power.

The effect upon the present case may be stated as follows: The city of Los Angeles has the power to open, widen, extend, and improve streets and to regulate the ordinary uses thereof. The Railroad Commission, under section 43 of the Public Utilities Act, has the power to make orders, which are binding upon the railroad companies under its supervision, to abolish grade crossings of the public streets of a city and to order a separation of grades so that the railroad and street shall not be upon the same level, and generally to exercise the powers specified in that section. It cannot vacate the street or direct a cessation of the public use thereof. Its orders are to be directed to the railroad company and not to the city, except so far as may be necessary to apportion the expense of construction and maintenance of the particular mode of crossing which shall be required. The city has the power to alter the construction of its streets at such crossings, or any of them, by elevating them upon a viaduct so as to pass over the railroad, or by making a subway passing under the railroad. In either case, if the change in the street does not interfere with the operation and use of the railroad at the time, the Commission cannot prevent the change, and it may be made without the consent of the Commission. But if it does interfere, either at the time or afterward, whether by natural causes, or lack of repair of the street as changed, or by reason of changes in the construction or use of the railroad subsequently directed or approved by the Commission, the city must conform to the orders of the Commission so as to avoid such interference.

It is ordered that the Railroad Commission proceed to consider and determine, upon the merits, the complaints made to it by the plaintiffs herein, and that a writ of mandate be issued to it in accordance herewith.

We concur: ANGELLOTTI, C. J.; HENSHAW, J.; SLOSS, J.; MELVIN, J.; LORIGAN, J.

175 Cal. 812

CITY OF PASADENA et al. v. RAILROAD COMMISSION OF CALIFORNIA.

(L. A. 5029.)

(Supreme Court of California. June 11, 1917.)

In Bank. Application by the City of Pasadena and others against the Railroad Commission of the State of California, for writ of mandamus. Writ denied.

John Munger, City Atty., of Pasadena, Alfred Barstow, City Atty., of Alhambra, S. O. McFadden, City Atty., of San Gabriel, William Hazlett, City Atty., of South Pasadena (Wm. B.

Bosley, of San Francisco, of counsel), for plaintiffs. Douglas Brookman, of San Francisco (Max Thelen, of San Francisco, of counsel), for defendant. Albert Lee Stephens, City Atty., of the City of Los Angeles, and Charles S. Burnell, Asst. City Atty., both of Los Angeles, amici curiæ in opposition to the writ.

PER CURIAM. This is a proceeding in mandamus. It is in all respects identical with the case entitled Civic Center Association of Los Angeles et al. v. Railroad Commission (L. A. 5028), 166 Pac. 351, this day decided, except that the plaintiffs here are the cities of Pasadena, Alhambra, San Gabriel, and South Pasadena, each of which claims a sufficient interest to maintain the proceeding. All other questions, save their right to sue in that behalf, are discussed and decided in the other case. No private right is in issue. The question of their right to maintain such a proceeding is not of itself of enough importance here to justify this court, burdened as it is with the press of real cases, in taking time to consider it.

The proceeding is dismissed.

33 Cal. App. 740

WILLATS et al. v. BOSWORTH et al.

(Civ. 2045.)

(District Court of Appeal, First District, California. May 18, 1917. Rehearing Denied by Supreme Court July 16, 1917.)

1. TRUSTS 🔑96 — CONSTRUCTIVE TRUSTS—FRAUD OF TRUSTEE.

Where the trustee orally agreed to carry out a trust and to make a written declaration thereof, a constructive trust enforceable in equity arose, although the oral trust was void.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 148.]

2. TRUSTS 🔑21(2) — DEFINITENESS — SUFFICIENCY.

A written declaration which shows on its face that it was intended to be a declaration of trust, which names the beneficiaries, describes the property, and defines the duties of the trustee, is not void for indefiniteness, although the term is not stated.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 30.]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by George Elwyn Willats and another against Paul H. Bosworth and others. From the judgment rendered, defendant Bosworth appeals. Affirmed.

McClellan & McClellan, of San Francisco, for appellant. William F. Herron, of San Francisco, for respondents.

RICHARDS, J. This is an action brought to establish a trust in real estate, and to remove the trustee for alleged violations of the terms and duties of his trust. The answer of the defendants admitted the substantial facts attending the creation of the trust, but upon the trial of the cause and upon this appeal the defendants there and the appellant here deny the sufficiency of those facts to accomplish the creation of a trust, and assert absolute ownership of the premises in question in the defendant Paul H. Bosworth. The trial court found in favor of the plaintiffs and entered its judgment establishing the trust and removing said Paul H. Bosworth as trustee thereof for culpable misconduct in the management of the trust, and appointing another trustee, and directing the execution of a deed to the premises covered by the trust on the part of said Bosworth to the new trustee. From such judgment the defendant Paul H. Bosworth prosecutes this appeal.

The only point urged by the appellant upon this appeal is that of the insufficiency of the evidence to justify the findings and judgment of the trial court.

The facts of the case are these: Virginia W. Bosworth was on and prior to the 18th day of October, 1911, the owner of the premises in question. She was the mother of Paul H. Bosworth and grandmother of the plaintiffs, and also of the defendant Virginia Bosworth, a minor, the latter being the daughter of said Paul H. Bosworth. On said 18th day of October, 1911, being on her deathbed, and desiring that her said property should be devoted to the maintenance and support of her said grandchildren, and having the fullest confidence in the integrity of her son Paul H. Bosworth, she executed and delivered to him a deed absolute in form to the premises in question, and said Paul H. Bosworth then and there orally agreed and promised that he would hold said real estate in trust for the benefit of the said grandchildren of his dying mother and for the purposes specifically to be set forth in a declaration of trust to be thereafter prepared and signed by him. Shortly thereafter said Paul H. Bosworth did prepare and execute a purported declaration of trust.

Upon the trial of the cause practically all of the foregoing facts were admitted by said Bosworth, who then asserted, and undertook to prove, a set of facts tending to show that he had not acted in violation of the terms of his trust. Upon this appeal, however, the appellant contends that the trust itself was invalid for two reasons: First, that the oral declaration of trust made at the time of the execution of the deed to said Bosworth by his mother was void because not in writing, as required by the sections of the Civil Code relating to express trusts; and, second, that the declaration of trust thereafter prepared and signed by him was too indefinite in its terms for enforcement in a court of equity.

[1] There is no merit in either of these contentions. So far as the case rested—if it was required to rest at all—upon the trust arising out of the oral promises of the appellant, the case would come clearly within the line of authorities relating to constructive trusts arising out of the fraud of the trustee in his attempted renunciation of the terms of his oral trust, among which are the following

cases: Brison v. Brison, 75 Cal. 527, 17 Pac. 689, 7 Am. St. Rep. 189; Lauricella v. Lauricella, 161 Cal. 61, 118 Pac. 430; Bradley v. Bradley, 165 Cal. 237, 131 Pac. 750; Lamb v. Lamb, 172 Cal. 577, 153 Pac. 913. The trust thus constructively arising would have been valid and enforceable in a court of equity had the appellant herein made no other or written declaration of the fact and terms of his trust. The court finds, however, that the appellant did in fact make a declaration of trust shortly after the receipt of the deed from his mother to the premises in question.

[2] The appellant contends that this declaration of trust was void for indefiniteness in its terms. The evidence showed and the court found that this written declaration of trust was drawn by the trustee himself, and this fact furnishes an added reason for the application of the well-known rule of construction that written instruments are to be construed most strongly against their maker. Whatever of indefiniteness appears in this declaration of trust was created by the trustee himself; but, regardless of this fact, an inspection of the writing will show that there is no such indefiniteness in its terms as would suffice to defeat it. The fact that it is intended to be a declaration of trust expressly appears; the beneficiaries are named; the property is described; the duties of the trustee in the matter of the collection of rents and care of the property are defined; and in the event of a sale of the property by the trustee the distribution of the proceeds among the beneficiaries share and share alike is provided for. It is true that the trustee is not expressly authorized to make a sale of the premises, but such is the clear implication of the writing. It is true also that the term of the trust is not stated, but this also would arise by necessary implication from the provision relating to the distribution by the trustee of the trust property upon its sale.

It follows that the findings of the court as to the existence and validity of the trust are fully sustained, as are also the findings of the court relating to the violation of its terms by the trustee.

The judgment was therefore supported by the proofs and findings in the case.

Judgment affirmed.

We concur: KERRIGAN, J.; BEASLY, Judge pro tem.

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33 Cal. App. 715

WING CHUNG LONG CO. v. PRUSSIAN NAT. INS. CO. (Civ. 1816.)

(District Court of Appeal, Second District, California. May 18, 1917.)

INSURANCE 🔑229(2)—CANCELLATION OF POLICY BY INSURER.

The insurer having under provision of standard policy prescribed by St. 1909, p. 404, that it may be canceled at any time, by the company by giving five days' notice of cancellation, right to elect arbitrarily to cancel it, the notice definitely informing insured that cancellation was made is effective, though from such notice and a previous one it would be understood that the company elected to rescind on the ground of nonpayment of premium, and though it had in fact been paid.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 500–502.]

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by the Wing Chung Long Company against the Prussian National Insurance Company. Judgment for plaintiff, and defendant appeals. Reversed.

John R. Layng, of Los Angeles, for appellant. G. C. De Garmo, of Los Angeles, for respondent.

JAMES, J. The judgment in this case was for the plaintiff. The appeal from the judgment is presented on a judgment roll and a bill of exceptions.

The action was to recover upon a fire insurance policy. Plaintiff, in December, 1912, secured through one Youtz, a broker, insurance from the defendant corporation as evidenced by its policy of that date. This policy was in form that known as "California standard" as prescribed in an act of the Legislature of 1909 (Stats. 1909, p. 404). The policy corresponding to the terms of the statute contained this clause as to conditions under which cancellation thereof might be made by either party:

> "This policy shall be canceled at any time at the request of the insured, in which case the company shall, upon surrender of this policy, refund the excess of paid premium above the customary short rates for the expired time. This policy may be canceled at any time, without tender of unearned portion of premium, by the company by giving five (5) days' written notice of cancellation to the insured and to any mortgagee or other party to whom, with the written consent of the company, this policy is made payable, in which case the company shall, upon surrender of the policy or relinquishment of liability thereunder, refund the excess of paid premium above the pro rata premium for the expired time."

On March 25, 1913, the defendant company transmitted to the insured the following letter:

> "March 25th, 1913.
>
> "Wing Chung Long Company, 307½ Marchessault Street, Los Angeles, Cal.—Gentlemen: In accordance with the insurance laws of the state of California as set forth in the printed conditions of the California standard form fire insurance policy, by lines numbered 95, 96, 97, 98, 99, 100, 101 and 102 stipulations, and conditions specially referred to, I, the undersigned, acting under the authority conferred on me as general agent of the Prussian National Underwriters, in the state of California, do hereby give you notice of the cancellation of the Prussian National Underwriters' policy No. 912575, issued to secure against loss by fire in the amount of $700 to your stock and fixtures at No. 307½ Marchessault street, state of California. This notice operative immediately.
>
> "Kindly return the policy to this office by

early mail. The earned premium under the policy is $4.95, which please remit.

"Yours very truly,

"John A. Prinsen, General Agent."

The plaintiff alleged that in January, 1913, the defendant attempted to cancel the policy by serving a notice that the policy would be canceled for nonpayment of premium, unless within five days the plaintiff paid such premium, and that, as the plaintiff had made payment of the premium, it was led to believe:

> "That if said premium was in fact paid said policy would not be canceled, and this plaintiff, knowing that said premium had been paid, did not deliver said policy to said company, and did not make demand upon said company for the return of any unearned premium thereon; that said plaintiff was entirely misled and deceived by said notice sent to said plaintiff, as aforesaid."

On September 1, 1913, the merchandise described in the policy of insurance was destroyed by fire and proof of loss was made by the plaintiff; whereupon the defendant company made reply by letter as follows:

> "Gentlemen: Proof of loss under policy number and agency as above noted was duly received, and after referring to our files find that said policy was duly canceled for nonpayment of premium; and holding as we do your acknowledgment of said notice therefor in due form we return herewith said papers (proof of loss and schedule), declaring that we cannot accept of same or admit liability thereunder."

This letter was signed by the same general agent of the defendant whose signature was attached to the letter of March 25, 1913. It was stipulated at the trial that upon receipt of the letter of March 25th plaintiff took the same to Youtz, the broker and that Youtz advised the plaintiff to pay no attention to the same, and that the plaintiff did not tender a surrender of its policy or demand the unearned premium from the defendant. There was no testimony showing what effect this advice of Youtz (conceding it to be material) had upon the plaintiff, and there was no testimony showing whether plaintiff secured other insurance upon its property. It was stipulated that the premium had in fact been paid to Youtz at the time the policy was issued, and that for the purpose of collecting the same Youtz was the agent of the defendant. The single question presented seems to be as to whether, assuming that the company based its notice of cancellation upon the ground that the premium had not been paid, when in fact payment thereof had been made, the cancellation became of effect. As to whether the notice of cancellation clearly showed that the company elected to rescind because of alleged nonpayment of premium need not be determined; it may be assumed that such was the understanding which should be gathered from the notices received by the plaintiff. Counsel for respondent argues that, having elected to cancel the policy upon a ground which was not available to it, for the reason that the facts were wanting to sustain it, the company is estopped to insist upon the cancellation. It will be noticed that as between the insured and insurer there is a mutual right of cancellation given under the policy the form of which is prescribed by the statute hereinbefore referred to. The insured has the right to elect arbitrarily to cancel the policy, and the insurer has the same arbitrary right to cause cancellation to be made, with the condition that the notice of cancellation shall not become effective for five days. This latter provision undoubtedly is for the purpose of allowing the insured to obtain other insurance if he so desires. If the right of the insurer to cancel its policy was limited to certain conditions or contingencies, then, where notice of cancellation referred to one of those grounds, such as nonpayment of premium, such notice would be ineffectual where the insured could show that the premium in fact had been paid, even though, had some other of the permitted grounds been assumed by the insurer, the notice of cancellation would have been effective. In such a case the argument of respondent without doubt would be incontrovertible. Here the notice given to the insured definitely informed the latter that cancellation was made of the policy. The insurer was not under necessity to state the grounds upon which such cancellation was based, and a misstatement of the grounds which might have influenced it to take the action would not, in our opinion, have the effect of nullifying the notice of cancellation. The trial court made a finding that the notice of cancellation was misleading. The notice was not misleading in that there was any ambiguity or uncertainty as to the advice given by it to the insured that the policy was canceled and the finding referred to, to our mind, fails to find support in the evidence. Our conclusion is that, on the record as it is presented to us, the judgment for the plaintiff cannot be sustained.

Other questions argued by appellant we think it unnecessary to discuss in view of the conclusion expressed upon the main proposition involved in the case.

The judgment is reversed.

We concur: CONREY, P. J.; WORKS, Judge pro tem.

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33 Cal. App. 671

VOSS v. LEVI (two cases). (Civ. 1873, 2118.)

(District Court of Appeal, Second District, California. May 16, 1917.)

1. GUARANTY 🔑53(2)—NOVATION 🔑5—RELEASE FROM LEASE.

The mere acceptance of rental by a landlord from a person in possession of the leased premises could not amount to a consent to release the original parties from the obligations of their written contract, and did not operate to discharge guarantor of lease.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 64; Novation, Cent. Dig. § 5.]

2. Landlord and Tenant 🔑194(2)—**Surrender and Acceptance.**

Though the landlord's agent told the tenant that he might move out if he desired, the permission did not become binding on the landlord until the tenant's surrender of the premises had been accepted by him, and he took possession of the premises and proceeded to have them remodeled.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 788.]

Appeals from Superior Court, San Diego County; C. N. Andrews, Judge.

Actions by C. L. Voss against Adolph Levi. From the judgment in one case and an order denying his motion for new trial, defendant appeals, from the judgment in the other case, he appeals, and from the judgment in such other case, plaintiff also appeals. Judgment and order in the first case affirmed, and judgment in the second case affirmed.

Hoff & Chatterson, of San Diego, for appellant. E. T. Lannon, of San Diego, for respondent.

JAMES, J. On the 24th day of January, 1911, one Trepte leased to the Diamond Carriage & Livery Company, a corporation, certain real property in the city of San Diego for a period of five years for a total rental of $7,500, which was made payable monthly in advance at the rate of $125 each month. The lease contained a term prohibiting subletting without the written consent of the lessor. Adolph Levi and J. E. Connell signed the lease as guarantors. On the 12th day of June, 1913, Trepte assigned the lease to Voss, the plaintiff herein. The plaintiff was not a resident of the state, but was at all times material to this controversy represented by E. E. Selmser, who resided in the city of San Diego. The lessee company, by reason of nonpayment of state license tax, forfeited its charter on November 30, 1912. The stock of the company had theretofore been transferred to a firm called Davis & Crawford. Subsequent thereto Davis & Crawford transferred to Adolph Levi and Edgar Levi, and they in turn transferred to A. C. Griffith, who in turn transferred to one Morse. In September, 1914, Morse moved out and left the property vacant. The business during all of these times was conducted either under the name of "Diamond Carriage & Livery Company" or "Diamond Carriage Company." After the transfer of the lease by Trepte, the rent was paid to the agent of the plaintiff, who received checks from individuals occupying the premises and gave receipts to and in the names of such individuals. Morse had a conversation with Selmser, the agent of the plaintiff, prior to September, 1914, in which this agent informed Morse that he could surrender the property at any time he desired, as more rental could be secured by the owner than was being paid under the lease. Morse testified that he asked for a reduction of rent, to which the agent would not consent, and was told that, if he wanted to give up the premises, he would be released. He further testified that he moved out, but after he moved out rent was demanded from him by Selmser. No rent was paid after the 1st day of September, 1914, and on about the 19th of January, 1915, Selmser, on behalf of plaintiff, took possession of the premises, made material changes in the building by having stalls taken out and a cement floor put in, all in preparation to change the use of the building from that to which it had theretofore been put. There were two actions brought for rent by which the plaintiff sought to recover against Adolph Levi as guarantor under the lease; Connell having died in the meantime. The complaint in the first action was filed on November 18, 1914, and in that action the rental for the months of September, October, and November, 1914, amounting to $375, was sought to be recovered. Thereafter, in June, 1915, another action was brought to recover rental alleged to have accrued for the months of December, January, February, March, April, and May, 1915. In the first action recovery of the amount sued for was allowed by the court. In the second action the court found that the lease had been terminated on the 19th day of January, 1915, when the plaintiff took possession and assumed control of the premises, and therefore allowed a recovery only of rental for the month of December and 19 days in January, 1915. The defendant appealed from the judgment in the first case and from an order denying a motion for a new trial. The defendant also appealed from the judgment entered in the second case. The plaintiff was dissatisfied with the judgment in the second case, because the court limited the recovery to the amount of rental accruing only to the 19th of January, 1915, and his appeal from that judgment is also brought here; the appeals being number, respectively, Civil 1873 and 2118. By a stipulation entered into between counsel, these appeals have been consolidated and are presented together.

There is really but one point material for consideration as determinative of both appeals, and that is: Was the lease originally entered into by the corporation lessee terminated prior to September, 1914, by surrender of the premises and the acceptance thereof by the assignee of the lessor? In addition to facts shown and which have been recited in brief in the foregoing, it also appeared in evidence that no written consent had ever been given by the lessor or his assignee, or the agent of the latter, to the assignment of the lessee's interest. It did appear that the several persons holding possession under the lease paid the rental to the agent of the owner, and that he issued to them receipts in their own names. It did not appear, however, in any other way than such acts would give evidence of, that the owner ever consented to release the original lessee or the guarantors on the lease from the obligations of their contract. The business carried on on the premises up to the time that Morse moved out was always conducted under the name of the "Diamond Carriage & Livery Company" or the "Diamond Carriage Company," and the several persons who occupied the premises claimed to so occupy them under the lease as originally made and under all the particular terms thereof. Furthermore, the possession of the premises was passed to each by the act of the preceding occupant, the owner having no part whatever in making delivery of the premises to any of the occupants, except to the original lessee.

[1] The mere acceptance of rental from the person in possession of the premises could not amount to a consent to release parties from the obligations of their written contract. Such obligations so solemnly expressed are not to be so easily put an end to.

[2] Notwithstanding that the agent, Selmser, told Morse prior to September, 1914, that he might move out if he desired, that permission would not become of binding effect upon the lessor until the surrender of the premises had been accepted by the latter. Such acceptance of surrender was evidenced only at the time the plaintiff, on the 19th day of January, 1915, took possession of the premises and proceeded to have them remodeled. That an acceptance of surrender was then completely had we have no doubt. The court's conclusion on that matter we fully agree with. The cases of Bradbury v. Higginson, 162 Cal. 602, 123 Pac. 797, and Welcome v. Hess, 90 Cal. 507, 27 Pac. 369, 25 Am. St. Rep. 145, which are cited by both counsel in the case, furnish no argument which, in our opinion, proposes any different conclusion than that which we have expressed.

The judgment and order in case No. 1873 are affirmed. The judgment in case No. 2118 is affirmed.

We concur: CONREY, P. J.; WORKS, Judge pro tem.

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33 Cal. App. 738

E. A. HARDISON PERFORATING CO. v. DAVIES et al. (Civ. 1869.)

(District Court of Appeal, Second District, California. May 23, 1917. Rehearing Denied by Supreme Court July 19, 1917.)

1. Replevin 🔑72—Right to Possession—Sufficiency of Evidence.

In an action of claim and delivery for the recovery of tools and implements to drill for oil on the theory that they had been loaned to a company which forfeited its lease so that defendant landlord seized the tools, evidence *held* sufficient to support finding that plaintiff was entitled to possession of the articles when the action was commenced; the tools having been loaned, and not sold.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 292–295.]

2. Replevin 🔑61—Demand—Pleading.

In an action of claim and delivery, the complaint, alleging that on the day when the complaint was filed plaintiff demanded of defendants possession of the property, and defendants refused, and now refuse, to deliver, sufficiently alleged that the commencement of the action was preceded by demand, since the use of the terms "demanded," and "refused and now refuse," demonstrated that the pleader contemplated the past and not the future of the day when the complaint was filed.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. § 223.]

Appeal from Superior Court, Kern County; Paul W. Bennett and Howard A. Peairs, Judges.

Action by the E. A. Hardison Perforating Company, a corporation, against J. F. Davies and G. M. Kyle. From the judgment and an order denying motion for new trial, defendants appeal. Judgment and order affirmed.

Geo. E. Whitaker, of Bakersfield, for appellants. E. L. Foster and Chas. A. Barnhart, both of Bakersfield, for respondent.

WORKS, Judge pro tem. This is an appeal from the judgment and from an order denying a motion for a new trial.

The respondent delivered to the Hibernian Petroleum Company certain tools and implements which were put to use by that corporation in an attempt to produce oil from a certain tract of land which it held under lease from appellant Davies. The Hibernian Company forfeited the lease, and Davies, at the time of his re-entry upon the land, seized the personal property above mentioned as also forfeited to him under a certain provision of the lease. The Hardison Company commenced this action of claim and delivery for the recovery of the tools and implements, upon the theory that they had been loaned to the Hibernian Company, and that the respondent had never parted with title to them. The respondent recovered judgment.

[1] The appellants contend that the delivery of the personal property to the Hibernian Company was not a loan, but a sale, and that the evidence fails to sustain the finding of the trial court that the respondent was entitled to the possession of the articles at the time the action was commenced. The witness Deuel, the vice president and manager of respondent, has this to say of the delivery to the Hibernian Company:

> "The Hardison Company didn't dispose of its title to the property. It never has. I didn't receive any money from anybody for those tools. This is true in reference to every item on that list."

On cross-examination he said further, referring to the president of the Hibernian Company:

> "I practically loaned him these tools with the price put on in case he lost any of them, because a great number of friends of mine were interested in the company. I was myself. I considered on account of these things it was best to let them use the tools."

One of the directors of the Hibernian Company testified that the president of that corporation told the directors that the delivery of the tools to the company was "practically a loan, * * * and we will never be asked to pay for them." While these statements are largely conclusions, and, under all the circumstances of the case, might have been regarded by the trial judge with suspicion, he was the sole judge of their weight and they are sufficient to support the finding which appellants assail.

[2] The appellants insist that there was no showing that the commencement of the action was preceded by a demand that appellants deliver up the tools and implements. The complaint alleges, after setting out a list of the articles claimed, that on a certain day "the plaintiff demanded of the defendants the possession of the said personal property, and the defendants refused and now refuse to deliver said personal property to the plaintiff," and the allegation was not denied in the answer. The difficulty is, however, appellants insist, that the day on which demand is thus alleged to have been made was the day upon which the complaint was filed. They contend for the rule that a pleading is to be construed most strongly against the pleader, and assert that such a construction shows the demand to have been made after, not before, the filing of the complaint. There are several obstacles to such a construction. A statement in the complaint indicating that demand was made after its filing would have been futile; and a construction showing the futility of an allegation in a pleading will not lightly be made as against a possible construction exhibiting its utility. Again, the allegation is that plaintiff, on the day mentioned, "demanded," and that defendants "refused and now refuse," delivery of the property. The use of these terms demonstrates that the past, and not the future, was in the contemplation of the pleader.

The judgment and order are affirmed.

We concur: CONREY, P. J; JAMES, J.

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33 Cal. App. 665

RUDIN et al. v. REA et al. (Civ. 2046.)

(District Court of Appeal, First District, California. May 15, 1917.)

Limitation of Actions ⚷99(1)—Computation of Period—Fraud.

Employé's fraud in transferring to plaintiffs securities in settlement of obligation and their failure to discover the fraud *held* not to extend term of statute of limitations so as to permit employer to recover on employé's bond.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 477.]

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Action by John Rudin and others, trustees for the King-Richardson Company, against James W. Rea and others. Judgment for defendants James W. Rea and V. Koch, and plaintiffs appeal. Affirmed.

Stanley Moore, of San Francisco, and Wilder Wight, of Oakland, for appellants. E. M. Rosenthal, E. M. Rea, and A. A. Caldwell, all of San Jose, for respondents.

PER CURIAM. Action upon a bond. Judgment went for the defendants, Jas. W. Rea and V. Koch, and plaintiffs appeal.

The facts of the case are briefly these: A. F. Palmer was an agent of the King-Richardson Company, a corporation engaged in the business of selling and distributing books, and in the course of that agency sold the books of the King-Richardson Company, received payments on account of such sales, and made and reported collection to the company. It became necessary, according to the rules of the company, for Palmer to give a bond for the faithful performance of his duties as such agent, and he gave the bond upon which this suit is brought, signed by the sureties Koch and Rea. Subsequently Palmer was found to be indebted to his employer in a considerable sum of money, and, without the knowledge of his sureties upon the bond, and without any information imparted to them, an arrangement was entered into between the King-Richardson Company and Palmer by which the latter undertook to transfer to his employer certain securities in settlement of his obligation and liability to it. Some considerable time after that arrangement had been made it was discovered that Palmer had embezzled these securities, the real owners of them appeared and the King-Richardson Company lost the benefit of them. Thereupon through its trustees it brought suit upon the bond. That suit was brought more than four years after the obligation otherwise would have arisen on the bond. The statute of limitations was pleaded by the sureties.

As against the statute it is urged by the plaintiffs that the fraudulent acts of Palmer in making the settlement with the company by means of the transfer to it of the securities referred to, and the failure of the company to discover the facts of the fraud, extended the term of the statute so as to permit them to recover against the sureties on the bond. The lower court held, however, that the term of the statute was not extended by those acts on the part of Palmer, and the only question before us in this case is whether or not the alleged fraudulent acts of Palmer worked an extension of the statute of limitations so as to bring this suit within its terms.

We are of the opinion, after a careful examination of the cases, that the trial court was not in error in holding that the cause of action against the sureties was barred by the statute. That being so, the other points in the case become immaterial, and it is not necessary to discuss them; but upon the ground that the statute of limitations barred the action against the sureties, the judgment will be affirmed. It is so ordered.

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33 Cal. App. 719

OFFICER v. AVERY MILL & LUMBER CO.

(Civ. 1862.)

(District Court of Appeal, Second District, California. May 18, 1917.)

Customs and Usages 🔑19(3)—Evidence—Sufficiency.

Evidence *held* sufficient to establish trade custom under which seller of lumber on 60 days' time could bring suit within 60 days if the purchaser was made defendant in an action by any other person.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. § 46.]

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by H. E. Officer against the Avery Mill & Lumber Company. Judgment for plaintiff and order denying new trial, and defendant appeals. Affirmed.

E. I. Feemster, of Visalia, for appellant. Lamberson, Burke & Lamberson, of Visalia, for respondent.

WORKS, Judge pro tem. This is an appeal from the judgment and from an order denying a motion for a new trial.

The action was brought to recover judgment for an amount alleged to be due on a shipment of lumber. The parties agree as to the sum that is unpaid, but the appellant contends that the bill was not due when the suit was commenced. It is conceded that, under a custom prevailing in the lumber business, the sale was at 60 days' time, but the action was begun within that period. The respondent justifies the early prosecution of the suit under an alleged custom of the business, supplementary to the custom that sales are at 60 days, to the effect that, if a buyer is sued by any creditor on any account before the expiration of 60 days after a given sale of lumber, the bill immediately becomes due. Evidence was introduced tending to show that an action had been filed against the appellant by a certain plaintiff within 60 days after the sale to appellant and before the commencement of this action, and evidence of the alleged custom was also received.

The appellant makes the contention that the findings are not supported by the evidence in two respects. The first of these is that there was no evidence of the existence of such a custom as the one relied on by respondent. We have read the record, and our inspection of it convinces us that the point is not well taken.

The second point made is that the evidence does not show a custom of such notoriety as to impute to appellant a knowledge of its existence; but the witness Cooper testified that the custom was "in general usage and effect in the lumber trade in California" at the time the lumber was sold, and he further said that it was then "commonly known and recognized among the retail lumber dealers." Moreover, there is some evidence that the appellant had actual knowledge of the custom. The testimony of Cooper tended to show that notice of its existence was printed in certain lists issued by the larger lumber concerns which sell to the retail dealers, and he said:

> "If I remember rightly, I asked Mr. Avery [the president of appellant] if he had any of those lists, and he said he had a bunch of them or our acknowledgments to them."

The judgment and order are affirmed.

We concur: CONREY, P. J.; JAMES, J.

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33 Cal. App. 661

BAILEY ORNAMENTAL IRON CO. v. GOLDSCHMIDT et al.

(Civ. 2238.)

(District Court of Appeal, Second District, California. May 14, 1917.)

1. Constitutional Law 🔑161 — Obligation of Contract — Mechanics' Liens — Statutes.

The obligation of a contract would be violated by allowing a lien for construction work not commenced until July 7, 1911, though done under contracts made before June 30th; the lien being claimed under Code Civ. Proc. §§ 1183, 1184, amended by St. 1911, p. 1313 et seq., which became effective June 30, 1911, Const. art. 20, § 15, not giving a mechanic's lienor his substantive right, and the mechanic's lien law not relating alone to the remedy.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 494, 495.]

2. Contracts 🔑167 — Incorporation of Law.

The law in force at the time a contract is executed enters into and forms a part of the contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 750.]

Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by the Bailey Ornamental Iron Company, a corporation, against Emma M. Goldschmidt, the Imperial Iron & Machine Company, a corporation, and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Andrew J. Copp, Jr., of Los Angeles, for appellant. E. B. Coil, of Los Angeles, for respondents.

CONREY, P. J. Action to enforce a mechanic's lien claimed by the plaintiff. The plaintiff appeals from the judgment.

In March, 1911, the defendant Emma M. Goldschmidt, being about to cause the erection of a dwelling house on land owned by her in the city of Los Angeles, entered into an oral contract with the Imperial Iron & Machine Company, under which that company agreed to construct for her a certain iron balcony as a part of the proposed building. The price for the work was to be $268; no time for the payment being named in the agreement. Mrs. Goldschmidt paid an installment of this price on May 18, and the remainder thereof on June 3, 1911, although at those times none of the work had been done. On June 26, 1911, the Imperial Iron & Machine Company entered into an oral contract with the plaintiff for the construction of said balcony. The work was commenced by the plaintiff on the 7th day of July, and completed on the 16th day of August, 1911. Later the building was completed and a notice of claim of lien in due form was filed for record by the plaintiff.

At all times prior to June 30, 1911, the law permitted the owner of real property, in causing the construction of any improvement thereon at a cost of not more than $1,000, to provide for such improvement by a contract not filed in the recorder's office, or even by an oral contract, and to pay the consideration therefor whenever it pleased him to do so; and the provisions of the Code of Civil Procedure with reference to putting in writing building contracts, and filing them for record, and the provisions of that Code relative to the mode and time of payment and the withholding of a percentage of the contract price, were not applicable thereto. "It was permissible for the parties to contract for the payment of the whole amount to the contractor before the commencement of the work." Denison v. Burrell, 119 Cal. 180, 51 Pac. 1; Southern Cal. Lumber Co. v. Jones, 133 Cal. 242, 65 Pac. 378.

Sections 1183 and 1184 of the Code of Civil Procedure were amended by a statute which became effective on June 30, 1911. Stats. 1911, p. 1313 et seq. If these amendments are applicable to the present case, the plaintiff was entitled to enforce its claim of lien; otherwise, the judgment in favor of defendants should be affirmed. The argument for appellant relies upon that section of the state Constitution which declares that:

> "Mechanics, materialmen, artisans, and laborers of every class shall have a lien upon the property upon which they have bestowed labor or furnished material, for the value of such labor done and material furnished; and the Legislature shall provide, by law, for the speedy and efficient enforcement of such liens." Const. art. 20, § 15.

[1] Appellant contends that its substantive right is given by the Constitution; that the mechanics' lien law relates to the remedy; and that therefore no obligation of contract is violated by allowing it a lien for construction work which was not commenced until July 7, 1911, although it was done pursuant to contracts entered into prior to the 30th of June. This contention cannot be sustained. Referring to the section of the Constitution quoted above, the Supreme Court said:

> "This declaration of a right, like many others in our Constitution, is inoperative except as supplemented by legislative action. So far as substantial benefits are concerned, the naked right without the interposition of the Legislature is like the earth before the creation, 'without form and void,' or to put it in the usual form, the Constitution in this respect is not self-executing." Spinney v. Griffith, 98 Cal. 149, 32 Pac. 974.

The foregoing decision could not have been rendered except upon the theory that the constitutional provisions do not create a complete right and that the actual right of lien, as well as the remedy for its enforcement, is derived from the statute, and that until the enactment of the necessary statute the lien contemplated by the Constitution cannot exist.

[2] It is a familiar rule that the law in force at the time a contract is executed enters into and forms a part of the contract. Barnitz v. Beverly, 163 U. S. 118, 16 Sup. Ct. 1042, 41 L. Ed. 93; Welsh v. Cross, 146 Cal. 621, 624, 81 Pac. 229, 106 Am. St. Rep. 63, 2 Ann. Cas. 796. When Mrs. Goldschmidt contracted with the Imperial Iron & Machine Company for the construction of the balcony and paid that company for the work, there was not in existence any law under which, after she paid the contract price, her property could be subjected to a "mechanic's lien" of a subcontractor whom the contractor might thereafter employ to do the work. She was under no obligation to prevent the contractor from having the work done by third persons, and she was not bound to take notice of the fact that on and after the 30th of June there would be a different law governing such contracts.

Counsel for appellant has referred to a few California decisions which he thinks favor his position; but, in our opinion, they do not benefit his case. The principal decision discussed by him on this point is McCrea v. Craig, 23 Cal. 522. There it appeared that on April 26, 1862, a law was passed in relation to liens of mechanics and others, which took effect June 25, 1862, the last section of which repealed all prior laws upon the subject. The action was one to enforce a lien for materials furnished to the contractor. The plaintiff had commenced to furnish those materials prior to June 25th, but did not complete the furnishing of them or file his notice of lien until after the new law went into effect. Although his lien was deemed to have been acquired and his notice related back to the time when he commenced furnishing the materials, nevertheless it was held that after the new statute went into effect all subsequent acts or proceedings relating to the lien or its enforcement were governed by and must have been in accordance with its provisions. The right of lien came within the earlier statute, but the subsequent steps of procedure for the enforcement of the lien were governed by the law as amended.

In Andrews & Johnson Co. v. Atwood, 167 Ill. 249, 47 N. E. 387, it appeared that Atwood, the owner of the property, entered into a contract with a contractor for the erection of a building upon his lot. Thereafter, and while the building was in course of construction, the mechanic's lien law was amended so as to extend lien rights to a class of persons not included in the law as it was when the contract was made. In the decision the new class of claimants was conveniently designated by the term "sub-subcontractors." The court said that, if the amending act should be held to govern contracts entered into before the act was passed, it would be an act impairing the obligation of contracts and would clearly fall within the inhibition of the Constitution. See, also, Kendall v. Fader, 199 Ill. 294, 65 N. E. 318.

In Bass v. Williams, 73 Mich. 208, 41 N. W. 229, a similar question arose. The court said:

> "Applying the statute coming in force in June, a burden was at once cast upon the owners, which they did not assume when the contract was made—that is, to refuse payment to Williams until they had gone among the men and inquired of each and every one of them if their labor had entered into the shingles, and, if so, whether they had each been paid, or to have kept a strict account of each laborer's time, and the work done, and then to see that each was paid before making payments to Williams, or to pay to Williams at the peril of having the shingles seized and held under the lien which the statute gives. We are satisfied that this statute cannot be applied to a contract made before the statute took effect. It impairs the obligation of the contract, and comes plainly within the inhibition of the Constitution."

Applying to this case the reasoning of the foregoing decisions, we think that the amendments of 1911 are not applicable in this case and that no right of lien became vested in the plaintiff.

The judgment is affirmed.

We concur: JAMES, J.; WORKS, Judge pro tem.

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33 Cal. App. 669

CARLINI et al. v. LOUIS SCHULTZ CO., Inc. (Civ. 2050.)

(District Court of Appeal, First District, California. May 16, 1917.)

LANDLORD AND TENANT 🔑199½—ILLEGAL CONSIDERATION FOR LEASE—RELIEF.

The lessee of property in the segregated district of San Francisco, and the assignee of the lease, all parties having known that the lessee would obtain almost all the rental from the renting of rooms to prostitutes, had no standing to have cancellation of the lease or modification to make its terms less onerous on the lessee because the segregated district was abolished, and rooms in the premises could not be rented under the same conditions as when the lease was made.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 761.]

Appeal from Superior Court, City and County of San Francisco; G. E. Crothers, Judge.

Action by Louise Carlini and the Eastern Outfitting Company, a corporation, against the Louis Schultz Company, Incorporated, a corporation. From a judgment for defendant, and an order sustaining demurrer to the second amended complaint, plaintiffs appeal. Affirmed.

Wm. Hoff Cook, of San Francisco, for appellants. Charles W. Slack and Chauncey S. Goodrich, both of San Francisco, and John T. Pigott, of Sacramento, for respondent.

PER CURIAM. This is an appeal from a judgment in favor of defendant entered upon an order sustaining a demurrer to the second amended complaint after the plaintiffs' refusal to further amend, in an action in which the relief asked was the cancellation of a lease or a modification thereof so as to make its terms less onerous upon the lessee.

The amended complaint is uncertain in many of the respects pointed out in the demurrer; but, passing those defects, and addressing ourselves to the main objection, viz. want of facts averred in said amended complaint to constitute a cause of action, it appears from the amended pleading that:

> "The said leased premises were located in what was then and there known as a 'segregated district' of San Francisco, * * * and said district was denominated and designated as the 'segregated district' by police authorities of San Francisco, for the purpose of permitting prostitutes and men with whom they might cohabit and other people of 'easy virtue' to reside and pursue their said life and calling in said 'segregated and restricted district' without molestation or interference by the police in so doing; * * * and at said time both the lessor of said leased premises, and its successor in estate herein, the defendant, and the plaintiffs herein, were well acquainted with the aforesaid facts in relation to such segregated and restricted district; and by reason of the aforesaid conditions the rooms in said premises so leased were rented and used by the aforesaid class of people without any molestation or interference by the police, as all of the aforesaid parties, as lessors and lessees, well knew, and almost all of the rental to be derived from said premises was to be and was from the renting of said rooms in said premises for the purposes and kind of people as aforesaid, as all of said parties, as lessors and lessees, well knew, and the revenue derived and to be derived from such renting of said rooms in said leased premises was the material consideration for the payment of the rental, as provided in the aforesaid lease; * * *" and that "the aforesaid lease was so made as aforesaid with a full and complete knowledge and understanding upon the part of the lessor and lessee therein named that the rooms in the said leased premises were to be so used and rented out by the lessee to said class of people as aforesaid. * * *"

Then follow averments that the said "segregated district" has been abolished by the police commission, and that since said abolition "the lessees of said premises under the aforesaid lease have been and are unable to rent rooms in said leased premises under the same conditions as they were at the time of making said lease, * * * and that the material part of the consideration for said lease * * * was the income and revenue to be derived from so doing." The relief prayed for is the cancellation of the lease or its modification in the way of a reduction of rent.

For the purposes of the demurrer the foregoing allegations of the complaint must be taken as true. We think it very plain, therefore, without going further into the averments of the complaint, that the lessee and its assignee (plaintiffs herein) have no standing in a court either of law or equity, and that the demurrer to the complaint was properly sustained.

Judgment affirmed.

(33 Cal. App. 667)

EDGAR BROS. CO. v. SCHMEISER MFG. CO. (Civ. 1826.)

(District Court of Appeal, Second District, California. May 15, 1917.)

1. CONTRACTS 🔑9(2)—UNCERTAINTY—AGENCY CONTRACT.

An agency contract, placed at the bottom of an order ticket showing a list of articles ordered by the agent corporation from the principal corporation, which read, "To have exclusive agency in Imperial Valley for 1912 and by ordering one car before Feb. 1st, 1913, can have the agency for the same season," was inoperative for uncertainty and incompleteness.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 16.]

2. EVIDENCE 🔑450(6)—PAROL EVIDENCE AFFECTING WRITINGS.

In the agent company's suit for commissions, oral evidence, offered in an endeavor to supply the missing members of the contract, was improperly received over defendant's objection.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2079.]

3. FRAUDS, STATUTE OF 🔑53—CONTRACT NOT TO BE PERFORMED IN YEAR.

An agency contract, made during April, 1912, to cover the season of 1913, which expired about October, was within the statute of frauds (Civ. Code, § 1624, subd. 1), as not to be performed within a year.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 69, 80, 92.]

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by Edgar Bros. Company, a corporation, against the Schmeiser Manufacturing Company, a corporation. From a judgment for plaintiff, defendant appeals. Reversed.

A. G. Bailey, of Woodland, and Phil D. Swing, of El Centro, for appellant. McPherrin & Nichols, of Imperial, for respondent.

WORKS, Judge pro tem. This is an appeal from the judgment.

The respondent claims to have been an exclusive agent of appellant for the year 1913, the agency pertaining to the sale within certain territory of manufactured articles which were the output of appellant. The action was commenced to recover commissions on various of such articles sold in the territory during the year by the Schmeiser Company itself, and the Edgar Bros. Company had judgment for the amount of those commissions. The agency contract was placed at the bottom of an "order ticket," showing a list of articles ordered by the Edgar concern from the Schmeiser Company, and was, omitting the signatures, as follows:

> "To have exclusive agency in Imperial Valley for 1912 and by ordering one car before Feb. 1st, 1913, can have the agency for same season."

[1] The appellant contends that the agreement was inoperative for uncertainty and incompleteness, and the claim must be sustained. The paper is so lacking in the terms going to make a workable contract of agency that it is unnecessary for us to specify them.

[2] A considerable amount of oral evidence was offered in an endeavor to supply the missing members, and it was received by the trial court in the face of objections by the appellant. The evidence was improperly admitted. Conceding that the expression "one car" and the word "season" called for explanation, there was nothing further in the paper which required the aid of parol evidence. The terms of the agency were neither uncertain nor ambiguous; they were simply missing.

[3] The testimony of witnesses showed that the "season" of 1913, as that term is used in the agreement, expired about October. The contract was entered into during April, 1912. It was, then, not to be performed within a year, and was therefore within the statute of frauds. Civ. Code, § 1624, subd. 1; Wickson v. Monarch Cycle Mfg. Co., 128 Cal. 156, 60 Pac. 764, 79 Am. St. Rep. 36. For the reasons given above, it was an insufficient memorandum under the statute.

It is not necessary to consider other points which are urged by the appellant.

The judgment is reversed.

We concur: CONREY, P. J.; JAMES, J.

(33 Cal. App. 655)

WILLIAMS v. SAVINGS BANK OF SANTA ROSA et al. (Civ. 2031.)

(District Court of Appeal, First District, California. May 14, 1917.)

1. GIFTS 🔑30(4)—BANK DEPOSIT—VALIDITY.

Where deceased did not surrender control over funds in the bank, but retained possession of the passbook, although she directed the bank to change the deposit into a joint deposit between herself and sister with rights of survivorship, there was no valid gift.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. § 56.]

2. TRUSTS 🔑34(3)—BANK DEPOSIT—SUFFICIENCY OF EVIDENCE.

Where deceased directed a bank to change her deposit into a joint one in favor of herself and sister with rights of survivorship, writing to the bank as follows: "Will you please add my sister's name, Mrs. M. E. Williams, to my bank account, which will make it more convenient to me"—upon receipt of which the bank entered the account in the passbook as subject to the check of either sister or the survivor of them, although deceased retained possession of the book, *held* sufficient to constitute a trust in favor of the surviving sister.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 44.]

3. BANKS AND BANKING 🔑301(5) — JOINT DEPOSITS—SUFFICIENCY OF EVIDENCE—STATUTE.

Where deceased directed a savings bank to change her deposit into a joint one in favor of herself and sister with rights of survivorship, which was noted by the bank in the passbook of which decedent retained possession, the surviving sister had a right to such funds on deposit under St. 1909, pp. 87–90, as amended by St. 1911, p. 1003, making valid such joint deposits with rights of survivorship.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 1174.]

Appeal from Superior Court, Sonoma County; Thomas C. Denny, Judge.

Action by Mary E. Williams against the Savings Bank of Santa Rosa and another. Judgment for plaintiff, and Ernest D. Woodman, executor of the will of Laura M. N. Huntoon, appeals from order denying motion for new trial. Affirmed.

Wilson & Wilson and P. L. Benjamin, all of San Francisco, for appellant. Hilliard Comstock, of Santa Rosa, for respondent.

KERRIGAN, J. This is an action brought by plaintiff to recover a sum of money on deposit in the defendant bank, which deposit is also claimed by the defendant Woodman as executor of the will of Laura M. N. Huntoon, deceased. Plaintiff recovered judgment, and the appeal is by said executor from an order denying his motion for a new trial.

Mrs. Laura M. N. Huntoon died at the age of 80 years, being a widow and childless. For a long time before her death she had been afflicted with paralysis and was able to get about only in a wheel chair. She had lived with the plaintiff at the latter's home for 12 years prior to her death, during all of which time she was taken care of by plaintiff and by Mrs. Laura Cragin, plaintiff's daughter. The tie that bound these women was very close and affectionate. Mrs. Huntoon left a will dated about 5 years before the time of her death, by the terms of which she disposed of her estate, consisting of real and personal property estimated to be worth over $117,000, dividing it among her heirs, viz. the plaintiff and some nephews and nieces. A legacy of $10,000 was left to the plaintiff, and a like legacy was given the appellant, who is a nephew of said deceased. They also were each to receive under the terms of the will the residue of the estate. At the time of her death the deceased had a deposit in the defendant bank. Subsequent to making her will she had frequently expressed an intention to make provision for the plaintiff in addition to the one contained in that instrument. It was her desire often repeated so to arrange certain savings bank accounts that the plaintiff could during their joint lives draw on them just as she herself might do, and that upon her death any money remaining on deposit would go to the plaintiff without the necessity for probate. Accordingly in the year 1912 she handed to her niece, Mrs. Cragin, the passbook issued to her by the defendant bank, with instructions to take it to the bank and have the account changed in such a manner as to carry out her desires in the respect indicated. Mrs. Cragin followed these directions. The cashier of the bank, with whom Mrs. Cragin's interview was had, requested that Mrs. Huntoon's directions be put in writing, whereupon Mrs. Huntoon addressed a note to the bank as follows: "Will you please add my sister's name, Mrs. M. E. Williams, to my bank account, which will make it more convenient to me." Upon the receipt of this note the bank cashier entered the account in the passbook as subject to the check of "Mrs. Huntoon or Mrs. M. E. Williams, either, or the survivor of them." The book was at once returned to Mrs. Huntoon, who, after examining it, commented upon that part of the bank's notation which referred to "the survivor" and expressed herself as greatly satisfied with the change in the account, saying that it was just what she wanted done.

Section 16 of the Bank Act of March 1, 1909 (Stats. 1909, pp. 87–90), as amended in the year 1911 (Stats. 1911, p. 1003), provides:

> "When a deposit with a bank shall be made by any person in the names of such depositor and another person or persons, and in form to be paid to either or to the survivor or survivors of them, such deposit thereupon, and any additions thereto made by either of such persons upon the making thereof, shall become the property of such persons as joint tenants, and the same, together with all interest thereon, shall be held for the exclusive use of the persons so named, and may be paid to either during the lifetime of all or any or to the survivor or survivors after the death of one or more of them, and such payments and the receipt or acquittance of the one to whom such payment is made shall be a valid and sufficient release and discharge to said bank for all payments made on account of such deposit."

[1, 2] It appearing that the deceased did not surrender dominion and control over the funds in the bank, the facts of the case as narrated above would not support the theory of a valid gift; but we have no doubt under the authorities in this state that the circumstances related do show a trust in the deposit for the benefit of the plaintiff. In the case of Drinkhouse, etc., v. German Sav. & L. Society, 17 Cal. App. 162, 118 Pac. 953, it

was held that where a deposit was made in a savings bank in the name of the depositor and another person payable to either, in order, as declared by the depositor at the time of making it, that if anything happened to her such other person "could take the passbook and go to the bank to withdraw the money," a trust was thereby created in favor of such other person in the residue of the deposit at the death of the depositor, notwithstanding that the latter retained exclusive possession of the passbook and the right to withdraw all or any portion of the deposit in her lifetime. See, also, McCarthy v. Holland, 30 Cal. App. 495, 158 Pac. 1045.

[3] Moreover, in this case we are of the opinion, as in the case last cited, that the evidence deduced at the trial brings it within the purview of section 16 of the Bank Act, supra, and was sufficient to constitute the plaintiff and the deceased joint owners in the deposit with the right of survivorship. A similar statute was so construed in New York. Clary v. Fitzgerald, 155 App. Div. 659, 140 N. Y. Supp. 536; McCarthy v. Holland, supra. We think that the complaint stating, as it does, the facts of the case is sufficient to enable the plaintiff to rely upon the theory that the deposit was for her benefit, as well as upon the theory that under the circumstances of the case she became the owner of the remainder of the deposit upon the death of Mrs. Huntoon according to the provisions of the section of the bank act set forth above.

The order is affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

33 Cal. App. 659

WILLIAMS v. UNION TRUST SAV. BANK OF SANTA ROSA et al. (Civ. 2032.)

(District Court of Appeal, First District, California. May 14, 1917.)

TRUSTS ⚷44(1)—BANK DEPOSIT—SUFFICIENCY OF EVIDENCE.

Evidence showing that deceased directed a savings bank to change her account so that either herself or sister might draw upon it, with rights of survivorship, and that deceased signed a signature card which merely provided that either sister might draw against the account, but saying nothing as to rights of survivorship where such card was the one commonly used by the bank in making joint account with rights of survivorship, and that all parties so understood the matter, *held* sufficient to establish a trust in favor of the surviving sister.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 66.]

Appeal from Superior Court, Sonoma County; Thomas C. Denny, Judge.

Action by Mary E. Williams against the Union Trust Savings Bank of Santa Rosa and another. Judgment for plaintiff, and defendant Ernest D. Woodman, executor of the estate of Laura M. N. Huntoon, appeals from order denying motion for new trial. Affirmed.

Wilson & Wilson and P. L. Benjamin, all of San Francisco, for appellant. Hilliard Comstock, of Santa Rosa, for respondent.

KERRIGAN, J. This is an appeal by Ernest D. Woodman, one of the defendants, from an order denying his motion for a new trial in an action brought by the plaintiff against said Woodman, as executor of the will of Laura M. N. Huntoon, deceased, and the defendant bank to recover the balance of a certain deposit in said bank.

This case, in many of its facts, is like the case of Mary E. Williams v. Savings Bank of Santa Rosa et al., No. 2031, 166 Pac. 366, this day decided. The deceased, at the time of her death, had been an invalid for about 12 years. She and the plaintiff were sisters and were very fond of each other. The deceased lived with the plaintiff and had been tenderly nursed by her all of that time, and in appreciation of such loving care and in consideration of the bond of affection existing between them she had intended for a long time, it appears from the record, to arrange her savings bank account so that both she and the plaintiff might separately draw upon it, and that on her death the balance of the deposit should belong to and become the property of the plaintiff without the formalities of probate proceedings. Accordingly some time in the early part of the year 1912 the deceased sent the plaintiff's daughter, Mrs. Laura Cragin, to the defendant bank to request that the necessary changes be made in the account so as to effectuate her theretofore often expressed desire concerning the matter. Mrs. Cragin called upon the cashier of the bank, and, according to her testimony, told him that her mother and the decedent desired that the account be changed so that either the plaintiff or the deceased might draw upon it, and that when the decedent "was gone" the money in the bank would belong to the plaintiff. The cashier thereupon gave to Mrs. Cragin a signature card to be signed by her mother and aunt. This card was filled in with the desired signatures and returned to the bank, but provided only by its terms that either of the two sisters might draw against the account, saying nothing as to the right of the survivor to the balance of the deposit. The cashier, however, testified that this was the form then used by the bank in making deposit accounts in the name of more than one person subject to the check of either and balance payable to the survivor. After the signature card had been filled in and returned to the bank the deceased, believing that her instructions had been carried out, expressed herself as relieved in mind about a matter that had been worrying her for some time, and that she was glad that upon her death so much of the fund as then remained would go to the plaintiff without the necessity of probate proceedings.

There is some doubt, under the circumstances of this case, whether it falls within the provisions of section 16 of the Bank Act of 1911; but there is no doubt in our minds that such circumstances show the creation of a trust for the benefit of the plaintiff under the rule laid down in the case of Booth v. Oakland Bank of Savings, 122 Cal. 19, 54 Pac. 370, as recently adopted and applied by this court in the case of Drinkhouse v. German S. & L. S., 17 Cal. App. 162, 118 Pac. 953.

Order affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

WRIGHT v. LOAIZA et al. (Civ. 1966.)

(District Court of Appeal, First District, California. May 21, 1917. Rehearing Denied by Supreme Court July 16, 1917.)

1. ACCOUNT, ACTION ON ⚷3 — "OPEN ACCOUNT."

If service as undertaker is furnished at the request of one acting for himself and as another's agent, though the account was carried in the name of the first person, payments from time to time would make the account an open book account as against both.

[Ed. Note.—For other cases, see Account, Action on, Cent. Dig. §§ 3, 4.]

2. LIMITATION OF ACTIONS ⚷53(1) — OPEN ACCOUNT.

On an open book account on which payments have been made from time to time the statute of limitations is of no avail.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 285, 289.]

Appeal from Superior Court, City and County of San Francisco; W. R. Guy, Judge.

Action by Harold L. Wright against W. Y. Loaiza and Dolores Loaiza. From the judgment rendered, Dolores Loaiza appeals. Affirmed.

Leon E. Morris, of San Francisco, for appellant. T. A. Perkins, of San Francisco, for respondent. McCutchen, Olney & Willard, of San Francisco, for defendant.

PER CURIAM. The defendants, W. Y. Loaiza and Dolores Loaiza, are brother and sister. Their deceased brother lived with the defendant Dolores before his death. Upon his death W. Y. Loaiza went to an undertaking company to make arrangements for the funeral. His testimony is that he went at the suggestion of his sister, who wished to have some little additional expense in the way of a better casket than he might otherwise buy, and directed him to make arrangements with the company. The arrangements were made, the funeral was conducted, and the cost was something like $600. The funeral directors entered upon their books the charge—or the memorandum of the account—against W. Y. Loaiza, the brother, because he was the one who had personally conducted the negotiations. There was some understanding between himself and his sister that a portion of the bill was to be paid by him, and a portion of it to be paid by a daughter of the deceased. From time to time payments were made on account of this bill by W. Y. Loaiza until something like $125 of it had been paid, which was the amount that W. Y. Loaiza and the niece were to pay. No further payments being made, this action was brought by the assignee of the funeral directors against W. Y. Loaiza and Dolores Loaiza upon an open book account. Dolores, while appearing in the pleadings, did not appear at the trial. The only witness, aside from those on the part of the plaintiff, was W. Y. Loaiza, who testified substantially to the above facts, and whose testimony to the effect that he had acted throughout as the agent of his sister remains uncontradicted upon the record. The only question upon this appeal is as to whether or not the plaintiff, as assignee of the funeral directors, is entitled to recover in this action upon an open book account, the statute of limitations having been pleaded by Dolores Loaiza, and it being conceded that more than two years had intervened between the original creation of the account and the time the action was brought.

The contentions of the appellant are: First, that there was no account against Dolores Loaiza, her name not appearing upon the books; and, second, that it was not an open book account, because she had done none of the things that would make it an open book account or a balance due upon such an account.

[1, 2] This court has determined that accounts of this character where there is a charge for goods sold or services rendered, and occasional payments made, are within the definition of open book accounts. Merchants' Collection Co. v. Levi, 163 Pac. 870. If the defendant W. Y. Loaiza was the authorized agent of Dolores Loaiza, and the account was in fact against both of them, although her name did not appear, then payments by either would, in our opinion, make the account an open book account. The only question is whether or not, the name of Dolores not appearing in any way upon the books of plaintiff's assignors, the plaintiff is entitled to bring this action upon an open book account; the contention of the appellant being that there is no open book account as far as she is concerned. Now, it is true that the name of Dolores was not entered upon the books; but the uncontradicted evidence shows that the party whose name the funeral directors did enter, W. Y. Loaiza, was acting throughout as the duly authorized agent of Dolores, and was understood by them to be such at the time her brother requested the services to be performed. Under these circumstances

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Dolores Loaiza, as the principal of W. Y. Loaiza, is sufficiently a party interested in this account to constitute it as to her an open book account. From the examination of the record which we have made in this case we are of the opinion that there is no merit in this appeal; that the action was upon an open book account; that the defendant W. Y. Loaiza in its creation acted throughout as the agent of Dolores Loaiza, who was the real party in interest and the real party indebted upon this account; that the payments made upon this account constituted it an open book account, and, that being so, the plea of the statute of limitations on the part of Dolores Loaiza has no merit.

As the result of these views, the judgment will be affirmed.

It is so ordered.

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33 Cal. App. 652

BEALL v. BEKINS VAN & STORAGE CO. (Civ. 1820.)

(District Court of Appeal, Second District, California. May 12, 1917.)

1. Appeal and Error 🔑302(5) — Defective Specifications of Particulars—Consideration of Cause on Merits.

Although specifications of particulars claiming that findings are not supported by evidence are general and defective, the appellate court will consider the cause on the merits, where adverse party has not been prejudiced by defects.

2. Carriers 🔑134 — Action for Loss of Goods — Findings — Sufficiency of Evidence.

Evidence *held* sufficient to support findings that defendant storage company agreed to pack plaintiff's goods in such condition as they were required to be put in for shipment, and that plaintiff relied upon defendants to do so.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 588–592, 607.]

3. Carriers 🔑115—Loss of Goods—Excuse for Nonperformance.

Where a storage company agreed to pack and ship goods at a certain time, and after determining what goods required crating, and taking one lot of goods, decided that among a second lot of goods certain trunks needed crating, removing such goods to its warehouse for that purpose, thereby causing delay in shipment, which goods were destroyed by fire while in the warehouse, the carrier could not excuse its failure to ship goods at time specified because of the necessity of placing the goods in the warehouse, claiming that plaintiff should have delivered trunks already crated because railway would not otherwise accept them, since, when the company first took the goods which they decided needed to be crated, it was their duty to then take such trunks for crating.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 501–507.]

4. Carriers 🔑138 — Liability as Warehouseman—Goods Awaiting Transportation.

Where a carrier agreed to pack and ship goods within a specified time, and such goods for its convenience were stored in its warehouse for crating, where they were destroyed by fire, it was immaterial whether its liability was that of carrier or warehouseman, since it acted under a special contract.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 608, 624.]

Appeal from Superior Court, Los Angeles County; George H. Cabaniss, Judge.

Action by J. A. Beall against the Bekins Van & Storage Company. Defendant appeals from judgment for plaintiff and from order denying motion for new trial. Affirmed.

R. T. Lightfoot, of Los Angeles, for appellant. James W. Bell, of Los Angeles, for respondent.

WORKS, Judge pro tem. This is an appeal from the judgment and from an order denying a motion for a new trial.

Appellant and respondent entered into a contract pursuant to which the latter delivered to the former, in two separate lots, certain goods and household effects, all of which were to have been shipped at the same time to Lillis, Cal. On the day that the van and storage company received the second lot of goods it did not deliver them, together with the first lot, to the Southern Pacific Company, as Beall claims it was its duty to do, but stored them in its warehouse for safe-keeping overnight. The warehouse was destroyed by fire before the next morning and Beall's property with it. This action was brought to recover the value of the articles and judgment went for Beall.

[1] Under certain very general specifications of particulars, to the sufficiency of which respondent objects, appellant claims that the findings are not supported by the evidence. No one finding is pointed out as lacking such support, but the assault is upon them in general. There are 28 findings, and but four specifications of particulars. The language of each of the latter it is most difficult to apply to any finding or findings. Notwithstanding such a situation, we have endeavored so to construe the specifications as to give appellant a hearing on the merits, in accordance with the more recent rulings on the subject of the sufficiency of specifications of particulars. American Type Founders' Co. v. Packer, 130 Cal. 459, 62 Pac. 744; McEwen v. Occidental Life Ins. Co., 172 Cal. 6, 155 Pac. 86; Pac. Gas & Elec. Co. v. Rollins, 164 Pac. 53.

[2] Whatever may be said of the specifications of particulars, the argument of appellant is directed at two of the findings, not by number, but in effect. The propriety of these, under the evidence, may be considered together. They are, collectively, to the effect that appellant contracted with respondent to pack the goods in such condition as they were required to be put in for shipment, and that respondent relied upon appellant so to do. Beall was the only witness who testified to the terms of the contract, which was made over the telephone by him and one of

the company's representatives. Beall says, in part:

> "He suggested that the goods ought to be crated. I told him I supposed they ought, but I would leave it to him. He said they would send out that day and get the goods to be crated, * * * which they afterwards did."

And again:

> "That day they came out and got the articles that they decided needed crating."

This was on Thursday, and Beall was to have the remainder, or second lot, of goods ready for a trip of appellant's vans on Monday, the day the shipment was to be made; but, according to the effect of Beall's testimony, those were the articles only which appellant had decided need not be crated, although Beall does use the word "pack" as describing what he was to do with them. The two findings are supported by the evidence.

[3] The trial court found that:

> "The defendant expressly agreed and undertook to have the goods in transit, and to deliver them to the connecting carrier on Monday, October 9, 1911."

This particular finding is not attacked, but the contention is made that delivery to the railway on Monday was excused and a deposit of the goods in the warehouse that night was necessitated by the fault of Beall. This particular question relates to what we have called the second lot of goods. They were delivered at appellant's warehouse by its vans between 2:30 and 3 in the afternoon of Monday. The evidence shows that the Southern Pacific Company does not receive freight at its Los Angeles station after 4:35 each day. When the second lot of goods reached the warehouse, it transpired that there were two uncrated trunks in the load, and the evidence shows that the railway does not receive trunks for shipment as freight unless they are crated. Appellant proceeded to crate the trunks in question, and its witnesses testified that the delay incident to the work prevented the delivery of the shipment at the railway station before the freight depot was closed for the day. All of Beall's goods were then deposited in appellant's warehouse for the night. The appellant contends that the trunks should have been delivered to it by Beall already crated; that he was therefore responsible for the delay and caused the detention at the warehouse. The answer to this position is that the trial court properly found that appellant had agreed to pack the goods for shipment. When the vans took from Beall on Thursday such of the articles as, to quote him again, "they decided needed crating," they should have taken the trunks with the other articles selected by them.

[4] Because of the delay occasioned by the preparation of the trunks for shipment and the consequent detention at the warehouse, and as it was stipulated at the trial that the fire was not caused through negligence, appellant asserts that the question of its liability should be measured by the law affecting warehousemen instead of carriers, and many authorities are cited to propositions distinguishing the two. We need not enter into a discussion of the merits of this contention. It has no application to the actual case. Enough has been said to show that appellant contracted to specially prepare for shipment such portion of Beall's goods as needed such preparation and to deliver the entire lot of goods to the railway on Monday. Whether it acted as a warehouse keeper or as a carrier, it did not comply with its agreement, and its failure to comply was the proximate cause of the damage to respondent.

The judgment and order are affirmed.

We concur: CONREY, P. J.; JAMES, J.

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33 Cal. App. 643

BRINKLEY–DOUGLAS FRUIT CO. v. SILMAN et al. (Civ. 1611.)

(District Court of Appeal, Third District, California. May 10, 1917. Rehearing Denied by Supreme Court July 9, 1917.)

1. PLEADING 🔑121(4) — DENIAL—INFORMATION AND BELIEF.

A denial on the ground that defendant has no information or belief concerning it of a matter of public record and within his reach, as incorporation of plaintiff, is not permissible, evasive, and raises no issue.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 248.]

2. CORPORATIONS 🔑32(3)—CORPORATE EXISTENCE—EVIDENCE.

Corporate existence may be proved by parol.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 109, 114, 115, 2086, 2087.]

3. CORPORATIONS 🔑32(11)—CORPORATE EXISTENCE—EVIDENCE.

As against collateral attack of incorporation, it is enough to prove de facto existence of the corporation.

4. SALES 🔑202(6)—TIME OF PASSING TITLE.

The court's conclusion that title to potatoes passed to the buyer, and therefore before they were attached as property of the seller, when the seller loaded them on the car and took out bill of lading with the buyer as consignee, depending on the intention of the seller, to be gathered from all the circumstances, is justified where buyer's check for a considerable part of the purchase money and its statement that it would have its bank wire bank at place of shipment that seller's draft for balance with bill of lading would be paid accompanied order, though the bill of lading with draft attached were not presented to the local bank, and payment thereon received, till the morning after the loading and attachment, the seller having had prior dealings with the buyer, and there being no reason to believe that he distrusted the good faith of the buyer or doubted that the money would be paid as agreed.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 547.]

5. ATTACHMENT 🔑296—CLAIM BY THIRD PERSON—SUFFICIENCY OF NOTICE—WAIVER.

Any insufficiency in claim by third person, under Code Civ. Proc. § 689, of property attached, is waived by the sheriff not objecting, but acting on it and demanding and receiving of the creditor a bond to indemnify him.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 1048–1061.]

6. Sheriffs and Constables 🔑127—Wrongful Levy and Sale—Action.

Conversion is the proper remedy against a sheriff who seizes and sells property of one person under process against another.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. §§ 254–259.]

7. Appeal and Error 🔑1054(1)—Harmless Error—Admission of Evidence.

Any error in admission of evidence of value was harmless; it appearing the court's finding was not influenced thereby, and that the value found was established by competent evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4185.]

8. Trover and Conversion 🔑68—Necessary Findings.

Ownership and right of possession being sufficient for recovery for conversion, though the property may at the time of conversion have been in another's possession, finding on actual possession is unnecessary.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. §§ 304–307.]

9. Appeal and Error 🔑1152—Correction of Judgment.

Error in judgment against administrator in not directing, as under Code Civ. Proc. § 1504, it should, that it be paid in due course of administration, will be corrected on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4483–4496.]

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by the Brinkley-Douglas Fruit Company against A. L. Silman, administrator of S. C. Cornell, deceased, and another. Judgment for plaintiff, and defendants appeal. Modified and affirmed.

F. W. Henderson and Hugh K. Landram, both of Merced, for appellants. Edward Bickmore, of Merced, for respondent.

BURNETT, J. The action was originally brought by plaintiff against S. C. Cornell, as sheriff of Merced county, and the Title Company, as surety on his official bond, for the conversion of 280 crates of sweet potatoes. After the action was commenced Cornell died, and his administrator was substituted as defendant. The complaint is in the usual form for conversion. The answer denied the corporate existence of plaintiff, that plaintiff was ever the owner of the potatoes, and denied any conversion by Cornell. As a separate defense it was alleged that defendant Cornell, as sheriff, on February 26, 1912, duly levied on said potatoes a writ of attachment issued out of the justice court in an action wherein F. H. Duarte was defendant, and at the time of said levy Duarte was the owner of and in the possession of said potatoes, and that they were afterwards sold, and the proceeds regularly applied to the satisfaction of the judgments obtained in that action and in another action against the same defendant. It was also alleged that the plaintiff herein never served upon defendant, Cornell, any notice of its claim to said potatoes prior to said sale, and plaintiff never at any time served upon Cornell any claim in accordance with section 689, Code of Civil Procedure, and never claimed any of the proceeds of said sale.

The court found that plaintiff was a corporation as alleged; that plaintiff was, on February 26, 1912, the owner and entitled to the possession of the potatoes, which were of the value of $476; that on said day S. C. Cornell, as sheriff, wrongfully converted the same to his own use; that the allegations in the answer in regard to the attachment and sale of the potatoes were true, but that it was not true that no claim of ownership was made by plaintiff, and, on the contrary, a demand and claim in writing was made upon S. C. Cornell prior to said sale. The court thereupon gave judgment in favor of plaintiff and against defendants in the sum of $476, from which judgment the appeal has been taken.

We proceed to notice all the points made by appellants in the order presented in the opening brief.

[1] 1. Appellants are entirely mistaken in the contention that there was no evidence to prove the corporate existence of plaintiff. There is the certificate of the secretary of state of the filing in his office of the certified copy of the articles of incorporation of plaintiff, on the back of which the following indorsement by the county clerk of Merced county appears:

> "No. 2644. In the Superior Court of the County of Merced, State of California. The Brinkley-Douglas Fruit Company, Plaintiff, v. S. C. Cornell et al., Defendants. Certificate of Filing of Articles of Incorporation. Filed, August 3, 1912. P. J. Thornton, Clerk."

As pointed out by respondent, the answer of defendants was filed February 13, 1913, and the denial of the incorporation of plaintiff was upon information and belief. If it be conceded that said certificate was not sufficient evidence of the incorporation, it is at least plain that before the answer was filed the attention of defendants was called to a public record of incorporation, and we have an instance, therefore, for the application of the principle stated by the authorities as follows:

> "The rule is universal that matters of public record and within reach of the defendant cannot be denied upon the ground that defendant had no information or belief concerning them."

The denial of the incorporation was therefore evasive and raised no issue.

[2, 3] But the corporate existence may be proved by parol (People v. Morley, 8 Cal. App. 372, 97 Pac. 84; Fresno Canal, etc., Co. v. Warner, 72 Cal. 379, 14 Pac. 37) and, when collaterally assailed, it is sufficient to prove that the corporation has a de facto existence

(Fresno Canal, etc., Co. Case, supra). There is abundant evidence in the record to satisfy the foregoing requirement. Indeed, appellants make no reference to the point in their closing brief, and they were probably convinced of their error.

[4] 2. A more serious contention is the next one, that "plaintiff never owned the potatoes." As to this appellants say:

> "Stating the case most favorably to plaintiff, it would seem that about February 20, 1912, plaintiff wrote or wired to F. K. Duarte, of Turlock, Merced county, a sweet potato dealer, for a car of 274 crates of sweet potatoes at $1.90 a crate; that at the same time plaintiff sent a check for $246.60, and stated that it would have the First National Bank of Pueblo wire the People's State Bank of Turlock that F. K. Duarte's draft for $1 per crate with bill of lading attached would be paid; that upon receipt of the order on February 26, 1912, Mary Duarte, daughter of F. K. Duarte, purchased the potatoes in question for her father from parties near Atwater, Merced county, and had them loaded on a Southern Pacific car; that they were loaded before 5 p. m. on the 26th, and Mary Duarte made out a shipping receipt for the car which she signed for her father and the agent for the railroad company. The receipt named Brinkley & Douglas as consignees, Pueblo, Colo. Mary Duarte then took the shipping receipt and went to Turlock on the 5 p. m. train. That night F. K. Duarte wired plaintiff as follows: 'Have your bank wire People's State Bank at Turlock to advance me dollar per crate on car P. F. E. 3935 on presentation of bill of lading; there is two hundred and eighty crates in the car.' The next morning (February 27, 1912) Mary Duarte took the shipping receipt to the People's State Bank, signed her father's name to a draft on plaintiff for $280, attached the shipping receipt to the draft, and gave both to the bank, and thereupon received the $280. The draft was paid by plaintiff on March 5, 1912. S. C. Cornell, as sheriff, duly levied upon the car of sweet potatoes under a writ of attachment on February 26, 1912. It is evident from the foregoing statement that the property in the potatoes had not passed from Duarte or to plaintiff at the time of the levy of the writ of attachment. 'If the bill of lading with draft attached is sent to the seller's agent or bank for collection the property in the goods is reserved and does not pass to the buyer until payment.' 35 Cyc. 333. See, also, Ramish v. Kirschbraun, 107 Cal. 659, 40 Pac. 1045; Hilmer v. Hills, 138 Cal. 134, 70 Pac. 1080."

We may notice briefly these authorities. As to the quotation from Cyc. it must, of course, be regarded, not only as an isolated sentence, but in connection with the context and the facts of the various cases cited in its support. As to this we may simply observe that the quoted sentence is followed by this statement:

> "A different intention may, however, be indicated by the circumstances of the transaction and will of course control."

In the Ramish Case, supra, the bill of lading was made to the vendors, and by them indorsed to the vendee, and it was agreed that it was to be delivered to the latter with the merchandise at Los Angeles "upon his payment there of the price of the eggs." It was in view of these circumstances that the court said:

> "There was no transfer of the title to the eggs before the bill of lading was received at the bank for delivery."

It was also an important circumstance in that case that the bill of lading was not made out at Ottumwa, the shipping point, to the plaintiff or vendee, but it was made to the defendants or vendors as consignees, "so that they could retain the property in the eggs in themselves until the payment of the draft by the plaintiff. Payment of the draft and transfer of the property in the eggs by delivery of the endorsed bill of lading were intended to be, and were, contemporaneous acts," as stated in the brief of respondents in that case.

In the Hilmer Case, supra, the evidence is reviewed, and it is concluded that it was clearly understood by the parties that the sale was to be for cash, and the title was not to pass until the money was paid. Under such circumstances, necessarily, the title would vest contemporaneously with the payment of the money, since that was the expressed intention of the vendor and vendee. This would be so notwithstanding possession may have been given to the vendee prior to the payment of the purchase price and the vendee named as consignee in the bill of lading. As to this latter circumstance, Emery's Sons v. Irving Nat. Bank, 25 Ohio St. 364, 18 Am. Rep. 299, is cited, in which it was held that the fact of the bill of lading being made out to the vendee as consignee does not have the effect to pass title in view of the evidence "clearly showing a contrary intention."

It must be said, however, that the case here is quite different. The evidence does not show clearly that it was the intention of the parties that the title should not pass until all the money was paid. The circumstances already detailed are quite consistent with the theory that the title passed when the potatoes were loaded on the car and the bill of lading taken out for plaintiff. It is not unreasonable to hold that Duarte considered the money as good as paid when he made the consignment to plaintiff, and that he intended thereby to surrender and transfer all of his interest in and right of control over said potatoes. He had received a large payment, and an assurance that the balance would be ready for him at the bank when the goods were ready to be shipped. There is no reason to believe that he distrusted the good faith of respondent or doubted that the money would be paid as agreed. He had had prior dealings with plaintiff, and it was quite natural for him to consider the sale consummated when he loaded the car for plaintiff. It is to be remembered that we are simply considering the question whether there was room for a rational conclusion that the title passed before the attachment was levied; in other words, whether there was any substantial evidence to support the finding of the court to that effect. We feel no hesitation in answering the question in the affirmative, and in this connection may refer to some authorities wherein the probative force of such circumstances is declared. In Emery's Sons v. Irving National Bank, supra, it is said:

> "Where goods are delivered by a vendor to a common carrier, consigned to the vendee, the question whether the title thereby passes from the vendor to the vendee depends upon the intention of the vendor, which intention is to be gathered from all the circumstances of the transaction. * * * In all such transactions the bill of lading is an important item of proof as to the intention, but it is not necessarily conclusive of the question. If the bill of lading shows that the consignment was made for the benefit of the consignor or his order, it is very strong proof of his intention to reserve the jus disponendi. And, on the other hand, if the bill of lading shows that the shipment is made for the benefit of the consignee, it is almost decisive of the consignor's intention to part with the ownership of the property. If the bill of lading does not disclose the person for whose benefit the consignment is made, it is of less weight on the question of the shipper's intention. We have no doubt, however, that if the bill of lading shows a consignment by vendor to vendee, and no other circumstance appears as to the intention, it will be taken as prima facie evidence of an unconditional delivery to the vendee."

In Lund v. Ganahl, 22 Cal. App. 103, 133 Pac. 501, it was contended, as herein, that the title to the property was not to pass until the full payment of the purchase price, but it was held that the circumstances were sufficient to justify the conclusion that the transaction amounted to a sale, and not a mere agreement to sell, notwithstanding the purchase price had not been fully paid and no bill of sale was executed; the presumption from the transfer of possession being that the title passed since no different intention was manifested.

We do not think it can be said that a different intention is so clearly shown by other evidence in this case as to nullify the force of the circumstances to which we referred as justifying the trial court's conclusion and to demand a reversal of the judgment. Even if the vendor or the vendee had testified positively that the intention was that the title should vest only when the entire purchase price was paid, we could not say that the trial court was bound to accord full credit to such statement or to base the findings upon it rather than upon the rational inference from the facts already detailed. However, a reading of the testimony of Duarte and of the president of the corporation is more favorable than otherwise to the contention that the transaction was intended as a completed sale. We think their testimony naturally gives rise to the impression that they so understood it. It is true that appellants claim that Duarte testified that the sale was to be for cash. He was apparently an illiterate witness, and was skillfully led by the able counsel for appellants, but the record shows that when apparently he made a statement to that effect he was testifying particularly concerning former sales to the Brinkley-Douglas Company. The question was, "Now, in shipping to the Brinkley-Douglas Fruit Company, did you use to consign it to them?" and he answered, "No, sir; they advanced me the money, the pay was advanced, always before loading I had the money." But, as before stated, when he loaded the car herein he undoubtedly considered the transaction closed and that he virtually had the money, nothing being required except cashing the check at the bank, which was done the next morning.

[5] 3. It is next contended that there was no demand under section 689 of the Code of Civil Procedure. Appellants say:

> "It must be conceded in this case that the only demand made by plaintiff on Cornell, as sheriff, was that contained in the telegram sent on February 28, 1912, which was as follows: 'S. C. Cornell, Sheriff, Merced, Cal. Understand you have attached car sweet potatoes P. F. E. thirty-nine thirty-five. We have paid for this car, what right have you to attach our goods. Turn car loose at once or will start proceedings for damages. Answer quick. Brinkley-Douglas Fruit Co.' This clearly fails far short of the demand required by C. C. P. 689, and which the sheriff must receive before he would be justified in relinquishing the property."

But there was a written notice of demand, as shown by the transcript, which it is not denied was received by the sheriff prior to the sale of the attached property. There was also a purported indemnity bond given to the sheriff which also appears in the record.

The said notice and demand contained all that is required by section 689 of the Code of Civil Procedure. The affidavit, however, was made by Duarte instead of the corporation. It appears, though, in the claim itself that it was made on behalf of the Brinkley-Douglas Fruit Company. It may be that, strictly speaking, Duarte was not authorized to make the claim for respondent, but, as far as the sheriff was concerned, he was put upon the same notice as though the affidavit had been made by the fruit company itself. As far as the question of agency is concerned, moreover, it is not an unreasonable view that Duarte was acting as the agent of the company throughout the entire transaction, including the purchase of the potatoes. Indeed, his daughter testified that they were purchased for the Brinkley-Douglas Fruit Company. However, the case seems to have been tried upon the theory that Duarte was the purchaser and then the vendor, and we have so regarded it. But the claim and notice provided in said section is for the protection of the sheriff that he may release the property or require an indemnity bond (Dubois v. Spinks, 114 Cal. 289, 46 Pac. 95), and when the sheriff does not object to the sufficiency of the notice, but demands of the creditor that he indemnify him against loss, and an undertaking is given without objection on the part of the creditor, the sheriff waives any question as to the sufficiency of the notice or demand (Kellogg v. Burr, 126 Cal. 38, 58 Pac. 306).

There is some contention in the closing brief of appellants that the indemnity bond received in evidence was not shown to have been given in this particular case, but no such objection was made when it was offered, and, besides, we are satisfied with the proof on that point. It is also claimed that the bond was and is a nullity. There may be some question as to its sufficiency and validity, but the sheriff seemed to be satisfied with it. It was his own fault if he did not require a good bond, but, at any rate, he acted upon the claim and notice in behalf of the respondent and he should not now be heard to question the sufficiency of the demand.

[6] 4. We think conversion was the proper remedy.

> "Trover is a proper form of action against a sheriff who seizes or sells the property of one person under process against another." 35 Cyc. 1792.

This is necessarily implied also by the language of section 689 of the Code of Civil Procedure.

[7] 5. It may have been error for the court to allow the testimony as to the value of the potatoes at Pueblo, Colo., but, if so, it was entirely without prejudice; for it is clear that the court in its finding was not influenced by such testimony, and the value found was established by competent and material testimony, virtually without conflict.

[8] 6. There was no failure to find upon every material issue. The possession at the time of the attachment was not a vital consideration. In such action of conversion the plaintiff is entitled to recover where he proves his ownership and right of possession together with the appropriation of the property by defendant. It is immaterial that the property may be at the time of conversion in the actual possession of a third party.

The court's findings as to the ownership and right of possession, as already set forth, render unimportant the issue of actual possession.

[9] 7. It is contended that the judgment against the administrator is erroneous in that it should have directed that it be paid in the due course of administration. Code Civ. Proc. § 1504. The point is, no doubt, well taken and the judgment in that respect should be corrected on appeal. Vance v. Smith, 124 Cal. 219, 56 Pac. 1031.

The foregoing includes all the reasons urged by appellants for reversal. We cannot avoid the opinion that they are more plausible than substantial, and that they should not avail to overthrow the conclusion of the lower court, which seems not only legal, but also entirely just and equitable in view of the undisputed fact that the potatoes were purchased with the money of respondent, and that there is no doubt of the good faith of the corporation in the transaction.

The judgment against the administrator is modified by adding thereto the following: "And that said judgment be paid in due course of administration"—and as thus modified the judgment is affirmed as to both defendants, as is also the order denying the motion of each defendant for a new trial; respondent to recover its costs.

We concur: CHIPMAN, P. J.; HART, J.

(33 Cal. App. 733)

STEPHENS et al. v. DAUGHERTY et al.

(Civ. 1859.)

(District Court of Appeal, Second District, California. May 22, 1917.)

1. GUARANTY 🔑85(1) — PLEADING — SUFFICIENCY.

In an action on a contract of guaranty of rent, the complaint showed no right of recovery, where the facts stated did not show a primary obligation against the lessee corresponding to the obligation of guaranty.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 99.]

2. DAMAGES 🔑150 — LIQUIDATED DAMAGE —PLEADING—SUFFICIENCY.

In an action on a guaranty to recover the amount stipulated as liquidated damages for failure of lessee to pay rent, the complaint was insufficient, where it failed to allege that it would have been impracticable or extremely difficult to fix the actual damages for failure to pay rent, in view of Civ. Code, § 1670, providing that every contract by which the amount of damages to be paid for the breach is determined in anticipation thereof is to that extent void, except as expressly provided in the next section, and section 1671, providing that parties to a contract may agree upon an amount, which will be presumed to be the amount of damages by reason of breach when from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage.

3. DAMAGES 🔑85—LIQUIDATED DAMAGES—BURDEN OF PROOF.

Civ. Code, § 1670, providing that every contract by which the amount of damage for a breach thereof is determined in anticipation thereof is to that extent void, except as expressly provided in the next section, must be presumed to apply in all cases, unless the parties seeking to recover upon the contract agreement pleads and proves that his case comes within section 1671, authorizing stipulations for liquidated damages, where it would be impracticable and extremely difficult to fix the actual damage.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 179-181, 183-187.]

4. GUARANTY 🔑87—TERMINATION OF LEASE —OBLIGATION TO PAY RENT—ACTUAL DAMAGE.

Where the landlord deprived the lessees of all interest in the leased premises, causing the lease to be absolutely terminated, there could be no remaining obligation to pay rent, and in an action on a contract of guaranty of payment of rent, it was necessary for the landlord to plead and prove the amount of actual damage suffered and coming within the terms of the guaranty.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 101.]

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by Frank A. Stephens and another against E. L. Daugherty and others. From two judgments entered in favor of defendants upon orders sustaining demurrers to plaintiffs' amended complaint, plaintiffs appeal. Judgments affirmed.

John A. Powell and Hunsaker & Britt, all of Los Angeles, for appellants. Simpson, Moody & Simpson, of Pasadena, and Stahl & Sayles and Earle K. Backus, all of Los Angeles, for respondents.

CONREY, P. J. The plaintiffs appeal from two judgments entered in favor of the defendants, following upon orders sustaining demurrers to plaintiffs' amended complaint.

As shown by the complaint, the plaintiffs, in October, 1912, made to one J. B. Dodson and his wife, Cora A. Dodson, a five-year lease of a certain apartment house in the city of San Diego for a stated aggregate rental payable at the rate of $400 per month. In that lease it was agreed as follows:

> "It is further understood and agreed that the parties of the second part as a part of this transaction shall cause to be executed and delivered to the said parties of the first part at the time of the execution of this lease, a good and sufficient guarantee or bond in the sum of twelve hundred ($1,200.00) dollars, as security for the payment by the said parties of the second part of the rent of said premises for three (3) months of said term immediately following the surrender of said premises, to the said parties of the first part, if surrender is made, or the three (3) months immediately following the forfeiture of this lease by the parties of the second part, as the parties of the first part may elect."

The complaint alleges that as a condition of entering into said contract of lease, plaintiffs required of said lessees that they should furnish to plaintiffs a guaranty or bond to the effect above stated. Thereupon, in order to comply with that condition and at the request of said lessees, at the same time and place and as a part of the same transaction and of said indenture of lease, the defendants, for the benefit of the plaintiffs and in consideration of the execution of said lease, made, executed, and delivered to the plaintiffs an undertaking, which is set forth in the complaint. The recitals of the undertaking refer to the above-mentioned stipulation contained in the lease, and by said undertaking the defendants guaranteed that:

> "If said property described in said lease should be surrendered to the lessors, or if the said lessees should forfeit the said lease, then and in that case we, or either of us, promise to pay to the said Frank A. Stephens and Florence L. Stephens twelve hundred ($1,200.00) dollars; said twelve hundred ($1,200.00) dollars shall become due and payable immediately upon the surrender of said premises to the said lessors, if surrender should be made, or immediately upon the forfeiture of this lease by the said lessees, if forfeiture should be made, as said lessors may elect."

The guaranty was accepted by the plaintiffs, who thereupon executed and delivered the lease, relying upon the security of said bond, and if said bond had not been furnished plaintiffs would have refused to execute said lease. Thereafter, in May, 1914, on account of default in payment of rent for two successive months, plaintiffs made demand in writing upon the lessees for payment of the rent or surrender of possession of the leased property. Payment not having been made, the plaintiffs commenced an action against the lessees to forfeit the lease and to recover possession of the rented premises, together with the unpaid rent and damages for the unlawful detention of the property. And on July 30, 1914, judgment was entered in favor of the plaintiffs in that action against J. B. Dodson and Cora A. Dodson, the defendants therein, awarding to the plaintiffs possession of the leased premises and adjudging the lease to be forfeited. Said judgment was further in favor of the plaintiffs for the sum of $1,800, of which $1,600 was specified to be the rent for April, May, June, and July, 1914, and $200 was allowed as damages for unlawful detention of the leased premises. Thereafter, on August 6, 1914, the lessees surrendered the property to the plaintiffs. After such surrender of possession the plaintiffs commenced this action against the defendants to recover the sum of $1,200, which they claim from the defendants under the bond executed by them as aforesaid.

[1] The contract of the defendants being only a contract of guaranty, the complaint shows no right of recovery thereon unless the facts, as stated, show a primary obligation against the lessees corresponding to the obligation of guaranty. Sections 1670 and 1671 of the Civil Code are as follows:

> 1670: "Every contract by which the amount of damage to be paid, or other compensation to be made, for a breach of an obligation, is determined in anticipation thereof, is to that extent void, except as expressly provided in the next section."
>
> 1671: "The parties to a contract may agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage."

[2, 3] It is not alleged in the complaint, nor do the facts alleged show, that it would have been impracticable or extremely difficult to fix the actual damages accruing to the plaintiffs on account of the surrender or forfeiture of the lease. If the Code sections quoted above are applicable, facts should have been alleged bringing the case within the exceptions described in section 1671. "The rule stated in section 1670 of the Civil Code, must be presumed to apply in all cases, unless the party seeking to recover upon the agreement shows by averment and proof that his case comes within the exception mentioned in section 1671." Los Angeles, etc., Association v. Pacific Surety Co., 24 Cal. App. 95, 99, 140 Pac. 295, 297. By section

1174 of the Code of Civil Procedure it is provided that in an action of unlawful detainer, where the plaintiff recovers for unlawful detainer by the defendant after default in the payment of rent, the court shall not only give judgment for the amount of the rent due, but shall also determine the damages occasioned to the plaintiff by such unlawful detention. It has been held that section 1174, Code of Civil Procedure, and certain sections of the Civil Code, provide rules for ascertaining damages in all kinds of actions for the recovery of real property. "When a tenant fails to pay rent as provided in the lease, the amount of damage is not extremely difficult to fix, and it certainly is not impracticable to fix the amount of such damage." Jack v. Sinsheimer, 125 Cal. 563, 565, 58 Pac. 130, 132. It was in accordance with the law as thus stated that the plaintiffs in their action against the lessees were allowed damages for the unlawful detainer of the leased premises. It does not appear that the damages recovered against the lessees had anything to do with conditions which might exist after the actual surrender of the premises; therefore those damages do not represent any part of the amount claimed from the defendants in this action, since they had nothing to do with the payment of "rent" of said premises for time following the date of surrender thereof.

[4] But the primary obligation of the lessees could not have existed to pay contract rent for premises which they were not to possess. There would be no consideration for such a promise. This forces us to the alternative that to be valid at all the obligation of the lessees must have had the nature of an obligation to pay damages for breach of the lease. The determination by the court in the action against the lessees that the lessors were damaged in the sum of $200 is not binding upon the defendants here, since they were not parties to that action. Besides, those damages were merely for unlawful detention of the premises. To recover upon the undertaking it was necessary to plead and prove the amount of the actual damages suffered by the plaintiffs and coming within the terms of the bond. No such facts are stated in the complaint.

We have given attention to the contention of appellants that a valid agreement may be made (collateral to a lease agreement), that even though there be a forfeiture of the lease, the lessee shall remain personally liable for all or a specified portion of the "rent" for the unexpired portion of the term. It seems to us that the authorities to which appellants refer merely recognize the rule that under certain circumstances a landlord who has taken possession of leased property before the expiration of the term may notify the tenant that in taking such possession he proposes to relet to another at the risk of the tenant, and that he will hold the tenant responsible for such portion of the rent as may remain unpaid after deducting the payments obtained from the new tenant. In such circumstances the possession of the property remains constructively the possession of the tenant, and the landlord does not take possession absolutely in his own right. But in the case at bar it appears that the plaintiffs elected to deprive the lessees of all interest in the leased premises, and caused the lease to be absolutely terminated. That having been done, there could be no remaining obligation to pay rent. We think that the plaintiffs here are attempting to recover upon a guaranty, and thereby to enforce the payment of a penalty in a case where there existed no right except such as might be based upon proof of actual damages and of the amount thereof, but have failed to state those necessary facts.

We do not agree with the contention that the promise made by the defendants and their principals may be sustained on the ground that it was a part of the consideration furnished to the lessors for the execution of the lease. The contingent nature of the promise definitely distinguishes it from an actual consideration paid or agreed to be paid for the lease. For the same reason the execution of this undertaking bears no analogy to the payment of a bonus or preliminary extra compensation offered as an inducement to the execution of the lease.

The judgments are affirmed.

We concur: JAMES, J.; WORKS, Judge pro tem.

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33 Cal. App. 684

ALDEN v. MAYFIELD. (Civ. 1654.)

(District Court of Appeal, Third District, California. May 16, 1917. Rehearing Denied by Supreme Court July 14, 1917.)

1. Fixtures 🔑35(2)—Removal — Sufficiency of Evidence.

In a lessor's action against her tenant for damages from the tenant's removing plate glass and marble from the front of the building, evidence *held* to justify findings that the glass and marble were attached to the building at defendant's own expense and were his property; that they were not so affixed as to constitute them integral parts of the premises; that they were removed without damage to the freehold or the building; and that the building on removal was put by defendant in as good condition as at the time the defendant installed the plate glass and marble front.

[Ed. Note.—For other cases, see Fixtures, Cent. Dig. §§ 73, 74.]

2. Appeal and Error 🔑1043(5)—Harmless Error—Denial of Injunction.

In a lessor's action against her tenant for damages from the removal of plate glass and marble from the front of the building, if the object of a temporary injunction was to restrain defendant from removing fixtures such as hatracks, failure to grant the remedy was harmless where it was found they belonged to the tenant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4119.]

3. INJUNCTION 🔑51—IMMATERIAL MATTER.

In such action, where certain fixtures were never disturbed by defendant, who never attempted to remove them, whether the court erred in refusing to grant preliminary injunction as to such fixtures was immaterial.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 104.]

4. INJUNCTION 🔑51—UNNECESSARY RELIEF.

In such action, under a finding that the parties had stipulated that other fixtures were the lessor's property, and under such stipulation, it was unnecessary to grant permanent injunctive relief as to such fixtures.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 104.]

5. PLEADING 🔑236(6)—AMENDMENT.

In such action, where it was evident from the time of filing answer that defendant's theory was that he put in the plate glass and marble slabs at his own expense, so that they constituted his property, and he was authorized to remove them, but the theory was not presented by the answer as originally filed, so that defendant lost on appeal, an order granting leave to defendant to amend his pleadings to enable him legally to make out his case on the proofs conformably to the theory on which he could prevail was in the exercise of a sound judicial discretion.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 601.]

Appeal from Superior Court, Solano County; A. J. Buckles and W. T. O'Donnell, Judges.

Action by Victoria Alden against C. E. Mayfield. From judgment for defendant, and from an order denying her new trial, plaintiff appeals. Judgment and order affirmed.

W. U. Goodman, of Fairfield, for appellant. T. T. C. Gregory and C. J. Goodell, both of San Francisco, for respondent.

HART, J. This appeal grows out of a second trial of this action. In the former trial, as in the second, the defendant prevailed, and an appeal was taken by the plaintiff to the Supreme Court from the judgment and the order denying him a new trial. The judgment and the order were reversed (Alden v. Mayfield, 163 Cal. 793, 127 Pac. 44, 41 L. R. A. [N. S.] 1022, Ann. Cas. 1914A, 258), and the nature of the action and the issues as presented and tried at the former trial are stated in the opinion in that case as follows:

> "Plaintiff sued to recover damages for injury to her freehold and for an injunction to restrain threatened future damages. The specific charge of damages was that the defendant 'between midnight of the 28th day of May and daylight of the 28th day of May wrongfully and unlawfully cut down, tore out, and removed the heavy plate glass and stone front of a brick building belonging to plaintiff and replaced the same with a cheap temporary structure with great damage to said property and the said plaintiff in the sum of $1,000.' Defendant admitted the taking down and removal of the plate glass and the marble stone front, but alleged that while tenant of the building he placed the plate glass and marble in the building; that the windows and marble were owned by him 'and were placed there by him for the purpose of trade, ornament, and convenience only, and were trade fixtures, and not an integral part of the said store or premises, and could be and were removed without any injury to the premises.' The court found in accordance with this averment of the answer. It further found that defendant threatened to remove fixtures which were part of the freehold, and as a conclusion of law declared that plaintiff was entitled to an injunction restraining defendant from injuring the freehold; but by its judgment withheld the injunction and gave judgment for defendant for costs."

In the opinion, it is said:

> "It is to be noted that the answer does not base the right of removal upon any agreement between the landlord and tenant, and the court does not find that the removal was by virtue of any such agreement. Wherefore all of respondent's argument based upon section 1013 of the Civil Code is meaningless. The pleadings and the findings are to the effect that the property removed was the tenant's property, was affixed to the freehold for the purpose of trade, ornament, and convenience and had not become an integral part of the store or premises. This is a finding under section 1019 of the Civil Code, which permits such removals under the indicated circumstances. The questions presented are, first, whether the plate glass and marbles so removed belonged to the defendant, and whether, if they so belonged to the defendant, they were attached to the freehold in such manner as to justify his removal of them. That they were attached by screws is uncontradicted. That the plate glass windows and the marble formed the front of the store occupied by defendant is equally without controversy. Their removal necessarily, and against any evidence to the contrary, was the removal, not of a fixture, but of a portion of the building itself, the very front of the store. By such removal the building itself ceased to be an inclosure and was open to intruders and the elements."

Upon the return of the cause to the court below for retrial, the defendant applied for, and, over objection by the plaintiff, was granted, leave to amend his answer by pleading an express oral agreement between him and the plaintiff, whereby it was stipulated and agreed that the defendant should put in the plate glass and the marble base in the front of the building at his own expense, and that, upon quitting the premises, he might remove the same upon the condition that he would not injure the building and would place the portion from which the glass and the marble were removed in equally as good condition as when the change indicated was made.

The court, as a result of the last trial, found that the agreement for the removal of the plate glass and the marble base, as pleaded in the amended answer, had been entered into between the parties. Conclusions of law were made and filed in accordance with the findings and judgment thereupon entered against the plaintiff and in favor of the defendant for costs.

These appeals by the plaintiff are from the judgment and the order denying her a new trial.

It is obvious that the situation presented by this appeal is, in material and important particulars, entirely different from that presented herein on the former appeal. As is to be noted from the excerpt extracted and reproduced above from the opinion of the Supreme Court disposing of the former appeal, the question whether there was an agreement between the parties whereby the defendant was to be allowed to remove from the front of the building the plate glass and the marble installed therein by him upon quitting the premises was not made an issue by the pleadings, nor was there a finding thereon by the trial court. The amendment of the answer after the decision by the Supreme Court formally introducing that issue into the case and the finding thereon that such an agreement had been made present, in a legal aspect, a much different case from that submitted to the Supreme Court on the first appeal.

In addition to the finding that the agreement authorizing the defendant, upon ceasing to occupy the building, to remove the plate glass and marble slabs from the front of the building, the court, as the result of the second trial, made the following findings, which appear to derive from the evidence sufficient support:

> "It was stipulated by plaintiff and defendant, and is hereby found as a fact, that all the shelving, fixtures, and such appliances attached to and connected with the store and all staging, electric light wiring, and gas fittings were, and are, the property of plaintiff, and that they could not be removed by defendant. The court finds that defendant has not threatened nor intended to, and will not, unless restrained by this court, or at all, cut out, tear down, or remove any of the shelving, fixtures, or appurtenances last hereinabove described, but has removed only such fixtures as aforesaid as by stipulation and agreement he could remove;" that "it was further stipulated by plaintiff and defendant and now is found as a fact that the following articles were, and are, the property of the defendant, and might be removed by him: three glass hat cases, four glass showcases on the side, two center glass showcases, six glass sectional suit cabinets or cases, one counter, one running ladder, one stove, one cash register, one safe, two mirrors, and all other articles not attached to the building."

It will later be shown that the issue as to the injunctive relief prayed for by the plaintiff has become entirely immaterial, so far as these appeals are concerned, and therefore the determination of these appeals, save as to certain rulings on evidence and the order allowing the amendment to the answer, is narrowed down to and made to rest solely upon the solution of three propositions, viz.: (1) Whether an agreement to remove the glass and marble was made; (2) if so, were they removed in such manner as unnecessarily to injure or damage the building; (3) was the building, or the front portion thereof from which the glass and the marble were removed, placed by the defendant in as good condition as it was prior to the installation of the plate glass and marble show window?

The decision of these questions obviously depends upon the further proposition whether the evidence supports the findings that the agreement was made, that in removing the glass and marble, the building was not injured or damaged, and that the front portion thereof, after the removal, was placed and left in as good condition as it was in before the new show window was installed by the defendant.

It is proper to observe that the evidence disclosing the nature of the improvements which, under the agreement, were to be removed by the defendant and their effect upon the building when installed and the effect of their removal upon the building—that is, whether they were so attached thereto as that their removal would of itself impair or weaken the building—is, we judge from the opinion of the Supreme Court, entirely different from that which thus appears to have been shown by the record supporting the former appeal. For instance, the evidence as it was incorporated into the record upon which the former appeal was submitted apparently justified the conclusion that "the plate glass windows and the marble formed the front of the store occupied by the defendant," that "their removal necessarily, and against any evidence to the contrary, was the removal, not of a fixture, but of a portion of the building itself, the very front of the store," and that "by such removal the building itself ceased to be an inclosure and was open to intruders and the elements." Alden v. Mayfield, 163 Cal. 793, 795, 127 Pac. 44, 41 L. R. A. (N. S.) 1022, Ann. Cas. 1914A, 258. At the trial from which the present appeals arise it is made to appear from the testimony of both the defendant and the witness Lund a building contractor, who put in the plate glass front and the marble slabs for the defendant, that the plate glass and the marble slabs removed from the building did not constitute the entire front of the store nor their removal cause the building itself to cease to be an inclosure. The manner in which the plate glass and the marble base were installed was described by Lund as follows:

> "The plate glass set at the outer edge of the shoulder of the base; a little recess, about five-sixteenths of an inch, was left outside of the hardwood floor for this glass to set in. We always leave a little space at the top of half an inch, so in case of any settlement there is no danger of breaking the glass. The glass at the corner was held in place by a wooden bar on the inside, which was fastened neither to the ceiling nor to the base of the window, and metal bars on the outside were screwed into this wooden bar to form a clamp to secure them. The base of the glass was held in place by the marble, which projected above the base of the glass, say one-half or three-quarters of an inch and the marble in turn was secured by brass screws, through the marble, into the wooden base of the window. * * * The plate glass that I put in for Mr. Mayfield did not in any way tend to support or strengthen or hold together the window; nor did the marble slabs."

This witness further testified that the molding was nailed to the building and cleats attached to the molding, and that the glass was slipped into and held by the cleats; that, in removing the glass, neither the molding nor the cleats were touched or disturbed, but the glass was merely withdrawn from the cleats.

The plaintiff testified that, when the plate glass and marble slabs were removed, the building was not thereby left open or exposed to the elements, that the whole front remained, and that "there were partitions, the windows still remained there, and the only way any one could enter would be entering through the door." In this statement the plaintiff was corroborated by Lund.

In brief, and recapitulatory of the testimony of the plaintiff and Lund, the marble was used as a base for the support of the plate glass, and the latter was itself nowhere attached to the building, but was slipped into the cleats which had been fastened to the molding, so that it could be and was, as we have seen and shall later further see, removed from the cleats without detaching the cleats or the molding or otherwise disturbing either or the building, that the plate glass and the marble did not form the front portion of the structure, and that when removed it did not destroy the inclosure of the building or otherwise expose it to the elements or intruders, the plaintiff testifying that entrance into the store, after the removal, could be effected only by means of the door. This, we say, is the testimony as it is presented by the record now before us relative to the manner in which the plate glass and the marble base were attached to the building; and, while it is true that the marble was secured by means of brass screws which were passed through it and into the wooden base of the window, yet the testimony adverted to very clearly shows that the show window was so constructed as to admit of the ready and easy removal thereof without the slighest injury to the building or the impairment of its stability as a structure in any degree.

As to the agreement for the removal of the plate glass and the marble, the testimony shows: That the plaintiff's son, Richard C. Haile (deceased at the time of the second trial), had the management and control of the building as the plaintiff's agent. He, in other words, was authorized by the plaintiff to attend to the renting of it, to make agreements and leases to that end, and to make such arrangements with tenants or persons employing the use of the building as might be necessary or required for the convenient use of the building for the purposes for which it might be let out. When the defendant leased the building the negotiations for that purpose were carried on with Haile. The defendant testified that he spoke to the plaintiff about making some changes and improvements in the store, and that she referred him to Haile, saying her son "had charge of it and whatever I did to do with him." The defendant then called on Haile, and the two entered into an agreement by which a number of improvements in the interior of the store were to be made, the defendant to pay for the same and to withhold from the rent in reimbursement for the expenditure so made the sum of $10 each month until the total sum so expended—amounting in the aggregate to $175—was repaid. Subsequently the defendant again went to Haile and asked him to install the heavy plate glass and the marble base in the place of the front show window as it then stood. Haile refused to pay for the improvement so asked for, but proposed that the defendant proceed to put in the plate glass windows and marble, and that the latter, when he vacated the store, "could take them out and remove them, provided I would replace them as the store originally was prior to the time when I took it out or in as good condition."

The court found that the removal of the plate glass and marble was by the defendant, on the 28th day of May, 1910, "effected and made without any damage whatsoever to said premises or said freehold or said building; that neither said glass nor said marble had by the manner in which they or either of them was affixed, or otherwise, become an integral part of the premises or freehold or building nor were said glass and marble an integral part thereof; that said glass and marble were affixed to said building by means of lag screws."

Testimony showing how the glass and marble were attached to the building has already been referred to herein, and, as further supporting the above finding, testimony disclosing the following additional facts should be considered: That there were only four slabs of marble and as many pieces of plate glass removed, leaving the remainder of the front intact; that neither the plate glass nor marble was used for or acted as a support for the store above or any part of the building; that, as a matter of fact, "the plates would surely break if there was any weight on them"; that it required only 30 or 40 minutes to remove them, and that immediately upon their removal they were replaced with plain glass and a wooden base even superior in quality to those in the front of the building before the plate glass and the marble were substituted therefor; that, in removing them, it was only necessary to slip the plate from the cleats by which they were held and to remove the screens securing the marble base; that by their removal the brick or other materials of which the building was constructed were not disturbed or damaged in any degree; and that the building itself remained as stable and strong as it ever was.

The testimony addressed to the vital issues involved in the controversy, as they were formally tendered and accepted at the later trial thereof, has now been briefly summarized, and from the testimony as so presented it is plainly manifest that, as the case was presented at the second trial thereof, and as it is here now presented, the defendant, both in the matter of pleading and in that of proof, relied and relies upon the provisions of section 1013, and not, as the situation necessitated upon the former trial, upon those of section 1019 of the Civil Code. The first-mentioned section, it should be explained, in effect provides that, where an agreement is so made between the landlord and tenant, the latter may remove property or a thing affixed by him to the land of the former. The section next named provides that at any time during the continuance of his term a tenant may remove from the demised premises anything affixed thereto by him for the purposes of trade, manufacture, ornament, or domestic use, if the removal can be effected without injury to the premises, unless the thing has, by the manner in which it is affixed, become an integral part thereof.

[1] And it seems to us that, from the testimony, of which the above is a conspectus, the conclusion is irresistible that, upon the theory upon which the cause was last presented and tried, there is, as before in effect declared, ample justification for the trial court's deductions therefrom, as evidenced by its findings, viz.: That the plate glass and the marble slabs removed by the defendant were attached to the building at his own expense, and that they were his property; (2) that they were not so affixed to the premises as to constitute them integral parts thereof, but were attached thereto in such manner "as to justify his removal of them," that is to say, in such manner as that they could be removed without injury or damage to the freehold or the building to which they were directly attached; (3) that they were removed without producing any injury or damage to the freehold or the building; and (4) that the building upon such removal was put by the defendant in as good, if not a better, condition in that respect than it was in prior to and at the time of the installation of the plate glass and the marble front or show window.

It results, of course, that the findings, being sufficiently sustained by the proofs, afford full support to the judgment.

The claim that the court should have granted the preliminary or other preventive relief asked for by the plaintiff is of little importance, even if, under the allegations of the complaint, the plaintiff was preliminarily entitled to such ancillary aid. The complaint, in furtherance of its plea for an injunction, alleged that the defendant had threatened and was about to remove from the store certain fixtures which belonged to the plaintiff. The court found, upon sufficient evidence, that certain fixtures, portable in character, such as hatracks, showcases, and other like store appliances, which were not affixed to the building in a legal sense, were the property of the plaintiff.

[2] If the object of the injunction was to restrain the defendant from removing these, the failure to grant that remedy is, so far as such fixtures were concerned, now unimportant and without prejudice, since, as shown, it was found that they belong to the defendant. As to the other fixtures, apart from the plate glass and marble slabs, the court found, as will be noticed from the findings above quoted herein, that the parties had stipulated that they were the property of the plaintiff. This finding is supported by evidence, and obviously favorable to the plaintiff. The evidence shows that these particular fixtures were never interfered with or disturbed by the defendant, nor was there any attempt on his part to remove them.

[3, 4] Therefore, so far as said fixtures were concerned, whether the court did or did not err in refusing to grant a preliminary injunction is now entirely without any significance or importance; and, under the finding and the stipulation referred to, it was obviously unnecessary to grant permanent injunctive relief as to said fixtures.

Of course, it will not be claimed that the prayer for an injunction was aimed at interference with or the removal of the plate glass and marble slabs, since the evidence shows, and indeed the complaint alleges, that those articles had already been removed when this action was instituted, and since, as clearly appears from the complaint, the injunctive relief asked for was solely and exclusively prohibitive, and not mandatory in its nature.

We do not think, as the plaintiff contends, that the court abused its discretion in allowing the defendant to amend his answer in the particular and manner indicated in the outset of this opinion. It is evident that, from the very inception of this action, particularly from the time of the filing of the answer, the theory of the defendant was that, having himself and at his own expense put in the plate glass and the marble slabs, they constituted his property, and that he would legally be entitled and authorized to remove them upon the termination of his term as lessee of the premises. But it transpired, as we have shown, that this theory was not presented by the answer as originally filed, nor did the court at the first trial make a finding in consonance therewith, and thus the defendant lost on appeal.

[5] In view of the situation as thus indicated, and in the interest of justice, the order granting leave to the defendant so to amend his pleading as to enable him legally to make out his case on the proofs conformably to the only theory upon which he could hope to prevail—the theory upon which he had evidently supposed he had properly proceeded in the first instance—constituted only the exercise of a sound judicial discretion.

We have examined in detail and with much care the rulings by which, so it is claimed, improper testimony was permitted to enter the record and have found in none of them any just ground for holding that, even if technically erroneous, they in any measure affected the substantial rights of the plaintiff at the trial of the case.

The judgment and the order appealed from are affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

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33 Cal. App. 724

ALDEN v. MAYFIELD. (Civ. 1655.)

(District Court of Appeal, Third District, California. May 21, 1917.)

1. Landlord and Tenant 🔑231(6)—Rental Value—Sufficiency of Evidence.

In a landlord's action to recover possession and for rent, evidence *held* to support finding of the trial court that the rental value of the premises was $65 per month.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 933, 934.]

2. Appeal and Error 🔑994(1)—Review—Acceptance of Testimony.

Where the trial court found in favor of defendant on an issue, testimony of defendant, a qualified witness, for himself on the issue, must be accepted on appeal at face value.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3901, 3906.]

3. Statutes 🔑211 — Construction — Headnote.

The headnote of Civ. Code, § 3345, which provides that any tenant holding over, etc., must pay treble rent, reading "Tenant Willfully Holding over," must be deemed a part of the section and accorded the same effect as though included in its body.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 288.]

4. Landlord and Tenant 🔑231(6)—Willful Holding Over—Sufficiency of Evidence.

In a landlord's action for treble rent under Civ. Code, § 3345, on account of tenant's having held over, evidence *held* to show the element of willfulness in the holding over.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 933, 934.]

5. Landlord and Tenant 🔑216 — "Willful" Holding Over—Statute.

Where the conduct of a tenant in refusing to surrender possession on demand of the landlord was deliberate, intentional, and obstinate, with knowledge that the tenancy was terminated, and that he was holding over against the landlord's will and consent, and not under a reasonable claim of right, the withholding of the premises by the tenant was "willful" within Civ. Code, § 3345, rendering any tenant who willfully holds over liable for treble rent.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 861–865.

For other definitions, see Words and Phrases, First and Second Series, Willful.]

6. Landlord and Tenant 🔑230(1) — Holding Over—Pleading—Statute.

In a landlord's action against the tenant for treble rent for a willful holding over under Civ. Code, § 3345, the complaint must allege willfulness or its equivalent, and a complaint alleging that the tenant refused to deliver up possession against plaintiff's will and wish, also averring that the possession was retained under no claim of right, and not in good faith, would sufficiently allege willfulness.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 904–910.]

7. Pleading 🔑403(2)—Cure of Defects in Complaint by Answer.

In a landlord's action against the tenant for treble rent for willfully holding over under Civ. Code, § 3345, the defect of the complaint that it did not allege the willfulness of the holding over was cured, and the issue presented by the answer's averments that defendant retained possession in good faith and under a claim of right and title for the period.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1344–1347.]

Appeal from Superior Court, Solano County; A. J. Buckles and W. T. O'Donnell, Judges.

Action by Victoria Alden against C. E. Mayfield. From a judgment for plaintiff and an order denying her motion for new trial, she appeals. Reversed.

W. U. Goodman, of Fairfield, for appellant. T. T. C. Gregory and C. J. Goodell, both of San Francisco, for respondent.

BURNETT, J. The action was brought to recover possession of certain real property in Suisun, Solano county, for rents due up to the time of the termination of the tenancy and for treble costs for the period subsequent to that date. At the first trial judgment was rendered for defendant, from which an appeal to the Supreme Court was taken and a reversal had. 164 Cal. 6, 127 Pac. 45. The new trial resulted in a judgment:

> "That said plaintiff have and recover from said defendant the sum of $650, with interest thereon from the first day of April, 1911, * * * and that plaintiff is not entitled to and shall not recover treble rents."

From this judgment and the order denying her motion for a new trial plaintiff has appealed, claiming that the rent due was $1,000, and that it should have been trebled; that the judgment, in other words, should have been in her favor for $3,000.

Two questions, then, are presented for determination: First, whether there is any evidence to support the finding of the trial court that the rental value of the premises was $65 per month; and, second, whether there is any justification for the court's conclusion that the rent should not be trebled.

[1, 2] As to the first of these considerations there can be no kind of doubt. Appellant argues at length and with persuasive force that the rental value was actually $100 per month. There is undoubtedly evidence to support the contention, but Mr. Mayfield testified:

> That the reasonable rental value "was $65 per month. * * * The rental value of that property from June 1st to the time I vacated was not one cent in excess of $65 per month. In proportion the other rents for adjoining places were lower. In that neighborhood they were lower."

He was a qualified witness, and, in view of the finding of the court below, his testimony must be accepted here at its face value. Further discussion of that matter is foreclosed.

[3] The position of appellant as to the

other question is based upon section 3345 of the Civil Code, providing:

> "If any tenant, or any person in collusion with the tenant, holds over any lands or tenements after demand made and one month's notice, in writing given, requiring the possession thereof, such person holding over must pay to the landlord treble rent during the time he continues in possession after such notice."

There is no doubt that such notice was given and defendant held over for ten months thereafter, but the defense is sought to be made that the holding over must be "willful" in order to subject the tenant to the penalty provided by said Code section, and that the lower court by its finding negatived the existence of this element. Attention is called to the fact that the headnote of said section is, "Tenant Willfully Holding Over," and the contention is made, supported by authority, that this must be deemed an important part of said section and be accorded the same effect as though included in the body of the law. As a legal proposition this may well be conceded, and we need not review the cases cited to the point.

[4] But we are of the opinion that the element of willfulness was clearly shown, and that the finding to the contrary is entirely unsupported. There seems to be in that regard no substantial difference between the showing at the second trial and at the first. It is appropriate, therefore, to quote the following language of the Supreme Court in said opinion (164 Cal. 6, 127 Pac. 45):

> "The difficulty with this argument [referring to the contention that there was a waiver by reason of the deposit of the rent] is that the defendant was informed before the deposit of money, both by the principal and by her attorney, that Haile no longer had anything to do with the matter, and we repeat that defendant's endeavor under those circumstances to re-establish the relationship of tenancy with the landlord who had repudiated him and terminated the tenancy was but a shallow bit of subterfuge and trickery. * * * Still further in this connection it is to be noted that the defendant does not deny, as it was incumbent upon him to deny, the allegation that he was holding over against the will and consent of the plaintiff. This he admits, and the admission under the circumstances is a pregnant one. It amounts to an admission that he knew there was no waiver and no continuation of the tenancy so far as plaintiff was concerned. * * * Therefore the evidence, so far from establishing a waiver, with all that a waiver implies—a meeting of minds and the intentional forbearance to enforce a right—clearly establishes that there was no waiver, but only an effort by defendant surreptitiously to do something which might in some way advantage him and enable him the longer to hold possession. This is made manifest from the fact that defendant was not prepared to leave the building, had no other location or store in which to move his goods, and was desirous of remaining where he was until he could secure other accommodations."

It may be added that the allegations of defendant's cross-complaint still further negative the idea that there had been any waiver of plaintiff's right to the possession or that defendant could have believed that there was a renewal of the tenancy. The claim for damages set up in his cross-complaint was based upon the theory that plaintiff and her agent, Haile, were trying to obtain possession of the premises, even going to the extreme on the part of Haile of making threats and creating disturbances in the store in order to induce defendant to evacuate.

[5] All these things would seem to show conclusively a willful withholding of the premises on the part of respondent. Doubtless the word "willful" is used in different statutes with various shades of meaning, but herein the conduct of defendant in refusing to surrender possession was deliberate, intentional, and obstinate, with knowledge that the tenancy was terminated, and that he was holding over against the will and consent of the landlord. We think nothing more is required to constitute willfulness on the part of the tenant.

For many illustrations of the use of the term and of the different significations attached to it we may refer to Words and Phrases, vol. 4, p. 1293 (2d Ser.). Probably the following quotation therefrom is as instructive as any that could be selected:

> "The word 'willfully' has various meanings and is used to denote the quality of an act, or the intent with which it is done. It is frequently used in the sense of intentionally, willingly, designedly, or with set purpose. When used in criminal statutes it usually means with a malevolent purpose or motive, with a wicked or criminal intent, especially if the forbidden act is one that is wrong in itself or involves moral turpitude; but if the forbidden act is not wrong in itself or does not involve moral turpitude, the word is then used in the sense of intentionally or purposely, so that when the act is so done it is done willfully. The word, however, should be given that meaning only which the context indicates was intended. United States v. Sioux City Stockyards Co. (C. C.) 162 Fed. 556."

We do not think the full measure of the Criminal Code should be applied to a case like this; that it is necessary, in other words, to find that the act of the one holding over is with "a malevolent purpose" in order to justify the infliction of the penalty, but it is sufficient if his conduct be intentional, with knowledge of the termination of the tenancy, and that the holding over is against the will and consent of the landlord, and not under a reasonable claim of right. Where the conduct of the tenant is characterized by good faith and a reasonable belief in his right to remain, the penalty should not, of course, be imposed, but we can find in the record no warrant for the application of this principle.

However, it is contended by respondent that:

> "To recover treble rents the statute upon which plaintiff relies must be expressly referred to in the complaint."

In support of this position he cites Chipman v. Emeric, 5 Cal. 239; Barnes v. Jones, 51 Cal. 303; Stewart v. Sefton, 108 Cal. 197, 41 Pac. 293; 13 Cyc. 178; and Ruling Case Law, vol. 8, p. 626.

The Chipman Case involved an action of waste at common law. The jury found for the plaintiff, and the lower court trebled the damages. The judgment was reversed, and judgment ordered to be entered for the amount found by the jury. This was done upon the authority of Bacon's Abridgment wherein the rule was stated as follows:

> "When treble damages are given by a statute, the demand for such damages must be expressly inserted in the declaration which must either recite the statute or conclude to the damage of the plaintiff against the form of a statute."

It is claimed that this decision has never been overruled or criticised. However, in this connection it may be suggested that the case was decided under a different statute from the one before us, that in the present case there is a prayer for treble damages, and that no objection on this ground was made to the complaint or to the evidence herein.

The Barnes Case was reversed really upon the ground that there was no intended trespass, but that the wrong was committed through an innocent mistake, although the court, in the course of the opinion, did declare:

> "But upon our construction of the statute, the complaint fails to state a case entitling the plaintiff to treble damages. It contains no averment that the trespass was willful, but only that the entry and cutting of the timber was wrongful and without the plaintiff's leave. The statute has no application to such a case; and though good as an action at common law, entitling the plaintiff to recover his actual damage, the complaint does not state a case in which the damages can be trebled."

The Stewart Case approved the above-stated rule and held that "to entitle the plaintiff to treble damages, under section 733 of the Code of Civil Procedure, she must have proved her allegation that defendant willfully or maliciously removed the trees, knowing them to be the property of plaintiff."

The statement in Cyc. is:

> "Where damages sought to be recovered arise by virtue of statute, or the amount thereof is determined or augmented by reason of statutory enactments, the complaint must allege facts sufficient to bring the case clearly within such statute, and as defendant should be apprised of the demand against him it is the better practice, and in most jurisdictions necessary, that reference be made thereto, especially if the injured party has also a remedy at common law."

The statement from Ruling Case Law is:

> "And where one seeks to recover penal damages given by statute he must distinctly claim them in his declaration. It is insufficient merely to set forth facts upon which a liability therefor might arise. If the case is one where there was also a common-law remedy, they must be claimed by reference to the statute. * * * If the wrongful act is of such a character or is attended by such conduct or animus of the defendant that the law authorizes the assessment of exemplary damages, the complaint should so describe the act that it may appear therefrom to be such a case."

[6] We may accept the rule as requiring an allegation of willfulness or its equivalent, and it may be conceded that the complaint herein is defective in the respect indicated. It might be thought that the element of willfulness is implied in the following allegations of the complaint:

> "That on or about the 12th day of April, 1910, in the town of Suisun city, county of Solano, state of California, the said plaintiff gave to and served on said defendant her written notice terminating said tenancy and requiring defendant to deliver possession of said premises to said plaintiff on the 1st day of June, 1910, a copy of which notice is hereto attached, marked Plaintiff's Exhibit B and made a part of this complaint to which reference is hereby made; that the said defendant failed, neglected, and refused on the 1st day of June, 1910, to deliver up said possession and continues in possession of same without the consent and against the will and wish of plaintiff; that said defendant now withholds the possession of said premises from the said plaintiff."

But it is apparent that these allegations are consistent with the position that defendant was holding under a claim of right and in good faith, notwithstanding it was "against the will and wish of plaintiff." If the additional averment had been made that the possession was retained under no claim of right, and not in good faith, there is no doubt the element of willfulness would have been tendered, although the word "willful" or its derivative might not have been used.

[7] But it can be said that this defect of the complaint was virtually cured and the issue presented by this averment in the answer:

> "Defendant alleges that from and after and including the said 1st day of June, 1910, he was in the peaceable possession of the said premises and in retaining possession thereof for the said period he acted in good faith and under a claim of right and title thereto for the said period."

It would be proper, therefore, for the court to have made a finding as to this allegation of said answer. There was no such specific finding, although it may have been considered as included in the declaration that "said withholding was not willful on the part of the defendant."

It may be added that the case was tried upon the theory that said issue was presented, and in view of the foregoing considerations we are of the opinion that substantial justice has not been done.

Upon a new trial there may be, of course, some additional evidence tending to show that respondent acted in good faith, but the record before us leads to a different conclusion.

The judgment and order are reversed.

We concur: CHIPMAN, P. J.; HART, J.

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33 Cal. App. 721

LILJEFELT v. BLUM et al. (Civ. 2049.)

(District Court of Appeal, First District, California. May 19, 1917.)

1. APPEAL AND ERROR 🔑932(1)—REVIEW—PRESUMPTIONS.

In an action for damages for assault and battery, in which defendants defaulted and plaintiff made application for the relief demanded, in the absence of both the evidence and findings, the appellate court must presume in support of a judgment for defendants that plaintiff, although assaulted, was not damaged.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3782.]

2. Costs 🔑22—Judgment for Nominal Damages.

In an action for damages for assault and battery, in which defendants defaulted, a judgment for plaintiff for nominal damages will not carry costs.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 47–73.]

3. Appeal and Error 🔑1171(6)—Review—Reversible Error.

In an action for assault and battery, in which defendants defaulted, and the court rendered judgment for defendants, if the plaintiff was entitled to a judgment for nominal damages, appellate court will not reverse the case because of failure of the trial court to find for plaintiff for nominal damages only.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4553; Damages, Cent. Dig. § 16.]

Appeal from Superior Court, Alameda County; Everett J. Brown, Judge.

Action by A. J. Liljefelt against Charles Blum and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Amasa C. Smith and Southard M. Modry, both of San Francisco, for appellant. Jane Doe Blum, for respondents.

PER CURIAM. [1-3] In this action plaintiff asked damages in the sum of $10,000 for an assault and battery committed on him by the defendant Jane Blum, who is the wife of the other defendant. Defendants defaulted, and application was made by the plaintiff to the court for the relief demanded in the complaint. The trial court gave judgment for the defendants. The case is here upon the judgment-roll alone. Findings were waived by plaintiff, and the evidence not being before this court, it is unable to determine upon what facts the trial court acted. It does appear that the defendant Jane Blum and one other witness were examined. The defendants having defaulted, the hearing on plaintiff's application for judgment was governed, as is conceded, by subdivision 2 of section 585 of the Code of Civil Procedure, under which the only question before the trial court was that of damages. In the absence of both the evidence and findings, this court must presume in support of the judgment that plaintiff, although assaulted, was not damaged. The plaintiff contends that, as all the facts alleged in his complaint were admitted by the default, he was entitled to nominal damages and his costs; but a judgment for nominal damages would not have carried costs; and conceding, but not deciding, that the plaintiff was entitled to a judgment for nominal damages, this court will not reverse this case because of a failure of the trial court to find in favor of plaintiff for nominal damages only.

Judgment affirmed.

(33 Cal. App. 698)

CONSOLIDATED LUMBER CO. v. CITY OF LOS ANGELES. (Civ. 1853.)

(District Court of Appeal, Second District, California. May 17, 1917.)

1. Damages 🔑83—Liquidated Damages or Penalty—Question for Jury—Statute—Impracticable or Extremely Difficult to Fix the Actual Damage.

The question of whether it would be "impracticable or extremely difficult to fix the actual damage" under Civ. Code, § 1671, allowing stipulated damages in such cases, is a question of fact.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 156.]

2. Damages 🔑85—Liquidated Damages or Penalty—Effect of Stipulation.

A provision in a contract, that amount specified is fixed as liquidated damages, because of the difficulty of estimating such damages, tends strongly to control the question in absence of contrary showing as to the difficulty of estimating actual damages necessary to validate a provision for liquidated damages, under Civ. Code, § 1671, providing that parties to a contract may agree upon an amount which shall be presumed to be the amount of damages sustained by a breach thereof, when it would be impracticable or extremely difficult to fix actual damage.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 179–181, 183–187.]

3. Trial 🔑404(5)—Findings—Stipulated Damages.

Where findings do not negative statement in a contract that actual damages for delay in delivery would be difficult of ascertainment, and fixing liquidated damages, such statement is conclusive.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 961.]

4. Trial 🔑396(3)—Findings—Responsiveness to Pleadings.

Findings that actual damages "could have been ascertained," and avoiding stipulated damages was irresponsive to pleadings, stating that "it would be exceedingly difficult, if not impossible," to estimate such damages.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 935.]

Appeal from Superior Court, Los Angeles County; W. H. Thomas, Judge.

Action by the Consolidated Lumber Company against the City of Los Angeles. Defendant appeals from judgment for plaintiff, and upon the judgment roll alone. Reversed.

Albert Lee Stephens, City Atty., and Charles S. Burnell, Asst. City Atty., both of Los Angeles, for appellant. Frank D. McClure, of Los Angeles, for respondent.

WORKS, Judge pro tem. This is an appeal from the judgment, and upon the judgment roll alone.

The respondent contracted to furnish to the appellant a large amount of lumber to be used in the construction of a municipal wharf. The agreement provided, as shown by the findings, that the city might deduct from the contract price the sum of $50 for each day that delivery of the lumber was delayed beyond the contract time. It also provided that:

> "Said sum of $50 per day, in view of the difficulty in estimating such damage, is hereby agreed upon, fixed and determined by the parties hereto as the liquidated damages that the city will suffer by reason of such default, and not by way of penalty."

The lumber company was 27 days beyond the allotted time in completing delivery and the city withheld the sum of $1,350 in settlement of the amount due. Respondent then brought this suit to recover the amount thus unpaid, and judgment was rendered in its favor. The theory of the trial court, in awarding the judgment, is indicated by the following statement erroneously incorporated in the findings of fact:

> "The court finds that that portion of the specifications which was made a part of the contract above set out fixing damages at $50 per day is void, and of no effect whatever."

[1] Section 1671 of the Civil Code provides:

> "The parties to a contract may agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage."

[2, 3] Section 1670 of the same Code is to the effect that contracts fixing the amount of damages in anticipation of the event, except such as are allowed under section 1671, are void. Whether "it would be impracticable or extremely difficult to fix the actual damage" in a case in which the parties have attempted to agree upon liquidated damages in advance is a question of fact. It will be noted that the specific declaration is made in the contract here in question that the actual damages to be suffered from a breach would be difficult to ascertain and that the parties are making provision for liquidated damages in lieu of actual damages. The decided cases in this state are uniformly to the effect that such a declaration tends strongly to establish the fact required by the statute to exist; and, further, tends to control the question as to whether the provision is one for liquidated damages or for a penalty, where the contract appears upon its face to be one allowed by the terms of section 1671. Potter v. Ahrens, 110 Cal. 674, 43 Pac. 388. See, also, Muldoon v. Lynch, 66 Cal. 536, 6 Pac. 417; Pogue v. Kaweah P. & W. Co., 138 Cal. 664, 72 Pac. 144; Nakagawa v. Okamoto, 164 Cal. 718, 130 Pac. 707. There is nothing in the findings to negative the statement in the contract that the actual damages for a delay in delivery of the lumber would have been difficult of ascertainment. That declaration is therefore conclusive.

[4] The answer alleges that the defendant was damaged by the delay in delivering the lumber, "but that it would be exceedingly difficult, if not impossible, to estimate the amount of such damage." There was no finding of fact upon this latter allegation. The allegation amounted to nothing in its alternative and negative statement as to the impossibility, but tendered only an issue as to the difficulty, of estimating the amount of the damage. Therefore the finding of the trial court that the damage "could have been ascertained, and that it is untrue that the same could not be ascertained," was not responsive to the pleadings.

The judgment is reversed.

We concur: CONREY, P. J.; JAMES, J.

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33 Cal. App. 730

PELL v. HERBERT. (Civ. 2071.)

(District Court of Appeal, First District, California. May 22, 1917.)

1. POISONS 🔑6—NEGLIGENCE—RIGHT OF ACTION.
Defendant's acts in keeping carbolic acid, a deadly poison, in a whisky bottle without any distinguishing mark or label showing its dangerous quality, and of intermingling the bottle with other similar bottles containing whisky or other drinkables, and in tendering such bottle containing carbolic acid to deceased, stating that he guessed that it was whisky, was gross negligence, for which the administrator of the deceased may recover damages.

[Ed. Note.—For other cases, see Poisons, Cent. Dig. §§ 3, 4.]

2. POISONS 🔑6—NEGLIGENCE—ACTION—JURY QUESTION—CONTRIBUTORY NEGLIGENCE.
The acts of the deceased in accepting defendant's proffered drink, and of assuming without question or investigation that the bottle from which he drank contained liquor similar to that which he had just seen his employer drink from another bottle, and believing it to be whisky, in view of the fact that it was not poured out in a glass or open receptacle where its color or smell or other dissimilarity to whisky might reasonably attract his notice and arouse his suspicion, but that he was handed the bottle and was expected to and did drink directly from it, did not constitute contributory negligence as a matter of law.

[Ed. Note.—For other cases, see Poisons, Cent. Dig. §§ 3, 4.]

3. DEATH 🔑68—DAMAGES—EVIDENCE—HABITS OF DECEASED.
In an action for damages for negligence of defendant in giving deceased a bottle of carbolic acid, stating that it was whisky, on the question of damages, evidence tending to show that the deceased was a man of dissolute and unthrifty habits, and was not a very useful member of society or supporter of his family, was properly submitted to the jury.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 86, 87.]

4. DEATH 🔑99(1) — EXCESSIVE DAMAGES — NEGLIGENT POISONING.
A verdict of $2,000 for the death of a human being due to the act of another in negligently giving him carbolic acid to drink, stating that it was whisky, was not so excessive as to justify the conclusion that the jury were moved by undue passion or prejudice in its rendition or amount.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 125, 126.]

Appeal from Superior Court, Monterey County; J. A. Bardin, Judge.

Action by J. A. Pell, administrator of the estate of Gabino Smith, deceased, against

Stanley Herbert. Judgment for plaintiff, and defendant appeals. Affirmed.

Andresen & Sargent and P. E. Zabala, of Salinas, for appellant. Walter S. White and Fred P. Feliz, both of Salinas, for respondent.

RICHARDS, J. This is an appeal from a judgment in plaintiff's favor for the sum of $2,000 damages for the alleged negligence of the defendant resulting in the death of one Gabino Smith, of whose estate the plaintiff is the administrator. The two points urged by the appellant are the insufficiency of the evidence to justify the verdict of the jury, and the contention that the verdict is excessive in the amount of its award.

The facts of the case are these: The defendant is a rancher residing in Monterey county. On the morning of September 28, 1913, the deceased, Gabino Smith, who was at that time his employé, came up to his house to wash before breakfast. The defendant was in the act of taking a drink of whisky from a bottle which was sitting on the wash sink, and offered the deceased a drink, which he indicated his willingness to accept. There was very little left in the bottle from which the defendant had been drinking, so he reached under the sink and got what he apparently supposed was another bottle of whisky, and handed it to the deceased stating that he guessed it was whisky. The deceased drank from the bottle which was handed him, and immediately after doing so said to the defendant, "What kind of a trick did you play on me?" and went presently into convulsions, and died within a few moments. The bottle from which he drank contained carbolic acid.

The foregoing facts were proven at the trial and formed the basis of the jury's verdict in plaintiff's favor. The appellant contends that the inference of negligence does not arise from the foregoing facts, and that even if such inference does arise, the facts also establish contributory negligence on the part of the deceased sufficient to have defeated the plaintiff's recovery.

[1] We are unable to agree with either of these contentions. The defendant's conduct in keeping carbolic acid, a deadly poison, in a whisky bottle without any distinguishing mark or label showing its dangerous and deadly quality, and of intermingling such bottle with such a content with other similar bottles containing whisky or other drinkables, and the act of the defendant in tendering such bottle containing carbolic acid to the deceased under the circumstances which he himself detailed, were acts of gross negligence amply sufficient to justify the verdict in plaintiff's favor.

[2] The acts of the deceased in accepting the defendant's proffered drink, and of assuming without question or investigation that the bottle from which he drank contained liquor similar to that which he had just seen his employer drink, and in believing it to be the whisky which he had just been invited to partake of, were in keeping with the ordinary and customary conduct of other individuals under like circumstances. It is to be noted that the liquid which he drank was not poured out in a glass or other open receptacle where its color or smell or other dissimilarity to whisky might reasonably attract his notice and arouse his suspicion, but that he was handed the bottle and was expected to and did drink directly from it. Under these circumstances we cannot say as a matter of law that his act in so doing was contributory negligence.

[3, 4] In support of the appellant's contention that the verdict of the jury was excessive he directs our attention to certain evidence tending to show that the deceased was a man of dissolute and unthrifty habits, and was not a very useful member of society or supporter of his family. These were matters properly submitted to the jury, and doubtless considered by them in arriving at the amount of their verdict. We are unable to say that a verdict in the sum of $2,000 for the death of a human being through the negligence of another under the circumstances detailed in this case was so excessive as to justify the conclusion that the jury were moved by undue passion or prejudice in its rendition or amount.

Judgment affirmed.

We concur: BEASLY, Judge pro tem.; KERRIGAN, J.

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33 Cal. App. 675

MONO POWER CO. v. CITY OF LOS ANGELES. (Civ. 1597.)

(District Court of Appeal, Third District, California. May 16, 1917. Rehearing Denied by Supreme Court July 14, 1917.)

1. APPEAL AND ERROR ⟹854(1) — BINDING FORCE OF REASONS OF TRIAL COURT.

The reasons given by the trial court for its decision are not binding upon the reviewing court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3408.]

2. CONSTITUTIONAL LAW ⟹208(1) — CLASS LEGISLATION.

It must be clearly shown that legislation attacked as class legislation makes an improper discrimination by conferring particular privileges upon a class of persons arbitrarily selected from a large number of persons, all of whom stand in the same relation to the privilege granted and between whom and the persons not so favored no reasonable distinction or substantial difference could be found justifying the inclusion of one and the exclusion of the other from such privilege.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 665, 666, 669–674.]

3. CONSTITUTIONAL LAW ⟹208(16) — CLASS LEGISLATION.

Code Civ. Proc. § 394, relative to the place of trial of actions between counties, cities, and cities and counties, is not unconstitutional as class legislation, since it does not appear from the statute that an arbitrary selection has been made from among a large number of persons between whom and the persons favored, cities, counties, and cities and counties, there is no reasonable distinction or substantial difference justifying the inclusion of one and the exclusion of the other from the privilege conferred.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 675–677.]

4. Eminent Domain 🔑173 — Venue — Statute.

An action to condemn to a power company's use land situated in Mono county, in which the city of Los Angeles was alleged to have an interest, was properly brought in Mono county under Code Civ. Proc. § 1243, relative to proceedings in eminent domain.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 473, 474.]

5. Eminent Domain 🔑173 — Venue — Statute.

Mono county was the proper county in which to try the case, Code Civ. Proc. § 394, relative to the place of trial of actions against cities, counties, etc., merely providing that the action or proceeding must be transferred for trial to a county other than that in which the city defendant is situated.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 473, 474.]

6. Venue 🔑61, 65—Change—Motion—Affidavit—Statute.

A motion for change of place of trial under Code Civ. Proc. § 394, relative to the place of trial of actions against counties, cities, etc., need not be made when defendant answers or demurs, and need not be accompanied by an affidavit of merits and a written demand for change of place of trial, as required by section 396, providing that actions may be tried in any county unless defendant demands a trial in the proper county.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 94–99, 109.]

Appeal from Superior Court, Mono County; P. R. Parker, Judge.

Action to condemn land by the Mono Power Company against the City of Los Angeles. From an order denying motion to change the place of trial, defendant appeals. Order reversed, with directions to grant defendant's motion.

Albert Lee Stephens, W. B. Mathews, S. B. Robinson, and Wm. B. Himrod, all of Los Angeles, for appellant. J. P. O'Brien, of San Francisco, for respondent.

CHIPMAN, P. J. The action was to condemn to plaintiff's use certain land situated in Mono county in which defendant is alleged to have an interest. The complaint was filed January 13, 1913, and defendant answered June 28, 1915. Thereafter defendant gave notice that, on September 1, 1915, it would move for a change of the place of trial from Mono county "to the superior court of such county of the state of California as the parties to the above-entitled cause may agree upon, by stipulation in writing, or, made in open court, and entered in the minutes, or, if they do not agree, then the nearest or most accessible court, where the like objection or cause for making the order does not exist. Said motion will be made upon the ground that the said proceeding is brought against the city in a county in which the plaintiff is doing business." The motion was made under section 394 of the Code of Civil Procedure, upon the papers, files and records of the court, in said action and upon the affidavit of S. B. Robinson, one of the attorneys for defendant, in which he deposed that:

> "The defendant, city of Los Angeles, is a city situated in the county of Los Angeles, state of California, and plaintiff, Mono Power Company, is doing business in the county of Mono, state of California, in which county the said proceeding is pending."

It appeared from the counter affidavit of J. P. O'Brien, attorney for plaintiff, that said notice of motion to change the place of trial was served after the cause had been set for trial, "that no affidavit of merits, and no demand to change the place of trial of said cause, was delivered with said notice of motion, and no affidavit of merits, and no demand to change the place of trial of said cause has ever been served or filed in this case," and said notice of motion "is not based or predicated upon an affidavit of merits, or upon a demand to change the place of trial of said cause, as required by the provisions of the statute in such cases made and provided." Averments are also made that the convenience of witnesses requires that the cause be tried in Mono county.

It appeared that two similar cases were pending, numbered respectively 2083 and 2084, in both of which motions to change the place of trial were made and heard together. One of these cases was subsequently dismissed. The motions were heard April 14, 1916, and the court made the following order:

> "In each of these cases defendant city filed a motion for change of place of trial under section 394, C. C. P., as amended in 1915. The motions were heard together under the stipulation that the one order made apply to both cases. It was and is the contention of the plaintiff that the court was without jurisdiction to hear or determine the motions by reason of the fact that there was no affidavit and demand filed at the time of first appearance. The contention is thus stated in general terms, perhaps inaccurately, for the reason that I do not consider it necessary to pass upon the motions from that viewpoint. I might say, however, as intimated at the time of argument, that if the motions were resisted upon that ground alone, I would be disposed to grant the motions and transfer the causes. It is my opinion that the amendment itself is unconstitutional and void; and, while plaintiff may have any advantage that may arise by reason of the lack of demand on first appearance still reserved, I reiterate that I do not consider the procedure contended for to be requisite herein. I cannot see where any lengthy opinion supporting my views would serve any purpose herein. The motions are denied."

[1] The reasons given by the trial court for its decision are not binding upon the reviewing court. It was well said, in Los Angeles County v. Winans, 13 Cal. App. 257, 265, 109 Pac. 650, 654:

"It is the judicial action of the trial court as distinguished from its judicial reason which appellate courts are called upon to review." Luman v. Golden Ancient Channel M. Co., 140 Cal. 700, 704, 74 Pac. 307; Simon Newman Co. v. Lassing, 141 Cal. 174, 175, 74 Pac. 761.

The points urged by respondent in support of the decision, to which appellant addresses itself in its brief, are: (1) Section 394 of the Code of Civil Procedure is unconstitutional; (2) a motion for change of place of trial under section 394 must be made at the time defendant answers or demurs, and must be accompanied by an affidavit of merits and a written demand for such change, as required by section 396, Code of Civil Procedure.

Section 394, as enacted in 1872, provided that actions against counties may be commenced and tried in any county in the judicial district in which such county is situated, unless such action is between counties, in which case they "may be commenced and tried in any county not a party thereto." In 1881 the section was amended to read:

> "An action against a county, or city and county, may be commenced and tried in such county, or city and county, unless such action is brought by a county, or city and county, in which case it may be commenced and tried in any county, or city and county, not a party thereto." Stats. 1881, p. 23.

The amendment of 1901 need not be noticed, as the amended section was held unconstitutional "for want of re-enactment and publication at large of the revised law." The section was amended in 1907, and provided that:

> "An action against a county may be commenced and tried in such county unless such action is brought by a county, in which case it may be commenced and tried in any county not a party thereto. Whenever an action is brought by a county or city against residents of another county or city, or a corporation doing business in the latter, the action must be, on the motion of the defendant, transferred for trial to a county, other than the plaintiff, if the plaintiff is a county, and other than that in which the plaintiff is situated, if the plaintiff is a city." Stats. 1907, p. 700.

The section was again amended in 1915. The section now relates both to actions and proceedings, and includes counties, cities, and counties and cities. The earlier part of the section as amended in 1915 is substantially as the section was made to read by the amendment of 1907. The following provision was added:

> "Whenever an action or proceeding is brought against a county, city and county, or city, in any county, or city and county, other than the defendant, if the defendant is a county, or city and county, or if the defendant is a city, other than that in which the defendant is situated, the action or proceeding must be, on motion of said defendant, transferred for trial to a county, or city and county, other than that in which the plaintiff, or any of the plaintiffs, resides, or is doing business, or is situated, and other than the plaintiff county, or city and county, or county in which such plaintiff city is situated, and other than the defendant county, or city and county, or county in which such defendant city is situated. In any action or proceeding, the parties thereto may, by stipulation in writing or made in open court, and entered in the minutes, agree upon any county, or city and county, for the place of trial thereof. This section shall apply to actions or proceedings now pending or hereafter brought." Stats. 1915, p. 721.

It was held, in Yuba County v. North American, etc., Mining Co., 12 Cal. App. 223, 107 Pac. 139, that this section, as it read prior to the amendment of 1915, and after the amendment of 1907, was not violative of the Constitution. In that case the defendant made a motion, under section 394, to change the place of trial. The court said:

> "The further point that section 394 is obnoxious to the provisions of the Constitution prohibiting special legislation, 'regulating the practice of courts of justice,' and 'providing for changing the venue' of actions, because according privileges to corporations doing business without the county where the action is commenced not accorded to corporations doing business within the county, is not, in our opinion, well taken. This discrimination is found in other sections where the right to have the place of trial changed is placed upon the distinct ground that the defendant resides in a county other than the county in which the action is commenced, and this although had the defendant been a resident of the latter county he could not have the venue changed. Such legislation has never been regarded as in any just sense special legislation within the meaning of the inhibitory provisions of the Constitution."

It is true there was in that case a demand made and an affidavit of merits filed, but that fact had nothing to do with the point involving the constitutionality of the section and the decision had the sanction of the Supreme Court.

The section applies equally to all counties, cities, and counties and cities in the state, and no one is given any advantage over another, and the section gives to parties to the suit other than the above mentioned the same right of transfer of the case as is accorded to counties, cities, and cities and counties. In Gridley v. Fellows, 166 Cal. 767, 138 Pac. 355, the constitutionality of section 395 of the Code of Civil Procedure was drawn in question on the grounds here urged against the validity of section 394. Said the court (166 Cal. page 768, 138 Pac. page 356):

> "The provision of the amendment of section 395 in question, it is true, applies only to specified classes of cases. But it applies alike in every part of the state to all actions embraced in the classes described. Consequently it is not a local law. It cannot be deemed a special law forbidden by the Constitution if it is addressed to a class of cases based on some natural, intrinsic, or constitutional distinction or difference, reasonable and substantial, between these actions and others not included and sufficient in some reasonable degree to account for or to justify the making of the different rule" (citing the leading case of Pasadena v. Stimson, 91 Cal. 251, 27 Pac. 604, and the latest enunciation of the rule, in Ex parte Miller, 162 Cal. 698, 124 Pac. 427).

In the discussion of the question the court said:

> "The presumption is in favor of the legislative action. The court cannot decide that the classification is unjustifiable in reason, unless it can see that the presumption is overcome because no reason exists."

[2] It must be clearly shown that the legislation attacked makes an improper discrimination by conferring particular privileges upon a class of persons arbitrarily selected from a large number of persons, all of whom stand in the same relation to the privilege granted, and between whom and the persons not so favored no reasonable distinction or substantial difference could be found justifying the inclusion of the one and the exclusion of the other from such privilege. Matter of Miller, supra.

We have seen that where a county is plaintiff, and a resident of or a corporation doing business in another county is defendant, the action or proceeding must be, on motion of defendant, transferred for trial to a county other than that of the plaintiff or defendant. Yuba City v. North American, etc., M. Co., supra.

[3] The reasons urged against the constitutionality of the part of section 394 involved in that case were unavailing, and should, we think, be so held in the present case. Cities, counties, and cities and counties are units of the state government, and we must assume that the Legislature was of the mind, in passing the law, that where a city is sued in a county other than that in which it is situated, circumstances might arise such as in the judgment of the Legislature should make it mandatory at defendant's request to transfer the case to a county other than that of plaintiff or defendant. Cities, counties, and cities and counties do not stand in the same relation towards each other and towards citizens generally, when considered in their governmental capacities, as citizens stand toward each other. We do not think it appears from the statute that an arbitrary selection has been made from among a large number of persons between whom and the persons favored (cities, counties, and cities and counties) there is no reasonable distinction or substantial difference justifying the inclusion of the one and exclusion of the other from such privilege. Matter of Miller, supra.

Whether the determination by the Legislature that a general law can be made applicable is conclusive was discussed in People v. Mullender, 132 Cal. 217, 64 Pac. 299, but not decided. It was, however, decided that a law cannot be held invalid merely because, in the opinion of the court, it would have been possible to frame a general law under which the purpose of the special law could have been accomplished. We find no justifiable reason for holding the section in question to be unconstitutional.

The contention of plaintiff is that in making its motion for a change of the place of trial the defendant was compelled to conform to the requirements of section 396 of the Code of Civil Procedure; that at the time defendant answered it should have filed an affidavit of merits, and should have demanded in writing "that the trial be had in the proper county." In its brief plaintiff says:

> "Section 396 declares that when an action is not commenced in the proper county, that is to say, in the county of the defendant's residence, where it is a personal action, as provided in section 395, or in the county where the municipality is situate, as provided in section 394, then the defendant must, at the time he answers or demurs, file an affidavit of merits and demand, in writing, that the trial be had in the proper county."

Sections 396 and 397 read as follows:

> "396. If the county in which the action is commenced is not the proper county for the trial thereof, the action may, notwithstanding, be tried therein, unless the defendant, at the time he answers or demurs, files an affidavit of merits, and demands, in writing, that the trial be had in the proper county.
>
> "397. The court may, on motion, change the place of trial in the following cases:
>
> "1. When the county designated in the complaint is not the proper county;
>
> "2. When there is reason to believe that an impartial trial cannot be had therein;
>
> "3. When the convenience of witnesses and the ends of justice would be promoted by the change:
>
> "4. When from any cause there is no judge of the court qualified to act."

[4-6] Respondent's premise, to wit, that the county in which defendant is situated was the proper county in which the action should have been brought, is unsound. Mono county was the proper county, and the only county in which the action could have been properly brought. Code Civ. Proc. § 1243. Not only so, but it was the proper county in which to try the case. Section 394 does not provide that the city defendant may have the place of trial changed to the county in which it is situated. Quite the contrary, the section provides that the action or proceeding must be transferred for trial to a county other than that in which it is situated. In Cook v. Pendergast, 61 Cal. 72, the court had section 396 under discussion and particularly the question as to what is meant by the term "proper county." Stating that the section in effect provides that a defendant has waived his right to a change of the place of trial on the ground that the action has not been commenced in the proper county, unless, at the time he first appears by answer or demurrer, he files an affidavit of merits and demands in writing a transfer to the proper county, the court said:

> "The 'proper county' is the county in which actions are required to be tried, 'subject to the power of the court, to change the place of trial' by sections 392, 393, 394, and 395 of the Code of Civil Procedure. Section 396 has changed the rule, if it ever was a rule, which required the motion, or notice of the motion, in all cases to precede or accompany the answer or demurrer. The prohibition of a motion on the ground that 'the county designated in the complaint is not the proper county,' except where the affidavit is filed and the written demand made when the answer or demurrer is filed, is itself a permission that a motion on any other statutory ground may be made by defendant, without the affidavit and demand, within a reasonable time after his appearance. Else why is the prerequisite

made applicable to motions made upon the ground particularly mentioned?"

We understand the court to have held that a demand for a change of the place of trial at the time of appearance, as also other requirements of section 396, do not apply where the motion is made on any ground other than that the action is not brought in the proper county for its trial. It was hence said in that case that a motion made on the ground that a fair and impartial trial could not be had might be made after answer, the court saying:

> "It has * * * been held that nothing less than an actual experiment, by way of trial, or attempt to impanel a jury, and a consequential failure, will be sufficient to show that a fair and impartial trial cannot be had."

Pascoe v. Baker, 158 Cal. 232, 110 Pac. 815, was an action for damages for personal injuries, and was commenced in the city and county of San Francisco. Defendant appeared and demanded a transfer to the county of Los Angeles, in which he resided. The motion was granted. Thereafter plaintiff moved to have the action retransferred to the city and county of San Francisco, basing his application on the ground of convenience of witnesses. The court granted the motion, and defendant appealed. Plaintiff filed no affidavit of merits, and it was contended that the order was unauthorized for that reason. The court said:

> "But we are cited to no authority in support of appellant's claim that such affidavit is required. It is true that a defendant, asking a change on the ground that the county in which the action is commenced is not the proper county for the trial, must file an affidavit of merits. This is the express provision of section 396 of the Code of Civil Procedure. No such condition has, however, been imposed upon a party occupying the position of the respondent here."

In Wadleigh v. Phelps, 147 Cal. 541, 82 Pac. 200, the action was brought in Nevada county, and the motion to change the place of trial was made on two grounds: (1) That defendant resided in San Mateo county; (2) on the ground of convenience of witnesses. No motion or demand was made until after defendant had appeared by demurrer. Upon the first ground it was held that defendant had waived his right by failure to make demand until after he had appeared. The court held as to the second ground that the counter affidavits of plaintiff sufficiently controverted all the facts relating to the convenience of witnesses to justify the lower court in concluding that the convenience of witnesses would not be promoted by the proposed change. We think it fair to assume that the court considered the merits of the motion made upon the second ground, and in doing so must have held that the provisions of section 396 do not apply except when the motion is made on the ground that the action is not brought in the proper county.

Respondent cites Powell v. Sutro, 80 Cal. 559, 22 Pac. 308, and Bohn v. Bohn, 164 Cal. 532, 129 Pac. 981. In each of these cases the motion was made on the ground that the action was not commenced in the proper county, having been brought in a county other than defendant's residence. The question now here was not involved in those cases. Obviously the defendant in each of those cases was bound by the provisions of section 396. Donohoe v. Wooster, 163 Cal. 117, 124 Pac. 730, was a similar case. It is cited also to the point that the right to change the place of trial must be determined by the conditions existing at the time of the appearance of the party demanding the change. Section 394, however, expressly provides that it "shall apply to actions or proceedings now pending or hereafter brought."

The order is reversed, with directions to grant defendant's motion.

We concur: HART, J.; BURNETT, J.

33 Cal. App. 522

COX v. SAN JOAQUIN LIGHT & POWER CORP. (L. A. 4288.)

(Supreme Court of California. June 22, 1917.)

LIMITATION OF ACTIONS ⚷121(2) — AMENDMENTS—PARTY PLAINTIFF—CHANGE OF CAPACITY.

Code Civ. Proc. § 377, provides when the death of a person not being a minor is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another person who is responsible for his conduct, then also against such other person. Civ. Code, § 1970, requires an action for wrongful death to be brought in the name of decedent's legal representative for the benefit of his next of kin. Decedent, alleged to have been wrongfully killed, left only his wife, who was his next of kin, who erroneously brought suit within the time limited in her own name, and after expiration of the time applied for leave to file an amended complaint as testatrix. *Held*, that such change in the capacity in which plaintiff sued was not the commencement of a new suit, and the amendment was properly allowed.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 540.]

In Bank. Appeal from Superior Court, Kern County; Milton T. Farmer, Judge.

Action by Pansy M. Cox, administratrix of the estate of Fred Cox, deceased, against the San Joaquin Light & Power Corporation. From the decree rendered, the defendant appeals. Affirmed.

The following is the opinion of Chipman, P. J., in the District Court of Appeal, concurred in by Burnett and Hart, JJ.:

The following statement of the case and points relied on is taken from appellant's opening brief, as sufficiently presenting the matters now here for review:

"On the 17th day of June, 1911, one Fred Cox, while employed by the defendant as an electric lineman, was electrocuted and killed. By complaint filed October 13, 1911, Pansy M. Cox, widow and heir of Fred Cox, brought this action against San Joaquin Light & Power Corporation to recover damages for the death of the said Fred Cox. On the 27th day of October, 1913, plaintiff's attorneys served and filed a notice of motion to file an amended complaint which in all material respects was the same as the original complaint except that the amended complaint set forth that Pansy M. Cox was the administratrix of the estate of Fred Cox, and in the amended complaint Pansy M. Cox sued as such administratrix. Defendants opposed the motion, but on the 7th day of January, 1914, the court granted permission to file the amended complaint. Thereafter defendant demurred to

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

the amended complaint upon the ground that the cause of action set forth in the same was barred by subdivision 3, § 340, of the Code of Civil Procedure, which demurrer was thereafter by the court overruled. The point presented by this appeal is this: In a suit against a master, for damages for death of his servant, alleged to have been caused by the negligence of the master, such suit being brought by the widow of the deceased, it is a change of the cause of action to permit by amendment the administrator of the deceased to be substituted for his widow or (what we will submit is the same question) to permit the widow, as administratrix, to be substituted for the widow suing as an heir. The demurrer upon the ground that the cause of action was barred by the statute of limitations is merely a corollary of the point last above stated for, it may be admitted, that if the cause of action is not changed and the amendment is a proper one, the amendment would relate back to the time of filing the original complaint. The question is therefore as outlined above, although presented to the lower court and presented here by this appeal, under two forms of attack: First, by objection to the filing of the amended complaint; and, second, by demurrer to the amended complaint, upon the ground of statute of limitations."

That Mrs. Cox is the widow and sole heir of decedent and the only person entitled to the fruits of the judgment is not disputed. Section 377 of the Code of Civil Procedure reads in part as follows: "When the death of a person not being a minor is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another person who is responsible for his conduct, then also against such other person." Section 1970 of the Civil Code, amended in 1907, abrogates in some degree the fellow-servant rule as it had previously existed, and changes somewhat the rule of assumption of risk in favor of the employé. The right of action for death reads as follows: "When death, whether instantaneous or otherwise, results from an injury to an employé received as aforesaid, the personal representative of such employé shall have a right of action * * * in respect thereof, for and on behalf, and for the benefit of the widow, children, dependent parents, and dependent brothers and sisters, in order of precedence as herein stated, but no more than one action shall be brought for such recovery."

It is contended by appellant that there is an "important distinction in the cause of action created by section 1970 of the Civil Code and that created by section 377 of the Code of Civil Procedure." The distinction pointed out in defendant's brief consists, it is claimed, in the fact that under section 1970 "if the personal representative sues for a death occurring in the relation of employer and employé that such personal representative is entitled to the liberal provisions of section 1970 with regard to the fellow-servant rule and assumption of risk," whereas, if the action is brought by the representative under section 377, "the old and rigid rules relating to acts of fellow servants and assumption of risk would apply." It is contended that the action was brought under section 377, and that by substituting the administratrix of deceased as his representative so as to bring the case under section 1970 there resulted "a complete change of the cause of action," and hence is not allowable.

Mr. Pomeroy gives us the meaning of the term, "cause of action." Cautioning against confusing it with the "remedy" and with "the action," he says: "In accordance with the principles of pleading adopted in the new American system, the existence of a legal right in an abstract form is never alleged by the plaintiff; but, instead thereof, the facts from which that right arises are set forth, and the right itself is inferred therefrom. The cause of action, as it appears in the complaint when properly pleaded, will therefore always be the facts from which the plaintiff's primary right and the defendant's corresponding primary duty have arisen, together with the facts which constitute the defendant's delict or act of wrong."

The cause of action here consisted of facts equally applicable to both sections, i. e., the death of the employé through the negligence of the employer. The same facts, as shown by appellant's statement of the case, are found in both the original and amended complaints, the only difference being that in the former the widow, as heir of the employé, was plaintiff and in the latter the widow as representative of the employé. In both complaints the same cause of action was stated. In both cases the person and only person beneficially interested was the widow. Section 377 gives the right generally to sue either in the name of the heir or representative of the deceased. Section 1970 gives the right only to the representative for the death of one sustaining the relation of employé to an employer. Whether or not section 1970 has the effect of abrogating section 377 and is exclusive, or to what extent section 1970 may prevail over section 377 so far as they respectively authorize actions for injuries causing death, are open questions. Pritchard v. Whitney Estate Co., 164 Cal. 564, 129 Pac. 989. But it seems now to be settled that where the relation of employer and employé exists and the employé meets his death through the negligence of the employer, section 1970 furnishes the only basis for the action. Id. The present action was commenced in 1911, and the case just cited was first decided in department in June, 1912, and in bank, in January, 1913. In October, 1913, plaintiff gave notice of motion to amend. It is not surprising that plaintiff's attorney made what now appears to have been a mistake in bringing the action in the name of the widow, since the department decision of the Supreme Court in the case cited would seem to lend some support to plaintiff's first impression of her right to sue in her own name as heir.

In the case of Reardon v. Balakala Consol. Copper Co. (C. C.) 193 Fed. 189, the action was exactly similar to the action here, and the same mistake was made in commencing the action. The father, being the next of kin, was, under section 1970 of the Civil Code, entitled to the benefit of the recovery, but erroneously, as did the widow in the present case, commenced the action in his own name under the mistaken supposition that the case fell within section 377 of the Code of Civil Procedure; and before the error was established by a ruling on defendant's demurrer to that complaint, the time within which a new action could be commenced by the administrator had elapsed. "The sole question presented here calling for consideration," said the court, "is whether under these circumstances it was competent to allow the complaint to be amended by substituting the administrator as plaintiff in the action so commenced by the father, and thus avoid bringing a new action; or should the action be dismissed?" The proposition was pressed upon the court that the bringing of the action by the father was wholly nugatory and ineffectual to arrest the running of the statute. Speaking of this contention, Mr. Justice Van Fleet, who heard the case, said: "It involves an erroneous conception of the legal effect of the omission sought to be corrected, and a too narrow construction of the purpose and effect of the statutes, both state and federal (Code Civ. Proc. § 473; R. S. § 954; U. S. Comp. St. 1901, p. 696), in providing the extent and character of relief that may be afforded by way of amendment, to avoid mistakes of the nature of that here involved. It should be borne in mind * * * that the substantive cause of action counted on in the amended complaint has not been changed. It remains precisely the same as that stated in the original pleading. No new facts are alleged as a ground of recovery, the only change being in the name of the plaintiff and the capacity in which he sues; while the father still remains the beneficiary of the recovery sought. This being so, the change effected by the amendment is obviously in no just sense the bringing of a new action. It is one of form rather than of substance, and in the interests of justice is to be treated as such, rather than to adopt a view which would result in an irretrievable bar to all remedy. Under the modern doctrine, the discretionary power of the court to such end is to be liberally exerted in favor of, rather than against, the disposition of a case upon its merits; and I am entirely satisfied after further examination of the question induced by the reargument that, under the broad and comprehensive terms of section 954, if not as well under the statute of the state, the defect involved is one which may be cured by amendment." After reviewing some of the decisions upon the question, the learned justice said: "The principles announced in these cases are clearly applicable to the circumstances presented here. As we have seen, no change has been worked in the form or substance of the cause of action set up. That remains in all respects the same. The father is now, as he was when the original complaint was filed, the real party in interest, for whose benefit, under the express language of the statute, the action may be maintained. He has then a right to have the action prosecuted, but the law says that that must be done through the instrumentality of the legal representative rather than that of the immediate beneficiary; and this purely formal requirement is all that is accomplished by the amendment allowed. Had the father procured himself, instead of the present plaintiff, to be appointed the administrator of his dead son's estate, as was his legal right, there could be no question, under the foregoing authorities, of his right to have himself in his representative capacity substituted as plaintiff in place of himself as an individual; and the chances are, if such had been the course pursued, the present objection would never have suggested itself."

A very full discussion of the question is found in Missouri, Kansas & T. R. R. Co. v. Wulf, 226 U. S. 570, 33 Sup. Ct. 135, 57 L. Ed. 355, Ann. Cas. 1914B, 134, in which Reardon v. Balakala, etc., Co., supra, is cited approvingly.

In Ruiz v. Santa Barbara Gas, etc., Co., 164 Cal. 188, 128 Pac. 330, the cause of action was of the same nature as the present cause of action, and the action was commenced by plaintiff as special administrator of the estate of deceased. He failed to allege that the deceased left any heir, and hence, under section 377, Code of Civil Procedure, failed to state a cause of action, and the trial court so held on demurrer to the complaint with leave to amend. Pending time given to amend plaintiff was appointed general administrator of the estate, and upon filing an amended complaint he did so in his new capacity as general administrator of deceased's estate. Meanwhile, however, the statute of limitations had run. The court said: "It is settled by the decisions that an action of the character authorized by section 377 of the Code of Civil Procedure is one solely for the benefit of the heirs, by which they may be compensated for the pecuniary injury suffered by them by reason of the loss of their relative, that the money recovered in such an action does not belong to the estate but to the heirs only, and that an administrator has the right to bring the action only because the statute authorizes him to do so, and that he is simply made a statutory trustee to recover damages for the benefit of the heirs (citing cases). The same is manifestly made to appear * * * in the provision of section 1970 of the Civil Code, hereinbefore referred to." Barr v. Southern Cal. Edison Co., 24 Cal. App. 22, 140 Pac. 47, was a case of the character of the present case, in which the complaint failed to allege that deceased left any heirs, and for that reason failed to state a cause of action. An amended pleading curing this defect, filed after the statute of limitations had run, was demurred to, and demurrer sustained. On appeal the judgment was reversed, and the amendment held allowable. We can perceive no good ground on which such an amendment would be justified that would not be equally available in support of the amendment here in question. Some of the authorities cited by appellant seem to support its contention. Mr. Thompson cites certain cases as supporting the rule claimed by appellant. In that connection, however, he says: "The test, under statutes allowing amendments, as to whether amendments may be made to a declaration after the time limited by statute within which actions can be brought seems to be: 1. Does the original declaration state a cause of action under the statute? 2. Does the amended declaration state a different cause of action? If the first question is answered affirmatively and the second negatively, the amended declaration is not barred by the statute of limitations." 6 Thompson on Negligence, p. 148, § 7017. As we think the original complaint stated a cause of action under the statute, and the amended complaint did not state a different cause of action, the test given by Mr. Thompson is fully met.

Dubbers v. Goux, 51 Cal. 153, is sometimes (as by the Utah Supreme Court) cited in support of the rule contended for by appellant. In that case the action was commenced by the husband, who afterward made a motion that his wife be substituted as plaintiff because she was the real party in interest. The lower court allowed the substitution, and defendant appealed. The Supreme Court said: "The court erred in permitting Mrs. Dubbers to be substituted for her husband as plaintiff. It is not pretended that she had succeeded to any interest held by her husband pending the action, nor that she had any joint interest with him in the subject-matter. On the contrary she was substituted as plaintiff on the theory that she was the only party in interest at the commencement of the action, and had ever since continued so. She was permitted to become the sole plaintiff, not to prosecute the same cause of action stated in the complaint, on the ground that she had succeeded to it, but another and distinct cause of action in her separate right. In effect, it was permitting her to prosecute a new suit, for another cause of action, by merely substituting her as sole plaintiff in the former action. It is scarcely necessary to say that section 473, Code of Civil Procedure, affords no warrant for such a proceeding." That case is easily distinguishable from the case here.

We are entirely satisfied with the view expressed by Mr Justice Van Fleet in Reardon v. Balakala, etc., Co., and do not find it necessary to consider the numerous cases cited by respective counsel.

The judgment is affirmed.

Borton & Theile, of Bakersfield, for appellant. Kaye & Siemon, of Bakersfield, and Harriman, Ryckman & Tuttle, of Los Angeles, for respondent.

PER CURIAM. In denying the application for a hearing in this court after decision by the District Court of Appeal of the Third Appellate District, we deem it proper in view of what is said in the opinion as to the effect of section 1970, Civil Code, on section 377 of the Code of Civil Procedure, to refer to the opinion in the case of Gonsalves et al. v. Petaluma & S. R. R. R. Co., decided August 5, 1916, 173 Cal. 264, 159 Pac. 724, discussing these sections which apparently was not brought to the attention of the District Court of Appeal.

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175 Cal. 585

In re RAWITZER'S ESTATE.

RAWITZER v. FIRST TRUST CO. OF OMAHA.

(S. F. 8028.)

(Supreme Court of California. June 28, 1917.)

1. Executors and Administrators 🔑338—Foreign Executor—Power.

The foreign executor of the will of a nonresident decedent cannot act as such in California and cannot maintain in court in that representative capacity any opposition to a sale proposed by the administrator with will annexed appointed within the state, or otherwise assert as a litigant rights or interests in the property of the decedent situated in the state, since, while a foreign executor may receive property voluntarily given to him, his authority does not extend beyond the jurisdiction of the state or government under which he is vested with his authority.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1410–1416.]

2. Wills 🔑681(2)—Time of Vesting.

Where a will contained a direct devise and bequest to a trustee empowering it to take the property immediately for the purposes of the trust, the disposition vested at the time of the death of the testator.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1612, 1613.]

3. Executors and Administrators 🔑338—Power of Trustee — Opposition to Sale by Administrator.

Where a nonresident trustee had a vested interest in the property of an estate, and the terms of its trust imposed upon it the duty to protect the property from all unnecessary expense and claims, it had power to oppose a petition for sale by an administrator with will annexed and a right of appeal from an adverse decision thereon.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1410–1416.]

4. Perpetuities 🔑6(4) — Restraint on Alienation—Validity.

Civ. Code, § 715, provides that the absolute power of alienation cannot be suspended by any limitation or condition whatever for a longer period than during continuance of the life of persons in being at the creation of the limitation or condition, etc. Civ. Code, § 866, provides that, where an express trust is created in relation to real property, every estate not embraced in the trust and not otherwise disposed of is left to the author of the trust or his successor. Section 871 provides that, when the purposes for which an express trust was created cease, the estate of the trustee also ceases. *Held*, that a trust created by a will for the benefit of testator's children to vest an undivided one-sixth part in each child when it shall have attained the age of 30 years, and providing that, if either or any of the children should not be living at the testator's death or die before attaining the age of 30 years, his share should fall into the estate and trust, the portions of the surviving children being thereby equally increased, was not void under section 715.

5. Executors and Administrators 🔑358(3)—Sale of Property—Notice of Appeal—Capacity of Appellant.

Where a foreign executor and trustee opposed both in his capacity as executor and trustee petition by administrator with will annexed for sale of lands, a notice of appeal which characterized the defendant as executor could be considered as an appeal in any capacity which entitled it to make such appeal; the statement characterizing it as executor being a description of the person, and not a limitation of the character in which it takes appeal.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1472, 1474, 1478.]

6. Executors and Administrators 🔑343 — Sales—Necessity.

In a proceeding by the administrator with will annexed for sale of real estate to pay debts and administration expenses, where the nonresident trustee holding title to the property offered to remove all necessity for the sale and to pay the expenses of the administration by depositing the necessary funds for that purpose in court, the court erred in directing a sale.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1439–1441.]

7. Wills 🔑630(3)—Trusts—Time for Vesting in Beneficiary.

Where a will gave property to trustee to vest in equal parts in such of his children as should survive the testator and reach the age of 30 years, when a child shall become 30 years, his contingent interest will then become a vested estate in possession, and he will be a tenant in common with the trustee equally entitled to possession of the land.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1469.]

8. Executors and Administrators 🔑323—Sale of Property—Presumption.

A testator must be presumed to have foreseen all contingencies and have had them in mind when he provided that an entire estate should remain intact in the management of the trustee and until the last of the six beneficiaries should be entitled to possession.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1334–1336.]

9. Executors and Administrators 🔑323—Sale of Trust Property—Authority of Trustee to Determine Time.

Where testator provided that an entire estate should remain intact in the management of a trustee, the contingencies that some of the beneficiaries would become entitled to a vested estate in possession and cotenants with the trustee before the termination of the trust do not justify an immediate sale contrary to the judgment of the trustee.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1334–1336.]

10. Executors and Administrators 🔑323—Sales—Authority of Administrator.

An administrator who seeks power to sell real property and thereby takes it permanently from the control and management of the heirs or devisees must show a good cause therefor.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1334–1336.]

11. Corporations 🔑654—Foreign Corporations—Authority to Act as Trustee.

As St. 1907, p. 562, applies only to domestic corporations organized to act as administrator, receiver, or trustee, etc., where a foreign corporation was authorized to act and was appointed as trustee under a will in its own state, it had authority to act as such in California.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2551, 2556.]

Department 1. Appeal from Superior Court, Alameda County; Wm. S. Wells, Judge.

Petition by Earl A. Rawitzer, as administrator with will annexed of the estate of Albert H. Rawitzer, deceased, for permission to sell land belonging to the estate, opposed by the First Trust Company of Omaha, executor of the estate of Albert H. Rawitzer, deceased. From an order directing the sale, defendant appeals. Reversed.

Walter R. Bacon, of San Francisco, for appellant. E. K. Taylor, of Alameda, for respondent.

SHAW, J. This is an appeal from an order directing the sale of real estate.

The appellant, First Trust Company of Omaha, is the executor of the last will of the decedent, duly appointed as such by the county court of Douglas county, state of Nebraska, and had entered upon its duties as such executor. The property of the decedent, including that here in controversy, is given by the will to said First Trust Company of Omaha as trustee in trust, for certain purposes hereinafter stated. The respondent is the administrator with the will annexed of the estate of the decedent, appointed by the superior court of Alameda county, in which county the land involved is situated.

The administrator, in his petition, asked for the sale of the land on the ground: First, that it was necessary for the payment of the debts of the decedent; and, second, that it was for the advantage, benefit and best interest of the estate and those interested therein that the same should be sold. The First Trust Company of Omaha filed opposition to this petition on the ground that there were no debts, that it was not to the best interest of the persons interested in the estate that the property should be sold, and that the First Trust Company of Omaha, as executor of said estate, had on hand sufficient moneys to pay all debts, legacies, and expenses of administration of the estate both in Nebraska and California, including the expenses incurred by the petitioner in the administration thereof up to the date of final settlement, and offered to deposit in court sufficient funds for that purpose. The court, after hearing the evidence, found in favor of the petitioner, and ordered that the property be sold at private sale for cash.

[1] The respondent makes the preliminary objection that the First Trust Company of Omaha, as executor of the will of said decedent, cannot act as such in this state, and cannot maintain in court, in that representative capacity, an opposition to the proposed sale, or otherwise assert as a litigant rights or interests in the property of decedent situated in this state. This objection must be sustained. "The authority of an executor or administrator does not extend beyond the jurisdiction of the state or government under which he is invested with his authority." A foreign executor may receive property voluntarily given to him, but he cannot by suit in the courts of this state enforce the right of the estate thereto. McCully v. Cooper, 114 Cal. 264, 46 Pac. 1113; Fox v. Tay, 89 Cal. 348, 24 Pac. 855, 26 Pac. 897, 23 Am. St. Rep. 474; Murphy v. Crouse, 135 Cal. 19, 66 Pac. 971, 87 Am. St. Rep. 90.

[2] The appellant, however, in its opposition to the petition for sale, appeared both in its capacity as executor of the estate of the decedent and in its capacity as trustee of the express trust declared in the last will of the decedent. The will contains a direct devise and bequest to the trustee empowering it to take the property immediately for the purposes of the trust. Such a disposition vests at the time of the death of the testator. Civ. Code, § 1341; Estate of O'Connor, 2 Cal. App. 475, 84 Pac. 317; Williams v. Williams, 73 Cal. 102, 14 Pac. 394.

[3] In its capacity as trustee the appellant has a vested interest in the property of the estate and the terms of the trust impose upon it the duty of protecting that property from all unnecessary expenses and claims. There can be no doubt that in that capacity it had power to oppose the petition for sale, and has the right of appeal to this court from an adverse decision thereon.

[4] The respondent further contends that, even if this be true, it has no application to the present case, because, as he claims, the trust declared in the will is void. If the trust is void, it would necessarily follow that the trustee named in the will would have no power or authority to act concerning the property attempted to be given to it in trust. It therefore becomes necessary to consider the merits of the claim that the trust is invalid. The point urged against its validity is that it violates the law of this state against perpetuities. Section 715 of the Civil Code provides:

> "The absolute power of alienation cannot be suspended, by any limitation or condition whatever, for a longer period than during the continuance of the lives of persons in being at the creation of the limitation or condition, except in the single case mentioned in section seven hundred and seventy-two."

The exception mentioned in section 772 has no application to the present case and need not be noticed further. We proceed to state briefly the terms of the will relating to the subject.

The original will of the decedent was executed January 2, 1912. Thereafter he married one Nona R. Keeline. By a codicil thereafter made he reaffirmed the provisions of the will, and made provision for his wife in accordance with an antenuptial agreement between them. A son was born to them from this marriage and now survives. This explanation is necessary because the original will speaks of dividing the estate among the children then born in shares of one-fifth each, and the codicil provides that a later born child shall come in, making the shares only one-sixth each.

After directing the payment of his debts and funeral expenses, the will gives all the residue and remainder of his estate of every kind and nature to the First Trust Company of Omaha, "in trust to be held and managed by it as trustee as hereinafter provided." It then proceeds to give the trustee power to manage and control the trust estate, sell, transfer, or convey it at its discretion, to buy personal property, and to buy real property when necessary for the foreclosure of liens, and to invest the assets and keep them invested so as to produce a regular income, but not to incur any indebtedness or encumber the estate; also to supplement, if necessary, certain ante mortem provisions he had made for his children for their maintenance and education, in case such provisions should be found inadequate. It is to be particularly observed that no time is fixed for the duration of this trust. Following these provisions the will declares that all of the estate both real and personal, so held in trust by said trustee, shall vest in and go as follows:

> "To my beloved son, Earl Arthur Rawitzer, if he shall survive me and attain the age of thirty years, I give and bequeath an undivided one-fifth part of said property absolutely and in his own right, including therein any advancement for the support, maintenance or education, that may have been made to him under the ninth division of this instrument."

The word "ninth" is mistakenly inserted instead of "eighth." Then follow provisions in identical language for the other four sons who were living at the date of the execution of the original will. The tenth clause is as follows:

> "And I further will and direct that if either or any of my sons shall not be living at my death or shall die before attaining the age of thirty years, the portion or portions hereinabove conditionally devised to him or them shall fall into my estate in trust and go as the other property, the portions of my surviving sons being thereby increased equally."

It appears that at the death of the decedent the youngest son, the child of the last marriage, was about one year old. The contention is that the foregoing provisions suspend the power of alienation of the property until that child shall arrive at the age of 30 years, or at all events longer than the lives of persons in being at the death of the testator. This claim is untenable. The gift to each child is upon a condition precedent. The child receives nothing except upon the condition that he survives the testator and attains the age of 30 years. All survived the testator, so that condition is fulfilled as to all. But any one of them may fail to attain the age of 30 years. In that case the gift to him would fail, and, under the tenth paragraph, his share would fall into the residue and the share of each remaining child would be increased proportionately. This would happen with each successive death within the 30 years until the last survivor would have a contingent right to, or a conditional estate in, the whole estate. If all of them died before attaining the age of 30 years, all of the gifts to his children would fail. There would be up to that time no suspension of the absolute power of alienation beyond the continuance of the lives in being at the creation of the limitation, and consequently there would be no violation of section 715. It follows that there can be no violation of that section, unless, by the terms of the disposition to the trustee, its estate would continue after the death of all the children before arriving at the age of 30 years. This is the only theory upon which it can be maintained that there is any suspension of alienation beyond the lives of persons in being at the time of the creation of the trust. But under our law regulating the subject of trusts and under the provisions of this will there would be no continuance of the trust after the death of the last beneficiary. Section 866 of the Civil Code provides that:

> "Where an express trust is created in relation to real property, every estate not embraced in the trust, and not otherwise disposed of, is left in the author of the trust or his successors."

Section 871 provides that:

> "When the purpose for which an express trust was created ceases, the estate of the trustee also ceases."

This is in accordance with a well-established principle of the law of trusts. 2 Perry on Trusts, § 920; 39 Cyc. 97; 28 Am. & Eng. Ency. of Law, 945. There is, as we have seen, no provision in this will for the continuance of the trust beyond the period of the lives of the children in case they should all die before reaching the age of 30 years. The only purpose of the trust is to preserve the property and keep it in income producing condition until the time comes when the respective shares vest in the children under the terms of the will. As soon as that has occurred by the successive attainment of the age of 30 years of the respective children, or is made impossible by the death of all of them before attaining that age, the entire purpose of the trust is subserved, and under the provision of section 871 the trust and the estate of the trustee would immediately cease. The consequence of the last-mentioned situation, that is, of the death of all the children under 30 years of age, would be that the remainder of the estate would be left undisposed of and would vest in the descendants of the testator according to the law of succession in the particular state where it is situated, or, with respect to personal property, the law of Nebraska, where the testator resided at his death. The estate of the trustee would cease and the suspension of the power of alienation would terminate immediately upon the death of the last child.

It follows that the trust cannot be declared void upon these grounds, and that the trustee, in its trust capacity, is sufficiently interested to oppose the sale and to maintain this appeal.

A still further objection is made that the notice of appeal is not taken by it in its capacity as trustee, but solely and only in its capacity as executor. The notice reads:

> "The First Trust Company of Omaha, the executor of the last will and testament of the said Albert H. Rawitzer, deceased, hereby appeals to the Supreme Court."

The notice is signed by "W. R. Bacon, Attorney for the First Trust Company of Omaha, executor of the last will and testament of Albert H. Rawitzer, deceased."

[5] The opposition to the sale is made, as before stated, by the trustee in both capacities, and it is signed "W. R. Bacon, Attorney for First Trust Company of Omaha, Executor and Trustee, Opponent." The objection is extremely technical, and we think the notice should be regarded as sufficient to show that the First Trust Company of Omaha appeals from the order complained of. The statement following its name in the body of the notice, characterizing it as the executor of the last will of the decedent, is a description of the person, and not a limitation of the character in which it takes the appeal. The appeal is to be considered as an appeal by the First Trust Company of Omaha in any capacity it had which entitled it to take such appeal.

[6] The petition for sale alleged that the estate was indebted in the sum of $40. The schedule shows that this $40 consisted entirely of city and county taxes. It was further shown that the expenses of administration to accrue would amount to $447, the main items being $190 each as compensation for the administrator and his attorney for their services in the administration of the estate. The evidence shows that the taxes had all been paid, and that at the time of the hearing there were neither taxes nor debts of any description existing against the estate situated in California, nor any claims, except the expenses of administration. It further appeared that the First Trust Company of Omaha, as executor, had money in its hand more than sufficient to pay all debts of the estate, all expenses of administration, and all legacies and other charges against the estate, including all debts and expenses of administration that would accrue in the course of administration in California. It offered to deposit in court at any time upon an order of the court a sum sufficient to meet all the said expenses of administration, and stated that it was its purpose, as trustee and as executor, to keep the property intact for the present and sell it from time to time when a sale could be made to the best advantage, after the distribution of the estate, and to avoid the sale of property for the purpose of paying debts, and that no sale for that purpose would be necessary. The evidence showed that the land consisted of an unimproved, unfenced lot in the city of Alameda, that it was worth $5,000 and produced no income, and that Alameda city lots had been of slow sale for two years past. There was no evidence as to the probable state of the market, or as to probable future values of real estate, or that this lot was depreciating or would depreciate in value, or was liable to waste or damage.

We think the court erred in directing a sale. There were no debts or claims against the estate. The Trust Company offered to remove all necessity for a sale to pay the expenses of administration by depositing in court the funds necessary for that purpose. If it had failed to do so when directed, the court could then have properly ordered a sale for that purpose. But it is not claimed that the trustee was not acting in good faith, and the evidence showed that it had the ability to deposit the fund if it had been directed to do so. Unless other reasons for a sale existed, the court should have accepted its offer and ordered it to deposit the money.

[7-9] There was an utter lack of showing that it would have been for the advantage, benefit, or best interests of the estate or of the interested parties to have the property sold by the administrator. The testator owned property in several different states of an aggregate value exceeding $60,000. By his will he gave it all to the trust company in trust, to be held and managed until all the children should reach the age of 30 years, giving to each child his equal share upon his arrival at that age, and provided that the trustee should in the meantime have power to sell and convey any or all of it, in its discretion, and should invest the proceeds and other assets so as to produce a regular income. He further declared therein that his purpose in creating such trusteeship was:

> "That said property shall remain intact in the management of said trustee, and that by the exercise of a sound discretion and the utmost good faith, the trustee may cause said property to produce a reasonable rate of income."

It was shown that the expectation and belief of the trust company was that in the course of the years to elapse before the trust expired the Alameda lot would increase in value, and that its purpose was to avoid forcing the property to a sale or sacrifice it on a dull market, and to sell it only when the state of the market would justify that course. This would certainly be the wisest policy to pursue in dealing with the property, and it accords with the will of the testator. Earl A. Rawitzer, the oldest child, will become 30 years of age in 1918. If he survives, his contingent interest or share will then become a vested estate in possession. He will thereupon be a tenant in common with the trust company, equally entitled to the possession of the lot, and he will also be entitled to receive his share of the other property of the estate. But these contingencies do not furnish reasons for an immediate sale contrary to the judgment of the trustee. The trustee may in the meantime make an advantageous sale of the lot. Its power to sell the other interests thereafter will remain, and Earl will, of course, have the power to dispose of his interest. No facts were proven or have been suggested tending to show that a sale could not be made thereafter as conveniently as before. The testator must be presumed to have foreseen these contingencies and to have had them in mind when he provided that the entire estate should remain intact in the management of the trustee, and they furnish no reason for interfering with the plan of the testator by substituting the wish of the child and the power of the probate court for the discretion which the testator gave the trustee to determine the time, terms, and conditions of sale.

[10] The administrator who asks power to sell real property, and thereby take it permanently from the control and management of the heirs, or devisees, must show good cause therefor. His mere desire is not enough. As there was no cause shown, the petition for a sale should have been denied.

[11] We see no reason to question the capacity of the trust company to take, manage, and dispose of the property. It was shown that it was empowered by the laws of Nebraska, under which it was organized, to act as trustee in that capacity. It is not prohibited from doing so by the California act of March 18, 1907 (Stats. 1907, p. 562). That act, even if it would otherwise have that effect, by its terms applies only to domestic corporations organized to act as administrator, receiver, trustee, and the like. It does not affect the power of foreign corporations to take property devised to them by will. The will has been probated here. It operates upon the real estate by the force of our laws and the lot will be distributed to the trust company by the superior court of this state. It will not have the status of a trustee appointed by the courts of another state to sell real property in this state, and therefore no complications or doubts as to its powers can arise on that account. After distribution the trust will still be subject to the jurisdiction of the superior court. Code Civ. Proc. § 1699. It is not claimed that it had not complied with our laws governing the right of foreign corporations to do business in this state. If it has not done so, and the objection is raised, it will doubtless be able to comply therewith, if such compliance is necessary to enable it to dispose of this lot, as to which we express no opinion.

The order is reversed.

We concur: SLOSS, J.; LAWLOR, J.

(33 Cal. App. 450)

PEOPLE v. GIBSON. (Cr. 2090.)

(Supreme Court of California.
June 16, 1917.)

HOMICIDE 🔑214(3)—DYING DECLARATIONS—ADMISSIBILITY.

Deceased's declarations made just previous to and as an inducement to the performing of an operation for abortion that "he told me he had not lost a case in 30 years, and now I am dying, now I am going to die," when she died within 15 minutes thereafter, *held* admissible as part of the res gestæ in view of Code Civ. Proc. § 1870, subd. 4, providing that dying declarations as competent evidence are restricted to the cause of death and the circumstances immediately attending it as part of the res gestæ.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 449.]

In Bank. Appeal from Superior Court, Santa Clara County; W. A. Beasly, Judge.

A. L. Gibson was convicted of murder in the second degree, and appeals from judgment and from order denying motion for new trial. Affirmed. Application for hearing in the Supreme Court denied.

The following is the opinion of Kerrigan, J., in the District Court of Appeal, concurred in by Lennon, P. J., and Richards, J.:

The defendant was convicted of murder in the second degree and sentenced to imprisonment in the state prison for the term of 20 years. This appeal is from the judgment and from an order denying defendant's motion for a new trial.

On July 26, 1916, Mrs. Madeline C. Silveria, realizing that she was about to die as the result of an operation for abortion performed upon her by the defendant, made a dying declaration in which she stated that the defendant performed an abortion on her on July 4, 1916, and then added: "He told me he had not lost a case in 30 years, and now I am dying, now I am going to die." Within 15 minutes after making the declaration she died. In support of the appeal defendant insists that the court erred in admitting in evidence that part of the dying woman's statement above quoted.

Dying declarations as competent evidence are restricted to the cause of death and the circumstances immediately attending it as part of the res gestæ. Code Civ. Proc. § 1870, subd. 4; People v. Fong Ah Sing, 64 Cal. 253, 256, 28 Pac. 233; People v. Lee Ah Chuck, 66 Cal. 662, 6 Pac. 859. From the record it is fair to infer that the statement attributed to the deceased was made just before the operation; but whether it was made then, or at the time of, or immediately following it, it certainly sheds some light on the occurrence, and was in fact a part of the res gestæ of the operation; hence was admissible evidence. In the case of People v. Cipolla, 155 Cal. 224, 100 Pac. 252, the rule is given as follows (syllabus): "The dying declarations of the deceased, shown to have been made under conviction of approaching death, were admissible and competent to cover all of the res gestæ, including not only the actual facts of the assault and the circumstances surrounding it, but also the matters immediately antecedent thereto and having a direct causal connection with the assault, as well as acts immediately following the assault, and so closely connected therewith as to form part of the occurrence. Under this his statement is admissible to show that immediately after the murderous assault his body was carried and thrown into the river, and that he crawled out at about the place where he was thrown in, by means of brush at that place, of which he caught hold and climbed out, when he could go no further and lay down." In People v. Brewer, 19 Cal. App. 742, 745, 127 Pac. 808, testimony of a question put to the decedent and her answer thereto, to the effect that she was in good health at the time of the operation, admitted as part of her dying declaration, related in truth, says the court, to the res gestæ of the operation which resulted in her death, and for that reason was admissible. See, also, People v. Roach, 17 Cal. 297; People v. Linares, 142 Cal. 17, 75 Pac. 308.

Defendant also insists that the dying declaration of the deceased was not corroborated, and that therefore the judgment should be reversed. This position is based upon the provisions of section 1108 and section 1111 of the Penal Code. The former section provides that upon a prosecution for procuring an abortion the defendant cannot be convicted upon the testimony of the woman on whom the offense was committed unless she is corroborated by other evidence. Section 1111 provides that a conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense. As to the first of these sections, it would seem to be a sufficient answer to the defendant's contention to say that this is not a prosecution for procuring an abortion: the defendant is charged with murder. As to section 1111, perhaps, suffice it to say that it is inapplicable to this case for the reason that the deceased could not well be regarded as an accomplice in her own death, but should rather be considered a victim of the offense. However that may be, and conceding, for the purpose of the argument only, that those sections, which were read to the jury, are applicable to the facts of this case, still the case cannot be reversed for the simple reason that the dying declaration is abundantly corroborated in every essential respect.

The defendant further insists that the court erred in giving the following instruction: "A witness is presumed to speak the truth. This presumption, however, may be rebutted by the manner in which he testifies, by the character of his testimony for truth, honesty, or integrity, or his motives, or by contradictory evidence. In determining the credit to be given to the testimony of a witness, you may take into consideration the conduct, appearance, and manner of the witness while on the stand; his interest, if any, in the result of the trial; the motives which actuate such witness in testifying; the reasonableness or unreasonableness of his testimony; the candor or lack of candor with which he testifies; his relation or feeling toward the parties; and the probability or improbability of his statements being true when considered with reference to all the other evidence, facts or circumstances in the case. A witness who willfully testifies falsely as to any material fact in giving his testimony is to be distrusted in other parts of his testimony. This instruction applies to the defendant as well as to all other witnesses."

We do not concur in appellant's criticism of this instruction. It does not single out and unfavorably comment on the defendant's testimony, as was done in the case of People v. Maughs, 149 Cal. 253, 86 Pac. 187, relied upon by the defendant. It merely submits the testimony of the defendant, who testified in his own behalf, to the usual and general tests of credibility in common with that of the other witnesses. It is not erroneous. State v. Wells, 111 Mo. 533, 20 S. W. 232; State v. Bartlett, 50 Or. 440, 93 Pac. 243, 19 L. R. A. [N. S.] 802, 814, 126 Am. St. Rep. 751; People v. Bartol, 24 Cal. App. 659, 665, 142 Pac. 510.

Other instructions are complained of, but we think the court's charge as a whole fairly covered the law applicable to the facts of the case.

We regret to have occasion in this case as in others to refer to the conduct of the district attorney in the trial of the cause. Our sense of justice is often shocked by the unfair questions and general demeanor of certain prosecuting officers; but in the case at bar, while certain actions of the district attorney deserve censure, we are unable to say that there was such willful persistence in misconduct as to require a reversal of the judgment.

The judgment and order are affirmed.

H. A. Gabriel, of San Jose, and Geo. T. Kerr, for appellant. U. S. Webb, Atty. Gen., John H. Riordan, Deputy Atty. Gen., and Arthur M. Free, Dist. Atty., and Archer Bowden, Deputy Dist. Atty., both of San Jose, for the People.

PER CURIAM. In denying the application for a hearing in this court after decision by the District Court of Appeal of the First Appellate District we deem it proper to say:

First. In regard to the objection to the admission in evidence of that portion of a dying declaration detailing a statement made by the defendant, a sufficient answer is contained in the statement of the District Court of Appeal substantially to the effect that it is a fair inference from the record that the statement attributed to the defendant was made just before the operation and as an inducement thereto, and that it therefore constitutes part of the res gestæ of the operation. We do not desire to be understood as giving our approval to that portion of the opinion substantially stating that it could properly have been held a part of such res gestæ if made subsequent to the operation.

Second. Upon the question of the corroboration of the dying declaration of deceased by other evidence, a sufficient answer to the objection of appellant, in so far as the petition for hearing in this court is concerned is to be found in the conclusion of the District Court of Appeal that the dying declaration is abundantly corroborated in every essential respect. Our order denying a hearing in this court is not to be taken as an intimation of our approval of that portion of the opinion which intimates that the deceased could not be regarded as an accomplice whose testimony required corroboration under the provisions of section 1111, Penal Code. Nor is our denial to be taken as intimating an opinion one way or the other on the question of the application of section 1108, Penal Code.

The application for a hearing is denied.

(175 Cal. 598)

WILLIAMS v. LOCKWOOD et al.

(Sac. 2290.)

(Supreme Court of California. June 29, 1917. Rehearing Denied July 27, 1917.)

1. PRINCIPAL AND AGENT 🔑79(5)—DUTIES OF AGENT—MUTUAL TRANSACTIONS.

In an action to set aside sale of real estate from principal to agent, where latter obtains any benefit from the transaction, the burden is on him of showing that an adequate consideration was paid, and that no unfair means of any kind were used by him to bring sale about, since the relation of principal and agent is fiduciary in character.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 183–185.]

2. PRINCIPAL AND AGENT 🔑69(3)—MUTUAL TRANSACTIONS—DUTIES OF AGENT—ACTIONS—EVIDENCE.

While a principal has a right to disaffirm a sale to his agent if there is any element of unfairness or of bad faith in the transaction, though the purchase price is adequate, price is a very important factor in determining the existence of unfairness or bad faith.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 134, 135.]

3. PRINCIPAL AND AGENT 🔑79(5)—DUTIES OF AGENT—ACTIONS—SUFFICIENCY OF EVIDENCE.

In an action to set aside a sale of real estate from principal to agent, evidence *held* to sustain finding that property was sold at its full and fair value, and that sale was not induced by unfair means.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 183–185.]

4. PRINCIPAL AND AGENT 🔑79(5)—DUTIES OF AGENT—ACTIONS—SUFFICIENCY OF EVIDENCE.

Where, in an action to set aside a sale of real estate from principal to agent for fraud, it appears that agent had for years faithfully represented his principal, and that action was not brought until long after contract of sale made, deed executed, and grantee dead, clear and satisfactory proof is required to show that agent induced the sale by fraud.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 183–185.]

5. APPEAL AND ERROR 🔑1056(1)—PREJUDICIAL ERROR—EXCLUSION OF EVIDENCE.

In an action to set aside a sale of real estate from principal to agent on the ground of fraud, the exclusion of a memorandum showing that the agent 1½ years after purchase of land placed value on it much higher than amount at which he bought it is not substantially prejudicial, where evidence shows value of land had rapidly increased in the interval.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4187, 4191, 4207.]

6. APPEAL AND ERROR 🔑1058(3)—HARMLESS ERROR—ADMISSIBILITY OF EVIDENCE.

In an action to set aside a sale of real estate from principal to agent on the ground of fraud, the exclusion of evidence that the agent's executor had told plaintiff after the agent's death that the agent had not treated her quite right could not have affected plaintiff, where the executor had previously testified that he told principal that it was a pity she had sold the property, and that agent had done a good thing for himself when he bought it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4202–4204.]

Department 1. Appeal from Superior Court, Butte County; John F. Ellison, Judge.

Action by Annie M. Williams against Arthur D. Lockwood and another, executors of Arthur R. Briggs, deceased, and others. From judgment for defendants, plaintiff appeals. Affirmed.

Bishop, Hoefler, Cook & Harwood and Alfred J. Harwood, all of San Francisco, for appellant. A. E. Bolton, of San Francisco, Frank H. Short, of Fresno, and Carlton Gray, of Oroville, for respondents.

SLOSS, J. The plaintiff brought this action to set aside a sale of real property made by her to Arthur R. Briggs. Briggs died after the consummation of the transaction, and the suit was brought against the executors of his will, and the beneficiaries named therein.

The plaintiff, and her brother, Orville Pratt, had succeeded, upon the death of their grandfather, O. C. Pratt, to the ownership of considerable property in Butte and Glenn counties, and elsewhere, in this state. Up to 1899, or thereabouts, the plaintiff lived in California, but in that year she was married to Dr. Carl Williams, and thereafter resided with him in Philadelphia. From about 1897 Briggs had been the confidential adviser of the plaintiff, and had had charge and management of the property which had come to her and her brother from the estate of O. C. Pratt. Their holdings were seriously involved. In the course of years Briggs succeeded in selling parts of the land, and used the proceeds to pay indebtedness, until there remained, free of all incumbrance, a tract of 2,560 acres of land in Butte county, and a somewhat smaller tract in Glenn county. Orville Pratt died, leaving a will by the terms of which one-tenth of his interest in these lands passed to the plaintiff. Briggs was the executor of this will.

The agreement of sale which is the subject of attack in this action was made in February, 1909. By it the plaintiff agreed to sell to Briggs, for the sum of $25,000, her interest (eleven-twentieths) in the 2,560 acres of land in Butte county, together with her interest in a certain warehouse, valued at $600. The purchase price was made payable in 5 years from the date of the agreement, with interest at the rate of 6 per cent., the purchaser meanwhile to have possession of the land. Payment was, however, completed, and a conveyance made, in June, 1910, 15 months after the making of the contract. In October, 1910, Briggs died, and this action was instituted in August, 1911.

The complaint, after setting forth many of the foregoing facts, alleges that Briggs induced the plaintiff to make the sale to him by various kinds of misconduct, misrepresentation, and concealment. It is alleged that Briggs represented to the plaintiff that $25,000 was the value of said property, but that, in fact, said property was then worth

$36,200, as Briggs well knew, and that it has since increased in value to the sum of $50,000. The particulars of the charges of unfairness need not here be detailed, as we shall have occasion to refer to them in our further discussion.

The court found the confidential relation as alleged in the complaint. It found, however, that Briggs did not induce the plaintiff to enter into the agreement of sale, but that he consented to become the purchaser "by reason of the apparent determination of the plaintiff to then sell and dispose of said lands." It is found that the property was not, on the 1st day of February, 1909 (the date of the agreement of sale), of any greater value than $25,000, and that Briggs did not conceive the design or intent of purchasing the plaintiff's property at less than its value. The court found, further, that plaintiff was not at the time she agreed to sell ignorant of the value of the property; that Briggs explained to her that, in his opinion, it was not an advantageous time to sell said property; but plaintiff, acting against his advice, expressed a purpose to sell, and Briggs was induced thereby to make the purchase at the then market value of the property. It is found that the consideration paid by him was a full and fair one. There are various specific findings, followed by a general one that:

> "The transaction was in all respects a reasonable, fair, and just transaction, and said Arthur R. Briggs made no false representations to the plaintiff, nor did he conceal any of the facts or circumstances from her, or deal unfairly with her."

There is a further finding to the effect that when plaintiff made the contract, or soon thereafter, she was in a position to know all the facts now relied upon by her, and that she should have acted with more promptness. Judgment went in favor of the defendants, and the plaintiff appeals from the judgment, and from an order denying her motion for a new trial.

[1] The relation of principal and agent, which (as is conceded) existed between the plaintiff and Briggs is fiduciary in character. The acts of the agent are judged with almost, if not quite, the same strictness as those of a trustee. Where he deals with his principal, and obtains any benefit through the transaction, the law throws upon him, as upon a trustee, the burden of showing that an adequate consideration was paid, and that no unfair means of any kind were used by him to induce the contract. 2 Pom. Eq. Jur. § 959; Mechem on Agency, § 1221; Rubidoex v. Parks, 48 Cal. 215; Sterling v. Smith, 97 Cal. 343, 32 Pac. 320; Burke v. Bours, 98 Cal. 171, 32 Pac. 980.

[2] The principal's right to disaffirm a sale to his agent is not defeated by a showing merely that the agent paid the full value of the property. If there was any element of unfairness or bad faith, the sale may be avoided, even though the purchase price appear to have been adequate. But the obtaining of the trusting principal's property for less than it was fairly worth is certainly a highly important factor in such cases, and without it the principal's application for relief makes a less persuasive appeal to the discretion of the chancellor.

[3] Here the complaint alleged that the property at the time of the sale was worth considerably more than the $25,000 agreed to be paid (and subsequently paid) by Briggs. The court found, however, that the consideration paid was the full and fair value of the property at the time. The appellant seeks to attack this finding as contrary to the evidence. The effort cannot, however, be sustained. There was a sharp conflict on the question of value, and a number of qualified witnesses gave testimony justifying the finding of the court. The appellant lays great stress upon the fact that one of her witnesses testified that land sold on five years' time, with interest at the rate of 6 per cent., the purchaser to have possession, should bring $10 an acre more than if sold for cash. It is said that this testimony was not directly contradicted. But the opinion of the witness was a very general one, expressed without reference to the circumstances or to the condition of the contracting parties. The respondents introduced evidence to show that at the time of the sale Mr. Briggs was a man of considerable wealth and of high financial standing, and that his unsecured obligation, bearing interest at the rate of 6 per cent., could have been sold at par. If the opinion of plaintiff's witness was entitled to any particular weight, we think the court could properly consider it offset by the evidence of the value of Briggs' promise to pay.

Starting, then, with the premise that Briggs paid a full and fair price for the land, we must inquire whether the evidence supports the specific and general findings of the court to the effect that Briggs did not make any false representations to the plaintiff, or conceal any facts from her, or deal unfairly with her.

It is argued that Briggs took an unfair advantage of the appellant in failing to follow her instructions as to the property to be partitioned. The record contains a voluminous correspondence between the parties. Mrs. Williams had repeatedly expressed a desire that the property be divided into separate interests, and Briggs had declared his intention to take steps to this end. Later on, however, he wrote to the appellant a letter in which he stated that a further study of the situation had convinced him that her interests "would not be served well by making the partition suggested." He gave his reasons for this conclusion. We think the trial court was justified in believing that these reasons were sound, and that Briggs was acting in good faith. The court found that Briggs conscientiously advised the plaintiff in connection with the matter of partitioning the said property, and that he took no advantage whatever of her in connection with such partition. It cannot be said that these findings are contrary to the evidence. The record does not compel an inference that plaintiff's position would have been better if a part of the land had been held by her in sole ownership, or that the sale to Briggs was influenced by the fact that she held an undivided interest.

Much is made of the point that Briggs informed the plaintiff that the property was appraised at a sum which made her interest worth $25,000. An appraisement corresponding with this representation had been made in the estate of Orville Pratt, the plaintiff's brother, and no later appraisement had been made when Briggs made the statement. It appears, however, that before the sale was concluded, there was a new appraisement in the Orville Pratt estate, and in this the value of the property was put at a figure which would make the plaintiff's interest worth something over $28,000. Briggs did not advise plaintiff of this new appraisement, and his failure to so advise her is relied upon as a circumstance showing unfairness and bad faith on his part. The court found that Briggs did not deceive or mislead the plaintiff in this respect. The finding is not without support in the evidence. It is true that the record shows that the new appraisement was made on January 30, 1909, two days before the date of the agreement of sale between the plaintiff and Briggs. But it does not appear when the appraisement was returned to the court, and there is no direct evidence that Briggs knew of the new appraisement before the consummation of his negotiations with the plaintiff. The inventory was sworn to by Briggs on January 30, the same day on which the appraisers verified their bill of charges. Both oaths were taken before the same notary. It may be that these facts would have justified an inference that Briggs knew of the appraisement. But the inference is not a necessary one. Under our probate practice the making of the inventory is the act of the executor, and it ordinarily precedes the appraisement. It is quite possible that Briggs may have sworn to the inventory, and then have turned the matter over to the appraisers for their action. In view of the fact that no claim was made against Briggs during his lifetime, and that he could not testify at the trial, we think the court was justified in making its finding in accord with the presumption that fraud or wrong had not been committed.

Another circumstance charged against Briggs, and perhaps the most serious one, is that he used his influence to hinder a possible sale of the property to one Roscoe. Roscoe had had some talk with the plaintiff about a possible purchase of the property, and he had been referred to Briggs. After examining the property he visited Briggs, who, as he testified, spoke in such a way as to discourage a purchase by Roscoe. Shortly thereafter Mrs. Williams came to California and discussed the matter with Briggs, who then told her that a sale to Roscoe would not be advantageous. It is claimed that Briggs used his influence to prevent a sale to Roscoe, in order that he might buy the land himself for a smaller price. But, while the death of Briggs made it impossible to furnish a satisfactory explanation of his attitude in this matter, there is some reason to believe that he may have had good grounds for thinking the proposed sale to Roscoe undesirable. The testimony regarding the negotiations between the plaintiff and Roscoe is by no means clear. Roscoe had never made any binding agreement to buy, and there is a good deal of uncertainty in the testimony regarding the price which he might have been willing to give. The plaintiff's letters show her to have been well aware of her own interests. If she had a prospect of obtaining from Roscoe a price in excess of that offered by Briggs, and there was no other deterring factor in the possible sale, it is hardly likely that she would have accepted without question Briggs' unexplained statement that the sale to Roscoe would not be advantageous. On the whole case the court was justified in concluding that this circumstance did not afford a sufficient basis for setting aside the sale and conveyance to Briggs.

The appellant claims that she had no independent advice in the transaction. But, under the circumstances of this case, we do not think that such advice was essential. The findings, which are fully supported in this respect, show clearly that the plaintiff had a very good idea of the value of her property; they state, further, that Briggs advised her that a sale at that time would not be in her best interest, and that the property would probably increase in value within a reasonable time. If, notwithstanding these suggestions, she remained determined to sell, it is hardly probable that the advice of any third person would have altered her intention.

[4] We have already referred to the finding bearing upon the plaintiff's want of promptness in disaffirming the transaction. We do not hold that this is a finding of laches. But the long delay, during which the value of the property increased greatly, together with the fact that Briggs had died before any complaint was made by plaintiff, were circumstances bearing upon the equity of the plaintiff's case. The learned trial judge evidently felt, after hearing all the witnesses and reviewing the entire situation, that plaintiff had not made out a case which would justify the upsetting of a transaction entered into

so long before. In the opinion filed in the lower court, and included in the transcript, we find these passages, in which are well stated the broad equitable considerations which led to the rendition of the judgment, and which should lead to its affirmance here:

> "In considering the case for the plaintiff, the court is not unmindful of the fact, and deems it its duty to give it its proper weight, that after the contract of sale was made to Mr. Briggs for the land in dispute some 15 months elapsed before the deed was executed to Mr. Briggs by the plaintiff, that some 6 months thereafter Mr. Briggs died, and that this suit was not brought for some nine months after the death of Mr. Briggs. This leaves the case in the position that one of the parties to the transaction, and whose version of it, if presented to the court, might materially modify the case as made, is dead, and that his testimony cannot be obtained, and that anything presented by plaintiff and her witnesses is not subject to contradiction or modification by having presented to the court the version of the other party to the transaction.
>
> "After a man has acted as the confidential business agent of another for a period of 10 years with the strictest of good faith, with energy, and with a careful eye to the interests of his principal, rendering full, complete, and, so far as appeared, accurate accounts of all financial transactions, it should require, it seems to me, very clear and satisfactory evidence to cause the court to hold that all of a sudden, in a very short space of time, and in contradiction to his entire attitude to his principal consistently maintained for a period of 10 years, he faces about, and by fraud and chicanery concludes to deprive his principal of her property without paying her a full and adequate consideration therefor. It is the opinion of the court that such satisfactory showing has not been made in this case."

When, in addition, it appears that the price paid for the property was a full and adequate consideration, it must be held that the suspicious circumstances claimed to be shown were not of sufficient force to require the court to put the stamp of fraud upon the transaction.

[5, 6] The alleged errors in the rulings on the admission of evidence are of small consequence. The court excluded a memorandum made by Briggs in October, 1910, in which he placed the value of the land purchased by him from the appellant at $50,000. This was over a year and a half after the purchase. The declaration would be entitled to little weight on the issue of the value of the land in February, 1909. It was clearly shown that the value had increased rapidly in the interval. Under the circumstances the exclusion of the evidence, assuming its materiality, was not substantially prejudicial. It is claimed that the court erred in not permitting the plaintiff to testify that Mr. Lockwood, the executor of Briggs' will, and one of the defendants here, had told her, after his testator's death, that Briggs "had not treated her quite right." Mr. Lockwood himself had already testified that he had on this occasion told Mrs. Williams that it was a great pity that she had sold the property, and that Mr. Briggs had done a good thing for himself when he bought it. The additional testimony sought to be introduced could not have added anything of substantial value to the plaintiff's case.

The judgment and the order denying a new trial are affirmed.

We concur: SHAW, J.; LAWLOR, J.

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33 Cal. App. 722

DEAN v. GAME. (Civ. 1998.)

(District Court of Appeal, First District, California. May 21, 1917.)

BILLS AND NOTES ⊂⇒362—TAKING FOR COLLECTION—POSITION OF HOLDER.

Plaintiff, who took a note simply for collection from one who became its holder in good faith for value before maturity, stood in the shoes of his transferor, and had as good title and right of action as the transferor himself.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 937–943.]

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by W. E. Dean against M. S. Game. From a judgment for defendant, plaintiff appeals. Reversed.

Chas. Quayle, of Oakland, for appellant. C. J. Goodell, of San Francisco, for respondent.

PER CURIAM. Respondent in this action executed his negotiable promissory note for the sum of $530.31, payable to the order of one D. J. Gregor ten days after its date, which said note was indorsed by one P. T. Brunsing, and was thereafter and before maturity indorsed and transferred by the payee thereof to one John F. Smith, who paid to said Gregor the sum of $500. The real transaction between the original parties to the note was this: It was agreed between Game, Gregor, and Brunsing that Game was to execute and Brunsing indorse said note to Gregor, who was to negotiate the same with Smith, who was to pay Gregor the sum of $500 therefor, which sum was to be divided among the original parties to the transaction. Smith had no knowledge of said dealings between the parties thereto, and took and held said note until after its maturity as a holder in good faith for value and without notice of any equities between the original parties thereto. After maturity Smith transferred said note to the plaintiff and appellant herein for collection. Upon the trial of the cause the respondent, Game, as a defense to said action pleaded the original transaction between the parties, and further averred that Gregor had paid to him no portion of the money which he had received from Smith, and that therefore as to him the note was without consideration. The trial court gave judgment for the respondent, Game, holding that the plaintiff, as the transferee of the note simply for collection, was not a holder thereof for value, and that as to him the defendant, Game, was entitled to plead the want of consideration for the note.

In so doing we think the trial court was in error. It is conceded that Smith became the holder of the note in good faith and for value before its maturity, and that, had this action been brought by him, the respondent's defenses would not have been available to him. This being so, we are satisfied that the plaintiff, taking the note simply for collection, stands in the shoes of Smith, and has as good title and right of action as Smith himself had. Daniel on Negotiable Instruments, vol. 1, § 726; Randolph on Commercial Paper, § 987; Poorman v. Mills & Co., 39 Cal. 345, 2 Am. Rep. 451; Bank of Sonoma v. Gove, 63 Cal. 355, 49 Am. Rep. 92; Eames v. Crosier, 101 Cal. 260, 35 Pac. 873; Sinkler v. Siljan, 136 Cal. 356, 68 Pac. 1024; O'Conor v. Clarke, 5 Cal. Unrep. Cas. 323, 44 Pac. 482.

Upon the authority of the foregoing cases the judgment will be reversed.

It is so ordered.

(33 Cal. App. 740)

PIONEER INVESTMENT & TRUST CO. v. MUNCEY et al. (Civ. 1834.)

(District Court of Appeal, Second District, California. May 23, 1917.)

1. EXECUTION 🔑390—SUPPLEMENTARY PROCEEDINGS—RESTRAINT OF TRANSFERS.

Under Code Civ. Proc. § 715, permitting a judgment debtor to be brought into court for examination concerning his property after issuance of execution, where proof is made that he has property which he refuses to apply upon the judgment, and section 717, authorizing an order requiring persons or corporations alleged to have property belonging to the judgment debtor to appear and answer concerning it, and section 720, providing that, if it appears that such person claims an interest in the property adverse to the debtor, the judgment creditor may maintain an action against him for the recovery of such interest, and the court may forbid a transfer or other disposition thereof, and that such order may be modified or vacated at any time upon such terms as may be just, where a hearing on a judgment creditor's application was had, and the debtor himself was dismissed, but a corporation claiming under an assignment from him was later ordered not to transfer the property assigned, the order, while not a statutory nunc pro tunc order, was within the power of the court; the exact time of making it being immaterial, so long as it was made within a few days of the hearing.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 1141.]

2. CONSTITUTIONAL LAW 🔑305—EXECUTION 🔑390—DUE PROCESS OF LAW — SUPPLEMENTARY PROCEEDINGS.

Under Code Civ. Proc. § 720, providing for an order supplementary to execution prohibiting a claimant under a judgment debtor from transferring the property, it is not necessary that the the judgment creditor give security before taking such order, and failure to require security is not a deprivation of due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 925–927; Execution, Cent. Dig. § 1141.]

3. APPEAL AND ERROR 🔑604—RECORD—SUFFICIENCY OF AUTHENTICATION.

While, under court rule 29 (119 Pac. xiv), the papers and evidence used in a hearing on a motion should be included in a bill of exceptions, that is not necessary where the parties stipulated the papers to be correct, which was sufficient authentication, under Code Civ. Proc. §§ 951, 953.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2655–2659.]

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Proceedings supplemental to execution by the Pioneer Investment & Trust Company against R. E. Muncey and another. From order adverse to defendants, they appeal. Order as to defendant Muncey reversed, and as to the other defendant affirmed.

Tanner, Odell, Odell & Taft, S. W. Odell, and J. B. Beman, all of Los Angeles, for appellants. Thomas Ball, of Los Angeles, for respondent.

JAMES, J. This is an appeal from orders made by the superior court upon proceedings had supplemental to execution. Plaintiff herein being a judgment creditor of defendant Muncey having prepared an affidavit which was filed in the superior court, secured an order requiring the appearance of the judgment debtor and the Law Credit Company, a corporation. The affidavit set out the date of the recovery of the judgment, the fact that execution had been issued and placed in the hands of the sheriff of the county of San Bernardino, that the sheriff had levied upon money in the hands of one William Thompson, a resident of the county of San Bernardino, which money the affiant alleged upon information and belief was the property of Muncey, that Thompson had made return admitting indebtedness to Muncey in the sum of $550, and that he held such money subject to the order of court. The facts regarding the matter of Thompson's indebtedness to Muncey were then set out. It was stated in the affidavit that Muncey had recovered a judgment against Thompson which had become final, but that prior to the making of the levy under this plaintiff's execution, wherein Thompson was served with the writ, Muncey had assigned the judgment so obtained in his favor to the Law Credit Company. It was then asserted in the affidavit that the assignment was fraudulent and made for the purpose of preventing satisfaction being obtained of this plaintiff's judgment. On May 3, 1915, the transcript shows, the court made the following minute order:

"Matters of examination concerning property regularly called. Thos. Ball, Esq., appearing as attorney for plaintiff and S. W. Odell, Esq., for defendant. R. E. Muncey is sworn, examined and discharged."

On May 5th what purports to be an order nunc pro tunc was made in the same matter by the court. It was recited therein that Muncey and the Law Credit Company having appeared on the 3d day of May, 1915, and having been examined concerning matters relative to the judgment which was assigned by Muncey to the Law Credit Company, it was ordered that the plaintiff be given leave to file and prosecute an action against the Law Credit Company to vacate and set aside the assignment, and that the defendant Muncey and the Law Credit Company be forbidden to further transfer the judgment, have execution issued thereon, or to do anything in the premises until the further order of the court. It appears that the Law Credit Company immediately thereafter moved to set aside the order so purporting to have been made "nunc pro tunc," which motion was by the court denied. The proceeding as initiated by the affidavit was one authorized by sections 715 and 717, Code of Civil Procedure. Under section 715 a judgment debtor may be brought into court for examination concerning his property after execution has been issued, where proof is made to the satisfaction of the judge that he has property which he refuses to apply upon the judgment. Section 717 authorizes an order to be made requiring persons or corporations alleged to have property belonging to the judgment debtor of a value exceeding $50, to appear and answer concerning the same. Section 720 provides that, if it appears that such person or corporation claims an interest in the property adverse to the debtor:

> "The judgment creditor may maintain an action against such person or corporation for the recovery of such interest or debt; and the court or judge may, by order, forbid a transfer or other disposition of such interest or debt, until an action can be commenced and prosecuted to judgment. Such order may be modified or vacated by the judge granting the same, or the court in which the action is brought, at any time, upon such terms as may be just."

It did appear from the affidavit upon which the order for examination was issued that there was due on the Thompson judgment a sum in excess of $50; the affidavit stated sufficient facts in other particulars to warrant the court in proceeding to an examination of the judgment debtor Muncey, and the Law Credit Company. So far as Muncey was concerned, it appears that by the order entered upon the minutes of the court he was completely discharged in the proceeding. By that minute entry it does not appear that the court made any order affecting the Law Credit Company.

[1] On behalf of the corporation appellant, it is urged that the court was without authority to make the nunc pro tunc order affecting it. In our opinion, the order does not possess a nunc pro tunc character, but is an order which the court was authorized to make following the hearing had, so as to dispose of the matter as affecting the Law Credit Company. Whether that order was made at the time of the examination or a few days afterward, we think immaterial. The appellant corporation was not entitled to notice as to when the court would make an order in a matter theretofore submitted to it. This order made affecting the Law Credit Company contained no statement as to any inadvertence or error having occurred, or as being expressed in the minute order of May 3d. By that minute order Muncey was discharged from the proceeding and the court was without jurisdiction to include him in the order of May 5th. To that extent the latter order should be set aside.

[2] The appellant corporation insists that the court was without authority to impose the restraint against it forbidding a transfer of the judgment, assignment of which it had received from Muncey, without requiring security to be given. It is argued that if the law apparently authorizes such an order to be made, it is unconstitutional as furnishing no adequate process of law under which only a person may be deprived of his property. This position we think cannot be maintained. The section of the Code (Code Civ. Proc. § 720) expressly gives authority for the making of an order such as was made in this case, without requiring security to be given, and this section affecting proceedings of a special nature, cannot be read in connection with the law relative to the issuing of injunctions. That the Law Credit Company may suffer any damage, is not clear. There is only the bare possibility that by the delay which the order produces, the appellant corporation will fail to discover some property of the defendant Muncey out of which to satisfy the judgment. It is often brought within the range of possibility that through the operation of the law some inconvenience or possible loss may be produced. In our opinion, the restraint authorized to be imposed by the section and which was here imposed is not such as to give support to the argument that constitutional rights of the appellant corporation have been interfered with. We may call attention also to the fact that where an order of restraint is made, if the creditor who obtains such an order fails seasonably to commence an action to have determined the interest of the third party in the property or debt, such third party may apply to the court to have the order vacated.

[3] At the conclusion of respondent's brief we find it suggested that the record in this case is not authenticated in such a way as to authorize this court to consider the papers contained therein. The transcript was prepared, showing the several affidavits and orders made, and by stipulation of counsel it was agreed that the copies therein set forth are true and correct. It has been held that, under rule 29 of the Supreme Court (119 Pac. xiv), the papers and evidence used on the hearing of a motion should be authenticated by being incorporated in a bill of exceptions. It can readily be understood that, where oral evidence is heard, the court should settle the bill. Here, however, the

matters to be considered all appeared in the form of affidavits, on the minutes of the court, or by written order. They were stipulated to be correct by the attorneys, and this we think was a sufficient authentication, under the provisions of sections 951, 953, Code of Civil Procedure.

The order as to appellant Law Credit Company is affirmed. The order restraining defendant R. E. Muncey from taking action with reference to the judgment assigned by him to the Law Credit Company is reversed.

We concur: CONREY, P. J.; WORKS, Judge pro tem.

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33 Cal. App. 696

CITY PROPERTIES CO. v. MEACHAM.

(Civ. 2059.)

(District Court of Appeal, First District, California. May 17, 1917.)

1. PLEADING 🔑85(5)—AMENDED COMPLAINT—SERVICE—TIME.

Service of an amended complaint is not complete before the filing of such complaint, as fixing the beginning of the time allowed defendant to answer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 178.]

2. PLEADING 🔑85(1)—ANSWER—FILING.

Pending his motion to set aside a default judgment which plaintiff had illegally caused to be entered against him, defendant was not required to file his answer, and the clerk might have refused to file it, if tendered.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 172, 173.]

3. APPEAL AND ERROR 🔑440—CORRECTION OF RECORD—JURISDICTION.

Where judgment was entered for defendant, and he prepared findings and delivered them to the clerk for submission to the judge, and the clerk inadvertently entered them as the judgment of the court, the court might correct the record of its proceedings and make it speak the truth, and its jurisdiction to do so was not lost because of an appeal from such judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2198–2201.]

Appeal from Superior Court, City and County of San Francisco; Marcel E. Cerf and E. P. Shortall, Judges.

Action by the City Properties Company against F. E. Meacham. From an order denying his motion to enter defendant's default, from a purported judgment entered by the clerk and subsequently set aside by the court and from an order setting aside such purported judgment, plaintiff appeals. Appeal from purported judgment and from order refusing to enter defendant's default dismissed, and order setting aside the judgment affirmed.

Arthur Crane, of San Francisco, for appellant. Chas. H. Sooy and Courtney L. Moore, both of San Francisco, for respondent.

KERRIGAN, J. In this action the plaintiff takes three appeals—one from an order denying his motion to enter the default of the defendant, another from a purported judgment entered by the clerk and subsequently set aside by the court, and the third from the order setting said purported judgment aside.

[1] As to the first of these appeals it appears that the plaintiff served upon the defendant an amended complaint, and at the expiration of ten days thereafter, no answer having been served or filed, caused the clerk to enter the defendant's default. The plaintiff, however, did not file said amended complaint so served upon defendant until some eight days after said service, so that at the time of the entry of defendant's default by the clerk his time to answer had not expired; the service not being complete until the filing of the paper. Coker v. Sup. Ct., 58 Cal. 178; Billings v. Palmer, 2 Cal. App. 432, 83 Pac. 1077. The defendant moved to set this default aside. Pending this motion more than ten days after the filing of said amended complaint having elapsed the plaintiff moved the court to enter the default of the defendant. These motions came on for hearing together, and the court granted the motion of defendant, and denied that of the plaintiff; and it is this latter order that the plaintiff asks to have reviewed as an incident to his appeal from the judgment.

[2] We think it clear that this order of the trial court was correct. Pending his motion to set aside the default which the plaintiff had irregularly caused to be entered against him the defendant was not required to file his answer; and indeed the clerk would have been justified in refusing to file it if tendered, in view of the state of the record which disclosed that the defendant's default had been entered.

[3] As to the purported appeal from the judgment and the order setting it aside, it appears that at the conclusion of the trial judgment was ordered entered in defendant's favor. Thereafter the defendant prepared findings—they not having been waived—and delivered them to the clerk of the court for submission to the judge; but the clerk inadvertently entered them as the judgment of the court without the judge of the court having seen or examined them. Upon motion of the plaintiff timely made this judgment so entered was by the court vacated. It being apparent that the judgment was entered by the clerk of the court through inadvertence, there is no doubt of the power of the court under such circumstances to correct the record of the court's proceedings and to make it speak the truth. The contention of the appellant, therefore, that by the taking of its appeal from the judgment so inadvertently entered the court lost jurisdiction to take any further action cannot be sustained. The court acted wholly within its authority in purging its records of the judgment entered under the circumstances described.

It follows from what we have said that the appeal from the purported judgment—in which it is also sought to have reviewed the order of the court refusing to enter the defendant's default—must be dismissed; and that the order setting aside and vacating said judgment must be affirmed. It is so ordered.

We concur: RICHARDS, J.; BEASLY, Judge pro tem.

33 Cal. App. 713

DAVIES v. PATTON et al. (Civ. 2058.)

(District Court of Appeal, First District, California. May 18, 1917. Rehearing Denied by Supreme Court July 16, 1917.)

MORTGAGES 🔑84—FRAUD—RESCISSION—NECESSITY OF TENDER.

Where a vendor took a first and second mortgage for part of the price of land, representing to the mortgagors that a bank was to own the first mortgage which was taken in its name, but which the vendor owned in fact, and the mortgagors were in possession of the property, were not damaged by the concealment, attempted no rescission of the transaction, and did not offer to return the property, they could not repudiate the mortgage.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 193.]

Appeal from Superior Court, Alameda County; Wm. H. Donahue, Judge.

Suit by Oma A. Davies against I. S. Patton and others. Judgment for plaintiff, and named defendant and another appeal. Affirmed.

F. H. Dam, of San Francisco, for appellants. George Clark, of San Francisco, for respondent.

PER CURIAM. This is an appeal from an action to foreclose a mortgage. It appears that the parties to this action had entered into an agreement for the sale and purchase of a certain piece of real property in Alameda county for the sum of $6,000; that the defendants and appellants paid on account thereof $1,000, and went into possession. In payment of the balance they executed two promissory notes, one for $3,000 secured by a first mortgage upon the property purchased, and the other for $2,000 secured by a second mortgage. The first mortgage, according to the understanding between the parties to this appeal, was to be owned and held by a certain bank in Oakland, and the second mortgage was to be owned and held by the plaintiff. When this suit was commenced, the appellants learned that the bank in fact was not the owner of the mortgage executed in its name, but held the same for the plaintiff, who in fact had always been the owner of both incumbrances. The appellants claimed in the trial court, and now urge here, that the making of the deed of conveyance and the execution of the two mortgages constituted one transaction, and that the plaintiff in taking the first mortgage in the name of the bank when in fact it belonged to her deceived and defrauded them, in consequence of which the plaintiff cannot avail herself of the equitable arm of the court for the foreclosure of the second mortgage—the one concerned in this suit.

From the evidence in the case it is clear that the plaintiff was prompted by no oppressive or wrongful intent in allowing the appellants to suppose that they were dealing with the bank in question in the matter of the first mortgage, and probably conducted that part of the transaction in the manner indicated solely for the purpose of securing prompt payment of that part of the appellants' obligation. It is quite evident, too, that the appellants had no serious objection to the plaintiff owning the first mortgage, for they in fact, according to the evidence introduced by the plaintiff, had requested her to take a mortgage for the full amount of the unpaid purchase price of the property. But aside from all of this, it appears that the appellants were and are in possession of the property, they were not damaged by the concealment, they attempted no rescission of the transaction or of any part of it, have not offered to return the property, but appear to think they may retain it and repudiate any obligation under their mortgages. Such a position cannot be given judicial countenance. 6 Cyc. 314; 35 Cyc. 146; 20 Cyc. 92; C. S. N. Co. v. Wright, 8 Cal. 585, 592. In our opinion the appeal is entirely devoid of merit.

The judgment and order are affirmed.

33 Cal. App. 744

GEORGE J. BIRKEL CO. v. LOVELL et al. (Civ. 1863.)

(District Court of Appeal, Second District, California. May 26, 1917.)

1. EVIDENCE 🔑441(9)—SALES 🔑38(8)—CONDITIONAL SALE—ACTION FOR BALANCE—DEFENSES.

In an action for the unpaid installments due under a written contract for the conditional sale of a piano, wherein defendant admitted that she signed the contract, and did not deny that she had seen and read it over before signing it, or allege that in signing it she relied upon any representations that it was in terms other than those actually expressed therein, an answer alleging facts concerning oral negotiations preceding her signing and that it was signed under false and fraudulent representations and was a mere formal contract not binding upon her constituted no defense.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1729–1732, 1787–1793, 2035, 2036; Sales, Cent. Dig, § 77.]

2. WITNESSES 🔑269(1)—CROSS-EXAMINATION OF WITNESS.

In such action questions on cross-examination of defendant's agent outside the scope of his testimony on direct examination were properly excluded, as being an attempt to present an affirmative defense prematurely.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 949.]

3. EVIDENCE ⚷448—PAROL EVIDENCE—CONTRACT OF CONDITIONAL SALE.

In such action questions to defendant's witnesses offered to prove negotiations preceding the written contract and to change or vary its terms by parol evidence not within the exception were properly excluded, where there was no mistake or imperfection in the writing put in issue, and no ambiguity in its terms, and where the validity of the agreement as made was not otherwise in dispute, as it did not come within the exceptions specified by Code Civ. Proc. § 1856.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2066–2082, 2084.]

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by the George J. Birkel Company against Mrs. Carrie A. Lovell and John Doe Lovell, her husband. From a judgment for plaintiff and from an order denying their motion for new trial, defendants appeal. Judgment and order affirmed.

Davis & Rush and John S. Cooper, all of Los Angeles, for appellants. E. S. Williams, of Los Angeles, for respondent.

CONREY, P. J. Appeal by the defendants from the judgment and from an order denying their motion for a new trial.

[1] The action is one wherein the plaintiff sued to obtain judgment for the unpaid balance due upon a written contract whereby the plaintiff made a conditional sale of a piano to the defendant Carrie A. Lovell. In the contract it was provided that, if the vendee should fail to pay any installment when due, thereupon, at the option of the vendor, all of the contract price then unpaid should become immediately due and payable. Such default did occur, and the vendor exercised said option and commenced this action. By their answer the defendants denied that the defendant Carrie A. Lovell at the time mentioned executed or delivered to the plaintiff her contract in writing, a copy of which is attached to the complaint. This denial was followed by the allegation of facts concerning the oral negotiations which preceded the signing of the written contract. These facts are of such a nature that they could not be proved without contradicting the terms of the writing. The answer alleged:

> "That, pursuant to these conditions, and no other, the defendant Carrie A. Lovell agreed to take the piano, and that at the time she took the said piano she signed an agreement under false and fraudulent representations to her that it was a mere matter of form to sign and execute a contract, and that upon the further promises and representations to her that she would in no way be bound under said contract," etc.

At the trial Mrs. Lovell admitted that she signed the contract, and did not deny that she had seen and read it over before signing. In her answer to the complaint she did not allege any facts showing that she did not read the contract before signing, or that in signing it she relied upon any representations made to her that the writing was in terms other than those which are actually expressed therein. Although the answer characterizes the statements of the plaintiff as "false and fraudulent representations," the facts set forth concerning those representations do not constitute a defense; for all of her assertions that "a course of cunning, deceit, and fraud" was pursued by the plaintiff are qualified by the admission that she voluntarily signed a written contract with knowledge of the terms therein plainly and distinctly stated.

[2] Appellants have presented many specifications of error in rulings whereby the court excluded testimony offered by them. By many of these rulings the court sustained objections to questions asked on cross-examination of the witness Geissler, who made the sale on behalf of the plaintiff to Mrs. Lovell. The subject-matter of these questions was outside the scope of the testimony of the witness on direct examination. In asking such questions counsel for appellants were attempting to present their affirmative defense prematurely.

[3] The only witnesses on behalf of the defendants were Mrs. Lovell herself and the witness Geissler. Many questions were asked of these witnesses which were of a character similar to those before mentioned, and these questions also were excluded by the court principally upon the ground that they were offered for the purpose of proving negotiations which preceded the written contract, and for the purpose of attempting to change, vary, or alter the terms of such written contract by parol evidence. These were correct rulings. Section 1856 of the Code of Civil Procedure specifies the instances in which a court may receive evidence of the terms of an agreement other than the contents of the writing when the terms of such agreement have been reduced to writing. The evidence offered by the defendants did not come within the provisions of that section. No mistake or imperfection of the writing was put in issue by the pleadings. There was no ambiguity in the terms of the writing. No question of construction or interpretation of the terms of the writing was involved in the case. See, also, Civ. Code, § 1625. The validity of the agreement as made was not a fact in dispute, except to the extent that the answer may be considered as an attempt to establish illegality in the contract or fraud in the obtaining thereof. And, for the reasons already stated, the answer was insufficient as a statement of a defense grounded upon fraud.

The judgment and order are affirmed.

We concur: JAMES, J.; WORKS, Judge pro tem.

(33 Cal. App. 755)

BOOS v. BYRNES. (Civ. 1639.)

(District Court of Appeal, Third District, California. May 28, 1917.)

1. Appeal and Error 🔑612(1)—Review—Affidavits Filed on Motion to Strike Judgment.

Affidavits in the clerk's transcript which were filed on motion to strike out judgment for plaintiff, but were not certified or otherwise authenticated by the judge of the trial court as having been used at the hearing of the motion, cannot be considered on appeal from the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2694–2696.]

2. Appeal and Error 🔑873(2)—Order Appealable—Statutes.

Under Code Civ. Proc. § 956, providing what may be reviewed on appeal from the judgment, and section 963, providing when an appeal may be taken, an order denying defendant's motion to strike out judgment for plaintiff is an appealable order, and cannot be reviewed on appeal from the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3460.]

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by Victor Boos against R. R. Byrnes. From a judgment for plaintiff, defendant appeals. Affirmed.

Charles Kasch, of Ukiah, for appellant.
Robert Duncan, of Ukiah, for respondent.

CHIPMAN, P. J. Action in replevin to recover possession of a certain automobile. Defendant justified the taking as sheriff under execution issued in an action entitled Mary Lazarus v. Simon Boos, alleging that said automobile is the property of said judgment debtor.

The cause was tried by the court without a jury, and the court made and entered findings and judgment for plaintiff on December 7, 1916. On December 12, 1916, defendant served and filed notice of a motion to set aside and vacate said findings and judgment on the ground that no notice of the filing of said findings or of the time when said findings would be presented to the judge of said court was served upon defendant, and that defendant did not waive notice of the time when said findings would be presented. The time for hearing said motion was shortened, and order made that it be heard December 13, 1916. We do not find in the record any order denying the motion, but plaintiff seems to treat the motion as having been denied.

[1, 2] On December 13, 1916, defendant served and filed notice of appeal from the judgment of December 7, 1916, and now seeks to review the action of the court in denying said motion. Respondent objects on two grounds, both of which are well taken and preclude our considering the order: First, the affidavits in the clerk's transcript, which were filed on the motion to strike out the judgment, cannot be considered upon this appeal because they were not certified or otherwise authenticated by the judge of the court as having been used at the hearing of said motion (Thompson v. American Fruit Co., 21 Cal. App. 338, 131 Pac. 878; Pouchan v. Godeau, 21 Cal. App. 365, 131 Pac. 879; Russell v. Chisholm, 23 Cal. App. 727, 139 Pac. 657); second, the said order is itself an appealable order and cannot be reviewed upon appeal from the judgment (Code Civ. Proc. §§ 956, 963; McCourtney v. Fortune, 42 Cal. 387; Deyoe v. Superior Court, 140 Cal. 476, 486, 74 Pac. 28, 98 Am. St. Rep. 73; Bohn v. Bohn, 164 Cal. 532, 537, 129 Pac. 981).

The remaining point urged by appellant is that the evidence does not support the finding and judgment allowing plaintiff $50 damages for the detention of the automobile. Appellant quotes some testimony from which he concludes that $37.50 is the extreme amount shown as damages. There was other testimony in the case fully warranting the finding.

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

(33 Cal. App. 624)

PEOPLE v. STANLEY. (Cr. 668.)

(District Court of Appeal, First District, California. May 10, 1917. Rehearing Denied June 9, 1917; Denied by Supreme Court July 9, 1917.)

1. Criminal Law 🔑150 — Limitation of Prosecuton—Neglect to Support Child.

Since under Pen. Code 1915, § 270, each willful omission to provide for an illegitimate child is a fresh offense, prosecution thereunder is not barred by the one-year statute of limitation (Pen. Code, § 801), though the omission began at the child's birth, more than a year before filing of information charging the offense as having been committed after statute went into effect and within one year.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 274, 275.]

2. Bastards 🔑17½, New, vol. 12 Key-No. Series — Constitutional Law 🔑197 — Ex Post Facto Law — Neglect to Support Child.

Construing Pen. Code 1915, § 270, so as to render each willful omission to provide for an illegitimate child a fresh offense, does not render it ex post facto, though applied to a child born before enactment of the statute.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 550.]

3. Bastards 🔑17½, New, vol. 12 Key-No. Series—Neglect to Support—Prosecution—Prerequisites.

Under Pen. Code 1915, § 270, an alleged father of an illegitimate child may be prosecuted for failure to support it without having duty to do so established and directed in a civil action under Civ. Code, § 196a.

4. Bastards 🔑92 — Review — Conflicting Evidence—Venue.

Judgment of trial court of conviction for offense of omitting to provide for an illegitimate child under Pen. Code 1915, § 270, will not be disturbed on ground that venue was not properly laid or proven, where evidence in that regard is conflicting.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 228–239.]

5. CRIMINAL LAW 🔑635 — PUBLIC TRIAL — WAIVER.

Defendant waives his right to a public trial by his own request for exclusion of spectators and by his concurrence in order of exclusion then made by trial court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1452.]

6. CRIMINAL LAW 🔑635—PUBLIC TRIAL.

The right to public trial is not violated when the order of court excluding the public is sufficiently broad and flexible as to admit the officers of the court, witnesses for the respective parties, the members of the bar, and all others who have a legitimate interest in the case, including relatives or friends of the defendant and of the complaining witness, and only expressly excluding those who have no interest in the case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1452.]

7. BASTARDS 🔑92 — CONDUCT OF TRIAL — PREJUDICIAL ERROR.

In a prosecution for omitting to provide for an illegitimate child, it was not prejudicial error under the circumstances to permit prosecuting witness to take her child, of which defendant was asserted to be the father, with her to the witness stand and hold it in her lap while testifying.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 228–239.]

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Henry J. Stanley was convicted on a charge of omitting to provide for an illegitimate child, and appeals. Affirmed.

Edwin V. McKenzie, of San Francisco, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

RICHARDS, J. This is an appeal from a judgment of conviction of the defendant upon the charge of omitting to provide for an illegitimate child, and from an order denying his motion for a new trial.

The first contention urged by the appellant is that the offense of which he was convicted is barred by the provision of section 801 of the Penal Code. The argument in support of this contention is based upon the facts that the statute under which this prosecution was had went into effect on August 8, 1915; that the child was born March 25, 1915, and that the defendant's omission to provide for it began at the date of its birth; that the information was filed herein on August 7, 1916; that the statutory limitation upon misdemeanors of this character is one year. From these facts the appellant argues that he is being prosecuted for an offense committed more than one year before the information was filed; and in connection with this argument and upon the same state of facts the appellant urges that the statute itself is an ex post facto law, at least in its application to his case, in that it has undertaken to make and punish as an offense that which was not a punishable offense at the time of its commission.

Neither of these contentions is well taken. As to both of them it appears that the information charged the offense as having been committed on October 15, 1915, and that the information was filed on August 16, 1916, or within the statutory period of the year, and that the proofs in the case support the date fixed for the inception of the defendant's offense.

[1] The statute under which he was charged and convicted became effective on August 8, 1915. It made an offense that which was not so in a legal sense before it went into effect. It did not purport to punish acts of omission prior to the date upon which it took effect, and the statute of limitations could not therefore have commenced to run before that date, nor could the defendant have been guilty of acts of omission which he could urge as constituting the inception of the crime which did not in legal effect exist so as to entitle him to the benefit of the statutory limitation.

[2] Besides, we are disposed to agree with the suggestion of the trial court in its charge to the jury that the offense of which the defendant stands convicted is in the nature of a continuing offense, and that public policy would require such a construction of the terms of section 270 of the Penal Code as to render each and every willful omission without legal excuse on the part of the parent to furnish necessary food, clothing, shelter, or medical attendance to his or her child a fresh offense. So construed, this statute is no more ex post facto or retroactive in its intendment and effect than would any other statute be which made penal acts and conduct which were not so prior to its enactment.

[3] The next contention of the appellant is that there can be no prosecution of the alleged father of an illegitimate child for his failure to support it until his duty so to do has been established and directed in a civil action under section 196a of the Civil Code. It is sufficient to say in response to this contention that the cases cited by the appellant in seeming support of it were decided prior to the amendment of section 270 of the Penal Code, and were among the causes which moved the Legislature to so amend said section of the Penal Code as to make its provisions expressly applicable to the parents of illegitimate children; and it is further quite clear that the provisions of the Civil Code having reference to the custody and support of legitimate children can have no application to illegitimates. The fact that there may be difficulties in some instances in establishing paternity in the latter class of cases would not of itself be a sufficient reason for importing into the statute the requirement of an

antecedent civil action not contemplated by its terms. We find no merit, therefore, in this contention on the part of the appellant.

[4] The appellant's next contention is that the venue of this prosecution was not properly laid or proven, since, as he claims, the evidence shows that the mother of the child did not reside in the city and county of San Francisco at the time of the defendant's alleged omission to provide necessaries for it. But in this regard the evidence is conflicting, and for that reason the judgment of the trial court will not be disturbed.

The next contention is that he was denied his right to a public trial. The following are the facts occurring during the course of the trial upon which this contention is predicated: Upon the opening day of the trial, September 20, 1916, after the information had been read to the jury, counsel for the defendant, addressing the judge of the trial court, said:

> "Your honor, the defense asks that the spectators be excluded."

To which the court replied:

> "Very well. I act on that suggestion in all cases of this character. The request has been made by the parties hereto, especially by the defendant, that in view of the nature of the proceedings to be had here we have a closed session. Therefore all persons now here except such as are in some way related to this case will please retire."

The record does not disclose what effect was given to this order, or to what extent, if any, it was enforced or obeyed. The trial of the cause proceeded for several days, and in fact was drawing toward its close, when, on September 27, 1916, while the witnesses for the defense were being called to testify, counsel for the defendant said:

> "Now we ask at this time that the courtroom be cleared, your honor, under the former rule."

To which the court replied:

> "Well, I will clear it of all except any persons who have any legitimate interest here. I am very much in sympathy with counsel's motion in so far as it has to do with a great many people who are attracted to the courtroom when cases of this character are on trial, not because they have any sort or kind of legitimate interest in the proceedings, not that they are concerned at all with the administration of public justice, but apparently simply and solely to gratify some sort of prurient curiosity or feeling or desire of some sort that finds great satisfaction in listening to testimony of the kind that is ordinarily adduced upon these hearings. If, upon the other hand, there are any persons here who are brought here because of any legitimate interest of any sort or kind in the case, or in any of those concerned with it, they may remain. For instance, if the defendant has here any personal friends or relatives, they may remain. If the complaining witness has any relatives or any friends now here, they may remain. But the rest of the people here who have no interest in this case will kindly retire.
>
> "Mr. McKenzie (counsel for the defendant): Your honor, if that is going to include the friends of this complaining witness, we assert our right to a public trial.
>
> "The Court: No, you having already waived your right to a public trial, that waiver will stand.
>
> "Mr. McKenzie: We meant the whole courtroom with the exception of the officers, and that is the motion we make.
>
> "The Court: All right. I will stand on that.
>
> "Mr. McKenzie: We ask that we have a public trial, and we refuse to waive the right.
>
> "The Court: The trial will proceed as already ordered."

[5] The record nowhere discloses to what extent the second order of the court was obeyed or enforced, nor in fact whether any portion of the public were excluded from the courtroom during the remainder of the trial of the cause, but if we are to assume for the purposes of this contention that both of the above orders of the trial court were obeyed, we are still of the opinion that as to the first order the defendant must be held to have waived his right to a public trial by his own request for the exclusion of spectators, and by his concurrence in the order which the trial court then made, and that as to the second order of the court, made also upon the defendant's request, that the courtroom be cleared, we think the form of the order was such as not to invade the right of the defendant to a public trial in case he had not already waived that right, and that, even though the trial court had made its second order on its own initiative, it would not have amounted to a denial of the right of the defendant to a public trial.

[6] The provision of the Constitution with respect to the right of accused persons to a public trial must be construed in a reasonable sense in view of the object to be subserved thereby, and is not to be interpreted as intended that the trial of criminal cases shall be held in places so large or so open as that the entire body of the public of a city or region may attend it if they so desire, or that every idle or morbidly curious person may have at all times freedom of admission to the place of trial. When the order of the court is sufficiently broad and flexible as to admit the officers of the court, the witnesses for the respective parties, the members of the bar, and also, as in this case, all others who have a legitimate interest of any sort or kind in the case, including the personal relatives or friends of the defendant and of the complaining witness, and only expressly excluding those "who have no interest in the case," it cannot be said that the trial has not been a public trial, or that the order was not one which it was clearly within the sound discretion of the trial court to make. Reagan v. United States, 202 Fed. 488, 120 C. C. A. 627, 44 L. R. A. (N. S.) 583, and cases cited. The authorities cited by appellant are not out of harmony with the views above expressed.

[7] The appellant further contends that the trial court committed a prejudicial error in permitting the prosecuting witness to take her child (of whom it was asserted the defendant was the father) with her to the witness stand and hold it in her lap while testifying. The record shows that the child was

an infant, and ill, and was asleep while being so held by its mother, and further shows that the trial court not only refused to permit the child to be admitted in evidence for the purpose of showing an asserted similarity of features to those of its putative father, but even went beyond this refusal in an emphatic instruction given at the time to the jury not to be influenced by the presence or position of the child. In addition to this the record shows that the child had been in the courtroom with its mother prior to her taking the witness stand, and subject to the same or even a closer observation on the part of the jury than was the case when the mother took the sleeping child with her to the stand. Under such conditions we fail to see either that the trial court erred, or that the defendant was in any way prejudiced by the episode of which he complains.

In addition to his foregoing contentions the defendant urges a number of objections to the instructions given or refused by the trial court. We have examined each of these in the light of the general body of instructions given by the court, and are convinced that upon the whole no prejudicial error was committed in the giving or refusing to give any of the instructions to which the appellant now objects.

We are able to discover no substantial error in the record before us.

Judgment and order affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

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33 Cal. App. 701

SELLARS v. SOUTHERN PAC. CO. et al.

(Civ. 1667.)

(District Court of Appeal, Third District, California. May 17, 1917. Rehearing Denied by Supreme Court July 16, 1917.)

1. CARRIERS 🔑318(8)—INJURY TO PASSENGER —SUFFICIENCY OF EVIDENCE—CAUSE OF INJURY.

Evidence *held* sufficient to show that it was probable that a passenger's injury would not have occurred if there had been a platform or stool at the car she was re-entering after a temporary absence from the train during its stop for meals at a principal station or if a porter had been present to assist her.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1313.]

2. EVIDENCE 🔑588—CREDIBILITY OF WITNESSES.

The jury could accept plaintiff's statements made on direct examination and reject inconsistent ones made on cross-examination.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2437; Witnesses, Cent. Dig. § 1164.]

3. APPEAL AND ERROR 🔑994(1)—REVIEW—CREDIBILITY OF WITNESSES.

Where a passenger recovered judgment for personal injuries, the appellate court must accept her as a credible witness.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3901, 3906.]

4. CARRIERS 🔑247(1)—WHO ARE "PASSENGERS"—LEAVING TRAIN TEMPORARILY.

A passenger leaving the train for temporary and proper purposes, such as exercise, refreshment, or relief from fatigue of travel while the train is stopping, continues to be a "passenger" during such absence.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Passenger.]

5. CARRIERS 🔑280(1)—CARE REQUIRED—PASSENGER TEMPORARILY LEAVING TRAIN.

In the case of a passenger temporarily leaving the train during a stop, the carrier is held to ordinary care and prudence in respect to such passenger, there being a difference in the danger involved and the opportunity and capacity to protect himself between the situation of a passenger while traveling on the train and while being temporarily absent from it.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1085-1088, 1102, 1106, 1109.]

6. CARRIERS 🔑320(8)—ACTION FOR PASSENGER'S INJURY—QUESTION FOR JURY—CARRIER'S ORDINARY CARE.

Whether a carrier's failure to maintain platform, stool or services of a porter to assist passenger in re-entering train after temporary absence constituted want of ordinary care due to passengers, was a question for the jury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1167.]

7. CARRIERS 🔑287(1)—SETTING DOWN AND TAKING UP PASSENGERS—CARRIER'S DUTY.

It is the carrier's duty to take every reasonable precaution for passengers' safety in boarding its cars.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1154, 1162.]

8. CARRIERS 🔑287(4)—SETTING DOWN AND TAKING UP PASSENGERS—DUTY TO FURNISH ASSISTANTS.

A carrier's failure to furnish platforms, stools, or assistants for the safety and comfort of passengers alighting from and boarding cars at principal stations may constitute actionable negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1157, 1158.]

9. CARRIERS 🔑347(4)—ACTION FOR PASSENGER'S INJURY—CONTRIBUTORY NEGLIGENCE —QUESTION FOR JURY.

Evidence *held* insufficient to show as a matter of law that a passenger in re-entering a train after temporary absence was guilty of contributory negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1355, 1356, 1367, 1368, 1402.]

10. CARRIERS 🔑328(1)—INJURY TO PASSENGERS—CONTRIBUTORY NEGLIGENCE—ENTERING CAR AT PLACE OTHER THAN PLATFORM.

A passenger after a temporary absence from the train was not required to enter another car adjacent to the platform and pass from that to the one in which she was traveling where her own car was not so adjacent.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1367.]

11. CARRIERS 🔑345—ACTION FOR PASSENGER'S INJURY—CONTRIBUTORY NEGLIGENCE —QUESTION FOR JURY.

In determining a passenger's contributory negligence in re-entering train after temporary absence, the jury could consider her age and sex, and surrounding facts and circumstances.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1400.]

12. Carriers 🔑317(9)—Action for Passenger's Injury—Admission of Evidence—Other Accidents.

Before evidence showing other accidents similar to plaintiff's accident in re-entering train after temporary absence could be introduced, it must be shown, or an offer made to show, that the conditions were similar.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1302½.]

13. Appeal and Error 🔑1056(6)—Harmless Error—Exclusion of Evidence—Error Not Affecting Result.

Any error in excluding evidence of similar accidents in a passenger's action for injury was harmless, where such evidence would not, in all human probability, have affected the result.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4193.]

14. Trial 🔑240—Refusal of Argumentative Instruction.

In a passenger's action for personal injuries, there was no error in refusing a requested instruction which was argumentative, obscure, and commonplace, stating that a carrier cannot be expected to treat its passengers as children, etc.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 561.]

15. Trial 🔑260(1)—Refusal of Request Covered by Charge.

In a passenger's action for personal injuries, there was no error in excluding a requested instruction, where its meritorious part relating to rule of reasonable care was covered by other instructions.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 651.]

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by Elnora L. Sellars against the Southern Pacific Company and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Borton & Theile, of Bakersfield, for appellants. Kaye & Siemon, of Bakersfield, for respondent.

BURNETT, J. The action is for damages caused by the negligent failure of the railroad company to provide safe and proper means of ingress and egress to and from the train on which plaintiff was a passenger, and the Southern Pacific Company is really the only defendant in interest. The plaintiff, who was a somewhat elderly lady of over 60, bought a ticket from Los Angeles to Exeter, Tulare county, over the railway operated by said company. The train arrived at Bakersfield, an intermediate point and eating station, at about 6 o'clock the following morning. An announcement for breakfast had been made by the company, and plaintiff, with other passengers left the train for that purpose. The eating room at the station was crowded, however, and plaintiff, without getting breakfast, returned to her car. It was a long train, and when the stop was made the car in which plaintiff had been riding did not reach the platform, but stood down in the switchyard quite a distance from the depot at a point where the rails of a switch extended outward from the main track and over the course plaintiff was required to pass in leaving and entering her car. There was quite a frost that morning, which may have contributed somewhat to the accident. The rails of the switch extended several inches above the ground, and no porter or other person was present to assist plaintiff in leaving or returning to the car, nor was there provided for passengers any stool or other contrivance to break the distance from the steps of the car to the ground. In attempting to board the car plaintiff fell heavily to the ground and sustained serious injuries, for which a jury held the railroad company liable and awarded her substantial damages. Plaintiff's account of the accident is as clear as could be expected under the circumstances, and we may quote from her testimony as follows:

"There was no platform at the place where I got on the car, nothing but switch rails coming in, converging just where I went to step up. I raised my hand to catch hold of the rails, but my left foot slipped on that rail, I remember that very distinctly; it was frosted. The rails seemed to stick up too far. I should think they were 8 or 10 inches above the ground. Just as I was raising up, putting my hand up to catch hold of the rail or handle on the car, this left foot slipped, and dumped me down this way almost under the train, and my arm doubled right under, broke straight off, and the bones went down in that ground."

In her cross-examination she related the details a little differently, as follows:

"I was just reaching up to catch hold of the rail. I think I caught my heel under the rail, I was not standing on the rail, I was walking along. I was just reaching my hand up and taking a step when I stumbled. This must have been the last step. I think my right foot was on the ground, and I was taking a step with my left foot. I had not lifted my right foot up. It was my left foot which caught. I don't know whether I slipped or stumbled. I noticed the frost particularly. I think I stumbled against the first rail of the switch and fell right down in the dirt just over that one rail. The only way I can tell the distance from the rail over which I stumbled is this: I was standing on my right foot and stepping with my left foot, and there would have been one additional step with the right foot before I got on the platform. I didn't intend to step on the rail. I noticed the rail. My purpose was to step over the rail. I don't know whether the heel of my shoe caught or slipped."

[1] From these statements it is argued by appellant that the accident occurred before she reached the car. Hence it is contended that the absence of a porter or of a stool must be eliminated from consideration as in no wise connected with the injury, and that the failure to have the car contiguous to the platform is of no vital importance, since her fall was clearly due to her own negligence. Such would be the only reasonable conclusion, probably, if the accident occurred while she was crossing the yard and before attempting to board the train. We are not justified, however, in adopting this theory of the facts.

[2, 3] Even if there were material inconsistencies between her testimony on direct and on cross examination, the jury might accept the statements made during the course of the former and reject those of the latter. This follows, of course, from the familiar responsibility and duty as to the evidence imposed upon the jury by the law. Moreover, there is no irreconcilable conflict in her statements. As to the few minor details wherein an apparent discrepancy exists, her testimony is not at all surprising, nor does this circumstance discredit her veracity as a witness. It is quite probable she did not know whether her foot was actually upon the rail, or whether she stumbled or slipped, or just how far she was from the steps of the car when the accident occurred. If she had pretended to know these things and had attempted to state them decisively there would be greater reason for distrusting her than appears in the record. It is true, though, that she states positively, both in the direct and in the cross examination, that she "was just reaching my hand up" to take hold of the rail when she slipped and fell. Indeed, accepting her as a credible witness, which the law requires of us in view of the finding of the jury, we necessarily conclude that she was in the *act* of going upon the platform of the car, and was necessarily very near the steps. As to whether she stumbled or slipped it is probably of no great importance. She may have stepped upon the rail of the switch in order to reach the lowest step of the car and slipped off in consequence of the frost, or she may have stumbled over said rail as she was reaching forward, but, at any rate, it is quite probable, if not almost certain, that she would not have so fallen if there had been a platform or stool next to the car or if a porter had been present to render assistance in her efforts to re-enter the car.

[4] This naturally suggests the consideration as to the duty of the railroad company in providing for such contingency. Out of the situation also comes the inquiry whether the care exacted by the law is that known as *reasonable* or the *highest degree* of diligence. Respondent contends that at the time of the accident the relation of carrier and passenger existed, and therefore the same care was required as though she had been seated in the car. She cites many authorities to the point that:

> "A passenger leaving the train for temporary and proper purposes, such as exercise, refreshment, or relief from the fatigue of travel while the train is stopping, continues to be a passenger during such absence from the train."

Of course, he is still a passenger, but it does not necessarily follow that he is entitled to the same degree of care as while on the train. There are some decisions, however, so holding, among them being A., T. & S. F. R. Co. v. Shean, 18 Colo. 368, 33 Pac. 108, 20 L. R. A. 729, wherein, after referring to the general rule as to utmost care required of a railroad company as to its passengers, it was said:

> "The same duty, * * * is imposed upon the company towards a passenger while, on a continuous journey, he is going to and returning from the eating stations provided by the company for the accommodation of passengers."

The doctrine of other cases to the contrary is summed up in the following quotation from 6 Cyc. 605:

> "A passenger by railroad is entitled to protection against danger, at the station house or waiting room, on the platform and in getting upon or alighting from the train, but the peculiar hazard of railway travel, requiring high speed by the use of the dangerous agency of steam, is not involved on the premises of the railroad company or while getting on or off the trains, and therefore in these respects the care required for the protection of the passenger is reasonable, rather than the highest or extraordinary care."

[5] However, the question is rather of academic than of practical importance here, and we need not concern ourselves about the peculiar terminology to be employed. It is at least clear that, generally speaking, there is a difference in the danger involved and the opportunity and capacity to protect himself between the situation of the passenger while traveling on the train and the other situations mentioned, and we think the authorities generally recognize the rule in cases like this to be that the carrier is held to "ordinary care and ordinary prudence."

A case involving the same principle as this, although different in its facts, decided by this court, is Teale v. Southern Pacific Co., 20 Cal. App. 570, 129 Pac. 949, wherein the duty of a common carrier to a passenger alighting from the train was carefully considered, and the decision is of interest here. We need not quote from it or from other decisions, but we think appellant is close to the mark in the affirmation of these principles:

> "(1) A railroad track is a known place of danger and persons going uninvited upon the track or railroad premises must exercise an extraordinary degree of care. (2) As to its passengers while in transit, a railroad is operating a powerful and dangerous agency, and must exercise an extraordinary and unusual degree of care. (3) As to the passengers of the railroad company not actually in transit but on the railroad premises or property, the railroad is relieved of the extraordinary degree of care required of it toward passengers in transit, and the passengers are relieved of the extraordinary degree of care required of persons not bearing such relation to the railroad company, and the measure of duty in such case of the railroad company toward the passenger and of the passenger toward the railroad company is the ordinary and usual one, viz. that each should be in the exercise of ordinary care."

[6] Thus expressing our opinion we are but following the view of the lower court as to these abstract principles, and we may go a step further in the declaration that whether the failure of the company in the respects already indicated was and is sufficient to constitute the want of ordinary care involved a

question of reasonable controversy, and it was therefore properly submitted to the jury for determination. It has become almost a commonplace of the law that the question of negligence is seldom "so clear from doubt * * * that the jury could not fairly and honestly find for the plaintiff." and that "it is not the duty of the court in such cases, any more than in any other, to usurp the province of the jury and pass upon the facts." Jamison v. S. J., etc., R. R. Co., 55 Cal. 593.

[7] As to the duty of a railroad company to take every reasonable precaution for the safety and comfort of its passengers in alighting from and boarding its cars, of course there is no controversy.

[8] Nor can there be much doubt that this general rule leads to the obligation to furnish platforms or stools or assistants at main stations like the one at Bakersfield. Where there is a platform it may be said also that it is the duty of the company to make it available for the passengers or, if not, to furnish one of the other suggested aids. At least, it is not unreasonable to say that its failure in these respects may constitute negligence and form the basis of an action for damages. Many cases are cited to illustrate the principle, to some of which we may briefly refer.

In Peniston v. Chicago, etc., R. Co., 34 La. Ann. 777, 44 Am. Rep. 444, the plaintiff sustained injuries while returning to the train after alighting for his meal. The railroad company was held to be negligent by reason of its failure to furnish sufficient light for the safety of the passengers. Therein the general principle is declared that:

> "Railway companies are under the legal obligation to furnish safe and proper means of ingress and egress to and from trains, platforms, station approaches," etc.

In Memphis & Charleston R. R. Co. v. Whitfield, 44 Miss. 466, 7 Am. Rep. 699, defendant's train of cars, on which plaintiff was a passenger, having reached the station at which plaintiff was to alight, passed several hundred yards beyond the depot, stopping at an unusual place, where it was low and icy. Plaintiff demanded of the conductor that the train should be backed, which was refused. In attempting to alight, plaintiff dislocated his knee. Defendant was held to be chargeable with negligence.

In Delamatyr v. Milwaukee & Prairie du Chien R. R. Co., 24 Wis. 578, the steps attached to the platform of the car had not been drawn up properly, so that plaintiff could not reach the station platform by stepping down in the usual manner, but was obliged to jump some distance and was injured. In holding the railroad company guilty of negligence, the court said:

> "Of course it is the duty of the company to afford passengers reasonable facilities for alighting from the cars, both by a reasonably safe platform and by stopping the train in such a manner that they may avail themselves of it without unnecessary exposure."

In Cincinnati, N. O. & T. P. Ry. Co. v. Bell (Ky.) 74 S. W. 700, a passenger, on reaching her destination, attempted to step from the platform of the car to the ground, and she fell, spraining her ankle. The lower step of the car platform was 23 inches above the level of the station platform. It was held that it was negligence for the railroad company not to have a stool for the use of the passenger or a porter to assist her in alighting.

In the Teale Case, supra, the alleged negligence consisted in the failure to have a sufficient light at the station to aid the passenger in getting off the train in safety. The duty of the railroad company to furnish such light at their stations in order to promote the safety of the passengers was strongly emphasized.

To these and other authorities the present case is analogous, and we may add that the general practice to furnish platforms and also stools and porters for such trains is a significant recognition of the duty of the railroad company in that regard, and an implied characterization of their omission as negligence on the part of the carrier.

[9, 10] We think it equally apparent that the question of contributory negligence was properly submitted to the jury, and that their finding adverse to appellant cannot be said to be unsustained. This consideration lies, manifestly, close to the other. If the first be debatable so must be the second. We cannot hold that plaintiff was at fault in attempting to board the car as she did. We cannot say that she was reckless or indifferent to her own safety, or that she attempted in an unusual or reprehensible manner to re-enter the train. She was not required to enter another car adjacent to the platform and then pass from that to the one in which she was traveling. If she had been advised to do so, a different question might be presented.

[11] In the determination of this issue as to her want of due care it was proper, of course, for the jury to take into consideration the age and sex of the plaintiff, as well as the surrounding facts and circumstances. In view of the whole case, we are satisfied that there was ground for the conclusion that she exercised ordinary care, and that it cannot be held as a matter of law that she was guilty of contributory negligence.

The case of Falls v. San Francisco & North Pacific Railroad Company, 97 Cal. 114, 31 Pac. 901, cited by appellant, is not controlling here. That was decided upon the proposition that the railroad company was not properly chargeable with negligence in using the same platform for the depositing of freight and for the accommodation of passengers at a flag station established for the convenience of a sparsely settled district wherein was made allowance of sufficient room for passengers. Therein the court followed Cincinnati, etc., R. R. Co. v. Peters, 80 Ind. 172, in which it was declared that:

> "At a mere way or flag station, where trains do not regularly stop for the reception and discharge of passengers, and only stop when they are flagged, or to discharge a special passenger, a passenger need not expect or rely upon the company's having furnished a platform or other convenient place for the reception and discharge of passengers."

[12] Appellant complains of the ruling of the court in sustaining an objection to each of these two questions asked of Charles L. Jones, an employé of appellant, who had been yardmaster for 9 years:

> "During that period of time how many accidents have you known of having been caused by slippery or frosty rails?" and "During this period of time how many accidents, if any, have you heard of or known of by people stumbling over rails?"

In support of its contention, appellant cites sections 446 et seq., vol. 1, of Wigmore on Evidence. The learned author cites instances wherein similar evidence was presented to different courts, although, as admitted by appellant:

> "Most of such authorities, however, are instances where other previous accidents are admitted, rather than the lack of other previous accidents."

But, conceding that there is no difference in principle between the admissibility of such positive and negative evidence, it is sufficient to say that before such testimony can be introduced it should be shown, or an offer made to show, that the conditions were similar. Wigmore, § 442. This was not done, and the ruling was therefore not erroneous.

[13] Moreover, if it should be granted that the court committed error, it was not grave enough to justify a reversal. If the witness had testified that he had never known of a similar accident before, it would not, in all human probability, have affected the verdict of the jury, nor would it change the legal aspect of the case here.

[14] There was no error in refusing the following instruction:

> "A railroad company cannot be expected to treat its passengers as children, or to put them under restraint. Passengers must take the responsibility of informing themselves concerning the everyday incidents of railway traveling, and the company could do business upon no other basis."

Many objections could be made to it. It is sufficient to say that it is argumentative, obscure, and commonplace.

[15] Another instruction, based upon the Falls Case, supra, was refused. It endeavored to expound the legal doctrine as to the liability of the carrier to one who, by express invitation or otherwise, has come upon the carrier's premises for the purpose of transacting business. It was misleading, argumentative, and inapplicable. As far as the rule of reasonable care therein set forth is concerned, it was amply covered by other instructions. It will be sufficient to quote the following, given on request of defendant:

> "There is no extraordinary or unusual degree of care imposed upon a railroad company in keeping up its stations and station grounds so far as concerns the rights of persons not actually being carried at the time on its trains. The burden that rested upon defendants in the case at bar, in the care of their stations and station grounds, was merely that they should use ordinary care. The plaintiff was obligated to the same duty to avoid the accident, namely, that he should use ordinary care."

The complaint as to certain instructions which were given is also without merit. They were as favorable to defendant as the law permitted. They were within the issues and applicable to the evidence. Indeed, there seems no ground for just criticism as to the action of the court in any respect.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

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33 Cal. App. 747

PRESTON v. DUNN. (Civ. 1942.)

(District Court of Appeal, Second District, California. May 28, 1917.)

1. SALES 🔑87(3)—SALE OF GOODS FOR REASONABLE VALUE—SUFFICIENCY OF EVIDENCE.

In an action for the price of goods sold defendant by plaintiff's assignor, evidence *held* to sustain finding that the goods were sold for their reasonable value, and not for a specified agreed price.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 245–247.]

2. SALES 🔑353(1)—ACTION FOR PRICE—COMPLAINT.

A complaint alleging that plaintiff's assignor sold and delivered to defendant at his special instance and request goods reasonably worth a stated amount, that defendant failed and refused to pay the amount, except a credited sum, and that there was due and owing, unpaid, from defendant to plaintiff, on an open account of the goods, a certain balance, stated a cause of action.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 995, 997, 999.]

3. SALES 🔑365—RIGHT TO FINDING—ACTION FOR PRICE OF GOODS—DEFENSE.

In an action for the price of goods sold by plaintiff's assignor to defendant, where the complaint did not allege that defendant agreed to pay the reasonable value of the goods, and defendant affirmatively alleged that the disputed items of the account were sold on an agreed price of $310, defendant was entitled to a finding on the issue; for, if it were determined in his favor, his defense would be sustained.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1077.]

4. SALES 🔑365—ACTIONS FOR PRICE—FINDING—CONSTRUCTION.

In an action for the price of goods sold by plaintiff's assignor, the finding that the amount of the balance claimed by plaintiff was due on an open book account amounted merely to a finding that the vendor of the goods kept a book of account in which it made its charges against defendant, and that it made the charges in sums which were the reasonable value of the goods sold.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1077.]

5. EVIDENCE 🔑354(13)—DOCUMENTARY EVIDENCE—LEDGER MADE FROM COST SHEETS.

In an action for the price of goods sold defendant by plaintiff's assignor, where the assignor's bookkeeper testified that items charged in the assignor's ledger were taken from slips handed in by the cost clerk, so that the ledger was a copy of the cost sheet, but that he did not know whether the statements in the cost sheet were correct, the ledger was inadmissible; the facts being insufficient to constitute the foundation necessary to authorize its admission.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1457, 1458.]

6. APPEAL AND ERROR 🔑1051(3)—HARMLESS ERROR—EVIDENCE.

Where defendant admitted the sale and delivery of the goods, and their reasonable value was proved to be the same as the sum charged, error in the admission of the ledger in evidence was not prejudicial to defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4164, 4167.]

7. LIMITATION OF ACTIONS 🔑29(1)—STATUTE OF LIMITATIONS—OPEN BOOK ACCOUNT.

Under Code Civ. Proc. § 337, subd. 1, providing that an action on any contract, etc., founded on an instrument in writing executed within the state shall be commenced within four years, etc., an open book account may be sued on within four years.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 136, 140.]

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by F. A. Preston against J. M. Dunn. From a judgment for plaintiff, defendant appeals. Reversed.

Gray & Bittleston and Ben F. Gray, all of Los Angeles, for appellant. Humphrey Marshall, Jr., and Frederick A. Preston, both of Los Angeles, for respondent.

CONREY, P. J. The defendant appeals from the judgment which was rendered for the amount demanded in the complaint. The (fourth amended) complaint alleged that plaintiff's assignor sold and delivered to the defendant at his special instance and request certain goods reasonably worth a certain stated amount; that the defendant has failed and refused to pay said amount, except a sum for which credit is given; that there is due, owing, and unpaid from defendant to plaintiff upon an open book account of said goods a balance of $386.54. The answer denied the allegations of the complaint, and for further answer alleged that the defendant entered into a verbal agreement with the plaintiff's assignor under which said assignor agreed to sell and deliver to defendant a well outfit complete for the sum of $310; that defendant paid on said contract the sum of $300, and admits that the remaining $10 has not been paid. The bill of particulars furnished by the plaintiff and taken from the assignor's ledger shows that the amount charged for the items which the defendant includes in the alleged $310 contract was $95, plus $490.71. This difference in their contentions constitutes the real subject-matter of the controversy. The court in its findings of fact stated that said assignor "sold and delivered to defendant at his special instance and request, on an open book account thereof, certain goods, wares, and merchandise, more particularly set forth in the bill of particulars on file in this action"; that said goods were reasonably worth the sum stated in the complaint; that there is due, owing, and unpaid from defendant to plaintiff "upon said open book account of said goods, wares, and merchandise a balance amounting to the sum of $386.54."

There was in the answer a plea of the statute of limitations and a denial of the assignment of the claim to plaintiff, and these defenses are mentioned in the briefs. But at the oral argument the court was informed by counsel that appellant does not now question the assignment and does not insist upon the statute of limitations as a defense. We will discuss the remaining questions presented.

[1] It is contended that the court failed to make any finding upon the stated defense that the goods constituting the well outfit were sold for an agreed price; whereas the evidence shows that they were sold for an agreed price and not for their "reasonable value." If we may assume that the court did find that they were sold for their reasonable value, and not for a specified agreed price, we are satisfied that the finding is sustained by the evidence; for, although the defendant testified to facts showing the contract as alleged by him, this testimony was denied by the witness who, as agent of plaintiff's assignor, made the sale. The testimony of that agent also affirmatively shows that the goods were sold and delivered in the following manner, viz.: That the witness quoted to the defendant the said prices of $95 and $490.71, and that after receiving the said quoted prices the defendant ordered the goods; also that the items charged were made in regular transactions of business with the defendant and the goods sold and delivered to him and the charges made on the books as they are shown in the bill of particulars; that said prices were agreed upon. Further he testified that the said prices were the reasonable value of the articles furnished.

[2] The findings of fact fully include and support the allegations of the complaint to the effect that the goods were sold and delivered to the defendant and were of the reasonable value stated. This finding, together with the finding that the amount stated was due to the plaintiff upon an open book account, would be sufficient to support the judgment, since those facts, together with the findings upon other facts not now in dispute, covered all of the allegations of the complaint, and the complaint stated a cause of action. But the complaint did not allege, and the court did not find in terms, that the defendant agreed to pay for those goods the

reasonable value thereof. The defendant had affirmatively alleged that the disputed items were sold to him upon an agreed price of $310. Notwithstanding that the items were worth more money, the sale might have been for the smaller sum of $310.

[3] The defendant was entitled to a finding upon this issue, for, if it were determined in his favor, his defense would be sustained.

[4] The finding that the amount of the balance claimed by plaintiff is due "upon an open book account" amounts to nothing more than a finding that the vendor of the goods kept a book of account in which it made its charges against the defendant, and that it made those charges in sums which were the reasonable value of the goods sold.

It is further claimed that the court should have sustained defendant's objection to the book of account which was received in evidence. The objection was based upon the fact that the book offered was merely a ledger which did not contain the original charges and was not the best evidence. The defendant admitted that all of the goods were sold to him as claimed by the plaintiff. The entire controversy relates to the amount payable therefor. The defendant admitted that the bill of particulars was correct to the extent that it was a true copy of the account as it appeared in the ledger; the admission did not go far enough to consent to the reception of the ledger itself. The bookkeeper testified that the ledger items were taken from a cash book and cost sheets. We need not consider the cashbook, since it is admitted that the payments made on account were correctly credited. The question then is whether the ledger was properly admitted, when the cost sheets might have been produced as the primary and best evidence. The bookkeeper said in substance:

> These items charged in the ledger are taken from slips handed me by the cost clerk. As the work goes on the workmen turn in their records and we take them from those slips. These items are correctly taken from the charges made on the slips showing actual time and valuation of materials furnished. "But I do not know whether the statements themselves are correct. I entered from the cost sheet into the ledger and it is a copy of the cost sheet."

The salesman testified:

> That when the goods were sold (referring to the $490.71 item) he placed the order in a book. "That book has been destroyed. It was kept by our trustee for a year afterwards. Thinking no question about it, we closed our office."

On cross-examination by defendant's counsel, he further testified that the figures which he had written in that book showed the price as made to Mr. Dunn, "the same as was copied on the cost sheet."

[5] The facts thus shown in evidence were not sufficient to constitute the foundation necessary to authorize the admission of the ledger. San Francisco Teaming Co. v. Gray, 11 Cal. App. 320, 104 Pac. 999; Chandler v. Robinett, 21 Cal. App. 333, 131 Pac. 891; Chan Kiu Sing v. Gordon, 171 Cal. 28, 151 Pac. 657; Montgomery and Mullen Lumber Co. v. Ocean Park Scenic Ry. Co., 161 Pac. 1171.

[6] But, as the sale and delivery of the goods were admitted, and the reasonable value of the goods was proved to be the same as the sum charged, the error was not prejudicial. It might have been important with respect to the plea of the statute of limitations. Code Civ. Proc. § 339, subd. 1. The section pleaded refers to the two-year period of limitations.

[7] An open book account may be sued upon at any time within four years. Code Civ. Proc. § 337, subd. 1. But, as we have stated, that defense has been waived on this appeal; and, even if otherwise good, it could not have been sustained, since the record before us does not show the date of commencement of the action.

By reason of the court's failure to find upon the affirmative defense above noted, the judgment is reversed.

We concur: JAMES, J.; SHAW, J.

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33 Cal. App. 751

In re BRODIE. (Cr. 543.)

(District Court of Appeal, Second District, California. May 28, 1917.)

1. JURY 🔑21(3)—RIGHT TO JURY TRIAL—PROTECTION OF JUVENILE DELINQUENTS.

Proceedings under the juvenile act (St. 1915, p. 1225) to commit a juvenile delinquent to a state institution without according him a jury trial are not criminal in nature, and hence are not unconstitutional, but are for the purpose of providing a formal guardianship by the state.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 138.]

2. INFANTS 🔑19—PROTECTION OF JUVENILE DELINQUENTS — STATUTE — NECESSITY OF FINDINGS.

To sustain a valid order of commitment of a juvenile delinquent under the juvenile act, the court must make a finding showing such reasons for such commitment as are necessary under section 9b, providing that no ward of the juvenile court shall be taken from custody of parent or guardian without the latter's consent unless the court "shall find" such parent or guardian incapable of providing, or to have failed or neglected to provide, the proper maintenance, training, and education, or unless the delinquent has been tried on probation and failed to reform or convicted of crime by jury, or unless the court "shall find" that the delinquent's welfare requires that his custody be taken from the parent or guardian, and in view of section 16, providing that the orders and findings, if any, shall be entered in a book known as the "juvenile court record."

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 19.]

Appeal from Superior Court, Los Angeles County; Sidney N. Reeve, Judge.

In the matter of David Brodie, a person under 21 years of age. Appeal on behalf of David Brodie from judgment of juvenile court of Los Angeles county, committing him to the Preston School of Industry. Reversed, and matter remanded to juvenile court for rehearing.

Joseph W. Mowell, of Los Angeles, for appellant. U. S. Webb, Atty. Gen., and Robert M. Clarke, Deputy Atty. Gen., for respondent.

JAMES, J. This is an appeal taken on behalf of David Brodie, who was by the judge of the juvenile court of Los Angeles county declared to be a ward of that court and ordered committed to the Preston School of Industry at Ione until he should become 21 years of age. The minor at the time the order was made in February, 1917, was of the age of 16 years. The complete record of the testimony heard, together with the various orders and findings of the court, are brought up under the alternative method of appeal. It appears that a petition was filed, the purpose being to have the minor declared a ward of the juvenile court, in which one or more misdemeanors were alleged to have been committed by the young man complained against. A hearing was had after notice to and in the presence of the mother, the natural guardian of the accused. The court questioned the minor, who admitted the truth of the charges made against him. His mother, with whom he resided, stated that he had always been of good habits about home and, excepting for the irregularities mentioned in the petition and which had been committed after association with certain other boys, no cause for complaint had arisen. It was shown that the boy had spent a part of 2 years in the high school of Los Angeles, and that he had been employed with a certain firm, a member of which expressed himself as being well pleased with the demeanor of the boy and his work while in that employment. It was stated to the judge that on behalf of the mother, evidence could be offered to show that the boy would be furnished steady employment. The report of the probation officer fully sustained all of the assertions made by the boy and his mother as to the previous good character and industrious habits of the young man. The mother desired to retain the custody of the boy, but the court, having theretofore committed two other boys concerned in the same transactions to the Preston School, declared that he did not believe any difference should be made as between the boys in their treatment, and consequently required that Brodie be committed to the Preston School.

[1] On this appeal, among other contentions, it is urged that the juvenile act provides a procedure, criminal in its nature, by which a minor may not be committed to a state institution without being accorded a jury trial. Acts by various of the Legislatures in the different states have been passed, having for their object the humanitarian purpose of providing a procedure by which incorrigible minors or those committing crime might be saved from the stigma of conviction and placed under probation with individuals or in institutions where they would receive corrective care and training in useful trades or occupations. These acts have always been sustained, and the summary procedure therein provided for approved as not being a procedure which would effect a criminal conviction, but rather one providing guardianship. Under this construction it has been repeatedly held that no infringement of constitutional rights was worked because the accused was not given a right to trial by jury; that orders of commitment in such cases were not for the purpose of inflicting punishment, but for the purpose of providing suitable guardianship, either by individuals or under the official supervision of the superintendents of state schools. We think it unnecessary to cite authorities to this point, for the proposition declared has been thoroughly established in a number of the states where such laws have been tested by appeal and otherwise.

[2] Another of the points advanced on behalf of appellant is to our minds of sufficient gravity to justify a reversal of the judgment. The juvenile act provides that it shall be made to apply to certain persons under the age of 21 years. A description of such persons is found in 13 subdivisions which immediately follow. Subdivision 13 (of § 1) declares that a person within the age mentioned, "who violates any law of this state or any ordinance of any town, city, county, or city and county of this state defining crime," shall be subject to the provisions of the act. Procedure for the issuance of a citation to the parent and guardian, requiring the production of a minor complained against, follows. A hearing is provided to be had, and authority is given to the judge of the juvenile court to declare a minor complained against to be a ward of the court. Section 8 of the act provides that when a person is so adjudged to be such ward, he may be committed to a home or to some reputable person, society, or corporation, or to the care of a probation officer. Subdivision "e" of section 8 provides that the court may, if the ward be a boy and over the age of 16 years, commit him to the Preston School of Industry for the period of his minority. It is further provided that in lieu of such commitment, the court may admonish the person and dismiss the petition. Section 9b of the act provides as follows:

> "No ward of the juvenile court as defined in this act shall be taken from the custody of his parent or legal guardian, without the consent of such parent or guardian unless the court shall find such parent or guardian to be incapable of providing or to have failed or neglected to provide proper maintenance, training and education for said person; or unless said person has been tried on probation in said custody and has failed to reform, or unless said person has been convicted of crime by a jury, or unless the court shall find that the welfare of said person requires that his custody be taken from said parent or guardian."

It will be noted by the provisions of this section that where the parent or guardian of a minor is deprived of his or her custody, certain findings must be made by the juvenile court. It is complained on this appeal that the court made no finding sufficient to satisfy either of the conditions enumerated in the section, and we think that the appellant is correct in that assertion. We have examined the record diligently, which covers the entire proceedings, both as to the documents filed, the records prepared, and testimony heard. As we view the provisions of the act, it is essential that the court make such findings as are required by section 9b and in writing. In section 16 of the same act it is provided:

> "The orders and findings, if any, of the superior court in all cases coming under the provisions of this act, shall be entered in a suitable book or books or other form of written record, to be kept for that purpose, and known as the 'juvenile court record,' and the court, when acting under this act, shall be called the 'juvenile court.'"

The Attorney General concedes that if the proceeding under the juvenile act is to be regarded as criminal and the commitment of the minor is to be regarded as punishment for an offense, then there would be no escape from the first proposition made by appellant that the constitutional right to a trial by jury would be violated. However, the Attorney General's position (to which we agree) is that a formal guardianship by the state is provided for only. That being the true construction, the provisions of section 9b above quoted are harmonious to that end. In other words, there would be no excuse or reason for depriving a natural guardian, capable, able, and willing to train, care for, and educate the minor, of the custody of the minor unless the court should determine that the welfare of the person required that his custody be taken away from the parent or guardian. The making of such a finding we think was essential to sustain a valid order of commitment, and that because of its absence the judgment should be reversed.

The judgment is reversed, and the matter remanded to the juvenile court for rehearing.

We concur: CONREY, P. J.; SHAW, J.

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33 Cal. App. 808

Ex parte BRODIE. (Cr. 539.)

(District Court of Appeal, Second District, California. May 28, 1917.)

In the matter of David Brodie a person under 21 years of age. Petition by David Brodie for a writ of habeas corpus. Petition denied.

Joseph W. Mowell, of Los Angeles, for petitioner. U. S. Webb, Atty. Gen., and Robert M. Clarke, Deputy Atty. Gen., and Thomas Lee Woolwine, Dist. Atty., and H. S. G. McCartney, Deputy Dist. Atty., both of Los Angeles, for respondent.

PER CURIAM. The matter of the regularity of the judgment committing the minor above mentioned to the Preston School of Industry was before this court in criminal case No. 543, 166 Pac. 605, an opinion in which has been this day filed, reversing the judgment. In this proceeding we think that the commitment issued to the superintendent of the Preston School of Industry on its face is sufficient to warrant the detention of the minor. The prayer of the petition is therefore denied, and it is ordered that the minor David Brodie remain in the custody of the superintendent of the Preston School of Industry until required to be returned to the county of Los Angeles for rehearing on the charge upon which he was convicted, or until otherwise discharged by law.

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33 Cal. App. 756

FISSEL et al. v. MONROE. (Civ. 1614.)

(District Court of Appeal, Third District, California. May 28, 1917.)

1. Appeal and Error 🔑1047(2)—Prejudicial Error—Trial by Court—Failure to Rule on Admissibility of Evidence.

That the court permitted all evidence to go in, subject to a ruling to be made at the argument, was not prejudicial error, although no such ruling was made, where all the evidence upon which defendant relied was admitted and was before the court, and the court's finding is supported by the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4147.]

2. Fraudulent Conveyances 🔑148(2) — Change of Possession — Transfer of Right to Crop Land.

Where a lessee transferred to his sons the right to crop the land, because he was unable to do so, and they continued in actual and exclusive possession until after the crop was harvested, there could be no change of possession of the crop, and Civ. Code, § 3440, providing that every transfer of property is conclusively presumed if made by a person having at that time the possession or control of the property, and not accompanied by an immediate delivery and followed by an actual and continued change of possession, to be fraudulent, and therefore void against those who are his creditors while he remains in possession, was inapplicable, and the lessor would have no right to the crop on that account.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 459.]

Appeal from Superior Court, Yolo County; W. A. Anderson, Judge.

Action by A. W. Fissel and another against J. W. Monroe. Judgment for plaintiffs, and defendant appeals. Affirmed.

E. E. Gaddis, of Woodland, for appellant. Arthur C. Huston and Harry L. Huston, both of Woodland, for respondents.

CHIPMAN, P. J. The first paragraph of the verified complaint is as follows:

> "That on the 24th day of July, 1915, at and in the county of Yolo, state of California, plaintiffs were the owners and in the possession, and at the time of the filing of this complaint are the owners, of the following described goods and chattels, of the value of $700, to wit: 640 sacks of barley."

It is then alleged that defendant wrongfully took said goods from the possession of plaintiffs, that demand was made of defendant for the possession thereof, which was refused, and that plaintiffs are damaged in the sum of $700.

Defendant answered:

> "(1) That, as to the allegations of paragraph 1 of said complaint, this defendant has no information or belief upon the subject sufficient to enable him to answer the same, and, placing his denial upon that ground, denies generally and specifically each and all and every of the allegations therein contained."

He denied that he "wrongfully took" said or any sacks of barley from the possession of plaintiffs, denied that plaintiffs made any demand for the possession thereof, and denied that defendant refused to deliver possession thereof. The allegation as to damage was also denied.

The court found "that all of the allegations of the complaint are true," and "that all of the allegations of the answer are untrue." Judgment was entered in favor of plaintiffs for $700, from which defendant prosecutes this appeal.

While it does not appear from the pleadings, reference is made in the record to the fact that defendant is sheriff of Yolo county, and that his possession and subsequent sale of the barley were by virtue of a writ of attachment issued in an action in which D. A. Curtin was plaintiff and E. L. Fissel, the father of plaintiffs was defendant.

It is stated in appellant's brief that the principal point urged on the appeal "is as to the insufficiency of the evidence to sustain the decision." The transfer of the barley in question from E. L. Fissel to the plaintiffs, as will be hereinafter specifically set forth, is claimed to have been presumptively fraudulent because not accompanied by an immediate delivery, and was not followed by an actual and continued change of possession, as required by section 3440 of the Civil Code.

Preliminarily respondents raise the point that plaintiffs' ownership, as alleged in paragraph 1 of the complaint, must be held not to be denied. As to this they say:

> "If the defendant claimed to be the owner, he could not deny ownership in the plaintiffs for want of information"—citing Bartlett Estate Co. v. Fraser, 11 Cal. App. 373, 105 Pac. 130.

For four or five years prior to the transaction involved herein, which occurred in 1915, E. L. Fissel, his wife and their two sons, respondents herein, were living on a tract of land called the Ludden place, which the father had leased from the owner. He was also, under a verbal lease from year to year, farming a piece of land known as the Elmore place, the two tracts being in close proximity to each other, the rental for the Elmore place being one-third of the crop raised. About March 2 or 3, 1915, the father, E. L. Fissel, was sick at his home on the Ludden place. The respondents and Sherman Hiddleson and J. T. Young, two employés of Mr. Fissel, Sr., were in the bedroom where the father was lying. As to the conversation occurring there, A. W. Fissel testified:

> "My father said he couldn't do any more, he was too sick, and for me to go ahead and put the crop in, I and my brother, and settle the bills that was against the crop, and if there was anything left, why, it was to be mine and my brother's. Q. Well, did he say what ranch? A. He said the Elmore ranch."

C. R. Fissel testified:

> "My father just told us to go ahead and put in the crop and we could have it."

J. T. Young's version of the conversation was that:

> "Mr. Fissel * * * told the two sons if they took the Ludden or the Elmore place and put the crop in it was theirs for paying the bills against the crop, and the boys said they would take it."

The witness Hiddleson said:

> "I went in there to see him and they was talking about the crop, and he told the boys if they would take the Elmore ranch and put in the crop and pay the bills they could have what they made."

Pursuant to the above-detailed conversation, plaintiffs plowed the balance of the land, about half of it having been theretofore plowed by the elder Fissel. They sowed and cultivated the grain and harvested the crop.

The position taken by appellant is that the plowing by the father of 50 acres (the entire field being 100 acres) was of the value of $1.50 per acre, or $75, that this constituted personal property and was the leasehold interest of E. L. Fissel, and that the transfer of this leasehold interest was without consideration, citing Jeffers v. Easton, 113 Cal. 352, 45 Pac. 680; Comm. Bank v. Pritchard, 126 Cal. 606, 59 Pac. 130; Barnum v. Cochrane, 143 Cal. 645, 77 Pac. 656. Respondents contend that there was no transfer of any leasehold interest, the transaction being nothing more that a mere cropping contract, citing Walls v. Preston, 25 Cal. 60, 64.

The testimony relied upon by appellant as bringing the case within the purview of section 3440 of the Civil Code is stated by him substantially as follows: The barley seized by appellant was raised on the Elmore place in 1915. Albert W. Fissel, then 25 years of age, was unmarried, and had lived with his parents since attaining his majority, about 6 years. He owned one horse, a couple of mules (which were not work animals in 1915), some carpenter tools and farm implements, consisting of a four-gang plow. C. R. Fissel was 23 years of age, and was also unmarried. He owned one mule 3 years old that had never been worked. He had no money in bank, nor had his brother, as far as he knew. The feed for the animals used in plowing the balance of the field, as well as the animals themselves and all implements used, were furnished by E. L. Fissel from the Ludden place, and the teams and men employed in the work were boarded by him. Appellants boarded with their parents, the mother did the cooking and the father purchased the groceries. Appellant states that the sacks in which the barley was placed were purchased by the father, but A. W. Fissel testified that he paid $40 and owed $35 for them, and that he had a settlement with the man from whom he bought the sacks. At the time of the purported transfer the father was indebted in divers sums of money of no considerable amount.

Respondents' position is that the only thing transferred to them by their father was the right to plant a crop of barley; that the property in question was not in existence at the time of the transfer, and therefore the transfer does not fall within the provisions of said section 3440; that there could be no immediate delivery and no actual and continued change of possession of that which was not yet in being.

There was evidence that plaintiffs did the necessary plowing of the land with a tractor for the hire of which they paid; they also hired the harvesting and threshing done and paid for it, both of them assisting in the work; they hauled the barley to the warehouse, setting apart the rentals and marking the sacks with the name of the owner of the land. With the exception of the 50 acres plowed by their father, which was replowed by plaintiffs, substantially all the cost of producing the crop was borne by plaintiffs. The seed used was in the granary taken from the Elmore place, and plaintiffs replaced it out of the crop raised by them.

Defendant made no claim of ownership in himself or any other person, and it is very doubtful whether, under the form of his answer, there was a sufficient denial of the averments of the verified complaint alleging ownership of the barley in plaintiffs. However, the facts constituting the basis of plaintiffs' claim of ownership were all brought out by plaintiffs, apparently disregarding their objection that the issue of ownership was not raised by the pleadings. Actual fraud was not alleged by defendant, and at the trial defendant's counsel expressly disclaimed that actual fraud in any way tainted the transaction. Neither did defendant in his answer deny the taking otherwise than by denying that he "unlawfully took" possession of the barley. Nor did he by his answer justify the taking as sheriff or otherwise. The fact that he did take possession, after the barley was harvested, under a writ of attachment at the suit of a creditor of plaintiffs' father and sold the barley under execution in that suit was brought out by plaintiffs in establishing their case, defendant objecting, and contending that, as he sued as an individual, evidence that he acted in his official capacity as sheriff was immaterial, irrelevant, and incompetent. In his cross-examination of plaintiffs' witnesses, who testified to what occurred between the father and his sons when the transaction was entered into, defendant sought to show that it was colorable and void as to creditors, under section 3440 of the Civil Code, and in the course of the examination the relation of the parties and the circumstances, above referred to, surrounding the transaction were developed over plaintiffs' objection that neither actual nor presumptive fraud could be shown under the pleadings.

[1] The court seems to have entertained some doubt as to the correctness of the theories respectively advanced by the parties and allowed all the evidence to go in, subject to a ruling to be made at the argument of the case. No ruling was made, and the record contains no intimation of the court's opinion other than as found in its omnibus finding "that all of the allegations of the complaint are true and all the allegations of the answer are untrue." In Raymond v. Glover, 122 Cal. 471, 476, 55 Pac. 398, 400, the trial court failed to pass upon the admissibility of certain evidence which was taken subject to a subsequent ruling as to such admissibility. It was pointed out that the Supreme Court "has repeatedly discouraged the practice of deferring rulings upon the admissibility of proffered evidence, but that to do so is not necessarily erroneous." The court, however, held that the failure to rule was error in that case because the objecting party was deprived of an opportunity to rebut the evidence that had been received under objection. In the present case all the evidence upon which defendant relied was admitted and was before the court, and if the finding of the court has support in the evidence, we cannot see that there was prejudicial error in the court's failure to announce its ruling on certain evidence.

Fissel, Sr., had the undoubted right to transfer to his sons, plaintiffs, the privilege of cropping the Elmore place subject to the terms of his lease, and unless he was at the time insolvent or contemplated insolvency, of which there is neither evidence nor claim made by defendant, he could do this voluntarily and without a valuable consideration. Civ. Code, § 3442. Defendant relies wholly upon the claim that the transfer was presumptively fraudulent under section 3440 of the Civil Code, which provides as follows:

> "Every transfer of personal property * * * is conclusively presumed, if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession," etc.

[2] We are unable to see how this section of the Civil Code can be made applicable to the facts in this case. E. L. Fissel transferred nothing to plaintiffs but the right to crop the land, and so far as that part of the transaction is concerned the plaintiffs went into immediate actual possession and continued in actual and exclusive possession until after the barley was harvested and until it was taken into plaintiffs' possession. The property now in question was not in existence when the transfer of the right to crop the land was made, and, of course, was not and could not then be in the possession of the transferor. For like reason there could be no actual and continued change of pos-

session of this nonexistent property. Plaintiffs took the land early in the season of 1915, prepared it for seeding by their own labor, seeded it, and afterwards harvested the grain, all at their own cost and expense. The property involved had not even a potential existence and constituted no part of anything transferred to plaintiffs.

It was held, in O'Brien v. Ballou, 116 Cal. 318, 48 Pac. 130, where a growing crop of wheat was sold, that:

> "Growing crops are chattels not susceptible of delivery until harvested, and are not 'in the possession or under the control of the vendor' within the meaning of the statute requiring an immediate delivery and continued change of possession. Davis v. McFarlane, 37 Cal. 634, 99 Am. Dec. 340. When the crop was harvested, it was the duty of plaintiff to take immediate possession of the grain and to retain such possession."

This was done by plaintiff in that case, and the contract of sale was held "not void under the statute of frauds."

We attach no importance to such facts as that plaintiffs were allowed to live with their father while putting in and harvesting the crop, that they had but little money, and that they used some of the farm implements and work animals that were on the Ludden place. The evidence was that plaintiffs' father had nothing to do with making the crop; that plaintiffs, through their own labor and resources and the credit they enjoyed in the neighborhood, had no difficulty in producing the crop and meeting their obligations without the aid of their father. We think that the evidence was sufficient to support the finding that plaintiffs are the owners of the property in question unaffected by the claims of any creditors of E. L. Fissel, plaintiffs' vendor.

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

175 Cal. 661

EX PARTE JACOBS. (Cr. 2103.)

(Supreme Court of California. Aug. 1, 1917.)

1. Habeas Corpus 🔑92(1)—Scope of Inquiry—Sufficiency of Evidence.

The insufficiency of the evidence to warrant a conviction cannot be considered on habeas corpus.

2. Habeas Corpus 🔑25(1) — Grounds — Want of Probable Cause.

Pen. Code, § 1487, subd. 7, authorizing a discharge on habeas corpus where a party has been committed on a criminal charge without reasonable or probable cause, applies only to a commitment for trial by a magistrate.

3. Criminal Law 🔑252(3)—Trial in Police Court—Sufficiency of Complaint.

Where a complaint in the police court stated facts constituting the offense of petit larceny under Pen. Code, §§ 484, 488, defining larceny and petit larceny, the words "by trick or device" did not impair its sufficiency.

4. Habeas Corpus 🔑4—Existence of Remedy by Appeal.

If the evidence on a trial for larceny was insufficient to show guilt, the remedy was by appeal, and not by habeas corpus.

In Bank. Original application by Maury Jacobs for a writ of habeas corpus. Application denied.

Henry B. Lister, of San Francisco, for petitioner.

PER CURIAM. [1-4] No good cause for the issuance of a writ appears. The question of insufficiency of evidence to warrant conviction cannot be considered on habeas corpus. Subdivision 7 of section 1487, authorizing a discharge on habeas corpus "where a party has been committed on a criminal charge without reasonable or probable cause," is applicable only where a person has been committed for trial by a magistrate without reasonable or probable cause. The complaint in the police court sufficiently stated facts constituting the offense of petit larceny. Sections 484 and 488, Pen. Code. The words "by trick and device" do not impair their effect in this regard. The judgment shows a conviction of the crime of petit larceny. If the evidence adduced on the trial was not sufficient to show the guilt of the prisoner of that charge, his remedy was by appeal.

The application for a writ of habeas corpus is denied.

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175 Cal. 662

CAMERON v. AYRES. (S. F. 7040.)

(Supreme Court of California. Aug. 1, 1917.)

1. Brokers 🔑53—Right to Commissions—Procuring Cause of Transaction.

A broker, employed to procure a loan, was not entitled to the agreed compensation, where a third party was the efficient cause of obtaining the loan.

2. Evidence 🔑471(30) — Conclusions of Witnesses—Agency.

The testimony of a person, employed to procure a loan, that the parties procuring the loan were his agents, was entitled to no weight, as being but the conclusion of the witness.

3. Evidence 🔑441(6) — Parol Evidence — Contract with Broker.

Where a written contract provided that, if plaintiff would negotiate a loan for defendant for the erection of a building, defendant would erect such building, and employ plaintiff as superintendent of the construction of the building, and pay him 10 per cent. of the cost of construction, plaintiff's testimony that he told defendant she would have to pay a broker's commission, besides his own commission, and that she said that would be all right, was an attempt to modify by parol the terms of a written contract.

4. Brokers 🔑54—Right to Commissions—Ability of Party Procuring—"Negotiated."

An unconsummated loan is not "negotiated," when the broker has found a lender ready and willing to advance the money; but the lender must also be able to advance the money.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Negotiate.]

5. Brokers 🔑63(3)—Right to Commissions — Failure to Complete Transaction — Default of Principal.

Where, on defendant's application for a loan of $60,000 with which to erect a building, the prospective lender offered to make such loan on condition that defendant added $20,000 to the amount of the loan and erected a building costing $80,000, defendant's acceptance of this offer was necessarily tentative, and conditional upon her own ability to raise the additional money, and, where she was unable to do so, she was not in default, so as to entitle a broker to commissions for procuring the loan.

In Bank. Appeal from Superior Court, Alameda County; Everett J. Brown, Judge.

Action by H. C. Cameron against Annie L. Ayres. From a judgment for defendant, plaintiff appeals. Affirmed.

Daniel A. Ryan, of San Francisco, for appellant. T. C. Huxley and Clarence Crowell, both of Oakland, for respondent.

HENSHAW, J. Plaintiff's complaint is founded on the following contract:

"Oakland, Cal., June 21, 1913.

"Mr. H. C. Cameron, 4812 Webster St., Oakland, Cal.—Dear Sir: If you will negotiate a loan for me of not less than sufficient to erect building, or a lesser sum if hereafter consented to by me, giving as security my lot of land situate on the northwest corner of Fourteenth and Oak streets, Oakland, California (150x116), I agree to erect a building on said land, using therefor all of said money so borrowed, and I further agree to employ you as superintendent of the construction of said building, and to pay you for your services ten (10%) per cent. of the cost of construction, and payable to you as follows: Estimates of cost of construction shall be made semimonthly and your ten per cent. estimated from that and to become then payable. I agree to commence said construction as soon after said loan is made as possible, and to continue said construction until completion.

"Respectfully, Annie L. Ayres,
"By Rowyen B. Ayres, Her Attorney in Fact.
"Accepted by H. C. Cameron."

He pleads that he negotiated and secured a loan for defendant in the sum of $60,000, which defendant agreed to accept and which thereafter she refused to accept. So refusing, she failed and neglected to construct the building referred to in the contract. Plaintiff avers the due performance by him of his part of the contract and his willingness and ability to superintend the construction of the building, and for defendant's breach of the contract lays his damages in the sum of $7,500.

Upon the conclusion of the taking of the evidence of plaintiff defendant moved for a nonsuit and her motion was granted. From the judgment which followed this appeal has been taken. The facts developed are that defendant made a written application to the Western Mortgage & Guaranty Company for a loan of $60,000, stating the terms upon which she desired the loan. The executive committee of the Mortgage & Guaranty Company did not grant the loan upon defendant's proffered terms, but offered to make a loan of $60,000 upon the real property described in the contract, provided that defendant added $20,000 to this $60,000 and would erect a building at a cost of $80,000, repaying the mortgage loan in named amounts at stated intervals. Plaintiff's testimony in relation to what followed this counter offer of the Mortgage & Guaranty Company is that he held a conversation with defendant's authorized agent asking him if he was—

"going ahead with the building or not. He said: 'I have lost the loan.' I said: 'Why, what is the matter?' 'Well,' he said, 'they took it away from me, because I could not live up to their conditions.' I said: 'Well, what were they? They did not give you any impossible conditions.' He said: 'Well, I could not get the balance of the money.'"

The evidence concerning plaintiff's activities in securing a lender and a loan discloses that he did no more than go to the brokerage firm of McDonald & Co. and tell them that he had a client who desired to borrow money on the security of the property mentioned in the contract. Plaintiff further states as his conclusion that McDonald & Co. thus became and continued to be his "agents." Yet the further evidence, and most of it from the lips of plaintiff, is that he did nothing more, and knew nothing more of the matter, saving that vaguely he knew that defendant had applied for a loan. The facts are that defendant made written application for the loan, as has been said, after entering into a written contract with McDonald & Co. to pay them 5 per cent. upon the amount of the loan secured for their services as brokers. This written agreement between McDonald & Co. and the defendant was signed in the presence of the plaintiff, who says that he protested against it only upon the ground that the amount of brokerage was excessive. In explanation of the fact that he considered McDonald & Co. his agents, he states that at the time he started to work on the matter of the loan he told defendant, "You will have to pay a broker's commission, besides mine," and the answer was, "That is all right." Without consideration of the omissions and uncertainties in this contract the nonsuit was properly ordered upon three distinct grounds:

[1-3] 1. Because plaintiff's contract called upon him to negotiate the loan for the defendant, and the evidence fails utterly to show that he did so negotiate the loan. Charged with such a duty, to measure up to the performance of his contract the agent or broker must show that he was the efficient cause of obtaining the loan. Ayres v. Thomas, 116 Cal. 140, 47 Pac. 1013. Here it appears that the efficient agent was McDonald & Co. True it is, plaintiff says, that McDonald & Co. were his agents; but this is entitled to no weight, as being but the conclusion of the witness. True it is, also, that he testified further that he said to defendant that she would have to pay a commission; but here he seeks to modify by parol the terms of his written contract wherein no commission was contemplated.

[4] 2. An unconsummated loan is not "negotiated" simply when the broker as negotiating agent shows that he was found a lender ready and willing to advance the money. He must show, also, that the lender was able to advance the money, and there is no proof whatsoever upon this matter. Gunn v. Bank of California, 99 Cal. 349, 33 Pac. 1105; Mattingly v. Pennie, 105 Cal. 514, 39 Pac. 200, 45 Am. St. Rep. 87.

[5] 3. The evidence fails to show either an acceptance of the loan by defendant or circumstances amounting to a breach of her contract, putting her in default for refusing to accept the loan. This is so because the proffered loan was upon condition that she raise a large additional sum of money to be expended in the construction of the building. She may have been willing to accept the loan. She may have been desirous of securing and using the additional $20,000; but manifestly the conditions attached to the offered loan of $60,000 were such that her so-called acceptance of it was necessarily tentative, and conditional upon her own ability to raise the additional money, and therefore it

is not shown that she was in any wise in default in having finally declined to proceed with the matter.

For these reasons the judgment appealed from is affirmed.

We concur: MELVIN, J.; SHAW, J.; SLOSS, J.; LAWLOR, J.

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175 Cal. 646

ARP v. FERGUSON et al. (L. A. 4001.)

(Supreme Court of California. July 30, 1917.)

1. MORTGAGES ⚷280(4) — ASSUMPTION OF MORTGAGE—EXTENT OF LIABILITY.

Where defendant, with full knowledge of a faulty description of the land in a mortgage by owner to plaintiff, purchased the land and agreed to pay and assume the mortgage, her obligation to plaintiff was not measured by a letter written by her to the mortgagor to the effect that she had deducted a given amount from the price, and "it is the understanding that I am to reimburse to you, upon terms to be agreed, the difference between the sum of $1,875 and any sum less than that amount which I am obliged eventually to pay to the said James Arp, account of the above lien"; such letter being a mere recital, except as to the part agreeing to give the mortgagor whatever may be left after payment of the lien, and in no wise affecting the agreement to pay the mortgage.

2. EVIDENCE ⚷445(5)—PAROL EVIDENCE—ASSUMPTION OF MORTGAGE.

That the purchaser had assumed the liabilities of the mortgage, and agreed to pay it according to its terms, could be established by parol.

3. REFORMATION OF INSTRUMENTS ⚷28—SUBSEQUENT GRANTEE WITH KNOWLEDGE.

A deed or other written instrument may be reformed against a subsequent grantee, or other person acquiring rights under the contract, who takes with notice of the infirmity in the original writing.

Department 2. Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by James Arp against R. H. Ferguson and others. From the judgment, and from an order denying her motion for a new trial, defendant Mary E. Packer appeals. Affirmed.

E. L. Foster and Chas. A. Barnhart, both of Bakersfield, for appellant. Kaye & Siemon, of Bakersfield, for respondent.

HENSHAW, J. Plaintiff sued defendants, alleging in substance the following: The defendant R. H. Ferguson and his wife had executed to him a mortgage upon certain lots in the city of Bakersfield to secure the payment of their promissory note for $1,853.97. By error a faulty description of the land crept into the mortgage. The lots were described as being in block 164; whereas, they were in fact in block 195. Thereafter, and with full knowledge of this mistake, defendant Mary E. Packer purchased this land from the Fergusons, and in so doing and as a part of the consideration of her purchase agreed to pay and assumed the obligation of paying the amount of the mortgage indebtedness. The action sought a reformation of the mortgage contract and the imposition upon defendant Packer of the personal liability which it was alleged she had undertaken. The court found in accordance with the allegations of the complaint, and its findings in this respect are supported. It appears, and it was pleaded, that plaintiff, Arp, took his note and mortgage from the Fergusons because he had become an accommodation maker with Ferguson in a joint note which they had executed to the Miller-Enwright Company of Sacramento, which joint note was for the sum of $1,853.97. The mortgage which the Fergusons gave to Arp was to hold Arp harmless because of his accommodation and to reimburse him for all sums which he might be legally bound to pay as joint maker of the Miller-Enwright note. It was established that he had thus been obliged to pay $2,588.52, and the trial court, reforming the mortgage in the particular indicated, gave judgment for that sum, declared the amount to be a valid lien upon the property purchased by defendant Packer, and gave personal judgment for any deficiency against the Fergusons, as well as against defendant Packer. Defendant Packer appeals from the judgment and order denying her motion for a new trial.

Defendant Packer had given to defendant Ferguson a writing as follows:

> "Bakersfield, Cal., September 30, 1912.
>
> "Mr. R. H. Ferguson, City—Dear Sir: Having deducted from the purchase price of $20,000, paid for lots 3, 4, and 5, in block numbered 195, the sum of $1,875, being account lien held by James Arp, against said property, unrecorded, it is the understanding that I am to reimburse to you upon terms to be agreed, the difference between the sum of $1,875 and any sum less than that amount which I am obliged eventually to pay to the said James Arp, account of the above lien.
>
> "Yours very truly, M. E. Packer."

[1-3] Appellant contends that this measures the extent of her liability. It is true that a contract which may rest in parol, if reduced to writing, measures the liability of the parties to it. This writing, however, in so far as it is a contract at all, declares merely that the purchaser has deducted and withholds $1,875 from the purchase price to meet and pay an indebtedness due to James Arp, the amount of which indebtedness is secured by a lien on the property. This is a mere recital. The contractual part of the writing is simply the agreement to give to Mr. Ferguson whatever may be left of the $1,875 after payment of the lien claim. This in no wise militates against the pleading and proof of the plaintiff that Mrs. Packer had assumed the liabilities of the Ferguson mortgage and had agreed to pay it according to its terms. That this could be established by parol is, of course, well settled. Hopkins v. Warner, 109 Cal. 133, 41 Pac. 868; Hibernia Sav. & L. Socy. v. Dickenson, 167

Cal. 616, 140 Pac. 265. And equally well established is the principle of law that a deed or other written instrument may be reformed against a subsequent grantee, or other person acquiring rights under the contract, who takes with notice of the infirmity in the original writing. Woodworth v. Guzman, 1 Cal. 203; Citizens' Nat. Bank v. Judy, 146 Ind. 322, 43 N. E. 259.

Certain errors of the court in ruling on the evidence are urged. Thus, it is declared that the court erred in allowing the introduction in evidence of the joint note of the plaintiff and defendant Ferguson in favor of the Miller-Enwright Company; also that the court erred in overruling appellant Packer's objection to evidence of the amount of the indebtedness for which Arp had become liable to that company as joint maker of the note. These points require no consideration. From what has already been said, it is manifest that Arp's legal liability on his note to the Miller-Enwright Company was the very essence of the mortgage given by the Fergusons to Arp, and that the amount of the lien upon the real property mortgaged was to be established by the extent of Arp's liability on his note.

The judgment and the order denying appellant's motion for a new trial are affirmed.

We concur: LORIGAN, J.; MELVIN, J.

175 Cal. 660

E. CLEMENS HORST CO. et al. v. RAILROAD COMMISSION OF STATE OF CALIFORNIA. (S. F. 8440.)

(Supreme Court of California. July 31, 1917.)

Certiorari 🔑4—Existence of Other Remedy—Remedy by Defense at Law.

An order of the Railroad Commission, directing a railroad company to enforce against petitioners a certain tariff with reference to demurrage, will not be reviewed by certiorari, as it may be taken for granted that the enforcement of such tariff can only be done by means of ordinary actions, and the order does not adjudicate the question of liability, or prevent the interposition of any defense in any action pending or subsequently brought.

In Bank. Original application by the E. Clemens Horst Company and others for a writ of review, directed against the Railroad Commission of the State of California. Application denied.

Edward C. Harrison and Maurice E. Harrison, both of San Francisco, for petitioners. Douglas Brookman, of San Francisco, for respondent.

PER CURIAM. We cannot see that the Railroad Commission has assumed by its order to adjudicate the question of the liability of the petitioners to the Southern Pacific Company, or to prevent the interposition of any defense in any action that may be pending or may be hereafter instituted against them by the Southern Pacific Company. No judgment is thereby attempted to be given against any of them. The whole effect of the order is that the Southern Pacific Company is directed to enforce against them a certain paragraph of a certain rule of a certain tariff with reference to demurrage, and this, it is taken for granted, can only be done by the company by means of ordinary actions against the several petitioners in the courts of the state, where the question of liability will be determined.

The application for a writ of certiorari is denied.

175 Cal. 651

HART v. CASLER et al. (L. A. 4029.)

(Supreme Court of California. July 30, 1917.)

Appeal and Error 🔑1011(1)—Findings on Conflicting Evidence—Conclusiveness.

In an action on a promissory note, defended on the ground of fraud in the transaction in which the note was given, where the evidence as to the making of the alleged fraudulent representations was in sharp conflict, defendants testifying that they were made, and plaintiff and her corroborating witnesses that no such representations were made, findings for plaintiff were supported by the evidence, and the judgment will be affirmed.

Department 2. Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by Lillian P. Hart against Florence C. Casler and another. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Affirmed.

Willedd Andrews, of Los Angeles, for appellants. Rodman & Donnell, of Los Angeles, for respondent.

HENSHAW, J. The sole ground for reversal advanced upon this appeal is the insufficiency of the evidence to sustain certain findings of the court. The action was upon a promissory note made by defendants to plaintiff in part payment of the purchase by the latter of plaintiff's interest in an apartment house in the city of Los Angeles. The answer admitted the execution of the promissory note and sought to avoid its legal effect by charging fraud in its procurement. The fraud charged was that plaintiff falsely represented to defendants, to induce them to make the purchase, that the apartment house "was paying a profit of from $300 to $600 a month over and above expenses." The evidence upon this was in sharp conflict; the defendants so testifying, and the plaintiff and her corroborating witnesses stating that such representations were not made, that it was shown and explained to the defendants that many apartments in the house were vacant at the time of the purchase, but that in winter, "when the house was full, it brought in a net income of from $300 to $600 a month." The court found in accordance with the testimony of plaintiff and her witnesses. The findings are supported, and that is all there is to this case.

The judgment and order appealed from are therefore affirmed.

We concur: LORIGAN, J.; MELVIN, J.

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175 Cal. 649

BURR CREAMERY CO. v. CITY OF LOS ANGELES et al. (L. A. 4021.)

(Supreme Court of California. July 30, 1917.)

LANDLORD AND TENANT 🔑79(2) — ASSIGNMENT OF LEASE — RIGHTS PASSING TO ASSIGNEE.

A lease for five years provided that at its expiration the property should be appraised and the rent based on such appraisal, if the tenant desired to continue the tenancy. It further provided that, if the tenant held over, such holding should be construed as a tenancy from month to month. The property was never appraised, and the lease was not renewed or extended, but the lessee continued in possession as a tenant from month to month. During the term a judgment was rendered in favor of the lessee for damages to the leasehold from the widening of a street. After the expiration of the term the lessee sold its business and assigned to the purchaser all its right, title, and interest in the lease if in force. *Held*, that the judgment for damages to the leasehold did not pass to the purchaser.

Department 2. Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

Action by the Burr Creamery Company against the City of Los Angeles and another. From a judgment in favor of the defendant Los Angeles Creamery Company, and an order denying a new trial, plaintiff appeals. Affirmed.

G. C. De Garmo and Olin Wellborn, Jr., both of Los Angeles, for appellant. Lloyd, Cheney & Geibel, of Los Angeles, for respondent.

HENSHAW, J. This is an action to recover the amount of an interlocutory judgment which awarded the Maple Grove Creamery some $5,000, as damages to its leasehold interest, occasioned by the widening of a street in Los Angeles at the instance of the city. Question having arisen as to the ownership of the fund, the city of Los Angeles paid it into court, and is here but a nominal defendant. The chronological events necessary for an understanding of the controversy are the following:

The owner of the land, Fannie Rusk Smith, executed a five-year lease of the premises to the Maple Grove Creamery. The lease provided that at its expiration the property should be reappraised, and the tenant, if it desired to continue its tenancy, should pay for rental 7 per cent. net of the value of the appraisement for the next term of five years. (This provision of the lease, it is admitted, was never enforced, nor in any way put into effect.) The lease further provided that, if the tenant should hold over its term with the consent, express or implied, of the landlord, "such holding shall be construed to be a tenancy only from month to month." The defendant Los Angeles Creamery Company in 1906 bought out the Maple Grove Creamery, and while it did not formally take over the leasehold interest of the Maple Grove Creamery, it entered into possession of the premises and attorned by paying rent to Fannie Rusk Smith in accordance with the terms of the lease, which rent she accepted. The interlocutory judgment in the matter of the opening of Eighth street, upon which this property fronted, awarded the Maple Grove Creamery $5,035.70 as damages to its leasehold interest. This judgment was docketed and entered January 3, 1910, and so far as the Maple Grove Creamery is concerned no contention arises but that the judgment is the property of the Los Angeles Creamery Company, to which it sold. The five-year term limited by this lease expired on December 15, 1910. The lease was never renewed, and the Los Angeles Creamery Company thus continued as tenant from month to month. On February 6, 1911, it executed to E. Burr a bill of sale of "all its right, title, and interest" in the equipment and machinery contained in the Maple Grove Creamery plant "and in and to the lease of said premises, if in force." All of these facts as above set forth were fully within the knowledge of E. Burr at the time he accepted this bill of sale. Thereafter he conveyed his rights to the plaintiff Burr Creamery Company, and the Burr Creamery Company made demand upon the officials of the city of Los Angeles for the payment of the award of damages. The city of Los Angeles then deposited the money in court, and plaintiff brought this action.

Upon this appeal it states that the sole question is "whether the assignment of the Fannie Rusk Smith lease by the Los Angeles Creamery Company to Burr carried with it the right to the award for damages." From no sustainable legal point of view can it be said that appellant's inquiry can be answered in the affirmative. We need consider but one aspect of the case. The issues have been sufficiently indicated. The court found:

> "That said lease by its terms ended December 15, 1910; that the properties described in said lease were never reappraised by either party thereto or any one else, and that said lease was not renewed or extended; that after December 15, 1910, said Los Angeles Creamery Company did not use or occupy said premises under the terms or conditions of said lease, but its occupancy after said December 15, 1910, was under and by virtue of a tenancy from month to month."

These findings are upon decisive issues in the case. They stand unchallenged by appellant, and they are conclusive against it on this appeal, without consideration of any of the other questions presented.

The judgment and order appealed from are therefore affirmed.

We concur: LORIGAN, J.; MELVIN, J.

175 Cal. 637

CLARK et al. v. CITY OF MANHATTAN BEACH et al. (L. A. 4922.)

(Supreme Court of California. July 17, 1917.)

1. ELECTIONS 🔑51—ELECTION BOARDS—APPOINTMENT.

Pol. Code, § 1142, providing for advertising for applications to serve as officers on boards for certain elections, has no application to a municipal election on the question whether bonds shall be issued for the purpose of constructing municipal wharves.

2. ELECTIONS 🔑55 — ELECTION BOARDS — QUALIFICATIONS.

An election is not invalid because some of the members of election board were appointed contrary to Pol. Code, § 1142, providing that no one who has been employed by a city is eligible as member of an election board at a municipal election held within 90 days of such employment, since they were at least de facto officers, and as such their acts were valid in the absence of fraud.

3. ELECTIONS 🔑227(3) — CONDUCT OF ELECTION—OPENING OF POLLS.

An election is not invalid because opening of polls was delayed ten minutes beyond time provided by statute, where such delay did not work injury to any voter.

4. ELECTIONS 🔑175—BALLOTS—STATEMENT OF PROPOSITION.

The scheme to construct under one bond issue several wharves necessary to effect adequate harbor improvement may be submitted at a municipal election as an entirety; it is not necessary that construction of each wharf should be separately submitted.

In Bank. Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by Stephen A. D. Clark and another against the City of Manhattan Beach and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

C. Franklin Baxter, of Los Angeles, for appellants. Frank L. Perry and Bordwell & Mathews, all of Los Angeles, for respondents.

LORIGAN, J. Plaintiffs, as property owners, sued for an injunction to prevent the issuance and sale by defendants of $90,000 of municipal improvement bonds, and from a judgment in favor of defendants plaintiffs appeal.

The facts show that Manhattan Beach is a city of the sixth class; that on November 7, 1914, its board of trustees determined that public interest and necessity demanded that the said city incur a bonded debt of $90,000 for the construction and completion of wharves upon or adjacent to the water front of said city to be owned and operated by said city, one to be located at the foot of Center street of the estimated cost of $70,000, and one at the foot of Marine avenue of the estimated cost of $20,000; and that an election to vote upon the proposition of incurring said indebtedness in the amount of said $90,000 be held on January 20, 1916. An election was accordingly held at which 311 votes were cast; that 230 thereof were cast in favor of the issuance of said bonds, and 78 against their issuance. The city was proceeding to issue and sell said bonds when this action was brought.

A number of grounds for a reversal are urged by appellants.

[1] First. They insist that the board of election was illegally constituted because not appointed according to law. Their counsel does not say anything further on this point than to make it; he does not attempt to point out why or in any which particular the appointments were not all according to law, and hence for this reason we might well ignore any consideration of it. But as in another part of his brief he makes reference to the fact (which is true) that the board of trustees "did not publish, advertise, or receive any petition of any election officers signifying their willingness or consent to act as such officers of election" in compliance with section 1142 of the Political Code of 1915, it may be assumed that noncompliance with this particular section is what in the opinion of counsel for appellants rendered the appointed board an illegal one. While the section referred to provides for advertising or calling for applications to serve as officers on boards for certain elections, it has no application to municipal elections such as was held here. That was definitely decided in Booth v. Mott, 169 Cal. 677, 147 Pac. 953, involving this very point, and nothing further need be said about it.

[2] Second. The next point, taking it up a little out of its order as made by appellants, but properly to be considered here as related to the one we have just been considering, is that the board of election was particularly chargeable with being illegally constituted because two of its members had been employed by the city of Manhattan Beach 90 days prior to this bond election at which they served. The trial court found as a fact that they had been so employed, but held that this did not affect the legal integrity of the election board or the validity of the election. This ruling was proper. While it is true that section 1142 of the Political Code provides that persons who have been employed by a city are not eligible as members of an election board at a municipal election held within 90 days of such employment, it has never been held that the simple fact that they were nevertheless appointed and acted as such rendered the election invalid. This very point was raised in McCarthy v. Wilson, 146 Cal. 323, 82 Pac. 243, the court saying:

"Conceding that the evidence showed that certain members of these boards (election boards) came within the inhibition of section 1142 of the Political Code, and were therefore ineligible, they nevertheless did act, and were at least de facto officers of election, and as such their acts were valid in the absence of fraud, even though they did not possess all the qualifications requisite for the office. Certainly no principle of law would warrant the disfranchisement of the voters of a precinct on any such ground as the one relied on as the basis of this objection."

See, also, as declaring this same principle, People v. Prewitt, 124 Cal. 7, 56 Pac. 619; Davis v. Grunig, 143 Cal. 342, 76 Pac. 1102. Here the board of election consisted of six members, including the two disqualified members. It is not alleged or pretended from the evidence that there was any fraudulent conduct on the part of the election board or of any of the officers of election. The claim is simply that an invalid election followed solely because there were two disqualified election appointees appointed on the election board, and notwithstanding it appears that there was not the slightest unfairness for that or any other reason in the conduct of the election. This contention the law will not sanction.

[3] Third. It is claimed that the polls were not opened on time. This point is trivial. The law directs that the polls shall be opened at 6 a. m. They were, in fact, opened at 6:10 a. m. The slight delay was occasioned through the key of the polling place having been mislaid and such delay worked not the slightest injury to any voter. Kenworthy v. Mast, 141 Cal. 268, 74 Pac. 841.

[4] Fourth. It is next contended that the form of the ballot submitted at the election did not allow the voters to express their choice. But here again we are left to conjecture in what respect counsel for appellants thinks the form of the ballot was improper or unfair, because he makes no attempt to point out in what particulars he claims it open to these objections. He contents himself with simply making the point and citing the case of Clark v. Los Angeles, 160 Cal. 317, 116 Pac. 966. We take it, however, on account of his citation of the Clark Case and the discussion in the brief of counsel for respondents, that what counsel for appellants claims is that the proposition to incur an indebtedness for constructing a wharf at the foot of Center street and one at the foot of Marine avenue should have been submitted to the voters as distinct and independent propositions, so that they could express their choice of either without affecting the other, instead of compelling them to vote on the municipal wharf improvement as an entire scheme embracing these two wharves as integral parts thereof and the bonded indebtedness therefor to be incurred or rejected as an entirety. There is nothing in the Clark Case to support this claim of appellants. It discusses the matter of when subjects should be separately stated on the ballot, because distinct, unrelated, and independent of each other, and when not. It lays down valuable rules to be followed in proposing to voters the incurring of municipal indebtedness, but suggests nothing which could support the present claim of appellants. In fact, it sustains the submission of the proposition of municipal improvements as an entirety in the manner just as submitted here. The proposition for this Manhattan Beach municipal wharf constituted a single scheme of which the several wharves mentioned were to constitute a general plan. It was not to consist of either but of both. How far the municipality should proceed to improve its water front by the construction of wharves was a matter addressed to the discretion of the city, to be indorsed or rejected by the voters. It could adopt one general plan or scheme which might embrace the construction of several wharves as necessary to effect the single purpose of adequate harbor improvement, and have that improvement provided for and constructed under one bonded indebtedness. The proposition submitted here for the action of the voters was no different in principle from that submitted in the case of Oakland v. Thompson, 151 Cal. 576, 91 Pac. 387. In this latter case the proposition submitted was to acquire several distinct and widely separated parcels of land for park purposes. The same point was made there as here, that the voters should have been allowed to vote as to each separate tract of land and not for or against the acquisition of all as a single unit. In sustaining the right of the city to submit the question of the acquisition of the several parcels to the voters as a single scheme or unit the court said:

> "The scheme is a single scheme, the purpose a single purpose. * * * The law does not contemplate, much less compel, that each parcel of land which may be desired for a park shall be voted upon separately. The plan is a single plan for the acquisition of all these lands for park purposes. * * * Certainly the plan adopted was within the discretionary power of the council under the law, and it enabled every voter to express himself * * * for or against the whole proposition. More than this was not required."

The proposition submitted here was intended to embrace a whole scheme for municipal wharves for the city, and upon the authority of the case just referred to was properly submitted to the voters in the manner that it was as a single unit without a violation of any of the rights of appellants.

A couple of other points are made for a reversal, but they are so entirely without merit as not even to warrant mentioning.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; MELVIN, J.; SHAW, J.; SLOSS, J.; LAWLOR, J.; HENSHAW, J.

175 Cal. 534

HARDING et al. v. ROBINSON et al.

(L. A. 3669.)

(Supreme Court of California. June 23, 1917. Rehearing Denied July 23, 1917.)

1. EVIDENCE 🔑448—PAROL EVIDENCE—AMBIGUITY.

Where there was no intrinsic ambiguity in a written contract concerning conveyance of land, parol evidence was not admissible to explain away any ambiguity, and Code Civ. Proc. § 1860, and Civ. Code, § 1647, authorizing the explanation of a contract by reference to the circumstances under which it was made and the matter to which it relates, cannot be successfully invoked to support the admission of parol evidence.

2. VENDOR AND PURCHASER 🔑65(2) — CONTRACT—CONSTRUCTION.

A contract for sale of land described by metes and bounds and naming a purchase price for the tract without referring to acreage evidenced a sale in gross.

3. VENDOR AND PURCHASER 🔑161—MISTAKE IN ACREAGE.

A mistake as to the number of acres set forth in a deed affords no ground of action by either party against the other, unless it appears by positive testimony that the quantity constituted one of the principal conditions of the contract, and did not operate merely as an inducement to the purchase.

4. CANCELLATION OF INSTRUMENTS 🔑37(6)—FRAUD—CONTRACT FOR SALE OF LAND—COMPLAINT—SUFFICIENCY.

In view of Civ. Code, § 1572, defining fraud as the suggestion, as a fact, of that which is not true, by one who does not believe it to be true, or the positive assertion of that which is not true, though declarant believes it to be true, or the suppression of that which is true by one having knowledge or belief of the fact, or a promise made without any intention of performing it to induce another to enter into a contract, in an action to cancel purchase-money notes in part, a complaint, stating that a vendor represented to the purchaser that the property contained 15 acres, without stating that the assertion was made in a manner not warranted by the information of the vendor at the time of making it or alleging that the circumstances were such that the purchaser was entitled to rely upon the representations, and which omitted the essential allegation that the vendor made the representation either with intent to deceive the purchaser or with the intent to induce him to enter into the contract, was insufficient to charge fraud.

5. CANCELLATION OF INSTRUMENTS 🔑53 — FRAUD — CONTRACT FOR SALE OF LAND — PROOF.

Where there was no finding that the vendor knew that his alleged fraudulent representations concerning the acreage were untrue, or that he had no reasonable ground for believing them to be true, or that the deception of the purchaser was willful, the findings are insufficient to show fraud.

6. CANCELLATION OF INSTRUMENTS 🔑37(6)—PLEADING FRAUD—STATUTE.

Civ. Code, § 1625, and Code Civ. Proc. § 1856, providing that the execution of a contract in writing, whether required by law to be in writing or not, supersedes all prior negotiations is a rule of substantive law, and the obligation of the parties evidenced by their writings may not be modified or set aside for fraud, unless the rules of the substantive law in pleading the fraud are duly complied with.

7. CANCELLATION OF INSTRUMENTS 🔑4 — GROUNDS—MISTAKE.

The mistake of which a party to a written contract may be heard to complain in equity can arise only by a mistake of law as declared in Civ. Code, § 1578, or a mistake entertained by the plaintiff with knowledge of the defendant under circumstances imposing a duty on defendant to correct the plaintiff's error, or when through fraud, mistake, or accident a written contract fails to express the real intention of the parties when such intention is to be regarded and erroneous parts of the writing disregarded, as provided by Civ. Code, § 1640.

8. CONTRACTS 🔑94(1)—FRAUD—MISTAKE.

Where there is a mistake entertained by a party to a written instrument with knowledge of the other party arising under circumstances which impose the duty upon such other party to correct the error, it is a species of fraud, and is treated as fraud and not as mistake.

9. REFORMATION OF INSTRUMENTS 🔑16 — GROUNDS—MISTAKE.

In order that a mistake or imperfection in a writing may justify the modification of a contract, it must be shown that the minds of the parties met, that they agreed upon something which was to have been embodied in the contract, and that by mistake it was either fraudulently or inadvertently omitted or clumsily and ambiguously expressed.

10. REFORMATION OF INSTRUMENTS 🔑19(1)—GROUNDS—MISTAKE—MUTUALITY.

An alleged mistake in not inserting in the contract for the sale of land the amount of acreage to be conveyed which was not mutual does not justify relief.

11. EVIDENCE 🔑419(1) — PAROL EVIDENCE VARYING WRITING—CONSIDERATION.

Where the statement in a written instrument as to the consideration is more than a mere statement of fact or acknowledgment of payment of a money consideration or is of a contractual nature, as where the consideration consists of a specific and direct promise by a party to do certain things, this part of the contract can no more be changed or modified by parol or extrinsic evidence than any other part.

In Bank. Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

Suit for injunction by B. L. Harding and another against H. W. Robinson and another. From a judgment for plaintiffs, and from an order denying motion for new trial, defendants appeal. Reversed.

Carter, Kirby & Henderson and E. W. Sargent, all of Los Angeles, for appellants. Frank J. Thomas, Irving M. Walker, and E. A. Meserve, all of Los Angeles, for respondents.

HENSHAW, J. The essentials of this controversy may be thus stated. Plaintiff Lombard desired to purchase a tract of land owned by defendant Robinson. They entered into a written agreement providing for the placing in the hands of the defendant Title Guaranty & Trust Company certain papers accompanied by instructions governing the conduct of the escrowee in regard thereto. In brief, this agreement was as follows: Lombard was to pay a certain amount in cash and execute a series of promissory notes, each for $1,000, falling due a month apart. A deed to the property was to be executed by Robinson to Lombard, and a trust deed from Lombard to the Title Guaranty & Trust Company of the same property securing the payments of these promissory notes as they fell due. The property was described by metes and bounds, with no reference to acreage. The total purchase price was $15,000. The contract was executed to the extent of the payments, followed by the delivery of the trust deed and the promissory notes until there fell due the two last notes payable on August 12 and September 12, 1912. These Lombard refused to pay, basing his refusal upon the ground that he had purchased the land on Robinson's representation that it contained 15 acres, and that he was buying the land upon this representation, agreeing to pay therefor $1,000 an acre; that a survey made subsequent to his purchase disclosed that the land contained but 13 and a fraction acres. Upon Robinson's refusal to acquiesce in this Lombard brought this action.

In his complaint Lombard averred, and these are all the averments material to this consideration, that "he agreed to pay for said real property the sum of $1,000 per acre"; that after he had obtained title to the property and had given the trust deed to secure the payment of the unpaid portion of the purchase price, he caused a survey of the property to be made which disclosed that the total acreage was 13.5 acres; that immediately he so notified Robinson, and made demand upon him for a cancellation or a credit upon the unpaid promissory notes to the amount of $1,500; "that at the time of and before the purchase of said property said defendant H. W. Robinson represented to said plaintiffs that said property contained 15 acres; that said plaintiffs relied upon said representations as to the quantity of land contained in said property, and said H. D. Lombard was, by said representations, induced to purchase the same and to pay to said H. W. Robinson said sum of $15,000 as hereinbefore alleged; that as hereinbefore particularly set out and alleged said sale by said H. W. Robinson and said purchase by said H. D. Lombard was made upon the basis of $1,000 per acre, and the quantity of said land was one of the principal conditions of said contract of purchase and sale." Lombard asked that Robinson and the Title Guaranty & Trust Company be restrained from selling the real property to enforce the payment of the promissory notes, and that the notes to the extent of $1,500, with interest upon that sum, be canceled, and that the trustee be compelled to convey the real property to Lombard upon the payment which he tendered, of $500 with interest.

Defendants answered by denial. The court's findings were in the precise words of the complaint, no more, no less. Its judgment in exactly the same manner followed the prayer of the complaint. From that judgment and from the order denying his motion for a new trial the defendants have appealed. Upon the appeal they take the broad ground that the complaint states no cause of action justifying the court in receiving the parol evidence which it did receive to vary the terms of a written contract; that, notwithstanding the admission of this evidence it should have been judicially disregarded by the trial court, and should be so eliminated from consideration by the appellate court; that the findings following the precise language of the complaint cannot justify the judgment given for the reasons above stated, and also for the reason that the findings in and of themselves are not sufficient to establish any right in plaintiff to the relief which he sought and obtained. Respondent Lombard makes answer that because his complaint was not demurred to and because much of the evidence was received without objection, and because the findings follow the complaint and are supported by the evidence, the complaint and the findings are sufficient to support the judgment: First, on the ground of fraud; and, if this be not tenable, then, second, upon the ground of mistake; and, if this be not tenable, then, third, upon the ground that it was open to the plaintiffs to show that the true consideration was something other than that expressed in the contract. These, then, are the propositions here calling for determination.

1. Fraud. It may be of profit at the outset of this discussion to call to mind briefly some of the fundamental principles governing the interpretation and finality of written contracts. Such a written contract "supersedes all the negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument." Civ. Code, § 1625. When a contract is in writing the writing itself—

> "is to be considered as containing all those terms, and therefore there can be between the parties and their representatives, or successors in interest, no evidence of the terms of the agreement other than the contents of the writing, except in the following cases:
>
> "1. Where a mistake or imperfection of the writing is put in issue by the pleading;
>
> "2. Where the validity of the agreement is the fact in dispute." Section 1856, Code Civ. Proc.
>
> "The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity." Section 1638, Civ. Code.

The truth of the facts recited in a written instrument are conclusively presumed to be true between the parties thereto, or their successors in interest by a subsequent title, but this rule does not apply to the recital of a consideration. Code Civ. Proc. § 1962, subd. 2. A promissory note is presumed to have been given for a consideration, but the presumption is controvertible. Code Civ. Proc. § 1963, subd. 21.

[1] There is no extrinsic ambiguity in this contract. Indeed, there is no ambiguity at all in the writings involved on this appeal.

Hence parol evidence was not admissible to explain away an ambiguity. Therefore section 1860 of the Code of Civil Procedure and section 1647 of the Civil Code cannot successfully be invoked to support the rulings of the trial court in the reception of parol evidence.

[2] With these incontestable principles of law before us we may come to the specific consideration of the question of fraud, and herein the first fact appearing beyond dispute is that the written contract evidenced a sale of land in gross without the slightest suggestion that the matter of acreage was in contemplation of the parties. It describes a given tract of land by metes and bounds, and names the purchase price of that tract as $15,000. The matter of quantity is not even remotely referred to in the contract, and it was, as we repeat, simply a sale in gross. 39 Cyc. 1311; Ohlert v. Alderson, 86 Wis. 433, 57 N. W. 88; Wadhams v. Swan, 109 Ill. 46.

[3] Even where acreage has been set forth in the deed and where the action was in fraud to set aside the deed because of the false representations, made by the grantee in possession before the deed was executed to him, this court has said that a mistake as to the number of acres "affords no ground of action by either party against the other, unless it be made to appear beyond controversy by clear and positive testimony that quantity constituted one of the principal conditions of the contract, and did not operate merely as an inducement to the purchase." Commissioners v. Younger, 29 Cal. 172.

[4] What then the court did and what respondents contend it was justified in doing, was, in essentials, to reform this contract for fraud. Yet no fraud whatsoever is charged in the complaint. Indeed, so inefficient is the pleading to state such a cause of action that the appellants would have been well justified in believing that designedly it did not intend to charge fraud. Fraud, actual, is defined in section 1572 of the Civil Code. It lies in the commission of one or another of the enumerated acts done "by a party to the contract * * * with intent to deceive another party thereto, or to induce him to enter into the contract." Those acts are:

> "1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true;
> "2. The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;
> "3. The suppression of that which is true, by one having knowledge or belief of the fact;
> "4. A promise made without any intention of performing it; or,
> "5. Any other act fitted to deceive."

[5] This complaint simply states that the grantor "represented to said plaintiffs that said property contained 15 acres." It is not charged that this assertion was made in a manner not warranted by the information of the grantor at the time of making it. It is not alleged that the circumstances were such that Lombard was entitled to rely upon the representation, and above all, there is the vital omission to charge that Robinson made this representation either with intent to deceive Lombard, or with the intent to induce him to enter into the contract. Such an allegation is essential to a charge of fraud. Without it, as fraud is never presumed, but must be both pleaded and proved, no charge whatsoever of fraud is preferred. "The material ingredient of actual fraud is the fraudulent intent, and this must be charged as one of the facts constituting the fraud. Feeney v. Howard, 79 Cal. 525, 21 Pac. 984, 4 L. R. A. 826, 12 Am. St. Rep. 162; Woodroof v. Howes, 88 Cal. 184, 26 Pac. 111; Estate of Benton, 131 Cal. 472, 63 Pac. 775; Hodgkins v. Dunham, 10 Cal. App. 690, 103 Pac. 351.

As the complaint is totally insufficient to raise an issue of fraud, so, also, are the findings totally insufficient to establish fraud, for as said in Hoffman v. Kirby, 136 Cal. 26, 68 Pac. 321:

> "There is, however, no finding that the defendant knew her representations to be untrue, or that she had no reasonable ground for believing them to be true, or that the deception of the plaintiff was willful, and the result is therefore the same as though the complaint was insufficient to show fraud or deceit."

See, also, Estate of Benton, 131 Cal. 472, 63 Pac. 775; Bane v. Peerman, 125 Cal. 220, 57 Pac. 885; Fay v. Reed, 128 Cal. 357, 60 Pac. 927; Buckman v. Hatch, 139 Cal. 53, 72 Pac. 445. Wherefore we have in the case at bar a complaint which fails to tender the issue of fraud and findings not declaring in fraud and wholly insufficient to support a judgment based on fraud. The presumption the respondent invokes to the effect that a man is presumed to know the acreage of his land is purely an evidentiary one. It cannot be called in to help out a defective pleading, nor to help out a finding insufficient to establish fraud, for again will always arise the fact that fraud is never presumed, and must always be pleaded and established, especially where the extraordinary power of the court is appealed to to set aside or modify a written contract. Colton v. Stanford, 82 Cal. 398, 23 Pac. 16, 16 Am. St. Rep. 137.

[6] And to the final contention of the respondents on this point that it will be conclusively taken against these appellants that issue was joined upon the ground of fraud duly alleged because evidence upon the question was admitted and considered by the court, here, waiving the declaration just announced that, even if all this were so, the findings which the court made were wholly inconclusive to establish this asserted fraud, there is this to be said: Section 1625 of the Civil Code and section 1856 of the Code of Civil Procedure do more than declare rules of evidence. They lay down positive, substantive law. "These sections declare a rule of law so long and so well established that it is needless to cite further authorities in

its support." Pierce v. Edwards, 150 Cal. 650, 89 Pac. 600. "According to the modern and better view, the rule which prohibits the modification of a written contract by parol is a rule, not of evidence, but of substantive law." Pitcairn v. Philip Hiss Co., 125 Fed. 110, 61 C. C. A. 657; 1 Greenl. Ev. (16th Ed.) 350a. By that law the solemn obligations of parties evidenced by their writings may not be modified or set aside for fraud unless the rules of this substantive law in pleading the fraud are duly complied with. Furthermore, when they have not been so complied with, not only is evidence inadmissible to effect such a modification of the contract, but if it be admitted, and that without objection of the opposing party, nevertheless, it is the duty of the court to disregard it utterly in reaching its decision. Pitcairn v. Philip Hiss Co., supra; Moody v. McCowan, 39 Ala. 586; Hamilton v. R. R. Co., 51 N. Y. 100; Goehrig v. Stryker (C. C.) 174 Fed. 897. As said by the Supreme Court of Alabama, this evidence "is against law; the silence of the opposing party does not cure its illegality, and the court is bound, mero motu, to treat it as having no validity." Moody v. McCowan, supra. And, as says the Court of Appeals of New York:

> "It does not follow that the omission to object to testimony is a concession that it is competent." Hamilton v. R. R. Co., supra.

Upon the ground of fraud therefore this judgment is in no wise sustained.

[7, 8] 2. *Mistake.* Quite as inefficient and inefficacious are the complaint and findings to support this judgment upon the ground of mistake. The mistake of which a party to a written contract may be heard to complain in equity can arise in only one of three ways: First. It may be a mistake of law as declared in section 1578 of the Civil Code which, of course, is not the mistake here meant. Second. It may be a mistake entertained by the plaintiff with the knowledge of the defendant arising under circumstances which impose the duty upon the defendant to correct the plaintiff's error. Defendant's failure to do so is itself a species of fraud, and is treated as fraud, and under our definitions, therefore, falls in the category of fraud and not of mistake. The third species of mistake is that defined in section 1640 of the Civil Code which declares that:

> "When through fraud, mistake or accident a written contract fails to express the real intention of the parties, such intention is to be regarded, and the erroneous parts of the writing disregarded."

[9] In this it is to be noted that the mistake arises from a failure of the contract to express the real understanding and agreement of all parties to it. That failure may arise through fraud, but this character of fraud is not fraud perpetrated to induce the contract, but a fraud whereby the terms as agreed upon by the parties are suppressed or misrepresented precisely as they may be omitted or misstated by error or oversight called in that section "mistake or accident." It is with this last character of mistake that we are here dealing, and in this connection must be read and considered section 1856 of the Code of Civil Procedure, supra, and in particular its declaration that no evidence of the terms of the agreement other than the contents of the writing can be received except in the following cases: "1. Where a mistake or imperfection of the writing is put in issue by the pleading." No such mistake is here pleaded. Such a mistake, to justify the modification of a contract, cannot be established, by a party who has accepted and acted upon a written contract by a mere showing that he thought the contract expressed something other than that which its plain terms denote. He must show, in addition to that the mutuality of the mistake, that the minds of the contracting parties met, that they agreed upon a certain thing which was to have been embodied in their contract, and that by a mistake it was either fraudulently or inadvertently omitted or clumsily and ambiguously expressed. To the necessity of pleading a mistake it is sufficient to refer, from the multitude, to such cases as Pierson v. McCahill, 21 Cal. 123; Murray v. Dake, 46 Cal. 645; Harrison v. McCormick, 89 Cal. 327, 26 Pac. 830, 23 Am. St. Rep. 469; Bradbury v. Higginson, 167 Cal. 553, 140 Pac. 254; Carr v. King, 24 Cal. App. 714, 142 Pac. 131; 17 Cyc. 703.

[10] Respondents' reliance upon Hoffman v. Kirby, 136 Cal. 26, 68 Pac. 321, as a justification for the admission of this parol evidence is entirely misplaced. In Hoffman v. Kirby there was a formal complaint based upon fraud and deceit under which a reformation of the contract was sought. That such a mistake, to justify relief because of it, must be mutual, as this manifestly is not, is recognized by all authorities. Allen v. Hammond, 11 Pet. 63, 9 L. Ed. 633; Thompson v. Jackson, 3 Rand. (Va.) 504, 15 Am. Dec. 721; Carr v. Callaghan, 3 Litt. (Ky.) 365; Glassell v. Thomas, 3 Leigh (Va.) 113; Chamberlaine v. Marsh, 6 Munf. (Va.) 283.

[11] *Consideration.* No better supported than the foregoing is appellants' last contention that the pleadings, proofs, findings, and judgment all may be considered as directed to the matter of the true consideration of the contract, which consideration it was permissible to prove by parol. The well-recognized limitation upon the right of a party to vary by parol evidence the terms of a contract and prove the true consideration is well declared as follows:

> "Where the statement in a written instrument as to the consideration is more than a mere statement of fact or acknowledgment of payment of a money consideration, and is of a contractual nature, as where the consideration consists of a specific and direct promise by one of the parties to do certain things, this part of the contract can no more be changed or modified by parol or extrinsic evidence than

any other part, for the party has the right to make the consideration of his agreement of the essence of the contract, and when this is done the provision as to the consideration for the contract must stand upon the same plane as the other provisions of the contract with reference to conclusiveness and immunity from attack by parol or extrinsic evidence." 17 Cyc. 661.

In full accord with this are all our cases: Bradbury v. Higginson, supra; Harrison v. McCormick, supra; Nicholson v. Tarpey, 89 Cal. 617, 26 Pac. 1101; McDonald v. Poole, 113 Cal. 437, 45 Pac. 702; Pierce v. Edwards, supra; Germain Fruit Co. v. Armsby Co., 153 Cal. 585, 96 Pac. 319; Peterson v. Cahix, 5 Cal. App. 525, 90 Pac. 948; Gladding, McBean & Co. v. Montgomery, 20 Cal. App. 276, 128 Pac. 790. To the same effect are the well-considered cases of Ohlert v. Alderson, 86 Wis. 433, 57 N. W. 88, and Wadhams v. Swan, 109 Ill. 46.

The contention of respondents, if sustained, would result in modifying the contract in important particulars. The contract as it reads binds Lombard to pay $15,000 for a described tract of land. The contract as he would have it read, and as the court made it read, would bind him to pay $1,000 an acre for the land, the acreage to be determined after sale, and payments to be made in accordance with that acreage when so determined. Under these pleadings this cannot be done.

It follows herefrom that the judgment and order appealed from must be reversed, and it is so ordered.

We concur: ANGELLOTTI, C. J.; MELVIN, J., SHAW, J.; SLOSS, J.

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33 Cal. App. 770

PEOPLE ex rel. BRADFORD, Dist. Atty., v. BARBIERE et al. (Civ. No. 1656.)

(District Court of Appeal, Third District, California. May 30, 1917.)

1. CONSTITUTIONAL LAW 🔑306—NUISANCE 🔑60—DUE PROCESS OF LAW—ABATEMENT OF DISORDERLY HOUSES.

Under St. 1913, pp. 20–22, providing for the abatement of nuisances consisting of disorderly houses, the provision for closing the premises for a year and for the sale of all personalty found therein does not violate the due process of law clause.

2. NUISANCE 🔑81—ABATEMENT OF DISORDERLY HOUSE—KNOWLEDGE OF OWNER OF PREMISES.

To warrant the abatement of disorderly house nuisance, and closing premises and sale of personalty found thereon, it is not necessary that the owner of the building have knowledge of the existence of the nuisance; the proceeding being partly in rem.

3. NUISANCE 🔑60—ABATEMENT OF DISORDERLY HOUSE—VALIDITY OF STATUTE.

Provision of St. 1913, pp. 20–22, fixing a penalty for contempts of orders abating nuisances in excess of penalties generally fixed by Code Civ. Proc. § 1218, is not invalid; it being within the power of the Legislature to fix the punishments for contempts.

Appeal from Superior Court, Sacramento County; Charles Busick, Judge.

Abatement proceedings by the People, on relation of Hugh B. Bradford, District Attorney of Sacramento County, against Andre Barbiere and others. From the decree rendered, defendants appeal. Affirmed.

R. P. Talbot, of Sacramento, for appellants. Hugh B. Bradford, Dist. Atty., and J. R. Hughes, Asst. Dist. Atty., both of Sacramento, for respondent.

HART, J. This action was instituted against the respondents under what is commonly known as the "Redlight Abatement Law," passed by the Legislature of 1913, and entitled:

> "An act declaring all buildings and places nuisances wherein or upon which acts of lewdness, assignation or prostitution are held or occur or which are used for such purposes, and providing for the abatement and prevention of such nuisances by injunction or otherwise." Stats. 1913, pp. 20–22.

It is alleged in the petition that the respondents, Andre Barbiere and Ernestine Moreau, are the owners, respectively, and in severalty, of two pieces of real property, upon which there stand two separate buildings, the one adjoining the other, situated in the block bounded by L and M and Second and Third streets, in the city of Sacramento. It is charged that the respondent Moreau had, previously to the institution of this proceeding, leased to one of the fictitiously named respondents, whose true name the evidence at the trial disclosed to be Pugne Maddalena, for the term of one year, commencing January 1, 1915, the building owned by her and above referred to, together with the furniture therein contained, it being expressly provided in the lease that said building and furniture were to be used by the lessee as a lodging house; that at the time this action was brought, on August 12, 1915, and for some time prior thereto, said premises (referring to both pieces described in the petition)—

> "were and now are used for the purpose of lewdness, assignation, and prostitution, and said property and said buildings were and now are a nuisance under the laws of the state of California; that there is on said property a common passageway from one property to the other and from one building to the other, erected upon said property and used by the occupants of each building."

The petition alleges that the respondent Angelo Flores "is the owner of the furniture, fixtures, and other movable property situated in said building described herein and owned by the said respondent Andre Barbiere," and that certain fictitiously named persons are the owners of the furniture, fixtures, and other movable property situated in the building alleged to be owned by the said Moreau, "and that said furniture, fixtures, etc., are used in conducting, maintaining, aiding, and abetting said nuisance," etc.

The respondents Barbiere and Moreau, by their joint answer, admitted their ownership, respectively, of the two pieces of property described in the complaint, but denied that said properties, either singly or together, were used for purposes of lewdness or prostitution. Moreau admits the lease of her premises to the said Maddalena as alleged in the complaint, but denies that said Maddalena at any time used the premises, or any part thereof, or the furniture therein contained, for the purposes of prostitution, assignation, or lewdness of any kind or character. The respondent Pugne Maddalena, answering the complaint for herself, admits the making of the lease mentioned above, and that, as lessee under said instrument, she occupied the premises and building belonging to the said Moreau, but denies that she at any time used said premises or building, or any part thereof, for the purpose of carrying on or conducting the business of prostitution, or that any acts of lewdness of any character were practiced therein. She admits that there exists a passageway between the property occupied by her and the property of Barbiere by means of which persons may pass from one of the said buildings to the other, but denies that said passageway is or ever was used "by the occupants of said building or at all."

The court's findings and conclusions of law were in accord with the charges set forth in the complaint, and judgment was thereupon entered as follows: That the two several premises described in the complaint had been, and at the time of the issuance of the injunction pendente lite were being, used for the purposes of prostitution and assignation; that said premises as so maintained and conducted constitute a public nuisance; that the temporary injunction be made permanent, perpetually abating said nuisance; that the premises or the buildings be closed for the period of one year, unless otherwise ordered by the court, and that the furniture, fixtures, etc., which it was found were used in the building of Moreau for the purpose of carrying on the business of prostitution, etc., be sold, in accordance with the terms of the statute under which this proceeding was instituted and is prosecuted. Subsequently to the entry of the judgment, the court, upon the application of the said Barbiere and Moreau, and the filing by them of a bond, conditioned as prescribed by section 9 of the statute, ordered that the premises alleged in the complaint to be owned by Barbiere in severalty be delivered to said Barbiere and Moreau and that "the aforesaid order of abatement be canceled, so far as the same may relate to the said property." This appeal is prosecuted from the judgment by the respondents Barbiere, Moreau, and Maddalena.

The points first presented and discussed by the appellants are in disparagement of the constitutional integrity of the act under which this proceeding was inaugurated and prosecuted. It is claimed that the act contravenes the mandates of the Fourteenth Amendment to the federal Constitution, in that the effect of the authority or power vested in the court by the act to order a building found to be used for the inhibited purposes, to be closed and not to be used for the period of one year, is, when exercised, to deprive the owner of such property thereof without due process of law. In connection with the point thus stated, appellants assail the act upon other constitutional grounds, claiming that the penalties or consequences authorized by its provisions to be visited upon those setting its mandates at defiance are unreasonably harsh and severe. It is further contended that the provision of the act authorizing the punishment as for contempt of any person guilty of disobedience to the order of abatement or the permanent injunction is, for reasons to be hereafter briefly noticed, void and not enforceable. Other specific points made will be stated as we take them up for consideration.

The first section of the act in question defines or describes the persons and buildings coming within the purview of its provisions and inhibitions. The second section provides:

> "Every building or place used for the purpose of lewdness, assignation or prostitution and every building or place wherein or upon which acts of lewdness, assignation or prostitution are held or occur, is a nuisance which shall be enjoined, abated and prevented as hereinafter provided, whether the same be a public or a private nuisance."

The third section provides that, whenever there is reason to believe that such nuisance is maintained or exists in any county or city and county, the district attorney of such county must, in the name of the people, or any citizen of the state residing in such county may in his own name, maintain an action in equity to abate and perpetually enjoin the person maintaining such nuisance, and the owner or lessee or agent of the place or building where such nuisance exists from maintaining and permitting the nuisance to be maintained or continued. Section 4 provides that, when the existence of such nuisance is shown by a verified complaint or an affidavit, the court or judge may issue a temporary injunction for its abatement. Section 6 reads:

> "Any violation or disobedience of either any injunction or order expressly provided for by this act shall be punished as a contempt of court by a fine of not less than two hundred dollars nor more than one thousand dollars, or by imprisonment in the county jail for not less than one month nor more than six months, or by both such fine and imprisonment."

The seventh section provides that:

> When the existence of the nuisance has been established in the action, "an order of abatement shall be entered as a part of the judgment in the case, which order shall direct the removal from the building or place of all fixtures, musical instruments and movable property em-

ployed in conducting, maintaining, aiding or abetting the nuisance, and shall direct the sale thereof in the manner provided for the sale of chattels under execution, and the effectual closing of the building or place against its use for any purpose, and so keeping it closed for a period of one year, unless sooner released, as hereinafter provided. While such order remains in effect as to closing, such building * * * shall be and remain in the custody of the court."

The eighth section provides for the disposition of the proceeds of the sale of the chattels, the same to be used in the payment of the fees and costs accruing by reason of the action and the sale, and the balance, if there be any after the fees and costs are paid, to be turned over to the owner of the property sold. The ninth section provides that if the owner of the building or premises has not been guilty of any contempt of court in the proceedings, and appears and pays all costs, fees, and allowances which are a lien on the building or place and files a bond in the full value of the property, to be ascertained by the court, with satisfactory sureties—

"conditioned that he will immediately abate any such nuisance that may exist at such building or place and prevent the same from being established or kept thereat within a period of one year thereafter, the court, or judge thereof, may, if satisfied with his good faith, order the premises, closed under the order of abatement, to be delivered to said owner, and said order of abatement canceled, so far as the same may relate to said property. * * *"

The legislation with which we are here concerned involves an attempt at the treatment of a sociological problem whose solution has puzzled the best thought of mankind from the beginning of organized society, if not from the beginning of the world. Whether by human legislation the permanent or even partial correction of the evil sought to be stamped out by the law may be accomplished is not a question of pertinent discussion here. All that is required of us in the consideration of this appeal is to ascertain and determine, in the first place, whether the act in question constitutes a valid exercise of legislative power, and, if so, whether, in the second place, the specific methods employed for the concrete application of such power are valid or otherwise. The general object of the legislation involved in the said act is, it is obvious, no different from that of certain penal statutes which have been upon the pages of our law books for many years. Sections 315 and 316 of the Penal Code declare it to be a misdemeanor for any person to keep or reside in a house of ill fame in this state, resorted to for purposes of prostitution or lewdness, or to keep a disorderly house, or any house for the purpose of assignation or prostitution. And the last-named section further places a ban upon the act of letting or leasing property to another, where the owner of the property knows that the same is to be used for the purpose of assignation or prostitution, and makes such act a misdemeanor.

The abatement act is only in furtherance of the policy of the state as established by the sections of the Penal Code above adverted to, and differs in a general sense from those sections only in that, unlike those sections, its design was to establish a summary method, through the civil processes of the law, for putting a stop to the maintenance of houses of ill fame, as that designation is commonly understood, and other like places, where acts of lewdness and prostitution are habitually practiced and carried on as a business. The act, in other words, represents only the concrete application of the state's power of police, and, preferably to the courts of criminal jurisdiction, invokes the aid of the civil courts as the most certain instrumentality for the suppression of an evil which has been by the Legislature deemed of so pernicious a nature, in its effect upon society, as to have actuated that body in denouncing its practice as a public crime. That it is within the competence of legislative authority to invest the civil courts with such power or jurisdiction is an unquestioned and unquestionable proposition, and in assigning to the equity side of our courts the exercise of that power the Legislature acted with manifest wisdom, since, by reason of their peculiar constitution and the nature of their remedial power, the equity courts may, with an alacrity equal to the efficacy of the operation of their judicial pronouncements, afford the relief to which the public are entitled under the act under whose provisions this proceeding was initiated and its object consummated in the court below. But the power in a court of equity to abate nuisances, whether public or private, has always been among the most conspicuous of the legal attributes of that tribunal, and the power specially conferred upon it by the act in question is new or novel to that forum in this state only in the nature of the particular subject to which it is thus authorized to be applied. The remedy provided is as ancient as chancery itself, and the fact that the particular nuisance, against the maintenance or existence of which the act authorizes equity to apply the force of its remedial power, is itself a crime, and a law remedy thus provided for its extinction is no argument against the legality, or even propriety, of placing it within the cognizance of that jurisdiction. Quite to the contrary, the fact that the act of maintaining the nuisance is itself a crime, which would, if it were not in and of itself already one, class it as a nuisance per se, furnishes the most forcible reason for authorizing the interposition of equity, to the end that its suppression may speedily and effectually be accomplished—a result which experience has demonstrated may not be expected from the courts of criminal jurisdiction, whose proceedings, more from the system itself than from the course of the ministers of the law in conducting those tribunals, are too often characterized by delays and mistrials, and whose judgments involve only the imposition of mere penalties, without as is more frequently true than not, having the effect of permanently abating the nuisance itself.

[1] The only question, then, that can arise with respect to such legislation as is involved in the act in question, is whether the consequences of the power conferred, when exercised and applied, are violative of the constitutional guaranties of the owners of the property affected by a decree granted under the act. We cannot say that such is the case. Indeed, similar and even identical legislation has been in other jurisdictions painstakingly examined and upheld as against the very constitutional objections urged against the statute in the case at bar. So far as we are aware, Iowa was the first state to adopt a statute such as the one before us. There has been cited here no decision of the Supreme Court of that state in which the act has been considered. But Iowa has liquor and cigarette laws, whose general purpose is precisely, and whose provisions as to forfeiture, etc., are substantially, the same as are those of the statute under consideration, and they have been sustained as a valid exercise of the police power. See Judge v. Kribs, 71 Iowa, 183, 32 N. W. 324; Tuttle v. Bunting, 147 Iowa, 153, 125 N. W. 844; Hodge v. Muscatine County, 121 Iowa, 482, 96 N. W. 968, 67 L. R. A. 624, 104 Am. St. Rep. 604; Id., 196 U. S. 276, 25 Sup. Ct. 237, 49 L. Ed. 477.

In the states of Minnesota, Nebraska, and Washington, however, where precisely similar statutes exist, said statutes have been considered by the higher courts of those states under objections urged against their validity for exactly the same reasons that are urged against the validity of the statute before us. In State v. Gilbert, 126 Minn. 95, 147 N. W. 953, the Supreme Court of Minnesota, reviewing the abatement statute of that state, has this to say, quoting from the syllabi of the opinion:

> "The act is not invalid, as entailing unconstitutional forfeitures of estate upon conviction for an offense, the Legislature having power to provide for specific forfeitures for specific acts, including total destruction, in a proper case, of property per se innocent; nor does it authorize summary forfeitures and penalties without sufficient notice and hearing. The act, in its remedial details, as well as in its general purpose, is a proper exercise of the police power, under the test that a police measure must fairly tend to accomplish the purpose of its enactment, and must not go beyond the reasonable demands of the occasion."

In State v. Jerome, 80 Wash. 261, 141 Pac. 753, the Supreme Court of Washington holds that the abatement law of that state is a valid exercise of the police power, and that the provisions therein contained, which are similar to those in our law, as to forfeitures and procedure in no way contravene the constitutional rights or guaranties of owners of the property upon which the decree authorized by the act is intended to operate. In State v. Fanning, 96 Neb. 123, 147 N. W. 215, the Supreme Court of Nebraska, having under consideration the abatement law of that state, said, among other things:

> "It is urged that the law is unconstitutional and void for a number of reasons assigned, among others that it deprives a citizen of his property without trial by jury, and without due process of law, and is a denial of the equal protection of the law. The powers of a court of equity to abate nuisances and to deprive persons of property used in the perpetration thereof have existed for centuries, and have been exercised in this state since its organization. Before the enactment of the statute under which these proceedings are brought, this power was exerted, in the case of Siefert v. Dillon, 83 Neb. 322, 119 N. W. 686 [19 L. R. A. (N. S.) 1018, 131 Am. St. Rep. 642, 17 Ann. Cas. 1126], to close up a bawdyhouse as a nuisance, and to prevent its use for such purpose in the future. The provisions of the Bill of Rights with respect to trial by jury have no application to remedies in courts of equity existing at the time of its adoption (Littleton v. Fritz, 65 Iowa, 488, 22 N. W. 641, 54 Am. Rep. 19), and in such cases due process of law is observed by using the equitable remedies existing concurrent with the strictly legal one of trial by jury, or those provided by statute law which afford notice and an opportunity to defend."

We are satisfied with the conclusion declared in the above cases and the reasons upon which it is predicated, and both the conclusion and the reasons therefor have cogent and, indeed, direct application to the case here.

[2] But it is contended that neither the owner of a building which has been declared a nuisance under the statute, nor the building itself, can be bound by the adjudication, unless such owner has knowledge that such building has been and is being used for purposes interdicted by the statute, and that it is not shown here that the owners of the buildings had knowledge of the character of the illicit uses to which they were being put. The action authorized by the statute is in rem, or against the property used in the maintenance of the nuisance, as well as in personam, or against the person maintaining it, and while, therefore, the owner, having no actual knowledge of the character of the business carried on in his building, might not personally be bound for the costs, the building and furniture may nevertheless be proceeded against and subjected to the forfeitures prescribed by the statute. If, therefore, a building or other property is so used as to make it a nuisance under the statute, the nuisance may be abated, and the property, if personal, confiscated, and, if real, subjected to the consequences of reasonable forfeitures, notwithstanding that the owner had no knowledge that it was used for the unlawful purpose constituting the nuisance. Com. v. Howe, 13 Gray (Mass.) 26; Hodge v. Muscatine County, 121 Iowa, 482, 96 N. W. 968, 67 L. R. A. 624, 104 Am. St. Rep. 304; State v. Gilbert, supra; State v. Fanning, supra; Tenement House Department v. McDevitt, 215 N. Y. 160, 109 N. E. 88, Ann. Cas. 1917A, 455. But it has been held that "the owner of property is presumed to know the

business conducted thereon." Hodge v. Muscatine County, supra; State v. Gilbert, supra. In the instant case, however, we are justified in saying that a fair and reasonable inference arises from the evidence that both Barbiere and Moreau knew at all times of the immoral uses to which the condemned buildings were being put.

[3] It is further contended that because, in point of severity, there is a conflict between the provisions of the abatement law prescribing a penalty as for contempt for the violation of any injunction or order authorized thereunder and section 1218 of the Code of Civil Procedure, fixing a penalty for contempts generally, the former provision is invalid, and it is argued that said provision is so connected with the entire act as that the necessary effect of its invalidity is to render the act as a whole void and nugatory. The contention is obviously untenable and the argument likewise fallacious. Assuming, for the purposes of the argument, that the section is void for the reason advanced, it is as clear as any proposition may be made that the provision (section 6) of the abatement law relative to contempts is entirely independent of and severable from the other parts of the statute, which are clearly valid, and that the valid parts are capable of enforcement, so as to effectuate the paramount object of the statute, with the section thereof relating to contempts of the court's adjudications or orders entirely eliminated therefrom. In other words, section 6 and the other parts of the statute are not interdependent, or the latter dependent for its validity upon the former; section 6 merely furnishing a remedy for the more effectual enforcement of all the terms of the court's decree under the law—a remedy which, were it not specially provided by the statute itself, would be supplied by the very section of the Code of Civil Procedure with whose provisions it is here claimed section 6 of the abatement law conflicts.

But we do not acquiesce in the view that section 6 of the abatement law either affects or is affected by the Code section referred to. We know of no constitutional limitation upon the right of the Legislature to fix reasonable penalties for contempts of the judgments, decrees, orders, or processes of courts of justice, and, in admeasuring such punishments, to assign, as it may do and has done in cases of public crime, to certain acts of contempt a greater or less penalty than is annexed to others, according to the nature of the contempt with respect to the subject-matter of the adjudication violated and the consequences of such violation to the public or to individual rights. If, however, the effect of the conflict is to destroy the force or validity of the one or the other of the two provisions, it is the section of the Code, and not that of the abatement law, which is thus affected, since the latter is the later legislative expression upon the subject.

The last point to which attention will be given is that the evidence fails to support the conclusion of the trial court, as embodied in its findings of fact, that the building owned by Barbiere was used in connection with the building of Moreau for the immoral purposes described in the complaint. It is not considered necessary to present herein a detailed statement of the testimony upon this point, or any extended synopsis thereof, to show, as a careful examination of the testimony has convinced us is true, that this point is not well founded. It is sufficient to say that it was clearly made to appear that there was a common passageway maintained from the Barbiere building to the Moreau building through and by means of which entrance to both buildings was habitually effected by those entering therein and that said passageway was through the saloon in the Barbiere building, thence to the apartments maintained by the Maddalena woman in the Moreau building. The fact is, as the evidence shows, that the respondent who is designated in the complaint as "Ernestine Moreau" is the wife of the respondent Barbiere, and, as seen, the testimony appears to show that the two buildings, the one owned by Barbiere and the other by his wife, are so connected together and attached to each other that the two may be used as one building; that Barbiere, as seen, conducted a saloon in his building, while the other building, as conducted by Maddalena, was used for the purpose of prostitution and assignation; that visitors to the Maddalena apartments entered said apartments through the entrance passing through the saloon. Moreover, from the whole record and the general situation as presented, it is fairly inferable that the entrance into the Maddalena apartments through the saloon was maintained, not alone for the purpose of providing for the visitors and inmates easy and unobserved access to the Maddalena apartments, which the evidence plainly enough shows were conducted as a place of prostitution, but also for the purpose of readily furnishing the inmates of and frequenters to the apartments with liquors and wines, and of facilitating the sale of those articles by Barbiere to those persons.

There is, in brief, testimony of numerous circumstances tending to establish the proposition that the saloon business of Barbiere and the assignation apartments of Maddalena were used to facilitate the business of each; but we need not take the time and space to recite them herein. We are satisfied that both buildings were used for the illicit purposes denounced by the statute.

The record has discovered to us no reason for molesting the judgment, and it is accordingly affirmed.

We concur; **CHIPMAN, P. J.; BURNETT, J.**

33 Cal. App. 805

BLACK v. GEYSER PEAK WINE & BRANDY CO. (Civ. 1651.)

(District Court of Appeal, Third District, California. May 31, 1917.)

Appeal and Error 🔑1011(1) — Review — Findings of Fact.

Findings on conflicting evidence will not be disturbed on appeal.

Appeal from Superior Court, Sonoma County; Emmet Seawell, Judge.

Action by C. A. Black against the Geyser Peak Wine & Brandy Company. Judgment for plaintiff, and defendant appeals. Affirmed.

W. F. Cowan, of Santa Rosa, and J. T. Coffman, of Healdsburg, for appellant. J. R. Leppo, of Santa Rosa, for respondent.

BURNETT, J. The action was brought by plaintiff upon his own demand and as the assignee of six assigned claims for the purchase price of grapes of the crop of 1915. Plaintiff alleged that he and his assignors, except one, sold their grapes to defendant upon specific agreements that they were to be paid for at the market price prevailing for said season at the place of delivery when said price became established, and that this market price was in due course established at $15 per ton for black and $14 per ton for white grapes. The one exception was in the instance of the assignor, Abshire, wherein an implied contract to the same effect was relied upon. Defendant in its answer took issue with this theory of the contracts and alleged that it bought all of said grapes at an agreed price of $12 per ton for the black grapes and $10 for the white, and that it had paid the amount agreed upon, which was accepted as full payment by plaintiff and his assignors.

We cannot understand how the learned counsel for appellant could expect this court to interfere with the judgment and order denying the motion for a new trial. The only point made is that the evidence is insufficient to support the findings of the lower court, and to sustain the position of appellant an interesting and ingenious argument is made. However, respondent in his brief sets out portions of the transcript which disclose unequivocal, clear and direct testimony fully supporting and warranting every material finding. We have taken pains, by an examination of the record, to verify the quotations of respondent, and we can perceive no good reason for reproducing such testimony or for dwelling upon the well-established rule that must operate here for an affirmance of the action of the lower court.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

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34 Cal. App. 55

TATUM v. IOWA WATER CO. et al. (Civ. 1671.)

(District Court of Appeal, Third District, California. June 6, 1917. Rehearing Denied by Supreme Court Aug. 4, 1917.)

1. Limitation of Actions 🔑19(7)—Sale by Administrator—Title of Purchaser.

Code Civ. Proc. § 1573, providing that no action for recovery of any estate sold by an executor or administrator "under the provisions of this chapter" can be maintained by any one claiming under decedent, unless it be commenced within three years after settlement of final account, construed together with sections 1356 and 1561, applies to sales without notice by administrator with will annexed, when authorized by will.

2. Limitation of Actions 🔑19(7)—Sale by Administrator—Recovery of Property.

Code Civ. Proc. § 1573, as to time within which action for recovery of any estate sold by an executor or administrator must be brought by one claiming under decedent, applies to sale without notice, unauthorized by will, whether order confirming such sale be regarded as void or voidable.

3. Executors and Administrators 🔑138(9) — Sale — Confirmation — Collateral Attack.

Where court, having jurisdiction for that purpose, construes a will as authorizing a sale without notice, order confirming such sale is not void for want of jurisdiction, but at most erroneous, and title of purchaser at such sale is good as against one claiming under decedent.

4. Husband and Wife 🔑276(6)—Community Property—Administration—Sale.

Under Civ. Code, § 1402, entire community property is equally subject to the charges and expenses of administering on husband's estate, and, where will gives executor power of sale, he may sell all of it to pay such costs.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by J. W. Tatum against the Iowa Water Company and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Kaye & Siemon and E. F. Brittan, all of Bakersfield, and Joseph T. Tatum, of Los Angeles, for appellant. Melville P. Frasier, of Los Angeles, for respondents.

BURNETT, J. The action is to quiet title. The complaint is in the usual form, and the answer avers title by virtue of an administrator's sale, and it pleads the bar of section 1573 of the Code of Civil Procedure. One Abisha S. Hudson, at the time of his death, held the title in fee and was in possession of the land, and the same was the community property of himself and wife, Rose E. Hudson. Decedent left a will, wherein he appointed his wife and his niece, Mary F. Park, executrices of said will. Said will was admitted to probate by the superior court of Kern county on May 11, 1908, and on said day, by written request of said Rose E. Hudson, W. Weyant was appointed administrator with the will annexed of said estate, who duly qualified as such, and who continued to act in that capacity until his final discharge,

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

on July 1, 1909. The said will contained the following clauses:

> "First. Subject to the payment of my just debts and funeral expenses and expenses of administration, I devise and bequeath to my beloved wife, Rose E. Hudson, all of the property, both real and personal of which I die possessed, whether standing in my name, or in the name or names of any other person or persons whomsoever, for the term of her natural life, declaring it to be my will and wish that she shall have for her own use and benefit, during her life, not only the income of said property, but also such portion, or all of the property as may be necessary for her comfortable maintenance and support.
>
> "Second. I authorize and empower my said wife to sell and dispose of any of the property hereby bequeathed, at such times and in such manner, and for such price as to her may seem best, and to reinvest the proceeds of such sale as to her may seem proper. * * *
>
> "Seventh. I constitute my beloved wife, Rose E. Hudson, of Stockton, California, and my niece Mary F. Park, of Stockton, California, the executrixes of this my last will and testament, and direct that no bonds of any kind shall be required of them, or either of them.
>
> "Eighth. I hereby authorize and empower my said executrixes to sell any and all of the property of which I die possessed of whatever kind and wherever situated, with or without notice, and at public or private sale, according to their best judgment, and without any order from any court having jurisdiction of my estate."

On June 5, 1908, Weyant, as administrator, sold the land in controversy to W. A. Sage for $2,020. He filed his return of sale the next day, the sale was confirmed by the court June 16, 1908, and the administrator was directed to execute a deed to the purchaser. The order of confirmation of said sale contains this language:

> "W. Weyant, administrator with the will annexed of the estate of Abisha S. Hudson, deceased, having made to this court and filed in the office of the clerk his return of sale, made under the power in will on file herein, * * * and it duly appearing to the court that authority is given in the will of said Abisha S. Hudson, deceased, to sell any and all property of said estate, of whatsoever kind and wherever situated, with or without notice, and at public or private sale, according to the best judgment of the executors of said will, and without any order from any court having jurisdiction of said estate, and it appearing that the proceedings for the sale of said real estate were fair, that the sum bid was not disproportionate to the value of the land, * * * that said sale was legally made and fairly conducted, and the court being fully advised in the premises, wherefore, it is by the court ordered, adjudged, and decreed that the said sale be and the same is hereby confirmed and approved," etc.

On June 17, 1908, Weyant, as administrator, executed and delivered to W. A. Sage a deed to said land containing recitals as to the sale and confirmation, and granting, in proper phrase:

> "All the right, title, interest, and estate of the said Abisha S. Hudson, deceased, at the time of his death, and also all the right, title, and interest that the said estate, by operation of law or otherwise, may have acquired, other than, or in addition to, that of said testator at the time of his death, in and to all that certain lot, piece, or parcel of land," etc.

On June 5, 1908, W. A. Sage and wife conveyed said land to the Iowa Land & Water Company, and, on May 1, 1911, the said company conveyed to the Iowa Water Company, reserving a right of way over a certain portion of it. The final account of Weyant as administrator was settled October 26, 1908, and the said account shows the disposition of the cash realized from said sale as follows:

> "Expenses of administration, $620.70; cash paid Rose E. Hudson, $1,280; cash on hand, $119.30."

On July 1, 1909, receipt of Rose E. Hudson for $118.60, balance of cash distributed to her, was filed. The decree of distribution in said estate, filed October 26, 1908, distributed to her all the personal property of said estate, including the net proceeds of said sale, but did not purport to distribute to her any interest in the land in question. On June 26, 1912, Rose E. Hudson executed and delivered to appellant a quitclaim deed of all her interest in said land. Subsequent to the date of the said conveyance to the Iowa Land & Water Company it bored wells on the land in question, and constructed a canal leading therefrom to certain lands in Tulare county, which it had purchased with said land sold by Weyant, and it developed a system for the distribution of water. In the prosecution of this enterprise it expended many thousand dollars on the land involved herein, and it appeared that respondents have been in the actual possession of it continuously since its purchase from W. A. Sage.

Appellant heard rumors that there was a flaw in the title of the Iowa Water Company to this land, and he thereupon investigated the transaction of the sale by said administrator, and searched the records for himself, and concluded, so it seems, that he might make some easy money. He had actual knowledge of the claim of title and of the possession of the water company, and he knew that respondents had expended large sums of money in improvements. He opened negotiations for the purchase of said lands from Mrs. Hudson, although he did not communicate directly with her, and she never indicated that she claimed ownership of any interest in the land. He made his offer through a trust company at Bakersfield, and paid $300 for a quitclaim deed from Mrs. Hudson, the said land being of the value of $64,000. In a few words, reducing it to its essential elements, we have this situation:

Respondents purchased the land in good faith for a valuable consideration at a sale by the administrator of the estate. This sale was confirmed by the superior court. It was known to Mrs. Hudson, who never questioned it, and who accepted the net proceeds of the transaction. In fact, it is fair to say, she had knowledge of every step in the administration and probably had Mr. Weyant appointed administrator for the purpose of effecting this very sale. For more than 4 years after the sale, and for 3½ years from the date of settlement of the administration, she made no complaint; she acquiesced in everything that was done; she took no steps towards asserting any right or claim in the land. Indeed, we are justified in saying that since the sale she never has asserted any claim. She did, indeed, execute a quitclaim deed for the paltry sum of $300; but this was upon the solicitation of appellant, and is significantly suggestive of her want of confidence in any substantial basis for disputing the title of respondents. On the other hand, we have appellant eagerly listening to some vague rumor that there was a slip somewhere in the legal steps leading to this title, and he quietly steals into the recorder's office, and, after investigation, concludes that the court was without jurisdiction to confirm said sale, and he therefore generously offers and pays $300 for the privilege of depriving respondents of property worth $64,000, which they have paid for and made valuable by their improvements.

[1] Assuredly, there should be some law—and there is—to confirm a transaction undoubtedly just and equitable, and to bring to naught what is equally reprehensible and iniquitous. Section 1573 of the Code of Civil Procedure provides:

> "No action for the recovery of any estate sold by an executor or administrator, under the provisions of this chapter, can be maintained by any heir or other person claiming under the decedent, unless it be commenced within three years next after the settlement of the final account of the executor or administrator."

As we have seen, the action herein was not brought within said statutory period, and, we may add, the bar of the statute was pleaded by respondents and found by the court. There is no merit in the contention that, by reason of the fact that the sale was without notice, it was not "under the provisions of this chapter." The chapter applies to all sales made by an executor or administrator, whether notice is required, or whether dispensed with by provisions of the will. It contemplates "sales and conveyances of property of decedents," as shown by the caption of the chapter. It embraces all probate sales of personal property and real estate. Indeed, there is a special section, No. 1561, which directly applies to sales made without notice. It provides:

> "When property is directed by the will to be sold, or authority is given in the will to sell property, the executor may sell any property of the estate without order of the court, and at either public or private sale, and with or without notice, as the executor may determine; but the executor must make return of such sales as in other cases. * * * In either case no title passes unless the sale be confirmed by the court."

That administrators with the will annexed are placed in the same category as executors appears from section 1356 of the same Code. The fact is that said chapter, embracing sections 1516 to 1579, inclusive, furnishes the legislative authority for all sales of the estates of deceased persons and the procedure required to secure legal confirmation of the title thereby transferred, and we can see no reason for holding that said section 1573 does not apply to a sale made without notice, as provided in the will.

[2] Nor is it sufficient answer to say that the sale without notice was unauthorized, and therefore the order of confirmation was without jurisdiction and void. Said section 1573 applies to valid, void, and voidable sales. That seems to be established in this state. The leading case is Harlan v. Peck, 33 Cal. 515, 91 Am. Dec. 653, wherein it was claimed that the sale was void, for the reason that jurisdictional facts were omitted from the petition for sale. The section of the Probate Act therein construed was similar to the section of the Code involved herein, and the court said:

> "The policy of the statute is to quiet titles to real estate sold by order of the probate courts. In view of that policy merely, there can be no distinction between sales which may be termed void for the want of jurisdiction and those which are voidable only. Nor is there anything in the language of the statute which creates such a distinction. The claim that such a distinction is created by the phrase 'under the provisions of this chapter' cannot be sustained. To so hold would be to nullify the statute, for if, as suggested, we read the phrase as meaning 'according to the provisions of this chapter,' the limitation would be confined * * * to sales in all respects valid, as to which, for obvious reasons, there can be no occasion for a statute of limitations. * * * So the defendant in every case would be compelled to allege and prove a valid sale before he could invoke the protection of the statute; or, in other words, he must show that he stands in no need of protection in order to obtain protection. * * * We think the statute applies to all sales, void as well as voidable, made by probate courts, of real estate belonging to persons who have died since the passage of the probate act."

This case is followed in Ganahl v. Soher, 68 Cal. 95, 8 Pac. 650; Reed v. Ring, 93 Cal. 96, 28 Pac. 851; Dennis v. Bint, 122 Cal. 39, 54 Pac. 378, 68 Am. St. Rep. 17; Bagley v. Bloom, 19 Cal. App. 255, 125 Pac. 931. For affirmation of the same doctrine we may refer also to Meeks v. Olpherts, 100 U. S. 564, 25 L. Ed. 735, Young v. Walker, 26 Kan. 242, and O'Keefe v. Behrens, 73 Kan. 469, 85 Pac. 555, 8 L. R. A. (N. S.) 354, 9 Ann. Cas. 867. In the last of these it is said:

> "The state itself, as a matter of public policy, is interested in the repose and stability of land titles, in the development and improvement of landed property which doubtful tenures prohibit, and in the repression of vexatious and speculative litigation. These considerations apply as well to sales made without notice as to those of which the heirs have been legally informed. A title which is not infirm needs no statute of limitations for its protection. If there be no defects, remedial legislation is superfluous. * * * Although length of years may not give jurisdiction, or, in a certain sense, make good that which is void, * * * an act of the Legislature may, out of consideration for the public welfare, oblige interested persons to assert their rights within a limited time or forever hold their peace."

Regardless, then, of the question whether the legal title to the land is vested in respondents, appellant is too late to maintain any claim to the property.

[3] Moreover, it cannot be said that the court acted in excess of its jurisdiction in confirming said sale. There was, at most, an erroneous judgment, subject to correction on appeal, but not open to collateral attack. The court admittedly had jurisdiction to construe the will of Hudson after it was admitted to probate. The court was apprised that no notice of the sale had been given. It would, of course, take judicial knowledge of the law requiring notice in ordinary cases, and we must presume that the will was examined to ascertain if therein authority was delegated to the executor to make a sale without notice and without an order of the court. The court found that such power was conferred, and, having in mind said section 1356, it reached the conclusion that the administrator with the will annexed had like authority, at least for the payment of the expenses of administration, which appeared from the return to be the purpose of the sale. The language of the decree of confirmation clearly shows that the court so considered and construed the provisions of said will, and its judgment of interpretation became final and binding upon all parties after the time for appeal had expired. Whether said judgment was right or wrong cannot be litigated in this proceeding. Of course, the rule is well settled, as stated in Morrissey v. Gray, 162 Cal. 638, 124 Pac. 246, as follows:

> "All intendments are in favor of the validity of judgments of courts of general jurisdiction, and the jurisdiction of such courts in rendering a particular judgment is conclusively presumed to have been acquired, unless the record itself shows to the contrary."

A similar question was involved in Bagley v. Bloom, supra, a case ably and thoroughly argued and carefully considered, and it was determined that the decree confirming the sale was a final determination that the will authorized the sale without notice, and that said construction was no longer open to dispute. In Crew v. Pratt, 119 Cal. 139, 51 Pac. 38, the validity of a trust provision in the will of O. C. Pratt, deceased, was attacked, and the court held that, in order to decree the distribution of the estate, it devolved upon the court to determine whether or not there was a valid trust created by the will, and having done so, adjudged it to be valid:

> "While its conclusion was erroneous, and the judgment open to reversal on appeal, yet, as no appeal was taken therefrom, and as the time therefor has long since expired, it is not now open to collateral attack."

There are many cases to the same effect, but it seems unnecessary to multiply citations. If there had been no will, and the court had attempted to confirm the sale made without notice, or upon insufficient notice, and the said infirmity appeared on the judgment roll, the case would fall within the line of authorities cited by appellant. In that event it would affirmatively appear that the sale was contrary to the express provision of the statute, and therefore invalid. But we are not confronted with that situation. Herein the record shows that the court was legally authorized to determine, and it did determine, every question incident to and involved in the judgment of confirmation, in such manner as to protect said judgment from anything other than a direct attack. Indeed, we are satisfied that the action of the court was not even erroneous, but that the construction placed upon said will as to the authority to make the sale without notice was entirely warranted.

[4] As to the point that no more than one-half the property was sold in any event, it is sufficient to refer to section 1402 of the Civil Code, providing that the entire community property is equally subject to the debts of the husband, the family allowances, "and the charges and expenses of administration." The section was applied in Sharp v. Loupe, 120 Cal. 89, 52 Pac. 134, 586, wherein the executors sold community property to pay debts. It was held that the interest of the surviving widow in the community property is that of an heir, and that her title thereto is to be administered as part of the estate of her husband; that the acts done in the administration of the estate were authorized by the statute, and are binding upon all persons interested in the estate. Upon a rehearing the opinion was construed and limited:

> "As holding that the husband can confer upon his executor testamentary authority to sell or otherwise dispose of the community property for the purpose of satisfying claims and demands which by the statute are made chargeable upon the community property."

See, also, Estate of Burdick, 112 Cal. 387, 44 Pac. 734; Estate of Moffitt, 153 Cal. 359, 95 Pac. 653, 1025, 20 L. R. A. (N. S.) 207; Estate of Warner, 6 Cal. App. 361, 92 Pac. 191.

There is no doubt here that the sale was intended to and did include the whole fee and, being for the costs of administration, it constituted a legal charge against the whole of the estate.

Other meritorious considerations urged by respondents are that appellant, by reason of the acceptance by Mrs. Hudson of the proceeds of the sale with knowledge of the transaction, is estopped from denying the validity of said sale; that, it being clear that the will of Hudson dealt with all the community property, and Mrs. Hudson, having accepted the benefit of said will, could not reject it by asserting in opposition to it her own inconsistent proprietary rights, and that appellant cannot be held to be a purchaser in good faith and for value; that he is a mere volunteer, who bought a lawsuit on speculation, and is therefore entitled to scant, or no, consideration in a court of justice. These propositions are elaborately argued, with the citation of numerous authorities; but what we have already said is, we think, decisive of the case.

Some of the findings are attacked as not supported by the evidence. They are probably not essential to the judgment; but, at any rate, it cannot be said that they are unsupported. As to finding 4, it cannot be doubted that the court did inspect the will of said Abisha S. Hudson, deceased, and that from said inspection it was justified in concluding that the testator intended to and did treat of the whole of the land without regard to any community interest. It is true, also, as far as the record shows, that the decree of distribution entered in said estate distributed the whole of the community property of said deceased to his wife, Rose E. Hudson. It cannot be said that the appraisement was only of one-half of the property. It purports to include the whole interest. As to the land herein, the appraisement is as follows:

> "Section 35, T. 25 S., R. 23 E., 640 acres, @ $3.50 per acre, $2,240.00."

It was equivalent to saying that the whole section was worth $2,240. The appraisers stated that it was community property, which they were called upon to do; but it is clear that it was all appraised. Some of the other findings, which are criticized by appellant, are rational conclusions from an inspection of the judgment roll in the said estate, and it is deemed unnecessary to notice them specifically.

We do not find any evidence that the improvements placed upon the land by respondents are of the value of $15,000, as found by the court; but the particular amount is, of course, unimportant, since it appears that they were and are of great value. Indeed, appellant himself testified:

> "I knew that defendant Iowa Land & Water Company had purchased the land of Sage; that they were in possession and had expended large sums in improvements."

Appellant has displayed ability and learning worthy of a better cause, and we have given due consideration to all the points made by him, but we are satisfied with the judgment and order of the trial court, and they are therefore affirmed.

We concur: CHIPMAN, P. J.; HART, J.

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34 Cal. App. 10

CYCLOPS IRON WORKS v. CHICO ICE & COLD STORAGE CO. (Civ. 1448.)

(District Court of Appeal, Third District, California. June 2, 1917. Rehearing Denied by Supreme Court July 30, 1917.)

1. TROVER AND CONVERSION 🔑40(3) — EVIDENCE—SUFFICIENCY.

In an action for damages for the alleged unlawful conversion by defendant corporation of 215 galvanized ice cans, evidence *held* sufficient to sustain defendant's contention that the cans in question were purchased by defendant's predecessor from plaintiff.

2. CORPORATIONS 🔑397 — CONTRACTS — AUTHORIZATION BY BOARD OF DIRECTORS.

It is not necessary, in order to bind a corporation that all acts done by its officers or agents should be specifically authorized by the board of directors and such authorization entered in its books.

3. CORPORATIONS 🔑425(4) — ESTOPPEL — TRANSACTION WITH CORPORATE OFFICERS.

Plaintiff corporation was estopped from repudiating the acts of its officers in the transaction here involved, since the officers were acting within the general scope of their power and there was no pretense of fraud on the part of defendant.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action by the Cyclops Iron Works, a corporation, against the Chico Ice & Cold Storage Company, a corporation. Judgment for defendant, and plaintiff appeals. Affirmed.

F. J. Castelhun, of San Francisco, for appellant. Guy R. Kennedy, of Chico, for respondent.

CHIPMAN, P. J. This is an action for damages in the sum of $967.50 for the alleged unlawful conversion of 215 galvanized iron ice cans. Judgment was rendered in favor of defendant for costs, from which plaintiff appeals.

In 1905, Joseph M. Etienne, Victor Etienne, Jr., and Paul Heilmann formed a copartnership and commenced the business of ice making under the name of Chico Ice & Cold Storage Company. Their plant was installed at Chico by the plaintiff corporation, of which Joseph M. Etienne and Victor Etienne, Jr., were, respectively, president and secretary, both being directors thereof and each owning one share of the capital stock of the corporation. Among other articles shipped to the copartnership by the appellant corporation were 410 cans, 215 of which are the subject of this action. The claim of appellant is that said cans belonged to it and were stored with the respondent corporation, while the latter claims that they were purchased by its predecessor, the copartnership above mentioned, along with the other apparatus constituting the ice plant.

In December, 1907, Paul Heilmann sold his interest in the partnership to Victor Etienne, Jr., and the defendant corporation was then formed, having the same name as the copartnership which it succeeded. Both prior and subsequent to said incorporation, A. G. Eames was negotiating for the purchase from the Etiennes of a half interest in the ice plant at Chico, such negotiations being carried on both by correspondence between Eames and Victor Etienne, Jr., and by conversations between them. The letters between the parties reveal the fact that Eames was desirous, before purchasing an interest in the business, of having something in the nature of an inventory to show just what he would acquire in the way of machinery and appliances. Respondent's position is that, before the close of the negotiations, he became possessed of such information, and that the sale, when consummated, included the cans in dispute. Appellant contends that the evidence does not support the findings of the court in this respect in favor of defendant.

Section 1565 of the Civil Code provides:

> "The consent of the parties to a contract must be: 1. Free; 2. Mutual; and 3. Communicated by each to the other"

—and section 1625 thereof declares:

> "The execution of a contract in writing * * * supersedes all the negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument."

Commencing with a letter from Victor Etienne, Jr., dated San Francisco, December 13, 1907, several communications passed between the parties and some conversations were held by them. The letters written by Mr. Etienne were on the letter head of the Cyclops Iron Works, although in one instance those words were erased. There was evidence introduced by plaintiff tending to show that, in conversations preceding the entering into of the contract, Victor Etienne stated to Eames that the cans in question were not to be included in the property sold. Mr. Eames testified that he replied to this statement that the cans must be included. Appellant also complains of the introduction in evidence by defendant of an inventory containing the item "426 ice cans," claiming that it was never brought to the notice of plaintiff or Victor Etienne.

Under the section of the Civil Code last above quoted, we hold that all prior communications and conversations were merged in the contract finally entered into, and proceed to quote from the letters the portions thereof which, in our opinion, constitute said contract and are the matters upon which the minds of the parties met.

On January 2, 1908, Victor Etienne, Jr., wrote to Mr. Eames a letter containing this statement:

> "To show you that we are not hidebound when negotiating a deal of this kind, myself and brother are willing to put this plant in at $15,500.00."

To this letter Mr. Eames, on January 3d, replied as follows:

> "I note that you are willing to put the Chico plant in at a flat valuation of $15,500.00. Even this figure I consider excessive, but I am willing to accept same if I am assured that this amount covers all of the supplies furnished the Chico Ice & Cold Storage Co. by the Cyclops Iron Works and now in the possession of the former concern. There are to be no future bills rendered the Chico Ice & Cold Storage Co. for electrical supplies or extras of any description."

On the following day, Mr. Etienne wrote:

> "All the bills to be rendered by the Cyclops Iron Works to the Chico Ice & Cold Storage Co. are now in possession of Mr. Heilmann, the only bill for extras is for electrical machinery, etc., the invoice of which Mr. Heilmann has and amounts to $837.52. This makes a total of $16,337.52 to which must be added all of the items as per Mr. Heilmann's books."

On January 5th, Mr. Eames wrote, in reply to the last letter, demurring to the items above quoted and stated:

> "The bill of $15,500.00 was to include all the machinery and supplies of every description furnished the Chico Ice & Cold Storage Co. by the Cyclops Iron Works or yourself, whether electrical or otherwise."

Mr. Etienne, on January 8th, wrote as follows:

> "I will accept on behalf of myself and brother, as a basis of closing up the negotiations between us, your letter of the 5th, which is as follows: 1st. That we are to be allowed $15,500.00 for all the machinery and extras, including the electrical machinery furnished by the Cyclops Iron Works up to date."

On the following day, January 9th, Mr. Eames wrote:

> "I have your favor of the 8th inst. and am pleased to note that we are at last agreed upon the sum which the Cyclops Iron Works is to receive for the machinery and supplies furnished the Chico Ice & Cold Storage Co."

A one half interest in the property was acquired by Eames in January, and the remaining half in March, 1908. Between those dates Eames and the Etiennes were equally interested in the operation of the plant, and during that time no demand was made on Eames or the company for the possession of the cans or for their value. The complaint was filed October 9, 1908.

[1] It seems unnecessary to set forth in detail the testimony in the case. The letters above quoted are sufficient to support the finding of the court that Eames purchased all "electrical supplies and extras of every description." There was testimony given by H. A. Eames, who, from and after February 11, 1908, was superintendent of respondent's plant, that 205 cans were actually used in the manufacture of ice—"195 in the machine and ten extra"; that when he took charge there were about 40 old cans that had been discarded, and that 160 more had been discarded in the three years following; that an attempt to solder leaky cans was unsuccessful. A. G. Eames also testified as to leaky and discarded cans. The court was justified in finding that the 215 cans in question were sold to defendant, and that a number of them had been used by it both before and after the transfer of the plant by the Etiennes.

Appellant contends that there was no evidence that Victor Etienne, Jr., "was conducting the negotiations for the Cyclops Iron Works, nor that the Cyclops Iron Works had held him out as an officer." We think this contention cannot be sustained.

The correspondence above quoted shows that Eames was endeavoring, in case he made the purchase, to secure assurances that the Cyclops Iron Works would have no claim of any character upon the "machinery and supplies of every description." Mr. Etienne refers to "all the bills to be rendered by the Cyclops Iron Works," etc. In another of his letters, dated December 28, 1907, this sentence appears:

"I can further state that the books show the true value of the plant, as we have charged for our plants to all of our patrons and under no consideration could I accept the passing on of an outsider of the work turned out by the Cyclops Iron Works."

[2] It is not necessary, in order to bind a corporation, that all acts done by its officers or agents should be specifically authorized by the board of directors and such authorization be entered in its books. In 10 Cyc. 940, referring to Minor et al. v. Mechanics' Bank of Alexandria, 1 Pet. 46, 7 L. Ed. 47, it is declared:

> "The officers of a business corporation are to be considered as having the authority to act in accordance with the general usage, practice, and course of the business in which such corporation is engaged, and consequently that their acts, within the scope of such usage, practice, and course of business, will in general bind the corporation in favor of persons having no knowledge of limitations of their authority or who are not in possession of facts attaching such limitations, such as ought to put prudent men upon inquiry."

In Pixley v. W. P. R. R. Co., 33 Cal. 183, 91 Am. Dec. 623, a syllabus reads:

> "The same presumptions are applicable to corporations as to private persons; hence, though the records of the defendant may have been an entire blank as to any corporate action of the board of directors, * * * it does not follow that the board did not pass a vote authorizing the president to make the contract; for a vote of the board of directors may be presumed from its acts, though there is no proof of such vote on the corporate record."

In Crowley v. Genesee Min. Co., 55 Cal. 273, 276, it is said that the authority of the agent to contract "may be conferred by the corporation at a regular meeting of the directors, or by their separate assent, or by any other mode of their doing such acts." The opinion then quotes the following from Bank of Middlebury v. Rutland R. R. Co., 30 Vt. 159:

> "If this were not so, * * * it would lead to very great injustice, for it is notorious that the transaction of the ordinary business of railways, banks, and similar corporations in this country is without any formal meetings or votes of the board. Hence there follows a necessity of giving effect to the acts of such corporations, according to the mode in which they choose to allow them to be transacted. If this were not done, it would become impossible to dispose of such contracts with any hope of reaching the truth and justice of the rights and duties of the several parties involved. * * * This is merely holding corporations to such rules of action as they see fit to adopt for their own guidance and the transaction of their business."

In view of the statements contained in the various letters above referred to, considering the fact that those written by Victor Etienne, Jr., were on the letter head of the Cyclops Iron Works, and that he used therein first and third person pronouns, referring, respectively, to himself and the plaintiff corporation; that he testified that he was "actively engaged in the management of the plaintiff corporation"—the trial court was not without substantial grounds for its conclusion, that Eames believed that said Etiennes "were acting for and on behalf of the Cyclops Iron Works, and that the Cyclops Iron Works was the real owner of the stock of said Chico Ice & Cold Storage Company."

[3] However this may be, we are quite convinced from all the evidence in the case that plaintiff is estopped from repudiating the acts of its officers in the transaction here involved, since they were acting within the general scope of their power, and since there is no pretense of fraud on the part of the defendant. 10 Cyc. 1067.

> "Corporations are held to a careful adherence to truth in their dealings with mankind and cannot by representations or silence involve others in onerous engagements and then defeat the just expectations which their conduct has superinduced." 10 Cyc. 1065.

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

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34 Cal. App. 41

STAPP v. MADERA CANAL & IRRIGATION CO. (Civ. 1646.)

(District Court of Appeal, Third District, California. June 6, 1917. Rehearing Denied by Supreme Court Aug. 4, 1917.)

1. ASSIGNMENTS 🔑73 — CONSTRUCTION — CLAIMS TRANSFERRED.

An assignment of claims for damages caused by flood waters from a dam and ditches of an irrigation company, caused on or about a specified date to the property of the assignors, authorized the assignee to recover for damages to the property of the assignors from the negligence of the company in the construction, operation, or maintenance of the headgate to its main ditch, as it was not necessary, in order to pass title to the claim by assignment, to state or describe the particular act of omission causing the flood waters to leave their course.

2. ASSIGNMENTS 🔑24(1) — CLAIMS ASSIGNABLE—DAMAGES TO PROPERTY.

Under Civ. Code, § 954, providing that a thing in action arising out of the violation of a right of property, or out of an obligation, may be transferred by the owner, a claim for damages to real property may be assigned, without assigning or transferring the title to, or possession of, the property damaged.

3. WATERS AND WATER COURSES 🔑263—IRRIGATION SYSTEMS—OVERFLOWS—EVIDENCE.

In an action for damages to property flooded by waters from an irrigation system, evidence *held* sufficient to sustain the findings that the irrigation dam was so constructed that the flash or retaining boards could not be approached and removed during floods, and were not removed at the time of the particular flood, that the headgate in the main ditch was improperly and carelessly maintained, in that its timbers and foundations were permitted to deteriorate and rot, that as a proximate consequence it could not withstand the pressure of the water impounded by the dam, and broke away, permitting greater quantities of water to flow into the irrigation ditches than they would carry, and that they overflowed, injuring the land and personal property of plaintiff and his assignors.

4. WATERS AND WATER COURSES 🔑262—IRRIGATION SYSTEMS—CARE REQUIRED.

The degree of care required to be exercised to prevent injury to person or property varies under different circumstances, and one constructing a dam to impound waters for an irrigation system is bound to guard against freshets, if the stream is occasionally subject to great freshets, and in so doing to exercise the care which a discreet person would use if the whole risk were his own.

5. NEGLIGENCE 🔑136(9)—QUESTIONS OF LAW OR FACT.

Negligence is a question of fact for the jury, though there is no conflict in the evidence, if different conclusions can be rationally drawn from the evidence.

6. WATERS AND WATER COURSES 🔑262—IRRIGATION SYSTEMS—OVERFLOWS—CONTRIBUTORY NEGLIGENCE.

Persons whose property was overflowed by flood waters from an irrigation ditch were not guilty of contributory negligence in building dwellings in the old bed of a natural waterway, where for more than 50 years no water had flowed therein, and that portion of the stream had apparently passed entirely out of existence, with no indications justifying or supporting the assumption that the stream would resume flowing therein.

7. WATERS AND WATER COURSES 🔑262—IRRIGATION SYSTEMS—OVERFLOWS—CONTRIBUTORY NEGLIGENCE.

It was not contributory negligence for plaintiff and his assignors to erect and maintain dwelling houses near and in line with an irrigation canal, knowing the dangers of overflow naturally attending the maintenance of such canal.

8. WATERS AND WATER COURSES 🔑263—IRRIGATION SYSTEMS—OVERFLOWS—QUESTIONS FOR JURY.

Where plaintiff, whose property was overflowed by flood waters from an irrigation system, was awakened at midnight by a telephone call from a neighbor telling him of the breaking, and on going to his barn found from four to five inches of water, he was not negligent as a matter of law in failing to immediately remove his personal property to a place of safety, instead of going to the homes of his neighbors to warn them of the flood, as a party placed in a position of peril by the negligent act of another, without sufficient time to consider all the circumstances, is excusable for omitting some precautions, or making an unwise choice, although, if his mind had been clear, he ought to have done otherwise.

9. LANDLORD AND TENANT 🔑142(1)—INJURIES TO PROPERTY — RIGHT OF ACTION BY TENANT.

A person in possession of premises owned by his mother-in-law, under a contract that he might use the premises in consideration of keeping them in repair, was entitled to recover for injuries to the premises, which were capable of being repaired, and ought to be repaired for the proper maintenance and enjoyment of the premises.

10. LANDLORD AND TENANT 🔑23—VALIDITY OF PAROL LEASE.

The contract with the mother-in-law, though not in writing, was a valid lease for at least one year.

11. LANDLORD AND TENANT 🔑142(6)—INJURIES TO PROPERTY BY THIRD PERSONS—DEFENSES.

It is no legal defense for a third person, who has injured a leasehold, that the lease is invalid, because not in writing.

Appeal from Superior Court, Madera County; W. M. Conley, Judge.

Action by J. J. Stapp against the Madera Canal & Irrigation Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Robert L. Hargrove, of Madera, for appellant. Sherwood Green, of Madera, for respondent.

HART, J. This is an action for damages to real and personal property of plaintiff and his assignors, eight in number. Since 1872, defendant and its predecessors and grantors have appropriated and diverted the waters of the Fresno river and have operated an irrigation system; its intake being situated in said river at a point about two miles northeast of the city of Madera. The court found:

"(1) That the defendant's dam across the Fresno river was so constructed that the flash or retaining boards could not be approached during floods and removed to relieve pressure; that defendant did not remove at this time, or previous thereto, or during the flood of January, 1914, the flash or retaining boards of the said dam, but permitted them to remain in place, restraining the said flood water of said river and raising the same to a great height, whereby great pressure was exerted on the headgate of the ditch leading out above the said dam.

"(2) That the Fresno river is a torrential or flood stream.

"(3) That the month of January is a time of year when floods might be expected.

"(4) That the headgate in the main ditch was properly constructed, but was improperly, carelessly, and negligently maintained by the defendant in this: That the timbers of which said headgate was constructed and braced, and the foundations thereof, were permitted to deteriorate and rot, and were allowed to weaken, and as a direct, natural, and proximate consequence the said gate could not and was unable to and did not withstand the pressure placed thereon by the water impounded by the defendant's dam across the Fresno river, whereby the said gate broke away on or about January 26, 1914, and permitted greater quantities of water to flow into the said ditches of the defendant than the said ditches would carry, and that said ditches overflowed, and flowed in and on the lands and personal property of the plaintiff and his assignors herein.

"(5) That at the time of said break in said headgate and the said overflow J. J. Stapp was under a contract whereby he had the use of No. 236 Vineyard avenue in the city of Madera, Cal., for keeping it in repair; that the damage done to the aforedescribed real property by the said flood water coming from the said ditches of the defendant onto said property and the damage done to the personal property situate thereon was as follows:

Real property		$ 62.50
Personal property:		
Hay	$30.00	
Barley	6.45	
Wood	8.00	
Sewing machine	5.00	
Picture	7.50	
Books	36.00	
W. O. W. suit	17.00	
Clothing	20.00	129.95
		$192.45."

The damage suffered by each of the assignors of the plaintiff is then set out in similar form, and it is found that their claims for damages were assigned to plaintiff before the commencement of the action. It is then found that said damage was not the result of extraordinary and unprecedented storms, nor the result of contributory negligence by plaintiff or his assignors, "but resulted solely from the negligence of the defendant in the maintenance of defendant's headgate across its main canal.

"(10) That at one time the land whereon the plaintiff and all the assignors of plaintiff (excepting Charles W. Kolb, B. Kleckner, and J. N. Kast) reside was a river bed of the Fresno river, but that no water has flowed from the river therein for a period of more than 50 years until the time of the break, * * * and plaintiff and his assignors were not negligent in building in said slough.

"(11) That none of the waters flowing from the Fresno river into the said former river bed or slough caused any of the damage, * * * but that all of said damage was caused by water from the defendant's canals."

The judgment was in favor of the plaintiff for the sum of $913.90 and costs, and the appeal by defendant is from the judgment.

[1] We will first notice appellant's fifth point, which is:

"That the assignment to plaintiff, for collection, of the claims of damages of said assignors against defendant for damages, * * * relates wholly to the flood waters from its dam, * * * and does not include or cover any damages done by reason of any negligence of defendant in the construction, operation, or maintenance of said headgate. That said assignment was not coupled with any interest in the property damages, and is insufficient and invalid."

The assignment reads as follows:

"This agreement, made this 11th day of January, 1915, witnesseth that the undersigned parties hereby assign to J. J. Stapp all their claim against the Madera Canal & Irrigation Company arising out of the damage caused by flood waters from the dam and ditches of the said company, caused on or about the 26th day of January, 1914, to either real or personal property of the said undersigned assignors, respectively; said assignment being made for the purpose of collection of the said claims, and includes full power to bring any legal action necessary, to prosecute the same in the name of the assignee, and to take any steps whatsoever which may be necessary for the collection and enforcement of the said claims." Signed by plaintiff and eight others.

There is absolutely no merit to this point. The assignors laid claim for damages arising at a particular time and directly from a particular cause—that is, from the flood waters flowing from the dam and the ditch of the defendant. It was not necessary, in order to pass title to such claim by assignment, to state or describe in the assignment the particular act of omission causing the flood waters from the dam and the ditch to leave their course and so flood and damage the property of the assignors. This proposition is no different from a case where a merchant should assign to B. a claim against C. arising from a sale by the merchant to C., of a bill of merchandise. To make the assignment good in law, it would not be necessary that the assignment should contain an itemized or detailed statement showing the specific kinds of merchandise which made up the account from which the assigned claim arose. If the validity of the assignment rested upon a showing therein of how the claim came into existence, the mere general statement that it was for merchandise would obviously be sufficient. So here. It was sufficient to show, as the assignment here does show, that the claim arose out of damage which was directly caused by the negligence of the defendant; but, as stated, it was not necessary, as is true in pleadings, to describe in the document transferring the claim how or in what particular with reference to the maintenance of the dam and ditch such negligence occurred, or, in other words, what particular part of the dam or ditch was so negligently maintained or attended to as to have produced the damage complained of.

[2] The objection to the assignment secondly stated, viz., that claims for damages to real property cannot be assigned without also assigning or transferring with the claim the title to or the possession of the property damaged, is also untenable. Section 954 of the Civil Code provides:

"A thing in action, arising out of the violation of a right of property, or out of an obligation, may be transferred by the owner. Upon the death of the owner it passes to his personal representatives, except where, in the cases provided in the Code of Civil Procedure, it passes to his devisees or successor in office."

The above section, as is manifest, effected a change in the common-law rule of the nonassignability of choses in action based upon damages arising out of torts, and the rule in this state and in other states now appears to be that such claims may be assigned, without at the same time assigning an interest in the property damaged. Indeed, the Code section cannot with reason be construed to have any other meaning. It clearly provides that two distinct classes of claims may be transferred—the one arising out of the violation of a right of property, which is this case, and the other arising out of an obligation or a contract. The cases have so construed the language of said section. See Mitchell v. Taylor, 27 Or. 377, 41 Pac. 119; Erickson v. Brookings County, 3 S. D. 434, 53 N. W. 857, 18 L. R. A. 347; Norfolk & W. R. Co. v. Read, 87 Va. 185, 12 S. E. 395; Jordan v. Welch, 61 Wash. 569, 112 Pac. 657; Slauson v. Schwabacher Bros., 4 Wash. 783, 31 Pac. 329, 31 Am. St. Rep. 948; Zabriskie v. Smith, 13 N. Y. 322, 64 Am. Dec. 554; Caledonian Ins. Co. v. Northern Pac. Ry. Co., 32 Mont. 46, 79 Pac. 544. In the states in which these cases were decided, the Code section is exactly in the language of our section 954, supra.

Of course, a distinction is to be drawn between claims arising out of damage to property and those arising out of personal injuries or damage to the person, and it has been said that the criterion by which the assignability of things in action may be determined is whether the claim or demand survives upon the decease of the party or dies with him. "If all things in action are separated into two classes by this line of division," say the cases cited in Kerr's Civil Code under section 954, "those embraced in the first class are assignable, and those which fall into the second class are not. In the first class may be put claims arising from a breach of contract, those arising from torts directly to real or personal property, and frauds, deceits, and other wrongs by which estate, real or personal, is injured, diminished, or damaged. In the second class are all torts to person or character, when injury and damage are confined to the body or feelings of the person injured." The authorities cited by the appellant are cases which deal with the question whether claims arising out of torts were assignable under the law as it existed prior to the enactment, in 1872, of section 954 of the Civil Code, and obviously they are not in point here, inasmuch as in this state the rule in respect of the assignability of choses in action down to the enactment of said section was the common-law rule.

[3] There was ample support in the testimony for the findings. R. L. Hargrove, local manager of the defendant corporation, described the dam or weir across the river, used for impounding and diverting water to the canals, by means of a headgate. The top of this weir was seven or eight feet above the bed of the river, and the company maintained in it a sufficient number of boards to divert the maximum amount of water to which it was entitled. If it were desired to remove any of these boards, it was necessary to walk out on a pathway which extended across the river parallel to the weir and was on the lower or downstream side thereof, and was about one foot below the level of the top of the weir when the boards were all in place. During times of flood water, the surplus water going over the dam would cover this footpath, so that it could not be used, and the boards could not be removed, except that, at the time of the flood concerned herein, one board was removed by men standing on the bank, but none of the others could be pulled out in that way. This testimony was sufficient to sustain the first finding of the court.

As the dam across the river withstood the flood waters, and none of the boards, except the one above mentioned, was removed, the water sought the place of least resistance, and found it in the headgate used for diverting the water into the canal. Several witnesses testified regarding the condition of the timbers of which the headgate was composed. Harry Barnes, defendant's engineer, said that at the time of the flood the material in the headgate was obviously defective, because, if it were not, the gate "would stand up." C. P. Jensen, an expert witness for defendant, made a similar statement. P. M. Stafford, another engineer, who went to work on the county bridge at the time of the break, said that he found rotten timbers floating there, and that, in his opinion, they were the cause of the flood. H. W. Brashear, a carpenter, corroborated this testimony. W. A. Brown, defendant's general superintendent, said that the standards at the headgate were "some rotten." Frank Clare, another engineer, three days after the flood, saw a post that came from the gate, and said "it was somewhat decayed and the nail holes had rotted." John Kast also said the timbers were rotten.

Appellant's position is that the headgate was properly constructed, that each year it was inspected and necessary repairs made, and that "defendant had no notice or knowledge that there were any defects in said headgate, or the timbers thereof." In view of the fact that the timbers had been placed in the headgate in 1906, and that they had been wet and dry for seven years, it seems rather surprising that the witness Schmidt, who testified that he inspected and repaired the headgate every year, should declare that he found no rotten timbers, even though he stuck his knife in them to see if they were sound. Superintendent Brown said he had charge of repairs to the headgate; that he made an examination each year; that he "just looked it over"; that he had a hammer or something of that kind, but did not make a scientific test; that he never ran a knife alongside the nails, to see if they would hold; but he said he could generally tell if a stick was rotten without sticking a knife into it. He said he went over the gate carefully and repaired it in August before the break.

[4, 5] The degree of care required to be exercised to prevent injury to person or property varies under different circumstances. "The rule of care," which is "ordinary or reasonable care," as stated in 1 Thompson on Negligence, § 707, "may be discharged by slight attention in some cases, and it may require the most exacting and unremitting attention, care and skill in others." In an early case in this state (Hoffman v. Tuolumne Water Co., 10 Cal. 413) the following quotation is made from Angell on Water Courses, § 336:

> "The degree of care which a party who constructs a dam across a stream of water is bound to use is in proportion to the extent of the injury which will be likely to result to third persons, provided it should prove insufficient. It is not enough that the dam is sufficient to resist ordinary floods; for, if the stream is occasionally subject to great freshets, those must likewise be guarded against; and the measure of care required in such cases is that which a discreet person would use if the whole risk were his own."
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> "No one is responsible for * * * the act of God, or inevitable accident. But when human agency is combined with it, and neglect occurs in the employment of such agency, liability for damage results." Chidester v. Con. Ditch Co., 59 Cal. 197.
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> "Negligence is a question of fact for the jury, even when there is no conflict in the evidence, if different conclusions upon the subject can be rationally drawn from the evidence." Wahlgren v. Market St. Ry. Co., 132 Cal. 656, 62 Pac. 308, 64 Pac. 993.

Under these authorities, and many others that might be cited, and the testimony, of which the above is a brief statement, we think the court was justified in reaching the conclusions which are crystallized in the first four findings of fact.

But it is contended by the defendant that the plaintiff and his assignors were guilty of contributory negligence, which was the proximate cause of the damage suffered by them. As the court found, the evidence showed that the land upon which the plaintiff and some of his assignors resided was at one time a part of the bed of the Fresno river. But the evidence disclosed, and, as we have above shown, the court found, that until the time at which the break in the canal complained of here occurred no water from the said river had flowed in or over said land for a period of over 50 years.

The several forms in which it is claimed that the plaintiff and his assignors were themselves guilty of negligence directly contributing to the damage of which they complain in this action are these: (1) That it was contributory negligence to construct dwelling houses in the bed of a natural waterway; (2) that, having erected their houses in close proximity to the canal with knowledge of the existence and location of said canal, and with notice, from the very nature of the purpose for which the canal was to be used, that it was liable to break at any time, it was the duty of the plaintiff and his assignors to protect themselves and property against such a contingency, and having failed so to protect their property, or to safeguard it against damage which would probably follow the breaking of the canal or dam, they thus were guilty of contributory negligence; (3) that the plaintiff, Stapp, had the time and opportunity to have saved certain of his personal property damaged by the waters from the canal, but that he negligently failed to do so, and thus contributed to the injury of which he complains.

[6] The answer to the first proposition of contributory negligence is in the finding, sustained by the undisputed evidence, that for a period of more than 50 years prior to the time of the break which caused the damage complained of in this case no water had flowed in or over the land upon which the plaintiff and his assignors resided; that portion of the stream known as the Fresno river having apparently passed entirely out of existence, with no indications justifying or supporting the assumption that the stream would resume flowing therein or thereon.

[7] To the second proposition, to wit, that the plaintiff and his assignors erected and maintained their dwelling houses near and in line with the canal, knowing the dangers naturally attending the maintenance of a water ditch, were themselves thus guilty of negligence which contributed to the damage, a conclusive answer is to be found in the following observations of the Supreme Court, in Judson v. Giant Powder Co., 107 Cal. 549, 40 Pac. 1020, 29 L. R. A. 718, 48 Am. St. Rep. 146:

> "It is argued that the explosion of all powder works is a mere matter of time; that such explosions are necessarily contemplated by every one who builds beside such works, or who brings dynamite into his dooryard. It is further contended that appellant gave to respondents actual notice of the dangerous character of its business by a previous explosion, which damaged respondents' property, and that respondents, by still continuing in business after such notice, in a degree assumed and ratified the risk, and cannot now be heard to complain. The only element of strength in this line of argument is its originality. The contention that in the ordinary course of events all powder factories explode, conceding such to be the fact, presents an element foreign to the case. The doctrine of fatalism is not here involved. In the ordinary course of events the time for this explosion had not arrived, and appellant had no legal right to hasten that event by its negligent acts."

[8] As to the asserted contributory negligence of the plaintiff, Stapp, in failing to remove his goods to a place of safety upon hearing of the breaking of the dam, we cannot upon the record say that the point is well taken. Stapp testified that the break occurred at midnight, and that he was awakened by a telephone call from a neighbor, telling him of the break; that he immediately arose, dressed himself, and, with a lighted lantern, went to his barn, into which the water had already flowed to the depth of four or five inches. He thereupon immediately rushed to the homes of some of his neighbors, whose houses were in line with the direction in which the water would naturally run, warning them of the coming flood. He then returned to his own home, found that the water about his premises had reached a depth of over two feet, and thereupon, by means of horses and wagon, he proceeded to remove his family to a place of safety. Some of the goods damaged by the flood were in a shed near the barn, and some—hay, barley, etc.—in the barn. He stated, during the course of his examination, that he believed it to be his first duty to wake up and warn his neighbors of the danger to which they were exposed from the flood. In Schneider v. Market St. Ry. Co., 134 Cal. 490, 66 Pac. 734, the following rule, announced in Shearman & Redfield on Negligence, section 89, is approved and applied:

> In cases where a party is suddenly put in a position of peril by the negligent act of another, without "sufficient time to consider all the circumstances, he is excusable for omitting some precautions, or making an unwise choice, under this disturbing influence, although if his mind had been clear, he ought to have done otherwise. This is especially true if the peril is caused by the defendant's fault."

The principle thus stated is, we think, applicable to the case of the plaintiff here, as shown by his testimony. Suddenly awakened at midnight from his sleep, and told of perils by which his family and his property were beset by reason of the giving way of a water ditch and the rushing of the flood waters upon and over, and thus submerging, his premises, it is not to be supposed that he or any other person, suddenly enveloped by such appalling circumstances, would be in a condition of mind to exercise the best judgment, or to do those acts and things which perhaps he could and ought to have done to save his property from damage. We therefore cannot say, as a matter of law, that the plaintiff failed to exercise such care as men of prudence usually exercise when their property is in a position of like exposure and danger, and of which danger they are apprised under circumstances analogous to those under which the plaintiff was given information of the peril to which his property was exposed.

[9-11] Certain rulings upon the evidence admitted and excluded, and to which exceptions were reserved, are complained of. Of these but one appears to merit special attention. It was made to appear by the evidence, as the court found, that the plaintiff had possession of the premises on which he resided, and which were owned by his mother-in-law, under a contract with the latter that he might use the same in consideration of keeping them in repair. When the plaintiff was about to give testimony relative to the damage to a certain part of the real property—a cesspool—which was susceptible to being repaired, objection thereto was made by the defendant on the ground that he (the plaintiff) was not the owner of the real property, and, therefore, not entitled to recover damages for any injury inflicted thereon by the breaking of the dam. The testimony was admitted, and, we think, properly so, since the obligation rested upon the plaintiff to repair at his own expense the cesspool. It is true that the evidence showed that his contract for the use of the premises was not in writing; but this is not, so far as the question before us is concerned, a matter of material importance. His contract, which, in legal effect, amounted to a lease of the property, was a valid one for the lease of the premises for at least a period of one year, and his agreement to keep the property in repair involved a consideration which was to be performed not at any particular time during the term but whenever the exigency of the situation might require it; and, having this obligation to perform, he would, of course, become an injured and interested party whenever the premises suffered damage which was capable of being repaired, and ought to be repaired for the proper maintenance and enjoyment of the same. But the question of the validity of the lease was not one to be raised by the defendant in this case. It could only arise between the parties to the lease, and then only when the rights of the parties as lessor and lessee were challenged in any way. If the parties to an oral lease of real property are satisfied to allow such lease to continue for more than a year or indefinitely, under the conditions upon which the lease was made, it is their own affair, with which others are not authorized to interfere, and it is no legal defense for a third party, who has injured the leasehold, to set up the plea, against the claim of damage by the lessee, that the lease is invalid because it is not in writing.

We have with care examined the numerous other assignments under this head, and have thus been convinced that they do not disclose rulings whose effect was to prejudice the rights of the defendant.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

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NORTHERN REDWOOD LUMBER CO. v. INDUSTRIAL ACCIDENT COMMISSION et al. (Civ. 1612.)

(District Court of Appeal, Third District, California. June 2, 1917.)

1. MASTER AND SERVANT 🔑405(1) — WORKMEN'S COMPENSATION — FINDINGS — SUFFICIENCY OF EVIDENCE.

Evidence *held* sufficient to support findings of Industrial Accident Commission that deceased was employed at a per diem compensation, that his employment was for all the year and not for a portion only, that when he lost his life he had not worked in said employment for substantially an entire year immediately preceding his death, and that his death occurred while actually engaged in such employment, so that compensation was properly made under Workmen's Compensation Act (St. 1913, p. 288) § 17a (2), as amended by St. 1915, p. 1086, § 6.

2. MASTER AND SERVANT 🔑386(1)—WORKMEN'S COMPENSATION — DEATH — BASIS OF COMPENSATION.

Under Workmen's Compensation Act, § 17a (2), as amended in 1915, where the wage or salary of the deceased employé in the specified class has not been fixed by definite agreement, the wage or salary of an employé of the same class, who had worked at the same or similar employment substantially the whole of the year immediately preceding death of employé, earned during the days when so employed, should be adopted as the basis of the compensation.

3. MASTER AND SERVANT 🔑386(1)—WORKMEN'S COMPENSATION — DEATH — BASIS OF COMPENSATION.

Under Workmen's Compensation Act, § 17a (2), as amended in 1915, where the employé's salary or wage for employment of a certain class is fixed by definite agreement, such wage is the basis for computation of compensation, rather than the average earnings of other employés of the same class.

4. MASTER AND SERVANT 🔑386(1) — WORKMEN'S COMPENSATION—BASIS OF COMPENSATION—FUNERAL EXPENSES.

The fact that an employer paid burial expenses of employé under the belief and understanding that the employé left no one dependent upon him, and that such funeral expenses, under Workmen's Compensation Act St. 1913, p. 287, § 15c (3), as amended by St. 1915, p. 1085, § 4, were paid, in no manner affects the liability of the employer.

5. Master and Servant 🔑417(7)—Workmen's Compensation—Findings of Industrial Accident Commission—Conclusiveness.

In determining the compensation to be awarded for the death of an employé, the findings of the Industrial Accident Commission, upon conflicting evidence as to whether or not deceased employé left persons partially dependent for support, is conclusive on the court.

6. Master and Servant 🔑405(5) — Workmen's Compensation — Dependents — Evidence.

The fact that employé signed employment card, stating that no persons were dependent on him, is evidence only as to dependency, and is not conclusive on the issue of dependency.

7. Master and Servant 🔑386(1)—Workmen's Compensation — Compensation in Addition to Burial Expenses.

Under Workmen's Compensation Act, § 15c (2), and section 15c (3), as amended in 1915, in cases of partial dependency the cost of burial may be allowed in addition to the death benefit awarded, while in cases of total dependency such costs may not be allowed in addition to death benefit.

8. Master and Servant 🔑347 — Workmen's Compensation — Statutory Provisions—Compensation—Discrimination.

Workmen's Compensation Act, § 15c (1), (2), as amended in 1915, permitting the allowance of burial expenses in addition to death benefit awarded in cases of partial dependency, but in cases of total dependency not allowing funeral expenses in addition to death benefit, is not invalid by reason of such discrimination, nor because no obviously substantial reason appears for such discrimination.

Writ of review by the Northern Redwood Lumber Company, a corporation, of an award by the Industrial Accident Commission of the State of California to Oliver B. Harvey, applicant. Writ denied, and award of the Industrial Accident Commission affirmed.

Gavin McNab and Oliver B. Wyman, both of San Francisco, for petitioner. Christopher M. Bradley, of San Francisco, for respondent.

HART, J. Writ of review. The applicant, Oliver B. Harvey, was the father of Harry Clifford Harvey, who, on May 19, 1916, was drowned in a mill pond, being at the time in the employ of petitioner, Northern Redwood Lumber Company. The award of the Industrial Accident Commission was in favor of the applicant and against petitioner in the sum of $540.

Petitioner urges two points against the correctness of the award: (1) The evidence does not sustain findings 6 and 7, made by the Commission; and (2) error was committed by the Commission in refusing to allow petitioner credit for $100 expended by it on account of the burial expenses of the employé.

Finding No. 6 is as follows:

"That at the time of said injury the actual wages of the said employé were $2.75 per day, working six days per week, and that therefore his average annual earnings were $825; that the average weekly earnings were $15.87, and that 65 per cent. thereof equals $10.31."

Finding No. 7 is as follows:

"That Oliver B. Harvey, the applicant herein, is the father of said deceased employé, and at the time of his death was partially dependent upon him for support; that the annual amount devoted by the deceased to the support of applicant was the sum of $180, being approximately 21⅘ per cent. of the average annual earnings of said employé, and that such percentage of three times said average annual earnings equals the sum of $540; that therefore applicant is entitled to a death benefit in the total sum of $540, payable by defendant in weekly installments of $10.31 each; and that the amount of such installments now accrued and payable for the period of 14 weeks from the date of death up to and including the 25th day of August, 1916, equals the sum of $144.34."

Petitioner claims that there should have been a finding that deceased "was employed for not to exceed 225 days at $2.75 per day, which would give his annual average earnings at the sum of $618.25," instead of the finding that $825 was the amount thereof; and petitioner further states:

"The Commission arbitrarily took $2.75 and multiplied by 300, as though the case were one falling under section 17a (1) of the statute."

To sustain its position in this respect, petitioner quotes the following testimony given by the applicant, Oliver B. Harvey:

"Q. How many months during the year do you work or did you work for Northern Redwood Lumber Company? A. Eight or nine. Q. He [meaning Harry Clifford Harvey] worked the same season as you did during the year? A. Well, yes; about the same. Q. Eight or nine months? A. Yes, sir."

Respondent replies to the above contention: The average annual earnings of the employé were fixed by the Commission, "not under the provisions of section 17a (1) of the statute, but under the provisions of section 17a (2) of the statute, and there is ample evidential support for the computation under the latter subsection."

The two sections of the Workmen's Compensation Act above mentioned read as follows:

"Sec. 17. (a) The average weekly earnings referred to in section 15 hereof shall be one fifty-second of the average annual earnings of the employé; in computing such earnings his average annual earnings shall be taken at not less than three hundred and thirty-three dollars and thirty-three cents, nor at more than one thousand six hundred and sixty-six dollars and sixty-six cents and between said limits shall be arrived at as follows:

"(1) If the injured employé has worked in the same employment, whether for the same employer or not, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily earnings, wage or salary which he earned as such employé during the days when so employed.

"(2) If the injured employé has not so worked in such employment during substantially the whole of such immediately preceding year, his average annual earnings shall consist of three hundred times the average daily earnings, wage or salary which an employé of the same class, working substantially the whole of such immediately preceding year, in the same or a similar kind of employment, in the same or a neighboring place, earned during the days when so employed." St. 1913, p. 288, as amended by St. 1915, pp. 1086, 1087.

[1] 1. As to the proposition first above stated, it is clear that the basis of computation adopted by the Commission, as evidenced

by its findings, is that authorized by section 17a (2) of the Workmen's Compensation Act, above quoted herein, and that there is evidential support for said computation and finding may be shown by the following testimony given by the witness, L. Everding, secretary of the petitioner:

> "He had worked in the Riverside mill and was employed by the year around. Q. When did Harry Harvey commence work for the company? A. He worked a short time in March, 1914, and then again re-entered our employ in November, 1915. He worked for us in November, December, January, February, March, and April. Q. Up to the time of his death? A. Yes, sir. Q. Now, he got how much per day working for you? A. Two dollars and seventy-five cents working as rigging puller on the pond. Just previous to that he had been working in the mill. Q. At the time of his death Harry Harvey was working at days labor under the classification of rigging puller? A. Well, yes, you will see by his card what his wages were and in what position he was working. Q. What is the average season of employment as rigging puller? A. The average season of employment in the woods consists of about eight months. Q. That is the longest period of time you operate the woods, but you operate the mill a longer period? A. Yes, sir."

Corroborative of said testimony as to the classification or character of the employment to which the deceased was assigned, is the "card" referred to by Everding. This card was, we assume, a printed form, and was used by the petitioner in contracts for the hiring of employés, being perhaps a form or method prescribed by the rules of the Commission for the purpose of indicating the character of the employment in which the employé was hired to engage and of showing the wage he was to receive therefor. The entitlement of said card is: "Application for Employment." It was signed by the deceased employé and showed, among other facts, the following:

> "Name, Harry Harvey. Occupation, rigging puller. Wages per day, $2.75. Age, 24. Are you married? A. No. Number of persons depending on you? A. None."

[2] Thus it is very clear that the Commission was warranted in finding these pertinent facts: That the deceased was employed as a rigging puller, at a compensation of $2.75 per day; that his employment was not "seasonal," or, to be more explicit, for a portion of the year only, but was for "all the year around"; that, when he lost his life, he had not worked in said employment during substantially the whole of the year immediately preceding his death; and that he lost his life while actually engaged in that employment. Under these facts, as found by the Commission, it is manifest that, as before stated, the computation was made in accordance with the terms of subdivision 2a, of section 17 of the act. Indeed, we cannot perceive how it otherwise could justly be made under the evidence, since, as seen, the deceased was employed to perform services which the petitioner's business required to be performed during the entire year, and since, furthermore, the deceased had not "worked in such employment during substantially the whole of" the year immediately preceding the date of his death. In such case, as shown, the Commission is authorized, as it has done in this case, to make an award based upon a computation whereby the actual daily wage shown by the evidence to have been paid the deceased as an employé in the class to which he belonged was multiplied by 300, or approximately, if not actually, the number of working days in a year.

[3] But it appears to be seriously contended by the petitioner that the fact that the computation was so made conclusively shows that the Commission did not in this case intend to apply the second part of subdivision "a" of section 17, inasmuch (so it is declared) as there is no testimony showing—

> "the average daily earnings, wage or salary which an employé of the same class, working substantially the whole of such immediately preceding year, in the same or similar kind of employment, in the same or a neighboring place, earned during the days when so employed."

The argument, stating it in counsel's own language, is:

> "To apply section 17a (2) the record must disclose evidence showing the earnings of an employé of the same class, who did work substantially throughout the whole of the year immediately preceding the injury."

We are not able to accept this construction of said subdivision of the section. What the language of said subdivision was evidently intended to say was that, where the wage or salary of the deceased employé working in the class referred to by said subdivision of the section had not been definitely agreed to and fixed, the wage or salary of an employé of the same class, who had worked at the same or similar kind of employment substantially the whole of the year immediately preceding the death of the employé earned during the days when so employed, should be adopted as the basis of the computation. But where, as in this case, the employé's salary or wage for employment of a certain class is definitely fixed, there is obviously no necessity for any further testimony upon that element of the computation than that of the salary or wage so fixed.

2. As to the alleged error of the Commission in not allowing a credit of $100 expended for funeral expenses, appellant quotes section 15c (3) of said statute, as follows:

> "If the deceased employé leaves no person dependent upon him for support, the death benefit shall consist of the reasonable expenses of his burial, not exceeding one hundred dollars, and such further death benefit as may be provided by law." Stats. 1915, p. 1085.

Petitioner then quotes section 15c (2), upon which it bases its contention, as follows:

> "In case the deceased employé leaves no person wholly dependent upon him for support, but one or more persons partially dependent therefor, the death benefit shall be such percentage of three times such average annual earnings of the employé as the annual amount devoted by the deceased to the support of the

person or persons so partially dependent bears to such average annual earnings: Provided, that the death benefit shall not be greater than a sum sufficient, when added to the disability indemnity which, at the time of the death, has accrued and become payable under the provisions of subsection (b) hereof, together with the reasonable cost of the burial of such deceased employé, not exceeding one hundred dollars, to make the total disability indemnity, cost of burial and death benefit equal to three times his average annual earnings, such average annual earnings to be taken at not less than three hundred and thirty-three dollars and thirty-three cents nor more than one thousand six hundred and sixty-six dollars and sixty-six cents." Stats. 1915, p. 1084.

As seen, the record shows that petitioner and some of the members of his family were "partially dependent" upon the employé for support. Petitioner does not controvert this fact, but states that it paid the cost of burial "upon the belief and understanding that said employé left no one dependent upon him," as stated in the application card above quoted. The solution of this proposition hinges on the true meaning and intent of the statute in that particular, and thus a construction of the above section is necessary.

[4, 5] It may first be observed that whether the petitioner paid the burial expenses under a misapprehension—that is, under "the belief and understanding that said employé left no one dependent upon him"—is a matter which, obviously, cannot justly influence in any measure the determination of the question whether the law, as applied to the facts as found in this case, imposes that burden upon an employer. Of course, it must be conceded that upon the question whether there was any one dependent upon the deceased within the contemplation of the act, there is a direct and positive variance between the oral testimony and the application card; but the latter is not conclusive upon that question. It constituted nothing more than mere evidentiary matter, whose probative value upon the question of dependency was entirely with the commission to determine, and the determination by the Commission, upon what appears to us to be sufficient testimony, that there were certain persons partially dependent for support upon the deceased, is conclusive upon this court.

[6, 7] Taking up, now, the question whether funeral expenses, in addition to the death benefit, are among the items which may legally be allowed as against the employer, it is first to be remarked that, while the language of the law (section 15 of the act, as amended by the Legislature of 1915, Stats. 1915, supra) is not as clear upon this proposition as it might have been made, yet we cannot see how any other construction can reasonably be given that portion of said section relating to funeral expenses than that which is given to it here by counsel for the respondent, viz.: That in cases of partial dependency, the cost of burial may be allowed in addition to the death benefit awarded, while in cases of total dependency such cost may not be allowed in addition to the death benefit. Two of the subdivisions of section 15 refer to and provide for funeral expenses. The first reads as follows:

"(1) In case the deceased employé leaves a person or persons wholly dependent upon him for support, the death benefit shall be a sum sufficient, when added to the disability indemnity which, at the time of death, has accrued and become payable, under the provisions of subsection (b) hereof, including the reasonable expense of his burial, not exceeding one hundred dollars, to make the total disability indemnity, cost of burial and death benefit equal to three times his * * * annual earnings, such annual earnings to be taken at not less than three hundred and thirty-three dollars and thirty-three cents nor more than one thousand six hundred and sixty-six dollars and sixty-six cents."

The second subdivision referring to funeral expenses is "c" (2), above quoted. It is very clear that the intention of the Legislature, as expressed in the above-quoted subdivisions of section 15, was that, in the case of total dependency, funeral expenses are not to be paid in addition to the death benefit allowable under subdivision "b" of said section 15, while in the case of partial dependency, in addition to the death benefit allowable under said subsection, funeral expenses, or the reasonable cost of the burial of such deceased employé, may legally be imposed upon the employer. Indeed, as must become plainly manifest from the reading of the two subdivisions, that intention is with sufficient clearness expressed in the language itself of said subdivisions. The language of the one cannot reasonably be so viewed or construed as to give to it any other meaning than that the expenses of burial, not to exceed the sum of $100, shall be reckoned as a part of the death benefit itself. On the other hand, the language of the second subdivision, "together with the reasonable cost of the burial," etc., means, grammatically, "in addition to"; or, paraphrasing that particular sentence in the second subdivision, the language plainly means:

"Besides the amount of the death benefit awarded, the reasonable cost of the burial of the deceased employé, not to exceed $100, shall be paid."

This, we say, is the meaning of the language as grammatically construed, and we can conceive of no reason for holding that to said language a meaning at variance with that neccessarily following from its construction according to the rules of grammar should be ascribed.

[8] It is obviously not for us to inquire why the Legislature discriminated as to funeral expenses between the two classes of cases dealt with, respectively, by the first and second subdivisions of section 15. It is enough to know, as is clearly true, that the distinction or discrimination thus made is one which the Legislature has the power and the right to recognize and establish. Presumptively there was, in the legislative mind, a sufficient reason for the discrimination, al-

beit such reason may not be manifest upon the face of the statute itself. But, as suggested, whether there exists a substantial reason for the distinction, or whether the same was arbitrarily drawn, the power to make it is nevertheless in the Legislature. In other words, the fact of the discrimination does not render the provisions invalid, nor does the absence of an obviously substantial reason therefor compel, as is true in some cases, a construction of the provisions contrary to the plain grammatical signification of the language thereof.

Our conclusion is that the award should be affirmed, and the writ denied; and it is so ordered.

We concur: CHIPMAN, P. J.; BURNETT, J.

34 Cal. App. 126

INGALLS v. EYRAUD. (Civ. 1836.)

(District Court of Appeal, Second District, California. June 14, 1917.)

1. Bills and Notes 🔑493(3)—Action on Check—Prima Facie Case—Burden to Establish Affirmative Defense.

In suit on a check given as deposit on account of the purchase price of realty sold by plaintiff to defendant, plaintiff's introduction of the check in evidence, and proof of its nonpayment, and that the nonpayment was caused by defendant's orders to the bank, made a prima facie case for plaintiff, casting the burden on defendant to establish his affirmative defense of failure of consideration.

2. Vendor and Purchaser 🔑15—Bills and Notes—Failure of Consideration.

Where plaintiff's title to the realty, which he had contracted to convey to defendant, the contract providing that, if the title should be incurably defective, defendant's deposit should be returned to him, was admittedly imperfect on the only date when he made any offer to convey to defendant, and where, after such time, and before commencement of his action on defendant's deposit check, he conveyed to a third person whatever interest he had in the premises, though his conveyance to the third person was not made until a few days after the expiration of the 30-day period for making good the title named in plaintiff's contract with defendant, the consideration for defendant's deposit check failed, and plaintiff could not recover thereon.

Appeal from Superior Court, Kern County; Howard A. Peairs, Judge.

Action by H. A. Ingalls against A. P. Eyraud. From a judgment for defendant, and an order denying his motion for new trial, plaintiff appeals. Judgment and order affirmed.

T. N. Harvey, of Bakersfield, for appellant. Chas. N. Sears, of Bakersfield, for respondent.

CONREY, P. J. The plaintiff appeals from the judgment and from an order denying his motion for a new trial. The complaint states a cause of action on a check made by the defendant to the plaintiff on the 26th day of March, 1913, for the sum of $500. Thereafter the defendant notified the bank to refuse payment on the check, and payment was refused. The check was given as a deposit on account of the purchase price of real property in the city of Bakersfield, which the plaintiff sold to the defendant. The contract of sale bears the same date as the check, and was made "subject to administration of the John E. Bailey estate." The terms of sale were stated as follows:

> "Two days are allowed to examine title and consummate sale; at the termination of said time the balance of said purchase money is due, and payable upon tender of the deed of the property sold. If title is defective, 30 days are allowed to perfect the same, and if after the expiration of said term (unless extended by mutual consent) the title is incurably defective, then the deposit is to be returned. If the sale is not consummated in accordance with the foregoing conditions, the deposit is to be forfeited. Time is of the essence of this contract, without recourse."

The contract was signed by "H. A. Ingalls, Agent," and by the defendant. It is admitted that at that time the estate of John E. Bailey, deceased, was in process of administration, and that at the time of his death the title to the real property described in the contract was vested in John E. Bailey. The transcript shows that the decree of distribution in that estate was received in evidence, but the contents of the decree are not definitely shown in the record. The defendant's attorney offered in evidence a document, which he described as "the decree of distribution decreeing the property in question here to Matthew Bailey in the estate of John E. Bailey, deceased, on the 2d day of May, 1913." Although the record before us does not in direct terms establish the fact, we might infer, from the course of the testimony and from the argument contained in the briefs, that the decree of distribution contained the necessary words of distribution to Matthew Bailey of the property described in the contract. For the purposes of the argument, let it be assumed that this was the fact.

[1] Appellant introduced the check in evidence and proved its nonpayment, and that the nonpayment was caused by defendant's orders to the bank. This made a prima facie case for the plaintiff, and we agree with his attorney that thereby the burden was cast upon the defendant to establish his affirmative defense, which in substance was that the consideration for the check had failed. On March 28, 1913, plaintiff tendered to the defendant a grant deed purporting to convey to the defendant the property described in the contract, "subject to the administration of the John E. Bailey estate." The defendant refused to accept that deed, and claimed that the grantors then did not have any right to convey. He also informed the plaintiff that he would be satisfied to receive a quitclaim from Matthew Bailey.

The findings of the court state that the plaintiff thereupon admitted the fact to be that he had not good title and could not convey good title to said property, and that the conveyance so tendered did not convey title thereto to defendant, and that the property was pending administration and distribution under the estate of John E. Bailey, deceased; that the plaintiff thereupon informed the defendant that he would cause a good and sufficient deed of conveyance to said property to be executed and delivered to the plaintiff, conveying and vesting good title to the defendant; that the plaintiff at all times has failed, refused, and neglected to furnish or tender and deliver to the defendant any deed of conveyance, not defective, conveying good title to the property described in the contract. These findings are adequately supported by the evidence. The defendant's testimony is positive that no further tender of any deed was made to him by or on behalf of the plaintiff, after the 28th day of March, 1913. It further appears that on May 7, 1913, the plaintiff executed a deed of grant to one S. Owens, conveying the property described in the Eyraud contract, and that in the following month of June Matthew Bailey executed a grant deed granting the same premises to S. Owens. The facts above stated show, not only that the plaintiff's title to the property which he contracted to convey to the defendant was admittedly imperfect on the only date when he made any offer to convey to the defendant, but also that after that time, and before the commencement of this action, he conveyed to a third party whatever interest he had in the premises, and thereby placed it beyond his power to perform his contract with the defendant.

[2] The fact that plaintiff's conveyance to Owens was not made until a few days after the expiration of the 30-day period named in the Eyraud contract does not exempt the plaintiff from the effect of his act in making such conveyance. If his title was "incurably defective," then according to the contract the $500 deposit was to be returned to the defendant. If the defect was capable of remedy, the plaintiff's duty to the defendant with respect thereto was clearly defined. Upon the facts of the case, as shown by the evidence and found by the court, the consideration for the check failed, and the plaintiff was not entitled to recover thereon.

The judgment and order are affirmed.

We concur: JAMES, J.; WORKS, Judge pro tem.

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34 Cal. App. 137

DAVIES v. FISHER. (Civ. 2354.)

(District Court of Appeal, Second District, California. June 15, 1917. Rehearing Denied by Supreme Court Aug. 13, 1917.)

1. Divorce 🔑324—Liability for Support of Child—Statute.

Under a decree of divorce, awarding the custody of the minor child to plaintiff wife, without making any provision for the child's support or maintenance, prima facie defendant husband was relieved from liability on account of any claim for the support of the child, in view of Civ. Code, § 196, providing that the parent entitled to the custody of a child, must give him support and education suitable to his circumstances.

2. Divorce 🔑332—Support of Minor Child—Independent Action Against Father—Supplementary Proceeding.

Under Civ. Code, § 138, giving the court the right at any time during the minority of the children of divorced parents to make an order against the father for maintenance on behalf of the minors, where a mother procured a divorce in Nevada, and the decree awarded her the custody of her minor daughter, making no provision for contribution from the father for her support, and thereafter father and mother became residents of California, the mother, unable to support her child, could bring an action in California for judgment requiring her former husband to contribute to the support of the daughter; the proceeding being such a "supplementary proceeding" as was available to the mother.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by Mabel R. Davies (formerly Mabel R. Fisher) against Walter W. Fisher. From a judgment for plaintiff, defendant appeals. Order affirmed.

Fay R. Robertson, of Los Angeles (John Munro, of Los Angeles, of counsel), for appellant. J. R. Wilder, of Los Angeles, for respondent.

JAMES, J. Plaintiff sought by this action to secure a judgment in part requiring her former husband to contribute to the support of a minor child of the plaintiff and defendant. The court rendered judgment agreeable to the prayer of the complaint as to the maintenance, from which judgment this appeal is taken.

The plaintiff's complaint set forth the date of the marriage of the parties in 1894; the fact that they lived together 14 years, and that for 2 years last past both had been residents of the state of California, and for more than 3 months had been residents of the county of Los Angeles; that on the 4th of March, 1911, the plaintiff had been granted a divorce from the defendant, and gave the name and age of the child which was the issue of the marriage. In the complaint it was then alleged as follows:

> "That said child is in immediate need of money and funds for her care, custody, maintenance, support, and education; that plaintiff has nothing wherewith properly or at all to maintain, or support, or educate said child, and plaintiff avers that unless assistance or funds are immediately available to the use and benefit of said minor, to wit, for her maintenance and support, she will be compelled to subsist upon the charity of friends or such provision as might be forthcoming from the state, her education abandoned, and this plaintiff will be forced to abandon the care and custody of said child; that plaintiff has no money or means with which to prosecute this action; that said defendant is, and at all times herein referred to has been, abundantly able to provide means for the proper maintenance, support, and education of said child, and defendant

does now receive for his salary a sum in excess of $120 per month. * * *"

It was further alleged that demand had been made upon defendant to furnish money and means for the purposes mentioned and that defendant had refused so to do. The prayer included, not only a request for an order for payment of money, both for the maintenance of the child and expenses of suit, but the further prayer was that plaintiff be awarded the care, custody, and control of the minor. In the answer of defendant it was admitted that, at the date stated by plaintiff in her complaint, plaintiff had been granted a divorce from defendant; and the further statement in the answer was that such divorce had been granted "by default * * * on the ground of desertion." Denials were made, meeting the allegations as to the necessities of the child, and as a separate defense it was alleged that shortly after the divorce had been granted to the plaintiff she had married one Davies, and that Davies had received the minor child of plaintiff and defendant into his family and treated said child as his own, and that the child had, after the marriage between plaintiff and Davies, been supported by Davies and the plaintiff. By an amendment to the complaint, the plaintiff set forth the decree of divorce which had been granted to her in the state of Nevada. In this decree it was recited that the court had heard sworn testimony and "proof of service of summons and complaint," and had made findings of fact. Appropriate language to effect a dissolution of the marriage was then set forth, and in conclusion it was ordered "that plaintiff is hereby awarded the care and custody of the minor child, named Marion Fisher, until the further orders of court."

From the record presented it appears that an order to show cause was made herein, and that the defendant appeared and testimony was heard respecting the matters in issue, and that, such matters being submitted to the court, the order followed directing that defendant pay the sum of $20 per month. None of the testimony heard is brought up for examination. As we gather from the printed record, it would appear that the parties submitted the merits of their case upon the order to show cause, although we fail to find any stipulation or appropriate proceeding taken to necessarily indicate that such was the case. However, the order as finally made has the characteristics of a permanent order—in other words, a final judgment. But whether it be deemed an order or a judgment is perhaps immaterial, in view of the fact that the parties on this appeal in their briefs present the main questions involved as though a trial had been fully had on the merits. This condition of the briefs furnishes warrant for us to assume that all facts necessary to support the order or judgment were proved, conditioned, of course, upon it now appearing that under the allegations of the complaint and admissions of the answer plaintiff was entitled to any relief. In the decree of divorce granted to the plaintiff in the state of Nevada it is recited that proof of service of summons and complaint was shown to have been made. We will therefore assume, in so far as it is material here, that the Nevada court acquired full jurisdiction over the subject-matter and person of the defendant.

[1] We then find that the decree, after decreeing that the marriage be dissolved, awarded the custody of the minor child to the plaintiff without making any provision for her support or maintenance. Under such a decree prima facie the husband was relieved from liability on account of any claim for the support of that minor child. It is now well-established law of this state that where, in a decree of divorce, the father is deprived of the custody of a minor child, and no order is made requiring him to contribute toward his or her support, the whole duty of furnishing maintenance to the child rests on the mother. This particularly because of the provisions of section 196 of the Civil Code, which provides that "the parent entitled to the custody of a child must give him support and education suitable to his circumstances." Selfridge v. Paxton, 145 Cal. 713, 79 Pac. 425, and cases therein cited; Ex parte Miller, 109 Cal. 643, 42 Pac. 428; People v. Hartman, 23 Cal. App. 72, 137 Pac. 611. Taking this condition of the law as a basis, counsel for appellant advances one step further, and asserts that, admitting that in an action for divorce the court has authority, when awarding the custody of a minor to the mother, to require the father to contribute to the support of the child (sections 138 and 139, Civ. Code), as the Nevada court, by a decree concededly valid, awarded the custody of the minor in this case to the mother and made no provision for contribution from the father for her support, that decree operated as a final adjudication of the liability of the father, and divested him wholly of any further parental obligation in that direction. It was held in Shattuck v. Shattuck, 135 Cal. 192, 67 Pac. 45, that where a court, acting under section 138 of the Civil Code, in an action for divorce, failed to make provision requiring the father to support minors whose custody are awarded to the mother, no jurisdiction was retained to thereafter add to or modify the decree in such a way as to impose by a judgment such a duty upon the father. It will be found, however, that section 138, Civil Code, was amended in 1905, after the decision above cited was rendered, and that that section now gives to the court the right at any time during the minority of the children to make an order against the father for maintenance on behalf of the minors. So it there-

fore appears that, had the judgment of divorce been rendered in this state, plaintiff would have had the right in the action to move for modification of the judgment and obtain, if the circumstances warranted, precisely the relief that she sought and was given by the order made in this case.

[2] Appellant urges, however, that plaintiff has no standing to prosecute this, an independent action, after having had adjudicated all matters involved in the divorce proceeding. But it appears by the affirmative allegations of plaintiff's complaint that both parties to this action are now residents of the state of California. Plaintiff would be powerless to proceed in the Nevada action and obtain the relief demanded, because personal jurisdiction of the defendant could not there be had. We think this proceeding, while perhaps not cast by the allegations of the complaint in the most direct and convenient form, is one which the plaintiff had the right to avail herself of and which is appropriate under the statutes. In the Matter of McMullin, 164 Cal. 504, 129 Pac. 773, the court there was considering the obligations of the husband where a decree had been granted in Nevada, but no personal service of summons had been made. The decree there purported to give the custody of a minor child to the mother and awarded $100 a month as alimony to the plaintiff. Our Supreme Court held that the decree respecting alimony and the custody of the child could not be enforced in this state because only substituted service of summons was had and no personal jurisdiction of the defendant obtained. The court, however, made this observation:

> "* * * It fell within the power of the wife, under supplementary proceedings brought in this state, with personal service upon the former husband, to have procured, if the facts warranted, an award of the custody of the children, with provision for her own and their support. She did not do this, but resorted to guardianship proceedings, under which, in terms, she was awarded the custody of the persons and estates of the minors. The legal effect, then, of both the Nevada decree and the guardianship decree, was to give the mother the custody and control of the children, without charging upon the husband their support. Under section 196 of the Civil Code this situation prima facie relieves the husband of the duty of support and casts it on the wife. * * * Our law is adequate, but the obvious steps to be taken, and which, if taken, clearly would have fixed the father's duty in this regard, and so made him penally liable for his breach of duty, were disregarded. Instead of resorting to appropriate measures, by proceedings under the Nevada judgment, to straighten the legal tangle which now exonerates the husband from the duty of furnishing such support, resort was had to the criminal court. * * *"

While the Supreme Court has not intimated as to what the particular form of proceeding should have been in order to enable the wife in California to charge the husband with the support of the children, we think that issues were presented in this case which were in general appropriate to the end sought and of which the superior court had jurisdiction. It may be also of interest to note that in the cases cited, particularly where it was declared that divesting of custody without requirement for support in a divorce action freed the offending parent of obligation to contribute, it was assumed, and not contrarily alleged, that the wife had means, if she wished so to employ them, with which to care for the minors left in her custody. We apprehend that, regardless of the legal relations between husband and wife after divorce decree limiting or restricting their liability toward each other, support may be enforced in favor of a minor child from the father, where the situation is, as this case presents it, that the mother is left without means and is wholly unable properly to care for or educate her child. We feel well satisfied that this proceeding, brought in this state, where the complaint, admissions of the answer, and the evidence show the adjudication made in the divorce action in Nevada, and the necessity which has arisen for support to be furnished for the minor, may properly be considered as such a "supplementary" proceeding as is indicated in the Matter of McMullin, supra, to be available to the plaintiff.

The order is affirmed.

We concur: CONREY, P. J.; WORKS, Judge pro tem.

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33 Cal. App. 763

VULCAN FIRE INS. CO. v. JORGENSEN.

(Civ. 2027.)

(District Court of Appeal, First District, California. May 29, 1917. Rehearing Denied by Supreme Court July 27, 1917.)

1. Corporations 🔑80(12) — Subscription for Stock — Special Damage — Averment and Proof.

Where defendant would not have subscribed for stock except for the false statement that a man in whose integrity and business capacity defendant placed special reliance had written a letter advising defendant to subscribe, the subscription could be rescinded without the averment or proof of pecuniary damages.

2. Corporations 🔑80(12) — Subscription for Stock—Rescission—Promptness.

Where subscriber for corporate stock, immediately upon discovery of false representations and within eight days after the making of the contract, wrote a letter repudiating the subscription, he rescinded promptly.

3. Corporations 🔑80(12) — Subscription for Stock—Letter of Rescission—Sufficiency.

A letter of rescission, stating in unequivocal terms that the reason for the rescission was that the subscription was obtained by misrepresentations and fraud on the part of the company's agent, was sufficient, as the company could have learned the details from its agent.

4. Corporations 🔑80(12) — Subscription for Stock—Rescission — Condition Precedent.

Where the corporation had merely undertaken to deliver to the subscriber the stock upon payment of the balance of the purchase price, the rescission by the subscriber ipso facto canceled the obligation of the corporation, and an offer by subscriber to return whatever of value he had received was unnecessary.

5. APPEAL AND ERROR ⟹1050(1)—IMPROPER TESTIMONY—HARMLESS ERROR.

While the suscription sought to be canceled was made by the husband, where husband's testimony that he was induced by untrue representations to enter into the contract was uncontradicted, permitting the wife to state that she relied on the representations was without prejudice.

Appeal from Superior Court, Alameda County; Wm. S. Wells, Judge.

Action by the Vulcan Fire Insurance Company against H. P. Jorgensen, in which defendant filed a cross-complaint. From a judgment for defendant, and from an order denying a new trial, plaintiff appeals. Affirmed.

Otto Irving Wise, of San Francisco, for appellant. Peck, Bunker & Cole and Henry C. McPike, all of Oakland, for respondent.

LENNON, P. J. In an action to recover the balance due from the defendant upon a subscription to stock in the plaintiff corporation, the defendant denied liability, and in a cross-complaint averred that he had rescinded his contract of subscription sued upon because of certain fraudulent representations of the plaintiff's agent by which it was induced, and prayed judgment for the recovery of the amount paid by him upon said subscription. The court rendered judgment in defendant's favor, and granted him the relief sought by his cross-complaint, basing its judgment upon findings, among others, as follows:

"In procuring said subscription the plaintiff was represented by and acted entirely through one J. B. Harper. * * * On said last-named day said J. B. Harper * * * went to the ranch and home of the defendant in the county of Merced, * * * and as an inducement to defendant to subscribe for said capital stock stated to defendant as follows: That one J. F. Carlson, the president of the Central National Bank in the city of Oakland, had given to said Harper, as the agent and representative of plaintiff, a letter directed to defendant, advising the defendant to become a purchaser and subscriber for capital stock in Vulcan Fire Insurance Company, plaintiff herein, and that by some oversight he, the said Harper, had left said letter in his hotel, and that said J. F. Carlson was very angry with said Harper because he had not before solicited the subscription of defendant. That said Carlson was going to quit his position with said Central National Bank in Oakland within six months and take complete and active charge of the business of plaintiff and do nothing else. That said Carlson was head of plaintiff at that present time, but was not willing the general public should know about it, and that in accordance with the directions of said Carlson he, said Harper, had come to obtain defendant's subscription to said stock.

"At the time of the making of the aforesaid statement and representations, said J. B. Harper well knew that said defendant placed great reliance upon the business sagacity of said J. F. Carlson and in his judgment as a business man, and also held the said J. F. Carlson in high esteem as a friend, and if defendant could be induced to believe that said Carlson had given a letter to Harper directed to defendant, advising defendant to subscribe for capital stock in said plaintiff corporation, and that said Carlson was anxious for defendant to do so, and was angry with said Harper because he had not before that time solicited said subscription from defendant, and that said Carlson was going to quit his position with said Central National Bank within six months and take complete and active charge of the business of plaintiff and do nothing else, and that said Carlson was at the head of plaintiff at that present time but was not willing the general public should know about it, and that in accordance with the directions of said Carlson Harper had come to obtain defendant's subscription for said stock, said defendant would subscribe for the same; and the said statements and representations were so made by the said Harper with the design and for the purpose of obtaining from said defendant said subscription.

"The said defendant believed the said statements * * * and relied upon the said statements and all of them, and believing the same and relying upon them the said defendant then and there paid to the said Harper, as agent and representative of plaintiff, the sum of $750, being $5 per share upon 150 shares of the capital stock of plaintiff for which said defendant then and there subscribed and agreed to pay to plaintiff the further sum of $3,000, the balance of said subscription price.

"The said statements hereinabove referred to * * * were and each of them was false and untrue, and the said Harper * * * well knew that the same and each of them was false and untrue, and he well knew that the said defendant believed the said statements to be true and that he relied upon them and each of them as being true, and was induced by them and each of them to pay the said sum of money * * * to plaintiff, and became a subscriber for said 150 shares of stock believing and relying upon the said statements, and there was no other inducement to the said defendant than as hereinabove stated to become the subscriber for said stock, and each and all of said representations were untrue and were material, and, without the said statements and representations so made to the defendant, said defendant would not have paid to said Harper for plaintiff or to the plaintiff said sum of $750, or become a subscriber for said capital stock."

The court also found that the defendant, upon discovering the falsity of the representations, promptly rescinded his subscription, and, having reference to the duty of one seeking to rescind a contract, to return to the other party to it anything received under it, found that the defendant had received nothing.

In urging a reversal of the judgment and order denying its motion for a new trial the plaintiff makes several contentions, viz.: (1) That the record contains no allegation, evidence, or finding that the cross-complainant was in any way pecuniarily damaged by the alleged false representations; (2) that he failed to rescind promptly upon discovery of the facts entitling him to rescind; (3) that the notice of rescission by the cross-complainant was insufficient for various reasons, but chiefly because it failed to state the grounds upon which the right was attempted to be exercised; (4) that the defendant lost his right to rescind because he did not offer to return whatever of value he had received; and (5) errors of law in the admission of certain testimony.

1. Addressing ourselves to the first of these contentions, in an action such as this, where the defendant and cross-complainant merely recites the payment of his subscription and asks for its rescission, an allegation or proof of pecuniary damage sustained by him is not necessary. The author of Cook on Corporations, speaking of the rescission of a subscription to corporate stock, says:

> "It is the duty and right of directors, without waiting for a bill in equity or other legal proceedings, to revoke a subscription contract, and remove from the stockholders' list the name of a subscriber who reasonably proves that he was induced to subscribe by fraudulent representations chargeable to the corporations and who requests a rescission of the subscription. * * * Where, upon such a demand being made by a subscriber, the directors refuse to dissolve the subscription contract, the subscriber need not always resort to a bill in equity to have the contract set aside for fraud. A mere notification to the corporation is generally sufficient.
>
> "Sec. 154. The most common remedy of a subscriber induced by fraud to subscribe is to wait until the corporation brings suit to collect the subscriptions, and then to set up the fraud as a defense. Nearly all the cases in this country are cases where this remedy has been adopted. * * *" Cook on Corporations, §§ 153 and 154, p. 422, vol. 1.

That such misrepresentations as are complained of in the case at bar are sufficient to entitle the subscriber to rescind, without proof of pecuniary damage suffered, is well settled. At section 145 (page 410) of the work just referred to the author says:

> "Any false statement by the authorized agents of a corporation in regard to the past or present status of the corporate enterprise or material matters connected therewith, whereby subscriptions are obtained, is a fraudulent representation. Thus, a false statement that * * * certain individuals are directors * * * has been held to constitute a fraudulent representation entitling the subscriber induced thereby to subscribe to the remedies provided for him by law in such cases"

—citing Blake's Case, 34 Beav. 639; Munster's Case, 14 W. R. 957; In re Metropolitan, etc., Ass'n, 64 L. T. Rep. 561; Ex parte Brown, 95 L. T. Rep. 756.

The rule announced was followed in the case of Coles v. Kennedy, 81 Iowa, 360, 46 N. W. 1088, 25 Am. St. Rep. 503. There one of the representations by which the complaining subscriber had been induced to take the stock was that one L. H. Mallory, a resident for many years of the community and known as a man of large business experience and capacity and a successful business man, had subscribed for 5,000 shares in the company, whereas in truth he was given the stock for the influence of his name in procuring subscriptions. In speaking of this feature of the case the court said:

> "The fact that Mr. Mallory was not to pay for his stock was concealed from the appellee. To have disclosed it would have been to defeat the very purpose for which the 5,000 shares were given to Mallory. We have no doubt but the belief that Mr. Mallory had subscribed for 5,000 shares of the stock, and that he had or was to pay for the same, operated as an inducement to appellee to subscribe for the stock, and execute the contract in question. This was such a fraud as cannot have the approval of a court of equity, and for which the contract induced by it should be canceled and held for naught."

[1] In the case at bar it plainly appears that the sole inducing cause of the subscription was the false statements as to the connection of Mr. Carlson with the corporation plaintiff—a man in whose integrity and business capacity the respondent placed special reliance. We think it clear that such a subscription could be rescinded without the subscriber averring or proving pecuniary damage.

[2] 2. The second contention of the appellant, that the respondent failed to rescind promptly, is also, we think, untenable. The evidence shows that immediately upon discovering the falsity of the representations and within eight days of the making of the contract of subscription the respondent wrote to the president of the company repudiating the contract.

[3] 3. Nor do we think that the appellant's third contention can be upheld. The letter of rescission unequivocally stated that the reason for this action on the part of the respondent was that the subscription had been obtained by misrepresentation and fraud on the part of the company's agent. It is true that the specific misrepresentations complained of were not enumerated, and that no reply was vouchsafed by the wife of the respondent to a letter written to her by the attorney of the appellant inquiring of what they consisted. But the most detailed enumeration of those representations would not have made the attempted rescission more unequivocal, although undoubtedly the possession of them would have enabled the plaintiff to form an opinion as to whether the respondent's withdrawal from his contract was justified. The appellant, however, had other means of finding out what these representations were, inasmuch as they were made by its own agent, and we cannot assume that the agent would not have disclosed them to his principal upon the latter's demand. In the case of Savage v. Bartlett, 78 Md. 561, 28 Atl. 414, speaking of the rights of a stockholder with regard to a corporation to the stock of which he has subscribed, induced by false representations, the court says:

> "A notice to the company that he rescinds the subscription, giving the reasons therefor, is sufficient."

[4] 4. Nor can we give our adherence to the appellant's fourth contention. The respondent, having received nothing from the appellant, could return nothing. The appellant had merely undertaken to issue a certain number of shares of stock upon payment of the balance of the purchase price. While this was a contingent obligation on the part of the corporation, it was ipso facto canceled upon the rescission by the stockholder of his subscription, and the corporation was thereby placed in the same position as if stock issued by it had been returned by the subscriber. The argument that a certain number of shares had been "set aside" for the sub-

scriber, and that the latter therefore had received something which he failed to return, has not even the merit of plausibility.

[5] But one other point made by the appellant requires mention. The respondent's wife was a witness at the trial on his behalf, and, over the objection of the appellant, was permitted to answer affirmatively the following question:

> "Did you rely on a statement of Mr. Harper that he had a letter from Mr. Carlson and that Mr. Carlson was to be president of the Vulcan Fire Insurance Company prior to your subscribing for this certificate of stock?"

The objection was that the question was incompetent, irrelevant, and immaterial, and assumed facts not in evidence. While the subscription sought to be canceled was one made by the husband, and therefore ordinarily it would be immaterial what effect the representations made in obtaining it had upon the wife, it sufficiently appeared that the wife was present at the interview between the agent and her husband and took an active part therein. The company's reply to the letter of cancellation was addressed to her, and was couched in such terms as if she were the active head of the marital community whose funds had been invested in the stock; and it was quite apparent from the evidence of the whole transaction that when the company's agent in his efforts to sell the stock to the respondent had won the lady over he had gained three-fourths of the battle. But quite apart from this the evidence of the husband that he was induced by the agent's untrue representations to enter into the subscription contract was uncontradicted, so that, even if the court ought not to have permitted this question to be answered, its action in so doing cannot be held to have caused any prejudice to the appellant.

For the reasons given, the judgment and order are affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

(34 Cal. App. 143)

ROBERTSON v. DREW. (Civ. 1895.)

(District Court of Appeal, First District, California. June 16, 1917. Rehearing Denied July 16, 1917.)

1. LANDLORD AND TENANT 🔑83(1)—LEASE—CONSTRUCTION—"RENEWAL OF LEASE."

A covenant providing for the "renewal of a lease" at the option of the lessee imports the giving of a new lease; but what is meant by the quoted words may depend upon a reading of the whole instrument and the practical construction given it by the parties.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Renewal.]

2. LANDLORD AND TENANT 🔑83(1)—LEASE—CONSTRUCTION—NEW LEASE.

Plaintiff leased certain premises to defendant for one year from August 11, 1913, with the privilege to defendant of "renewing the lease" for a further term of from one to five years. On August 11, 1914, defendant wrote to plaintiff that he had elected to take the premises for two years. On August 21st, the plaintiff replied, stating that, if defendant called at the office, "we will fix you up." Defendant did not call, but remained in the premises, paying rent as before, until the January following, when he gave up possession without the consent of plaintiff. The premises remained unoccupied until August 14, 1916, and the plaintiff seeks to recover rent for such period. *Held*, that construction given lease by parties negatives theory that lessee, could on mere notice or by remaining in possession, hold the premises for an additional period under the original lease.

3. LANDLORD AND TENANT 🔑72 — LEASE—TERMINATION—TIME.

Defendant was in possession of the premises when the lease was made, and the receipts for the rent were made to run from the 11th of one month, inclusive, to the 11th day of the next month, exclusive. *Held*, that the lease had terminated before defendant's letter was written.

4. LANDLORD AND TENANT 🔑83(2)—RENEWAL OF PRIVILEGE — AFTER EXPIRATION OF TERM.

Where one desires to avail himself of the privilege of renewing or extending a lease, he must exercise that right before the expiration of the original term.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by M. Robertson against J. S. Drew. Judgment for defendant, and plaintiff appeals. Affirmed.

Jas. H. Boyer, of San Francisco, for appellant. E. M. Leonard, of San Francisco, for respondent.

KERRIGAN, J. Plaintiff prosecuted this appeal from a judgment in favor of the defendant in an action on a lease to recover rent. In August, 1913, plaintiff leased certain premises to the defendant for the term of one year from August 11, 1913, with the privilege to defendant of "renewing the lease" for a further term of from one to five years. On August 11, 1914, the defendant wrote a letter to the plaintiff, stating in part that he had elected to take the premises for a further period of two years. On August 21st the plaintiff replied to this letter, saying: "If you will call at the office, we will fix you up." Defendant, however, did not call, but remained in the premises, paying the same rent as before, until the month of January following, when he gave up possession without the consent of the plaintiff. The premises remained unoccupied until August 14, 1916. It is sought in this action to recover an amount representing rent payable up to the date last mentioned, under the claim that by the foregoing correspondence the lease had been renewed for the term indicated.

[1] First in order of presentation and importance is the question whether the term of the lease was so extended. There appears by the decided cases to be a clear distinction between the meaning of the expressions "renewing a lease" and "extending the term" thereof. A covenant providing for

the renewal of a lease at the option of the lessee imports the giving of a new lease; but where the option given is for an extension of the term the lessee upon notice, if notice is required, or by remaining in possession if no notice is required, is entitled to hold for the additional period. But as to what is meant by the expression "renewal" of a lease in a given case may depend upon a reading of the whole instrument in which it occurs, and upon the practical construction given to its provisions by the parties themselves. Shamp v. White, 106 Cal. 220, 39 Pac. 537; Howell v. City, etc., 165 Cal. 174, 131 Pac. 130.

[2] In the case under consideration the language of the contract is "renewal of the lease"; and, moreover, the practical construction given its provisions by the parties to it indicates quite plainly, we think, that a new lease was contemplated if the lessee availed himself of his option. In this connection it is significant that the lessee directed that the sum of $100, which was held by the lessor as security for the faithful performance by the lessee of the covenants of the lease, be applied to the payment of the rent for the last two months of the term. In the letter of the defendant already referred to, written on August 11, 1914, he stated:

> "My lease, dated August 11, 1913, for one year, having terminated, I desire a renewal of the same for two years, with an additional option of two years at the same rent."

And he then proceeds to ask that certain small structural changes in the premises be made, to be provided for in the "new contract," and closes the letter with a request that the plaintiff telephone him on receipt of the letter if he wishes to discuss the matter further. Ten days later the plaintiff replied, saying, as above indicated:

> "In reference to renewing your lease, if you will kindly call at the office, we will fix you up properly."

We think these circumstances negative the theory that the parties understood that the defendant was entitled upon mere notice, or by remaining in possession, to hold the premises for an additional period under the original lease.

[3, 4] Moreover, we think the lease had terminated before the letter relied upon by defendant was written. Where one desires to avail himself of the privilege of renewing or extending a lease, he must exercise that right before the expiration of the original term. San Pedro Salt Co. v. Hauser Packing Co., 13 Cal. App. 1, 108 Pac. 728. Here, while the lease reads for one year from the 11th day of August, 1913, to the 11th day of August, 1914, the defendant was in possession of the premises when the lease was made, and the receipts for the rent, it appears, were made to run from the 11th day of one month, inclusive, to the 11th day of the next month, exclusive. It would be difficult in the face of these circumstances to hold that the lease did not commence on the day of its date. In McGlynn v. Moore, 25 Cal. at page 390, "to have and to hold * * * from the 1st day of July, 1859, * * *" rent "payable * * * on the last day of each and every month, * * *" was held to include the 1st day of July; the court saying:

> "The old rule doubtless was to exclude the day of the date in all cases where the holding was from a given date, but since the decision of Pugh v. Duke of Leeds, Cowper, 714, the word 'from' has been construed as exclusive, or inclusive, as would best express the intention of the parties, to be gathered from the whole instrument; the court holding that the word 'from' may, in vulgar use, and even in strict propriety of language, mean either inclusive or exclusive."

In McAdam's Landlord & Tenant, vol. 1, p. 178, it is said:

> "A lease which by its terms extends for one year 'from the date thereof,' the lessee going into possession on the day of its execution, will be deemed by practical construction of the parties to include the day of its execution, and the term will expire at midnight on the day preceding that date in the following year."

For the foregoing reasons, the judgment is affirmed.

We concur: RICHARDS, J.; BEASLY, Judge pro tem.

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34 Cal. App. 134

MORSE v. SAN DIEGO HIGH SCHOOL BOARD OF EDUCATION OF CITY OF SAN DIEGO et al. (Civ. 2322.)

(District Court of Appeal, Second District, California. June 15, 1917. Rehearing Denied by Supreme Court Aug. 13, 1917.)

1. Schools and School Districts 🔑141(5) — Discharge of Teachers — Powers of Court.

Under Pol. Code, § 1617, subd. 7, subtit. "b," as to employment of teachers, the board of education may dispense with the services of a teacher without making charges against his competency or character.

2. Schools and School Districts 🔑141(5) — Discharge of Teachers — Powers of Court.

Under Pol. Code, § 1617, subd. 7, subtit. "b," the sole condition to validity of the discharge of a teacher by the board of education is that due notice, on or before the 10th day of June, of the fact that the services will not be required for the ensuing year, be given.

3. Schools and School Districts 🔑141(1) — Discharge of Teachers — Powers of Court.

Since the board of education could validly discharge a school-teacher without a hearing, the mere fact that there was a conspiracy between certain members of the board to discharge plaintiff would not render the discharge unlawful, or beyond the powers of the board.

4. Schools and School Districts 🔑141(5) — Discharge of Teachers — Powers of Court.

The mere fact that a rule of a subcommittee of the board of education, requiring notice that it would not recommend a teacher for re-election, was not complied with, did not invalidate the discharge of a teacher by the board.

Appeal from Superior Court, San Diego County; W. A. Sloane, Judge.

Mandamus by John H. Morse against the San Diego High School Board of Education of the City of San Diego and the High School District of the County of San Diego. From judgment of dismissal, plaintiff appeals. Affirmed.

F. F. Grant, of San Diego, for appellant. Spencer M. Marsh, of San Diego, for respondents.

JAMES, J. This is an appeal from a judgment of dismissal, following the sustaining of a demurrer to the plaintiff's complaint. The plaintiff asked for a writ of mandate to compel the issuance to him of a salary warrant to which he claimed to be entitled under an alleged employment as teacher in the San Diego high school. The chief question to be decided is as to whether a city board of education has the right at the end of a school year to discharge a high school teacher at its discretion and without assigning cause therefor. Plaintiff by his complaint showed that he had been employed during the school year of 1915–16 as a teacher in the high school of the city of San Diego; that on May 16, 1916, the board of education gave notice of its determination that his services would not be required for the ensuing school year. It was further alleged that this notice was void, and did not have the effect of terminating the employment of the teacher. Some other matters are set forth in the complaint which will hereinafter be referred to.

[1] It is argued on behalf of the appellant that no authority resides in a board of education, as conferred by the statutes of the state, to dispense with the services of a teacher without making charges against the competency or character of such teacher—in other words, that the teacher, having once been employed, cannot be dislodged from his position, except for cause. Appellant's counsel argues that to permit such a thing to be done is contrary to the principles of the system of civil service, although he does not point to any provision of law which shows that the privileges or requirements of a civil service system have been extended to teachers in the public schools, unless section 1617 of the Political Code, subtitle "b" of subdivision 7, operates to have that effect. We have examined that section with much care, and in our opinion to give it the effect argued for by appellant would be to "legislate judicially" and import by construction provisions not found within the terms of that section, thus imposing upon the law a clearly forced interpretation. The language of the subtitle to which we have referred confers authority on boards of education:

"To employ the teachers, and immediately notify the county superintendent of schools, in writing, of such employment, naming the grade of certificate held by the teacher employed; also to employ janitors and other employés of the school; to fix and order paid their compensation, unless the same be otherwise prescribed by law: Provided, that no board shall enter into any contract with such employés to extend beyond the close of the next ensuing school year, *except that teachers may be elected on or after June first for the next ensuing school year, and each teacher so elected shall be deemed re-elected from year to year thereafter unless the governing body of the school district shall on or before the tenth day of June give notice in writing to such teacher that his services will not be required for the ensuing school year.* * * *"

[2] We have italicized that portion of the section most important to be considered here. To our minds, the right of a board of education to dispense with the services of a teacher at the close of any school year is only contingent upon the notice being given as above prescribed, and which it is admitted by the allegations of the complaint herein was given to this plaintiff. The matter of providing instructors in the public schools has not as yet been deemed appropriate by the law to be placed under civil service rules, and there appears very good reason for the exception. The desire of the governing bodies of school districts, presumptively at least, is to secure the best of instructors for the students, and while a teacher or instructor, once employed, may, so far as his or her general qualifications are concerned, be competent, it may so happen that instructors or teachers may be available who possess more extensive knowledge and under whose instruction better educational results can be secured. If, having once employed a teacher, a board of education is powerless to dislodge him from his position, except for cause, then, where the opportunity is presented for a betterment in the direction suggested, nothing can be done, and the best interests of the school will consequently suffer. This may present an abstract argument, for as we view the language used in the provision cited, no room is left for debate as to the meaning of the section.

[3, 4] We have referred to the fact that the complaint contained other allegations as to certain matters. Those matters, as set forth, are that there was a conspiracy among the members of the board of education to deprive the plaintiff of his position, and also that a certain rule of the high school board declared that a committee on teachers should give notice to all teachers whom they did not intend to recommend for re-election, at least five days before presenting their report to the board for action. It was alleged, further, that this five-day notice from the committee on teachers had not been given. As to whether there was a conspiracy among the members of the board of education is wholly immaterial, in view of the authority of the board to dispense with the services of any teacher at the end of any school year without assigning cause or reason therefor. As to whether a teachers' committee was required to give notice that they did not intend to recommend the re-election of teach-

ers also appears to us to be immaterial. Any rule governing a subcommittee of the board of education certainly would not have the effect to qualify the authority of the board itself as given by the statute.

From the conclusions expressed, it follows that the demurrer was properly sustained, and the judgment which was entered upon the failure of plaintiff to amend was a necessary consequence of the legal condition presented.

The judgment is affirmed.

We concur: CONREY, P. J.; WORKS, Judge pro tem.

33 Cal. App. 800

ASH et al. v. SUPERIOR COURT OF SAN BERNARDINO COUNTY et al.

(Civ. 2347.)

(District Court of Appeal, Second District, California. May 31, 1917.)

Elections ⟹108—Registration of Voters—Cancellation Proceedings—Parties—"May"—"Must."

In proceedings under Pol. Code, § 1109, to compel the clerk to cancel any entry made on the great register illegally, or that ought to be canceled by reason of facts that have occurred after such entry, if the person whose name is sought to be canceled be not a party, the court "may" order him to be made a defendant, and section 1111, providing that in such action as many persons as there are causes of action against may be joined as defendants, to obtain cancellation of registrations on the ground stated in the first section, the provisions of section 1111 are mandatory, the word "may" meaning "must," and the court has no authority to cancel registrations until the parties whose certificates were sought to be canceled appeared or were made parties defendant and served with lawful process.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, May, Must.]

Prohibition by Guy L. Ash and others against the Superior Court of the County of San Bernardino and H. T. Dewhirst, Judge thereof. Peremptory writ issued.

Ralph E. Swing and Frank T. Bates, both of San Bernardino, for petitioners. H. T. Dewhirst, of Redlands, in pro. per. Cecil H. Phillips, of San Bernardino, for respondents.

CONREY, P. J. On the 27th day of March, 1917, an action was commenced in the superior court of San Bernardino county by Grant Holcomb and others, electors in the city of San Bernardino, against the county clerk of San Bernardino county to compel the clerk to cancel certain registrations of voters. The action was instituted in accordance with section 1109 of the Political Code, which reads as follows:

> "Any person may proceed by action in the superior court to compel the clerk to cancel any entry made on the great register illegally, or that ought to be canceled by reason of facts that have occurred subsequent to the time of such entry, but if the person whose name is sought to be canceled be not a party to the action, the court may order him to be made a party defendant."

Section 1111 of the same Code reads as follows:

> "In an action under the authority of section eleven hundred and nine, the clerk and as many persons as there are causes of action against may be joined as defendants."

The object of the action was to obtain cancellation of registrations of three groups of persons separately listed in Exhibits A, B, and C of the complaint. It was alleged that each of the persons named in Exhibit A does not reside in and has removed from the precinct within which his affidavit of registration stated that he resided at the time of registration. As to each of the persons named in Exhibit B, it was alleged that the affidavit of registration fails to show whether or not the registering person is able to read the Constitution of the United States. As to each of the persons named in Exhibit C, it is alleged that his affidavit of registration stated a place of residence of the registering person which in fact was conducted as a lodging house, but did not show what room or floor of such house of residence the registering person occupied; that as to each of the persons named in Exhibit C he was not in fact the proprietor or head of or the husband or wife of the proprietor or head of said house. The affidavits of registration referred to of the persons listed in Exhibits B and C were defective in that they failed to show facts which are required by the provisions of section 1096, subds. 7 and 2, of the Political Code.

Petitioner Guy L. Ash is one of the persons named in Exhibit A; petitioner Mrs. Irene Hansen is one of the persons named in Exhibit B; and petitioner Frank Pohlmann is one of the persons named in Exhibit C. They present this petition on behalf of themselves and many other of the persons named in said exhibits. None of said persons are parties named in the complaint in the action of Holcomb v. Patty, and none of them have been ordered to be made parties defendant. The superior court in that action did, on March 27, 1917, make an order that the persons named in said exhibits appear before the court on April 5, 1917, and show cause why their registrations should not be canceled, and that notice of such order be served by mailing a copy of the notice to each of those persons at least five days before April 5, 1917. Aside from this procedure, no service of process has been made upon any person other than the county clerk, who is the sole party defendant. The order to show cause and the mailing of notices in the manner required by said order of court did not constitute any process of law which may be recognized as applicable to the case, and cannot be recognized as having any effect to bring those persons within the jurisdiction of the court.

The clerk has filed his answer in that action, and, unless prohibited from so doing, the superior court will proceed to hear and determine the action without making said persons defendants and without service of any lawful process upon them or any of them.

Petitioners claim that the superior court is without jurisdiction to proceed against the clerk alone and order the cancellation of the registrations of the petitioners or any of the persons represented by them in this proceeding. The argument is that each registered voter has a vested right to have his name remain upon the register until it shall be removed by lawful authority; that therefore in any action to cancel the registration of his name he is a necessary party, and judgment adversely affecting his status as a registered voter cannot be rendered unless he has been served with summons or has voluntarily appeared in the action. It is further claimed that as to registered voters belonging to any of the classes comprised within said action, the provisions of section 1111 are mandatory; that the statement in that section that "as many persons as there are causes of action against may be joined as defendants" should be construed as reading to the effect that such persons "must be joined as defendants." In this contention we agree with the petitioners. Primarily the register of elections is a public record created for the purpose of identifying qualified electors, in order to safeguard elections and preserve the purity of the ballot box. But it is equally true that a qualified elector who complies with the law has the personal right to have his affidavit of registration received and filed, and that it shall for the lawful period remain a part of the register. After his affidavit has been received and has become a part of the register of elections, he cannot be deprived of this right without some procedure which complies with the requirements of due process of law. In Pohlmann v. Patty, 165 Pac. 447, we said that in determining the sufficiency of the affidavits the acts of the clerk are of a judicial nature, and before accepting them it is his duty to pass upon the certificates and see that they are sufficient in form.

> "His acceptance of the certificates amounts to a judgment making them a part of the great register. Thereupon the qualified voter becomes entitled to have his name upon the great register, and the clerk is not vested with authority to thereafter remove it therefrom. If subsequently there should occur any facts of the description contained in section 1106 of the Political Code, that section states that the clerk must cancel the registration, or, if any facts occur which result in a judgment of cancellation of a registration, it may be eliminated * * * as provided by section 1109 of the Political Code."

There may be instances in which the action authorized by section 1109 of the Political Code may be prosecuted and a valid judgment rendered compelling the clerk to cancel registrations without bringing in as party defendant any person other than the clerk. This would seem necessarily to be so in case of the death of the person registered. But, whatever may be said of other instances of cancellation of registrations as provided by section 1106 of the Political Code, we think that the power of cancellation of a completed registration without notice to the person whose registration is sought to be canceled cannot be exercised arbitrarily and without notice under any of the circumstances included within the action now pending in the superior court. If the clerk should wrongfully attempt to cancel a registration, there would be a remedy by writ of mandamus to compel him to restore the name to the register. But if it be held that a valid judgment may be entered compelling the clerk to cancel a registration in an action wherein the person affected is not made a party defendant, such judgment would effectively stand in the way of any procedure against the clerk to compel recognition of the registered person's rights. He would have been deprived of a vested right without any opportunity to defend that right, and yet there would be no further legal remedy. To this it is no answer to say that he may then have his name restored to the register by filing a new affidavit of registration; for the wrong may have been done during those days preceding an election when by law the right of registration is suspended.

We may say here, as was said by the Supreme Court of New York in a similar case, that if the statute may be properly construed to give a judge the right to prevent any person from voting by striking his name from the register as under the existing law the names of voters must be registered for a specified period of time prior to an election, without adequate procedure to bring such person before the court, "then the provision is of a sweeping and revolutionary character, and dangerous in the extreme. * * * Such a power, so construed, would be unconstitutional as to its exercise, would deny the right of suffrage granted by the Constitution of the state, and would leave the election * * * entirely within the power of state judicial officers." In re Ward (Sup.) 20 N. Y. Supp. 606.

It is ordered that the peremptory writ issue prohibiting the respondent court and the judge thereof from canceling or ordering to be canceled any of the affidavits of registration of the petitioners herein or of any other of the persons mentioned in and referred to in their petition, except such of those persons as shall have appeared therein or have been duly made parties defendant and served with lawful process within due time prior to the time of the hearing of said action in the superior court.

We concur: JAMES, J.; SHAW, J.

33 Cal. App. 792

BOSS v. LEWIS et al. (Civ. 2305.)

(District Court of Appeal, Second District, California. May 31, 1917. Rehearing Denied by Supreme Court July 30, 1917.)

1. COUNTIES ⚷153½—VITAL STATISTICS—STATUTE—CONSTITUTIONALITY.

St. 1915, p. 575, § 3, provides that the state shall be divided into registration districts. Section 4 provides that the clerk of each city shall be the local registrar in and for such primary registration district, etc. Section 20 provides that each local registrar shall be paid 25 cents for each birth certificate, etc., and that all amounts payable to a local registrar shall be paid by the treasurer of the county in which the district is located "upon certification by the state registrar." Const. art. 11, § 13, provides that the Legislature shall not delegate to any special commission or individual any power to in any way interfere with any county, city, etc. *Held*, that the sections of the act cited are not in violation of the constitutional provision cited, it not being an attempt on the part of the Legislature to delegate to a private individual the power to appropriate and interfere with county money.

2. COUNTIES ⚷153½—CONSTITUTIONAL LAW—STATUTE—POLICE POWER.

Const. art. 11, § 12, provides that the Legislature shall have no power to impose taxes upon counties, etc., for county, city, town, or other municipal purposes, but may by general laws vest in the corporate authorities power to assess and collect taxes for such purposes. Const. art. 13, § 14, provides a method of raising money for state purposes. *Held*, that the requirement that the fees of local registration be paid out of the county treasury is not in conflict with the constitutional provisions cited; it being an appropriate exercise of the police power of the state.

Application for writ of mandate by W. H. Boss against Walter A. Lewis, as County Auditor, and John N. Hunt, as County Treasurer. Peremptory writ issued.

Kemper B. Campbell, of Los Angeles, for petitioner. A. J. Hill, County Counsel, and Roy V. Reppy, Asst. County Counsel, both of Los Angeles, for respondents.

CONREY, P. J. The petitioner is the city clerk of the city of Huntington Park, a city of the sixth class. As such city clerk he is local registrar for the primary registration district comprised within the city of Huntington Park, as provided by chapter 378, found at page 575 et seq. of the Statutes of 1915. In this proceeding he seeks to compel the county auditor of the county of Los Angeles to issue his warrant payable out of the county treasury for certain fees to which the petitioner claims to be entitled under the provisions of that act, and to compel the county treasurer to pay the same.

For convenience we will designate the statute as the vital statistics act.

The state board of health is an official body authorized by article 20, § 14, of the state Constitution, and established in accordance with certain provisions of the Political Code. Pol. Code, §§ 2978–2984. The Code sections authorize the state board of health to appoint a secretary, whose duties are duly defined and who is a civil executive officer. In the vital statistics act it is provided that the secretary of the state board of health is ex officio state registrar of vital statistics, and that he "shall have full supervision and control over the central bureau of vital statistics which is hereby authorized to be established by said state board of health." It is directed that the state board of health shall appoint a competent vital statistician and a clerk, and "shall provide for such clerical and other assistants as may be necessary for the purposes of this act." It is provided that the state registrar shall have charge of the registration of births, marriages, and deaths; and that the state board of health shall be charged with the uniform and thorough enforcement of the law throughout the state, and shall promulgate any additional rules or regulations.

Certain portions of the vital statistics act read as follows:

> "Sec. 3. For the purposes of this act the state shall be divided into registration districts as follows: Each city and county, city and incorporated town and each county exclusive of the portion included within cities and incorporated towns shall constitute a primary registration district.
>
> "Sec. 4. * * * The clerk of each city * * * shall be the local registrar in and for such primary registration district and shall perform all such duties of local registrar as hereinafter provided. * * *"
>
> "Sec. 20. Each local registrar shall be paid the sum of twenty-five cents for each birth certificate and each death certificate properly and completely made out and registered with him, and correctly recorded and promptly returned by him to the state registrar, as required by this act. * * * All amounts payable to a local registrar under the provisions of this section shall be paid by the treasurer of the county in which the registration district is located, upon certification by the state registrar. * * *"

The duty of county auditors to issue warrants in favor of persons entitled thereto in payment of claims and demands chargeable against the county is defined by section 4091 of the Political Code.

It is conceded that the collection of vital statistics is a state function, and that the local registrars are state officers, and that the county charter of Los Angeles county contains no provisions affecting the state's general powers in the particulars at issue in this proceeding. The proper disposition of this case requires nothing more than that we pass upon the specific propositions urged by counsel for respondents, who contend that those provisions of the vital statistics act which impose upon the county treasury the burden of payment of a local registrar's fees are unconstitutional and void. Those propositions are stated as follows: (1) That the provisions in question are violative of article 11, § 13, of the Constitution, and are an attempt on the part of the Legislature to delegate to a private individual the power to appropriate and interfere with county money. (2) That the Legislature has not the right to require a county to meet any portion of the burden of government within its confines with which the county has no connection whatever. (3) That the legislation in question is forbidden by section 12 of article 11, taken together with section 14 of article 13, of the state Constitution.

Article 11, § 13, of the Constitution reads as follows:

> "The Legislature shall not delegate to any special commission, private corporation, company, association or individual any power to make, control, appropriate, supervise or in any way interfere with any county, city, town or municipal improvement, money, property, or effects, whether held in trust or otherwise, or to levy taxes or assessments or perform any municipal function whatever, except that the Legislature shall have power to provide for the supervision, regulation and conduct, in such manner as it may determine, of the affairs of irrigation districts, reclamation districts or drainage districts, organized or existing under any law of this state."

[1] We do not find, in the sections of the vital statistics act to which reference is made, any violation of the foregoing section of the Constitution. There is no attempted "delegation of power," as that term should be understood. The act itself is complete and prescribes duties which must be performed. No attempt is made to vest in the state board of health or in the state registrar any discretion as to whether or not there shall be local registration districts or local registrars. The state board of health is an official body created to enforce a general and permanent law for the entire state. The state registrar and local registrars are administrative officers under its supervision. None of them come within the description of "special commission, private corporation, company, association or individual." They are not vested with discretionary powers under which they might control, appropriate, supervise, or in any way interfere with county money. The control and the appropriation are the direct effect of the statute incident to the performance of the duties imposed by the statute. When the state registrar, after receiving his report from the local registrar, makes to the treasurers of the several counties his certificate of the number of births and deaths properly registered, with the names of the local registrars and the amounts due to each of them as fees for the performance of their duties at the rates fixed by the state, he is not exercising a power to appropriate county money, but is merely performing an administrative or clerical act which is necessary to carry into effect the provisions of the statute.

[2] In our opinion, the requirement that the fees of local registrars shall be paid out of the county treasury is not in conflict with any limitation upon the power of the Legislature to impose upon counties the burden of expense incurred in the performance of a state governmental function. The particular reason urged by respondents for their contention is that the county has no connection whatever with the performance of those functions. The position of counsel seems to be that, although the object of county government is to carry out state purposes and perform state functions locally, yet that the payment of compensation to public officers for the performance of general public duties imposed upon them by the state and performed by such officers within a county may not be imposed as a burden upon the county treasury unless those officers are in fact county officers acting as part of the local governmental unit. Counsel would distinguish between the rule applicable in the case at bar and the rule covering the compensation of district attorneys, assessors, sheriffs, and other county officers performing state functions locally and whose compensation and expenses it is admitted that a county may be required to pay, even when the expense thus incurred relates solely to the performance of state functions within the county. But we think that the distinction to which counsel refer is one of form and not of substance. A county is a mere political agency of the state, and holds its property on behalf of the state for governmental purposes. Reclamation District v. Superior Court, 171 Cal. 672, at pages 679 and 680, 154 Pac. 845. It is created by the state, acting independently of the local population; therein it is significantly different from a city. In the case cited many instances are given illustrating legislative control over public property intrusted to the governmental management of counties and other subordinate districts of the state. Since the state has those powers, we perceive no sufficient reason for refusing to hold that under appropriate conditions, and in the exercise of its police power, as in the case at bar, the Legislature may direct the performance of prescribed state functions through local officers within the several counties of the state, and award to them compensation payable out of the public funds in the county treasury.

Section 12 of article 11 of the state Constitution reads as follows:

> "The Legislature shall have no power to impose taxes upon counties, cities, towns or other public or municipal corporations, or upon the inhabitants or property thereof, for county, city, town, or other municipal purposes, but may, by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes."

Section 14 of article 13 of the same Constitution provides a method of raising money for state purposes. Certain sources of revenue are separately defined upon which taxes shall be entirely and exclusively for state purposes. The taxes levied upon the corporations and other associations there described and upon their property are to be in lieu of all other taxes and licenses, state, county, and municipal, upon the described property, except in the instances provided in that section. Subdivision (e) of the section states that:

> "Out of the revenues from the taxes provided for in this section, together with all other state revenues, there shall be first set apart the moneys to be applied by the state to the support of the public school system and the state university. In the event that the above named revenues are at any time deemed insufficient to meet the annual expenditures of the state, including the above named expenditures for educational purposes, there may be levied, in the manner to be provided by law, a tax, for state purposes, on all the property in the state including the classes of property enumerated in this section, sufficient to meet the deficiency."

Quoting to us these provisions of the Constitution, respondents argue that their effect is to disable the Legislature from meeting any of the annual expenditures of the state from other sources than the taxes provided for upon public service corporations, etc., and a deficiency tax to be levied in case those taxes are insufficient. It is claimed that, if the Legislature may call upon the counties to assist the state in meeting the expenses of state government out of moneys raised by local taxation, the exercise of that power may result in destroying the integrity of the system of taxation established by the Constitution. But we think that the fearful consequence does not follow. Section 14 does declare that the taxes levied upon certain classes of property shall be entirely and exclusively for state purposes. It does not say that the Legislature may not for state purposes impose any taxes upon other classes of property than those so enumerated. It is directly contemplated that there may be other state revenues than those derived from the taxes provided for in section 14. And it is well known that the state is now deriving revenues from licenses and other taxes not collected from the special sources described in section 14.

Referring again to section 12 of article 11, the contention of respondents is based upon the clause which says that the Legislature may by general laws vest in counties, etc., the power to assess and collect taxes for county purposes. We are asked to draw the inference that the Legislature is thereby prohibited from vesting in county authorities power to assess or collect taxes for other than county purposes. If such prohibition is to be implied, it comes only by inference and indirection; and, being in derogation of the general legislative power of the state, the proposed interpretation will not be favored if the language is capable of any other meaning. The principal purpose of section 12 was to take from the Legislature the power to impose taxes upon the several local public corporations for their local purposes. But it was necessary that the power to impose taxes for local purposes should be vested somewhere; therefore, in order to remove all doubt upon the question, it was provided that the authority should be vested in the local corporate authorities. Section 12 contains nothing whatever which purports to establish a rule controlling the power of the Legislature concerning the levying and collecting of taxes for state purposes, and we find no reasonable ground for asserting that the subject of taxation for state purposes is included within the scope of that section.

In their discussion of article 11, § 12, respondents refer us to five decisions. These are: People v. Parks, 58 Cal. 624; Quigg v. Evans, 121 Cal. 546, 53 Pac. 1093; Conlin v. Board of Supervisors, 114 Cal. 404, 46 Pac. 279, 33 L. R. A. 752; Graham v. Mayor, etc., of Fresno, 151 Cal. 465, 91 Pac. 147; Fleming v. Hance, 153 Cal. 162, 94 Pac. 620. In People v. Parks, one of the judges (at page 644 of the decision) made the statement quoted by counsel:

> "A local board cannot be authorized to levy local taxes and assessments for a public purpose. Such a power could not be conferred upon a municipal corporation (Const. art. 11, § 12), neither can it be conferred upon a quasi municipal corporation."

In that case, the statement was mere dictum and is not authority. As stated in Miller v. Dunn, 72 Cal. 462, 470, 14 Pac. 27, 1 Am. St. Rep. 67, the statute under consideration in People v. Parks was declared unconstitutional solely on the ground that the Legislature could not delegate to executive officers such legislative powers as it had attempted to confer by that act. In Quigg v. Evans, supra, section 12 of article 11 of the Constitution was held not to apply to the case, since the legislative act there questioned was passed before the adoption of the Constitution of 1879, and the particular statute was continued in force. The point there urged by appellants was that the Legislature could not compel the city to pay claims for services rendered outside the city limits. At all events, the case would not be applicable here; it dealt with a strictly municipal corporation. In the present case we are discussing the relations between state and county governments under a general statute wherein compensation is provided for an officer performing duties imposed by a general state law, the duties being performed wholly within the county. The cases of Conlin v. Board of Supervisors, Graham v. Mayor, and Fleming v. Hance, supra, are likewise distinguishable from the present action, and in none of them was section 12 of article 11 mentioned or discussed. We are willing to say here, as was held in the Conlin Case, that the Legislature has not power to appropriate the funds of a city to the discharge of an obligation against the entire state, or for other than the purposes of such municipality; and, although the legislative control over affairs of the county is broader and in some respects more complete than over the affairs of cities, we readily concede that the Legislature would not have authority to give money out of the county treasury to a private person who had no other legal claim therefor, as the Legislature attempted to do in directing that Conlin be paid his private and invalid claim out of the treasury of the city of San Francisco. But we think that in the exercise of its power of providing for the general welfare of the state the Legislature may by a general law impose duties, all having the same character, upon local officers within the several counties of the state, and provide for them a compensation in proportion to their duties and payable out of the treasuries of the several counties in which those officers are located.

Let the peremptory writ issue.

We concur: JAMES, J.; SHAW, J.

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33 Cal. App. 782

MARSHALL v. RANSOME CONCRETE CO.
(Civ. 1659.)

(District Court of Appeal, Third District, California. May 30, 1917.)

1. MASTER AND SERVANT ⚷416—WORKMEN'S COMPENSATION—COMMISSIONS—AWARD.

Award of the industrial accident commissioner is not vitiated by mere recommendation that medical service in excess of that required to be furnished be proffered.

2. MASTER AND SERVANT ⚷385(18)—INJURY—WORKMEN'S COMPENSATION — FURTHER OPERATION.

It is no ground for reducing compensation under the Workmen's Compensation Act (Laws 1913, p. 279) that the injured employé, who had had two operations with little, if any, benefit, does not submit to another which would cost him several hundred dollars, he having no money, owing several hundred dollars for prior treatment, and being advised by several doctors that an operation would do no good, though other doctors say that an operation could be performed with great promise of success and without serious danger.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Proceedings under the Workmen's Compensation Act by F. P. Marshall, employé, against Ransome Concrete Company, employer, and Southwestern Surety Insurance Company, insurer. From judgment affirming the award of the Industrial Accident Commission, the insurer appeals. Affirmed.

Hartley F. Peart, of San Francisco, for appellant. Landreth & Patten, of Los Angeles, for respondent.

BURNETT, J. On the 7th day of March, 1913, at Sacramento, the applicant, F. P. Marshall, was seriously injured by the falling of a concrete tower. He was an employé of the Ransome Concrete Company, and there is no dispute that he became subject to the provisions of the Workmen's Compensation Act. Appellant was the insurance carrier, and it paid him 65 per cent. of his average weekly wages from the eighth day after the injury up to the 11th day of September, 1914, when appellant concluded that the disability was not more than 50 per cent. of total and it paid compensation at the rate of $9.37 per week up to and including the 9th day of January, 1915, when further payments were discontinued. On February 2, 1915, Marshall filed with the industrial accident commission his application for adjustment of his claim for further compensation. The claim was resisted on the grounds: (1) That the industrial accident commission had no jurisdiction over a controversy arising out of an accident which occurred on March 17, 1913; and (2) "That it would be possible by an operation to reduce the rate of disability to 25 per cent. of total, and, inasmuch as applicant refuses to have such operation performed at his own expense, he is responsible for and willfully contributes to whatever disability now exists in excess of 25 per cent. of total disability."

These objections were carefully considered by the industrial accident commission, as shown by the evidence taken and by the opinion filed in the cause. As to the question of jurisdiction, attention was called to the provision in the law of 1913 conferring upon the industrial accident commission all the duties, liability, authority, powers, and privileges theretofore conferred upon the industrial accident board, and it may be said that there is no further contention as to this question.

As to the other point the commission declared:

> "The Roseberry act limits the medical and surgical service to cure and relieve to the sum of $100, and for that reason this commission has no power to require medical or surgical treatment in excess of said $100; but the act also nowhere confers upon the commission power to compel an injured employé to undergo an operation and to bear the cost and expense of medical or surgical treatment for the same even for his own cure."

The commission furthermore proceeded to consider the extent of the liability of the insurance carrier in the premises, the amount already paid, and the balance of the unpaid liability, and it concluded that the only method available for the insurance carrier to reduce its liability was to reduce the disability. The commission, reiterating its position that it is powerless to compel either party to follow the suggestion, earnestly recommended that the insurance carrier proffer the proposed operation to applicant at its own cost and that the applicant accept the offer. Finally it was said:

> "Before applicant submits to an operation, if tendered, this commission desires to have further surgical advice in relation to the feasibility of such operation."

Two days thereafter the commission filed its findings of fact and made its award, directing the defendants and each of them to pay to F. P. Marshall as a partial disability indemnity because of said injury, "the sum of $9.37 per week for each and every week from and beginning with the 10th day of January, 1915, until the termination of said disability or the further order of this commission."

An application to the superior court of Sacramento county to review said award was made by the insurance company and therein said award was affirmed, and we have before us an appeal from the judgment of that court.

The particular finding of fact by the commission which has given rise to the discussion is as follows:

> "That the present disability of the applicant can be greatly relieved by a surgical operation, the risk of which is inconsiderable in view of the seriousness of the disability. That the defendants are entitled, if they shall tender such operation at their own expense and it shall be refused by the applicant or shall be accepted and successfully performed, to have the partial disability indemnity, herein provided, reduced or terminated as the result of the operation, if performed, may warrant."

It is to be observed that when the opinion was filed the commissioners were in doubt as to the feasibility of such operation, but at the time the findings were filed they were apparently convinced that the service should and could be performed.

[1] As to the first criticism of appellant, it is apparent that the commission did not require, nor attempt to require, medical or surgical service in excess of $100. It was only a recommendation that the additional service be proffered. Granting that no authority exists in the law for such recommendation, we find it decided, in Southwestern Surety Ins. Co. v. Pillsbury, 172 Cal. 768, 158 Pac. 762, that:

> "An award of compensation, which is otherwise in due form and complete in itself, is not invalidated by the fact that it includes an optional right to the insurance carrier, which, if accepted by it, would compel it to pay for surgical services rendered later than the ninety-day period following the accident."

It could not vitiate the award, but may be disregarded as would be any other gratuitous suggestion or recommendation.

[2] The point, however, to which appellant seems to attach the most serious consideration, is that the refusal of an injured employé to undergo an operation to relieve him is ground and reason for terminating his compensation. As to this, though, it must be said we have before us no such case. There is no finding that the employé has refused to undergo an operation. There could be no refusal without an offer or direction or demand, and it is apparent there has been none of these. The finding does indeed suggest and advise that there be such an offer, and it implies that it may be refused. There is also a promise that, if such condition should develop, the indemnity may be reduced or terminated. This, however, looks to the future and cannot be regarded as of any present practical value. There is no finding even that the applicant is unwilling to undergo an operation or that he has declined to submit to one. Nor are we informed that the applicant is in a position to secure the services of a surgeon who can perform the operation. The fact is, and it must be manifest upon a moment's reflection, that said finding is of no material importance in the determination of the cause. It may be entirely disregarded without doing violence to any rule of practice or procedure. The recommendation as to the "tender of the operation" must be eliminated, as we have seen, and we have left nothing but the bald statement that:

> "The present disability of the applicant can be greatly relieved by a surgical operation, the risk of which is inconsiderable in view of the seriousness of the disability."

It is not supplemented or qualified by a single fact indicating any remissness on the part of the applicant or, for that matter, of the surety company. It points to no concrete fact or circumstance imputing negligence to the applicant or to the insurance company. It does not affect in the slightest the present right of the applicant to receive indemnity nor the claim of appellant to have the payment reduced or discontinued. Rejecting this finding, therefore, as a mere generalization, we have left in the other findings ample support for the award.

But suppose we consider the case as though the applicant had refused or declined to submit to the surgical operation, and what would be the consequence? Upon this theory should the award be annulled? In this consideration is involved, of course, the general rule as to the care required of the injured person to mitigate the trouble and promote recovery. Probably the rule is as well stated as anywhere in 8 R. C. L. 447, as follows:

> "It has been pointed out that one who has suffered personal injuries through the negligence or wrongful acts of another is bound to exercise reasonable care and diligence to avoid loss or to minimize the consequences of such injury, and that he cannot recover for so much of his damage as results from his failure to do so. Thus he is bound to exercise reasonable diligence in securing medical or surgical aid, take all reasonable care of the injury, and to make use of reasonable means to prevent aggravation of it or to effect its speedy and complete cure. He is not required to take the best care of his injuries, however, nor to employ the means best adapted to heal them. It is sufficient that he act in good faith and with due diligence and that he exercise only ordinary care and reasonable or ordinary prudence of judgment."

Necessarily, said rule implies that the sufferer is able to employ the means that are needed to alleviate his situation. It would be a strange law that would require him to act with ordinary care and prudence and yet penalize him because of his inability, through indigence or otherwise, to avail himself of the remedy. An impossible or unavailable remedy is, of course, no remedy at all. If the injured person cannot appropriate the means, the effect as to him is the same as though they did not exist. His inability, unless shown to be the result of his own negligence, must be a complete answer to the charge of culpability. And, in considering the finding, we must assume that the applicant was in no position to avail himself of the operation; in other words, that it was practically impossible for him to adopt the course contended for by appellant. If we look to the evidence, we find that such was actually the situation. He said he had thought of the recommendation of the physicians to get a specially fitted shoe, "but I didn't do it, because it would cost too much, and I haven't had more than a dollar at a time since they cut me down." Furthermore, he declared he had no money "to pay for special plates or hospital fees or an operation." It also appears that he was in debt to the extent of $500 for medical treatment which he had already received. It is fair to infer from the testimony of one of the physicians that the suggested operation with the necessary subsequent treatment would cost $400 or $500, and there is nothing in the record to show that the applicant had the means or credit required for the purpose.

The foregoing ought to be sufficient to excuse and justify the applicant for his failure to take any affirmative action in the matter, but another reason also appears in the record that might properly cause a prudent person to hesitate before submitting to the recommended ordeal. It appears that he had submitted to an operation on two different occasions with but little, if any, benefit, and that he had consulted with Drs. Stephenson and Shaw, who told him that his leg "was as good as it ever would be, that it couldn't be improved on," and that nothing else could be done to improve it. He also consulted Dr. Garrett, who said he "didn't see where an operation would benefit, and that there was probably one chance out of a hundred of it doing any good, and that I couldn't have any more motion in the ankle than I had now and I wouldn't have, no matter how straight the leg was, and it would hinder me walking stairs and that kind of thing, and that he considered me, as far as my trade was concerned, to be totally disabled." Assuredly the foregoing furnished the basis for a rational belief on the part of Marshall that the supposed benefit from an additional operation was problematical and it justified his disinclination or refusal to take the chances. Indeed, one of the physicians who testified at the hearing declared:

> "If that was in my own family, I wouldn't rely on my own judgment; I would take him back to Dr. John B. Murphy, or a man of that character, but I would be very, very doubtful of any good results to be obtained in that limb."

It is true that other physicians testified that the operation could be performed with great promise of success and without serious danger, and the commission so found, as we have seen; but, after all, that is simply a matter of opinion, and it cannot be said that the applicant was bound to follow that opinion at his peril.

The applicant himself aptly sums up his reasons for declining the operation in these words:

> "They said that I had to pay for the operation, and I didn't think an operation would do me any good; also, that I didn't like to take chances of going under another anæsthetic."

We are satisfied that any just view of the case must lead to the conclusion that he should not be penalized for his conduct under the circumstances herein disclosed.

Many cases have been cited by appellant, but they are not particularly in point. They are instructive, however, as illustrations of the application to certain conditions of the general principle to which we have already adverted. To a few of these we may devote brief attention.

The case of Pacific Coast Casualty Co. v. Pillsbury, 171 Cal. 319, 153 Pac. 24, really involves an injury incurred not in the course of the appellant's employment. It seems that the applicant's arm was broken while in such employment, that it was properly treated and was progressing favorably, when, during a trip not for or in the service of the employer, the bone shifted or slipped so that it had to be rebroken and reset. It was held that the law did not authorize an award for the additional injury sustained by him, aggravating the first injury and prolonging the disability, for the reason that this additional injury was incurred while he was not in the employ of the company. No such question manifestly arises here.

In Fidelity & Deposit Co. of Maryland v. Industrial Accident Commission, 171 Cal. 728, 154 Pac. 834, L. R. A. 1916D, 903, the applicant was injured while driving his automobile in excess of the speed limit provided by the state motor vehicle act, and it was very properly held that this violation of a state law amounted to willful misconduct which disqualified the employé. There is no contention that in the case at bar Marshall was guilty of any disobedience of orders or violation of law that could be construed as willful misconduct.

Several cases from foreign jurisdictions are cited wherein it was held that the applicant was not entitled to compensation for the reason that he had refused an operation; but, while it does not explicitly appear that the services were offered at the expense of the employer or insurer, such is a reasonable inference from the language of the opinions therein. It is at least clear that the cases were decided upon the principle that the injured person must "avail himself of such reasonable remedial measures as are within his power," or, as expressed in one of the cases:

> "A workman must behave reasonably or his incapacity is the consequence of his own unreasonableness. To hold to the contrary would lead to this result, that a workman who had an injury, however small, might refuse to allow it to be dressed and let a trifling burn, say, become a sloughing sore and lead to partial or total incapacity."

Probably no more satisfactory consideration of this question can be found than in Lesh v. Illinois Steel Co., 163 Wis. 124, 157 N. W. 539, L. R. A. 1916E, 105, a recent decision of the Supreme Court of Wisconsin, wherein the leading cases are reviewed. Therein the applicant had injured his leg and after a certain date claimed compensation for permanent disability. The accident commission found that the present disability resulted from the workman's own willful refusal to submit himself to safe medical treatment, and he was denied further compensation. Among the interesting declarations of the court was the following:

> "No question of compelling the applicant to submit to an operation is involved. The question is: Shall society recompense a workman for a disability caused by his unreasonable refusal to adopt such means to effect a recovery as an ordinarily prudent person would use under like circumstances and which would result in the removal of the disability within the rule as stated above? * * * The proposition that an applicant, under the provisions of this humane law, may create, continue, or even increase his disability by his willful, unreasonable, and negligent conduct, claim compensation from his employer for his disability so caused, and thereby cast the burden of his wrongful act upon society in general, is not only * * * repugnant to all principles of law, but is abhorrent to that sense of justice common to all mankind."

How different such a case is from the one herein is apparent at a glance. The principle therein so strongly stated imperatively demands the acquittance of the applicant herein of any condemnation or censure. It cannot be said that he acted in a "willful, unreasonable, or negligent" manner, and to deprive him of the benefit of this "humane law" would indeed be "repugnant to all principles of law," and "abhorrent to that sense of justice common to all mankind."

We conclude that the judgment of the lower court is manifestly right, and it is therefore affirmed.

We concur: CHIPMAN, P. J.; HART, J.

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34 Cal. App. 111

Ex parte HITCHCOCK. (Cr. 678.)

(District Court of Appeal, First District, California. June 14, 1917.)

1. Municipal Corporations 🔑57—Regulation of Private Patrol System—"Municipal Affair."

The matter of the licensing and regulation of a private patrol service or system within designated limits of the city of Oakland is a "municipal affair," within Const. art. 11, § 6, investing municipalities with full power to legislate in all matters embraced within the term "municipal affairs," uncontrolled by general laws, since a municipal affair is one which refers to the internal business affairs of a municipality.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Municipal Affairs.]

2. Municipal Corporations 🔑78—Control of Statute by Ordinance—"Municipal Affair."

In so far as St. 1915, p. 1253, licensing the business of private detectives, undertakes to provide that private detectives holding licenses from the state board of prison directors may act or authorize their employés to act as uniformed policemen or watchmen within the city of Oakland, but without complying with the local ordinances of the city regulating such service, the provisions of the act must yield to the control of the city ordinance regulating the granting of permits to conduct or maintain any private patrol service or system in the city; it being a municipal affair within control of the city, under Const. art. 11, § 6.

3. Sheriffs and Constables 🔑77—Statutory Functions of Constable or Deputies.

It is not within the range of the statutory functions of a constable or his deputies under state law to engage in the business of conducting, maintaining, and soliciting business for a private patrol service in a city.

4. Municipal Corporations 🔑111(1)—Ordinances—Investment of Council and Chief of Police with Arbitrary Power.

An ordinance of the city of Oakland regulating the granting of permits to conduct any patrol service in the city, fixing a license therefor, and providing a penalty for violations thereof, is not invalid, as attempting to invest the council and chief of police of the city with arbitrary power to grant or deny the right to engage in the business of conducting or maintaining a patrol service.

Application by Cecil E. Hitchcock for writ of habeas corpus. Petition dismissed, and petitioner remanded.

Fitzgerald, Abbott & Beardsley, of Oakland, for petitioner. W. H. L. Hynes, Dist. Atty., and James M. Koford, Asst. Dist. Atty., both of Oakland, for respondent.

RICHARDS, J. The petitioner was arrested upon the charge of having violated the terms of a certain ordinance of the city of Oakland adopted by the council of said city on January 19, 1917, designed as Ordinance No. 1132, N. S., by engaging in the business of conducting, maintaining, and soliciting business for a patrol service or system without first obtaining a permit so to do from the council of said city of Oakland in conformity with the requirements of said ordinance. The petitioner makes several assaults upon the applicability of the ordinance to him and upon its general validity which will require a brief statement of the terms of the ordinance for their consideration.

The ordinance purports by its title to be an ordinance regulating the granting of permits to conduct or maintain any patrol service or system in the city of Oakland, fixing a license therefor, and providing a penalty for violations thereof. In the body of the ordinance the terms "patrol service" and "patrol system" are defined to be any service or system which purports to furnish to members or subscribers, for a consideration or otherwise, any watchman or guard, either uniformed or otherwise, to patrol any district in the city of Oakland, or to guard or watch any property therein, or to perform any service usually or customarily performed by the regular patrolmen of the police department of the city of Oakland. It is made unlawful for any person, firm, or corporation, either as principal or agent, to engage in the business of conducting or maintaining or soliciting business for any such patrol service or system without first obtaining a permit from the council of said city so to do; such permit to be obtained by an application in writing to the council, which application shall be referred to the chief of police, who shall make an investigation concerning the character of the applicant and the condition of police protection prevailing within the designated district, and report thereon to the council, which shall have power to grant or deny the applicant permission to engage in such business, but which permission shall be granted unless it shall appear from the report of the chief of police that the applicant is not a person of good moral character, especially in the qualities of honesty and integrity, or that the designated district is already supplied with sufficient or ample police protection by the city or by a patrol service or system or by both. A license fee of $100 per annum is required from the holder of permission for the conduct of such patrol service or system under the terms of said ordinance.

The main question presented by the petitioner herein is that he is exempted from the operation and effect of such ordinance by the fact that he is the holder of a license issued to him by the state board of prison directors under and by virtue of the terms of an act of the Legislature of the state of California entitled "An act to license and regulate the business of private detectives and detective agencies," approved June 7, 1915 (Stats. 1915, p. 1253), and still in force and effect. This act provides for the granting of licenses to private detectives and detective agencies by the state board of prison directors, and in section 5 thereof it is provided that:

> "A license obtained from the [state] board of prison directors by any person or persons, firm, association, copartnership or corporation mentioned in section 1 of this act, shall be sufficient to give to said person or persons, firm, association, copartnership or corporation obtaining said license, their employés or operatives, the authority to act under said license as a detective or uniformed patrolman or watchman in any county, city and county, city or town in this state."

Section 6 of the same act also provides that:

> "This act shall supersede and take the place of any rule, regulation or ordinance of any county, city and county, city or town in the state of California conflicting herewith."

It is plain, from a reading of the sections of the act above quoted and from the terms of the ordinance in question here, that the act and the ordinance are in conflict, and the first matter to be disposed of is the determination as to which should prevail. By the charter of the city of Oakland the council is given power "to make and enforce local police, sanitary and other laws and regulations" (article 5, § 51, subd. 1); also "to organize, provide, maintain and operate police and fire departments" (article 19, § 51, subd. 5); and also "to license for purposes of regulation or revenue all and every kind of business not prohibited by law" (article 9, § 51, subd. 31). The state Constitution (article 11, § 6) invests municipalities with the fullest power to legislate in all matters embraced within the term "municipal affairs" uncontrolled by general laws. Is the matter of the licensing and regulation of a private patrol service or system within designated limits of the city of Oakland a "municipal affair"? It would seem clear that upon the authorities this question must be answered in the affirmative.

[1] A municipal affair is one which refers to the internal business affairs of a municipality. Fragley v. Phelan, 126 Cal. 383, 58 Pac. 923. The most frequent and usual form in which a municipality manifests its control over its municipal affairs is in the passage of police and sanitary laws and regulations for the protection of the property, lives, and health of its inhabitants within the whole or designated portions of its area, and when a city, either through its charter or ordinances, undertakes to provide a scheme for such protection in relation to a subject-matter which is not, either expressly by the Constitution, or impliedly from its nature, committed to state control, the subject-matter thus laid hold upon by the municipality becomes a municipal affair over which the state Legislature may no longer exercise control. In re Prentice, 24 Cal. App. 345, 141 Pac. 220. Referring to the particular subject of the ordinance under review in this case it would seem to be clear that the establishment of a private patrol service or system over a designated area within the corporate limits of the city of Oakland is essentially within the definition of a municipal affair.

[2] The primary purpose of such a service or system is to supplement the regular or police supervision of the city by supplying protection to the property and lives of those of its inhabitants who may reside beyond the limited circle of more immediate official watchfulness, or who for any reason may desire or need special protection. Being thus supplementary to the regular police forces and energies of the municipality it would seem to be essential to the harmonious working of such a service or system that it should be the subject of civic supervision and control, and that in so far as the act of the Legislature above referred to undertakes to provide that private detectives holding licenses from the state board of prison directors might act, or might authorize their employés or operatives to act, as uniformed pa-

trolmen or watchmen within the municipality, but without complying with the local ordinances of such municipality regulating such service, the said provisions of said act must yield to the superior control of the municipality over the subject for the reason that, as we have seen, it is strictly a municipal affair.

[3] It is further contended by the petitioner herein that the ordinance in question interferes with his powers and rights as a deputy constable under the state law, but in respect to this contention it is to be noted that the ordinance by its terms is limited in its application to those business firms or corporations who are seeking to maintain a patrol service or system, and has no application to individuals who are either officially or unofficially performing the ordinary functions of such peace officers as sheriffs or constables. The charge upon which the defendant is held in custody is that of unlawfully engaging "in the business of conducting, maintaining and soliciting business for a certain patrol service without having obtained a permit so to do," in accordance with the terms of the ordinance in question. It cannot seriously be contended that the doing of these acts is within the range of the statutory functions of a constable or his deputies.

[4] The final contention of the petitioner is that the ordinance in question is invalid for the reason that it attempts to invest the council and chief of police of the city of Oakland with arbitrary power to grant or deny to any person seeking to engage in the business of conducting or maintaining a patrol service or system the right so to do. We do not so construe this ordinance. It assumes to deal with a subject involving the granting of permits to persons, firms, or corporations to conduct and maintain a patrol service or system. It is evident that certain qualities of character and personal fitness should be required in the holders of permits which would thus officially entitle them to perform the peculiarly delicate and important duties required in the maintenance and conduct of such a patrol service or system involving, as it would, the protection of the property and lives of inhabitants of the designated district of said city during the nighttime or during periods of special social strain or stress. The ordinance recognizes that a large degree of discretion must be reposed in the council of said city in the matter of granting or refusing these permits, and it therefore proceeds to provide a method by which the council may become informed as to the presence or absence in the applicant for such a permit of those qualities of moral character in respect especially to honesty and integrity which should form the basis of their official sanction. It is provided that the application shall be referred to the chief of police for investigation and report touching these matters, upon the presentation of which the council shall proceed to grant or deny the permit. We perceive no arbitrary grant of power to the council in these provisions, and it is not contended that the council has acted arbitrarily in the case before us. In fact, that body has not been called upon to act at all upon the individual case of the petitioner herein, for he has not applied for the permit required by the ordinance, the validity of which he here assails. His contention that the ordinance is invalid because it provides for a delegation of the powers of the council to the chief of police in the matter of the required investigation into the moral qualities of the applicant for a permit, has no merit. The duties of the chief of police in the premises are merely advisory to the council, in which by the express terms of the ordinance is reposed the ultimate right to grant or refuse the permit.

It is ordered that the petition be dismissed and the petitioner remanded.

We concur: LENNON, P. J.; KERRIGAN, J.

34 Cal. App. 35

Ex parte WOO HAH. (Cr. 545.)

(District Court of Appeal, Second District, California. June 6, 1917.)

CRIMINAL LAW 🔑259—COMMITMENT—SUFFICIENCY OF—POLICE COURT.

Where court in fact has jurisdiction of crime, a commitment reciting conviction before a police judge on a certain day "of the crime of violating poison law, committed in said city," is sufficient to furnish warrant for holding convict in the absence of statute prescribing form of commitment in police courts.

In the matter of the application of Woo Hah for writ of habeas corpus. Writ discharged.

C. B. Conlin, of Los Angeles, for petitioner. Erwin W. Widney, City Prosecutor, and Lyle Pendegast, Chief Deputy City Prosecutor, both of Los Angeles, for respondent.

JAMES, J. Petitioner by writ of habeas corpus seeks to be discharged from the custody of the chief of police of Los Angeles city. Several grounds are assigned in his petition, but at the oral argument the only point insisted upon was that the commitment issued was so lacking in its statements of essentials a to make it void; particularly, that no offense is described therein. The commitment recited that on the 19th day of May, 1917, petitioner was convicted before a police judge of the city of Los Angeles "of the crime of violating poison law, committed in said city of Los Angeles on or about the 18th day of May, 1917." It is admitted that there is a general statute of the state, not contained in any of the sections of the Code (St. 1907, p. 124, and as later amended by St. 1913, p. 692), whereby the handling of poisonous substances is designed to be regulated and for

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

the violation of different provisions of the act a person is liable to conviction for misdemeanor. The police court of the city of Los Angeles, it is also admitted, has jurisdiction of the offenses created by that statute.

The wording in the commitment whereby the offense of which the petitioner was convicted is described, does indicate that the act creates offenses of which the police court had jurisdiction, and we think the language used was sufficiently definite for the purpose; at least, definite enough so that it may not be said that the commitment exhibited here is one which is void upon its face. Conceding that the commitment might have been more definite in the description contained therein of the offense is not to say that such a commitment furnishes no warrant for the holding of petitioner. In the case of People v. Kelly, 120 Cal. 271, 52 Pac. 587, the clerk had omitted to observe the provisions of section 1207 of the Penal Code directing him to make a statement of a certain fact in his entry of judgment. The court said that the omission to make the required statement was an irregularity, and that the judgment was erroneous. The court observed, however:

> "But this omission does not render the judgment void. The court having jurisdiction under proper circumstances to render a judgment of the character involved, the absence of such recitals from the judgment does not make it void, however erroneous. All that is necessary, as against this objection, is that the judgment shall sufficiently express that which is adjudged; it need contain no recital of the facts upon which it is based."

The case of Ex parte Murray, 43 Cal. 455, is cited by the prosecuting attorney and is in point. There is no statute affecting police courts which prescribes any particular form which the commitment shall have. The judgment of the court as entered is expressed by recital in the commitment. For any error or irregularity in the judgment, or the entry thereof, petitioner here has his remedy by appeal.

The writ is discharged, and petitioner remanded to the custody of the chief of police of Los Angeles city.

We concur: CONREY, P. J.; WORKS, Judge pro tem.

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34 Cal. App. 88

KASTER v. SUPERIOR COURT IN AND FOR SACRAMENTO COUNTY et al. (Civ. 1681.)

(District Court of Appeal, Third District, California. June 8, 1917. Rehearing Denied by Supreme Court Aug. 6, 1917.)

1. JUSTICES OF THE PEACE 🔑167(3)—APPEAL—DISMISSAL OF ACTION FOR WANT OF PROSECUTION.

Code Civ. Proc. § 583, provides that the court may, in its discretion, dismiss any action for want of prosecution, whenever plaintiff has failed for two years after answer filed to bring such action to trial, and that any action shall be dismissed by the court in which it shall have been commenced, or to which it may be transferred on motion of the defendant, unless brought to trial within five years after defendant has filed his answer. *Held* that, whether or not this section authorized the superior court to dismiss an action appealed from the justice's court on questions of law and fact, and not brought to trial within two years, the court had inherent power to dismiss the action, especially as the provision as to dismissal for failure to bring the action to trial within two years is apparently not limited to the court in which the action has been commenced, or to which it may be transferred on defendant's motion.

2. JUSTICES OF THE PEACE 🔑167(3)—APPEAL—DISMISSAL OF ACTION FOR WANT OF PROSECUTION.

Where plaintiff's failure to bring to trial within two years an action appealed from justice court on the law and facts by defendant was not due to mistake or ignorance of his rights, and he was content to let the matter rest, because he was relying on a bond given to release an attachment obtained by him, and in the meantime defendants had moved to a distant state, so that the expense incident to personal attendance at the trial would nearly equal the amount of the demand, and one of the defendants would be unable to be personally present at the trial, the court did not abuse its discretion in dismissing the action, though the defendants obtained no stay of execution, and though a cross-complaint was set up, making it defendants' duty, as much as that of plaintiff, to bring the action to trial.

Application by E. M. Kaster for a writ of review directed against the Superior Court of the State of California in and for the County of Sacramento and Peter J. Shields, Judge thereof. Writ discharged.

Thomas B. Leeper, of Sacramento, for petitioner. B. F. Van Dyke, of Los Angeles, and Charles H. Crocker, of Sacramento, for respondents.

BURNETT, J. The application is for a writ of review to annul an order made by said superior court dismissing an action appealed from the justice court on questions of law and fact by one R. C. Brace and not brought to trial within two years after the appeal was taken. It is claimed by petitioner that section 583 of the Code of Civil Procedure, the apparent authority for said order, is not applicable to such case, and in support of his contention he cites Pistolesi v. Superior Court, 26 Cal. App. 403, 147 Pac. 104, and Long v. Superior Court, 31 Cal. App. 34, 159 Pac. 734. The latter follows the former, and in each it was sought to compel the superior court to dismiss the action for the reason that it had not been brought to trial within five years. In the Pistolesi Case it was said:

> "Nor do we think section 583 of the Code of Civil Procedure is applicable to this case. It reads as follows: '* * * Any action heretofore or hereafter commenced shall be dismissed *by the court in which the same shall have been commenced* or to which it may be transferred on motion of the defendant, after due notice to plaintiff, or by the court on its own motion, unless such action is brought to trial within five years after the defendant has filed his answer. * * *' This action was not *commenced* in the superior court, nor can it be regarded as having

been 'transferred' to that court 'on motion of the defendant'; the latter language aptly describing only an action transferred to a court of identical jurisdiction in another county."

[1] It is to be observed, though, that the first clause of said section, upon which it might be claimed this order was based, contains no such limitation. Applying it according to the ordinary signification of the language employed, it may be said to include any court in which the action is pending for trial. The clause is:

> "The court may in its discretion dismiss any action for want of prosecution on motion of the defendant and after due notice to the plaintiff, whenever plaintiff has failed for two years after answer filed to bring such action to trial."

However, it is not necessary to decide this point, for the following reason, stated in the Pistolesi Case:

> "Although it appears to us plain that neither of the sections referred to applies to this case, the superior court could yet, as it did, resort to its inherent power to pass on the motion and grant or deny it. 'It is settled by numerous decisions in this state that the superior court, without the aid of statutory authority, has the power to dismiss an action because of the failure of the plaintiff to prosecute it with reasonable diligence.' Romero v. Snyder, 167 Cal. 216, 138 Pac. 1002. There it was held that, if only a demurrer and not an answer was filed, the provisions of section 583 of the Code of Civil Procedure did not apply, but that the court under its general jurisdiction might dismiss the action for failure to prosecute it with reasonable diligence, and would be limited in so doing only by a sound discretion."

[2] Conceding, then, as the later decisions of the Supreme Court seem to hold, that the writ of certiorari may be invoked in such cases when there has been an abuse of discretion, we are led to consider whether the court below acted with such indifference to the proprieties of the occasion as to be placed in the position of a tribunal acting outside the scope of its authority. We cannot so denominate the attitude of respondents.

If there had been a showing of inability on the part of plaintiff or that he had been deceived or misled, or was ignorant of his rights, a different situation might, of course, be presented. He was content, though, to let the matter rest, because he was relying upon the obligation of the sureties on a bond given to release an attachment obtained by him after filing his complaint in the justice court. This circumstance, however, has nothing to do with his obligation to secure an early trial of the main action in the superior court. Nor does it make any difference, in our opinion, that no undertaking was given by the defendant to stay execution when he appealed to the superior court. The plaintiff might have obtained—and it seems he did do so—a writ of execution in spite of the appeal; but, whether execution was stayed or not, it was his duty to have the cause tried by the tribunal to which it had been regularly transferred for a new trial.

But it is said that defendant set up a cross-complaint, and therefore it was as much his duty as that of plaintiff to speed the trial. It is doubtful whether the pleading amounted to a cross-complaint. It was rather a defense to the action. But, granting it to be what is claimed for it, and it results that it was the duty of each litigant to promote an early trial, and the court could, upon the default of either, dismiss the case. The said defendant, however, seems to have been more diligent than plaintiff in invoking the discretion of the court to dismiss the action.

The reason that animated the court in its action is disclosed in the affidavit filed in support of the motion, and is substantially that plaintiff had taken no steps to bring on the trial for more than two years, and that defendants had departed the state and had located in the state of West Virginia, and that the expense incident to a personal attendance at the trial of the action would nearly equal the amount of the demand set forth in the plaintiff's complaint, and that said R. C. Brace would be unable to be personally present at the trial if it should take place. We cannot see how it can be said that the court abused its discretion under these circumstances. Indeed, the showing in palliation of such delay on the part of plaintiff should be strong and persuasive to justify an appellate court in declaring as a matter of law that there has been an abuse of the discretion which the lower court is permitted to exercise.

In conclusion, it may be said that, if plaintiff's contention is sound that, since no stay bond was given, "the judgment of the justice court remains in full force and effect, and plaintiff can levy execution and satisfy said judgment upon any property belonging to defendants," and "can sue to recover judgment against the sureties on the undertaking releasing the attachment," he will suffer no injury by the said order of the superior court.

At any rate, we do not think said order should be annulled, and the writ is therefore discharged.

We concur: CHIPMAN, P. J.; HART, J.

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34 Cal. App. 102

WOLLENSHLAGER v. MacLEAN et al.

(Civ. 1845.)

(District Court of Appeal, Second District, California. June 12, 1917.)

1. VENDOR AND PURCHASER 🔑232(9) — NOTICE—CONSTRUCTIVE NOTICE.

S. leased an apartment house to defendants. Subsequently S. and the defendants, as parties of the first part, made an agreement with C., whereby he was to furnish the apartment house and install a manager to operate it. The agreement further provided that such first parties should receive no rent for the premises during the continuation of the agreement, but that the net profits of the business should be divided between them, and the loss, if any, borne equally, and that nothing therein should be construed to constitute a partnership. On the same day S. and defendants executed an agreement providing that the agreement with C. should in no way affect the lease, that if a loss resulted under such agreement one-half should be paid by S. and one of the defendants, and one-half by the other two defendants, and that any profits should be divided in the same manner. Plaintiff purchased the apartment house from S., and C. transferred to plaintiff all his interest under the agreement. He also settled with plaintiff for the profits of the business, and directed the manager to conduct the business under plaintiff's orders; these transactions occurring without defendant's consent and without notice to them. *Held* that, even though plaintiff had no actual knowledge of the agreement between S. and the defendants as to the division of profits, his knowledge of the agreement with C. and of C.'s possession put him upon inquiry as to the relations between S. and defendants, and charged him with knowledge that S.'s right to collect rent had ceased and that the partnership relation had been substituted therefor.

2. LANDLORD AND TENANT 🔑199½—RENT—LIABILITY—DISCHARGE.

Even if the contract with C. did not destroy the lease, it excused the lessees from payment of rent, and limited S.'s right to his share of the profits.

3. LANDLORD AND TENANT 🔑190(1)—RENT—LIABILITY—DISCHARGE.

Plaintiff could not recover rent accruing subsequent to the date of his purchase of C.'s interest, as by taking possession of the premises without defendants' consent he evicted them from any possession which they had.

Appeal from Superior Court, Los Angeles County; W. H. Thomas, Judge.

Action by John Wollenshlager against James MacLean and others. From a judgment for defendants, and an order denying a new trial, plaintiff appeals. Affirmed.

William H. Fuller, of Los Angeles, for appellant. N. P. Moerdyke, H. J. Angell, and G. C. De Garmo, all of Los Angeles, for respondents.

CONREY, P. J. Plaintiff appeals from the judgment and from an order denying his motion for a new trial. He prosecuted this action to recover an alleged unpaid balance of rent for the months of November and December, 1913, and January, 1914, under a ten-year lease of an apartment house in the city of Los Angeles. The lease was executed on May 14, 1913, to the defendants by Elias A. Shedoudy, who, on the 16th day of October, 1913, conveyed the premises to the plaintiff and executed to him a transfer of the lease. The lease provided for a rental of $532 per month payable monthly in advance.

On May 16, 1913, Shedoudy and the defendants, as parties of the first part, made an agreement in writing with one Colyear, by which Colyear was authorized to furnish the apartment house, at a cost which should not exceed $10,000 without the written consent of the first parties. It was agreed that Colyear should install a competent person in the building as manager for the purpose of running and operating the apartment house "until the said property or apartment house can be leased and the furniture and furnishings placed in said buildings by the party of the second part is sold upon terms and conditions satisfactory to both parties hereto." It was also agreed that the first parties should receive no rent for the premises during the continuation of that agreement; that the net receipts from the rentals from the rooms in the building should be divided equally between the parties thereto during the life of the agreement; that one-half of the net profits of the business, after paying the running expenses thereof, should be paid to the first parties by way of compensation for the use and rent of the building, and the other half should belong to Colyear; that if the moneys so received from the rent of the rooms should be insufficient to pay the operating expenses thereof, the loss would be borne equally between the parties of the first part and the party of the second part. It was agreed that either party should have the right to endeavor to secure a tenant to purchase the furniture and furnishings and to lease the building, the tenant and terms of the lease must be satisfactory to the first parties, and the price and terms of sale of the furniture and furnishings must be satisfactory to the second party. If the price obtained from the purchaser should prove to be greater than the invoice price of the furniture and furnishings, the surplus above the invoice price would be equally divided between the parties to this agreement. The agreement further provided:

> "Nothing contained in this agreement shall be construed to constitute a partnership between the parties hereto, it being the express intention of said parties to make a contract for the sale of said furniture and furnishings satisfactory to said second party and the execution of a lease of said real properties above described satisfactory to said first parties. Neither parties hereto shall have the right to assign this contract except by written consent of the other parties hereto."

On the same day when the Colyear contract was executed, an agreement (designated in the briefs as "second agreement") was executed in writing between Shedoudy and the defendants, referring to the lease and to the Colyear agreement, and agreeing between Shedoudy and the defendants as follows:

> "It is understood and agreed that the execution of this agreement shall in no way affect the lease executed between Elias A. Shedoudy, as owner, and George W. May, H. G. Grimwood, and James MacLean, as lessees, and shall not be construed as to interfere with said lease. It is further agreed that, if a loss is result under this agreement, one-half of said loss shall be paid by Elias A. Shedoudy and James MacLean, and one-half shall be paid by George W. May and H. G. Grimwood. In case of profit under this agreement, the said profit shall be divided in the same manner."

On or about the 17th day of December, 1913, Colyear sold and transferred to the plaintiff, Wollenshlager, all of his interest in the furniture and under the Colyear agreement. A settlement was made between Colyear and Wollenshlager of the profits of the current business down to December 15th, and payment made to Wollenshlager as provided in the Colyear agreement. Thereupon, under the instructions of Colyear and of Wollenshlager, the manager of the house ceased to account to Colyear and continued to conduct business under the orders of Wollenshlager. These transactions occurred without the consent of the defendants and without notice to them. In prosecuting this action for rent, the plaintiff gives credit to the defendants for the moneys received by him from Colyear and from the house manager for the months of November and December, amounting in all to $500.94, and seeks to obtain judgment for the remaining balance of $1,095.06.

The court found that the lease and the Colyear agreement were executed as above stated; that Colyear under his agreement took possession of the premises and furnished the same, and conducted the business in accordance with the agreement until December 17, 1913; "that defendants herein have never at any time had, or been in possession of, the premises above described, or any part thereof"; that the premises and lease were transferred by Shedoudy to the plaintiff in October, 1913, with actual notice to plaintiff of the Colyear agreement; that on December 17, 1913, the plaintiff purchased, and Colyear transferred to the plaintiff without the consent or knowledge of the defendants, all of Colyear's right, title, and interest in and to said agreement and the property therein described; that on December 17, 1913, the plaintiff, without the consent of the defendants, or any of them, took exclusive possession of the premises, and from that time forth held and managed said apartment house, and, without the consent of the defendants, collected and appropriated to his own use the rents and profits thereof; that none of the rentals claimed by the plaintiff in this action were due or owing from the defendants to the plaintiff. Judgment was entered accordingly.

Appellant claims that the evidence is not sufficient to support certain of the findings. In this we do not agree with him. There is the uncontradicted testimony of Colyear that he sold and transferred to the plaintiff the furniture and furnishings of the apartment house, and all of his right, title, and interest in and to the Colyear agreement. Under the circumstances shown, the plaintiff should not be permitted to take advantage of the provision in that agreement that it must not be assigned without the written consent of all the parties thereto. He consented to the transfer, and pursuant thereto took the property into his possession. The court's finding that the plaintiff, without the consent of the defendants, took exclusive possession of the property, and collected and appropriated to his own use the rents and profits thereof, is entirely in accordance with the evidence, and it is difficult to account for the assertion of counsel for the appellant that "there is not a scintilla of evidence to be found in the record to support this finding."

[1-3] Appellant places emphasis upon that term of the Colyear contract which provided that it should not be construed to in any way affect or interfere with the lease executed between Shedoudy and the defendants. A statement of that kind in a contract is not controlling, if the terms of the contract are such that it cannot be carried into effect without violating the terms of the prior contract. The lease of May 14th provided that the defendants should have possession of the apartment house. The Colyear agreement of May 16th gave that possession to Colyear. The lease provided that the defendants should pay rent to Shedoudy. The Colyear contract provided, not only for a division of profits, but it also provided for an equal sharing of losses (if any there should be), as between Colyear on the one side and Shedoudy and the defendants on the other side. Then, to make clear the effect of these transactions as between Shedoudy and the defendants, those parties entered into the "second agreement," which contained a new alignment of the parties, classing MacLean with Shedoudy as bound to pay one-half the loss, "if a loss is result under this agreement," and obligating May and Grimwood to pay the other half; the profits, if any, to be divided in the same manner. It is true that the evidence shown in the record is silent as to whether or not the plaintiff had actual knowledge of the "second agreement" when he accepted his transfer of the premises and of the lease as sold to him by Shedoudy; but his knowledge of the Colyear agreement, and of Colyear's possession of the premises under that agreement, was, in our opinion, sufficient to put him upon inquiry as to what were the actually existing relations between Shedoudy and the defendants. Reasonable inquiry would have apprised him of the fact that Shedoudy's right to collect rent under the lease had ceased to exist, and that the partnership relation had been substituted therefor. We are satisfied that this change had occurred as the legal result of their transactions. In principle the case is like that of Pico v. Cuyas, 47 Cal. 174. Pico made to Cuyas a written lease of a hotel. Thereafter, and before the lessee obtained possession, the parties entered into a partnership to conduct together the business of the hotel upon an agreed division of profits and losses; it being understood that the lessee was to manage the business. Upon these facts it was determined that Pico could not recover rent. The court said:

> "Nor do we think that the effect of the contract proven was to change or modify the terms of the lease, or to work a surrender of it. The two contracts are entirely separate and distinct. It was competent for the plaintiff, after the ex-

ecution of the lease, to enter into a contract of partnership with the defendant in the business of hotel keeping, and to agree that the rent of the hotel should be a charge upon the firm. He remained the lessor and his claim for rent continued, but by an independent contract, which was entirely disconnected from the lease, he obligated himself to 'sustain as a partner his proportion of the charge for rent,' as of other charges against the firm. It is the result of this contract that, so long as the partnership continues, he can receive the rent only from the net profits of the concern; and these cannot be ascertained otherwise than by a partnership accounting."

So here, even if the Colyear contract did not have the effect to destroy the lease, it was sufficient to excuse the lessees from payment of rent and to limit the lessor's right by the amount of his share of the net profits so long as the Colyear contract continued in force. It did continue in force until December 17, 1913. This is sufficient to exclude the plaintiff's demand for rent for the month of November and the first 16 days of December; and, leaving the Colyear contract out of the case, the plaintiff's right to recover for the remainder of December and for the following month of January is defeated, because his act in taking possession of the premises on December 17th without the consent of the defendants was an eviction of the defendants from any possession which they may be supposed to have had under the lease.

The judgment and order are affirmed.

We concur: JAMES, J.; WORKS, Judge pro tem.

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34 Cal. App. 37

WARMAN STEEL CASTING CO. v. REDONDO BEACH CHAMBER OF COMMERCE et al. (Civ. 1857.)

(District Court of Appeal, Second District, California. June 6, 1917.)

1. CONTRACTS 🔑235—CONSTRUCTION—SCOPE AND EXTENT OF OBLIGATION.

An agreement that plaintiff would erect a factory, and defendant would, upon proof that plaintiff had spent certain sums in wages to employés, pay plaintiff a bonus, to be raised by contributions, and that before execution of the agreement each would show the other that the necessary cash had been provided in fact, was not an agreement by defendant or its members to pay bonus at all events, but to pay from a particular fund, and where plaintiff waived right to have fund secured in advance, it can recover only money held by defendant for purpose of fund intended to be provided.

2. ASSOCIATIONS 🔑20(2)—ACTIONS AGAINST —PARTIES—STATUTE—"BUSINESS."

A chamber of commerce, a voluntary association organized to promote common welfare, from which members derive no individual profit, is not engaged in any business, within Code Civ. Proc. § 388, providing that persons associated in "business" and transacting it under a common name may be sued by such name, and judgment may be taken against members served, though not named as parties.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Business.]

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by the Warman Steel Casting Company against the Redondo Beach Chamber of Commerce. From judgment for plaintiff, defendant and others appeal. Reversed.

M. A. Albee and Frank L. Perry, both of Los Angeles, for appellants. W. H. Fuller, of Los Angeles, for respondent.

JAMES, J. The appeal in this case is taken by the defendant named in the title and by J. H. Cavanah and W. J. Hess from an adverse judgment and from an order denying to appellants a new trial.

The Redondo Beach Chamber of Commerce was a voluntary organization of residents of the city of Redondo Beach. A set of by-laws, which constituted the only written evidence as to the purposes of the association and the obligation of its members, contained preliminarily this declaration:

"The object of this organization shall be to secure attractions and public entertainments, to foster and encourage commerce, stimulate home trade, secure manufactures, improve and beautify streets and parks, attract tourists, induce immigration, and to obtain the organized efforts of our citizens for the better promotion of the best interests of Redondo Beach."

The plaintiff corporation was desirous of securing a site for a factory, and the Chamber of Commerce of Redondo Beach was desirous of securing the factory to be located in its city. After a number of conferences, a written proposal was prepared by the Chamber of Commerce, which proposal was accepted in writing by the plaintiff. One of of the offers contained in this proposal as made on behalf of the Chamber was to pay a cash bonus to the plaintiff upon certain conditions being fulfilled. In this writing it was stated:

"As you are aware, we represent the entire citizen body of Redondo Beach, and the fund we propose to raise must come from workers themselves, as our crop of capitalists is very small indeed."

The agreement for the payment of the bonus was expressed by the following terms:

"The Chamber of Commerce agrees to give the Warman Steel Company the sum of $2,000 in cash, payable as follows upon the completion of the plant and the operation thereof: $1,000 to be paid by the trustee holding the fund of the Chamber of Commerce, upon the Warman Steel Company, furnishing proof that they have expended in wages to employés (exclusive of construction cost, salaries of officials, and like expenses) the sum of $20,000, and an additional $1,000 when they have paid out in like manner a second amount of $20,000. Both the Redondo Beach Chamber of Commerce and the Warman Steel Company agree that, before the execution of any agreement as hereinbefore proposed, they will show to the satisfaction of each other that the cash necessary to the erection and beginning of operation of the steel plant upon one side, and the payment of bonus and supplying of land upon the other, have been provided in fact, and are in the hands of a reliable trustee or trustees, or in bank for the use and purposes contemplated in this agreement."

This latter provision as to the fund, which would make up the amount of the bonus payment, being secured and deposited with a trustee in advance, was not complied with, nor insisted upon by the plaintiff. Plaintiff corporation established its plant at Redondo Beach, and after operating for some time made a demand upon the Chamber of Commerce that it be paid the bonus agreed upon. At the same time it made a showing by a statement of its secretary giving evidence that it had expended the required amount as wages to employés. The bonus fund had not at that time been collected, but one of the officers of the defendant association succeeded in collecting $1,297.25, which was turned over to the plaintiff, leaving, as alleged by the plaintiff, a balance due it in the sum of $772.44, that being the amount sued for and for which judgment was entered.

[1] Appellants urge a number of points as sustaining their contention that the judgment should be reversed. It is cogently argued, and we see no escape from the conclusion proposed by the appellants, that the agreement as made was not an agreement binding the association defendant or its members to pay at all events the bonus of $2,000 upon compliance by the plaintiff with the conditions expressed in the writing, but that the agreement was an agreement to pay from a certain particular fund which was to be provided by solicitation and derived from contributions. The agreement in the parts we have referred to not only expressly stated the source from which the fund was to be derived, but also gave to the plaintiff the right to insist that the fund be collected and placed in the hands of a trustee before the plaintiff proceeded to erect and operate its plant. Where the plaintiff elected to waive its right to have such fund secured in advance, we think its right of action must be limited to recovery of any amount held by the defendant association or any trustee, for the purposes of the fund intended to be provided. Here the showing was that the plaintiff had received the full amount of money that had been collected. It appears to us that it would be utterly inconsistent with the recitals of the written agreement to hold that it was intended that the individual members of the association should have primary liability as to any unpaid part of the bonus. Mechem on Agency (2d Ed.) § 189. Under the conclusion expressed, the plaintiff was not entitled to the judgment awarded to it.

[2] It will be noted that the plaintiff did not join as parties any of the individual members of the association. The two persons against whom judgment was entered were served with summons, notwithstanding that they were not joined as defendants in the action. The appellants insist that the association was not such an association as could be sued under its collective name, and that no judgment could be rendered against individual members served, but not joined as defendants. The theory under which the plaintiff proceeded was that the association was such an association as is mentioned in section 388 of the Code of Civil Procedure, in which case the associates may be sued by the common name, and summons may be served upon the individual members, and judgment taken against them as though they had been particularly named as parties. The argument of appellants that the association was not such an association as is described in section 388, Code of Civil Procedure, because it was not engaged in "any business," commends itself to us with much force. There seems to be a dearth of California decisions to that point, although Swift v. S. F. Stock & Exchange Board, 67 Cal. 567, 8 Pac. 94, is cited. Appellants also cite St. Paul Typothetæ et al. v. St. Paul Book Binders' Union, 94 Minn. 351, 102 N. W. 725, 3 Ann. Cas. 695. In the latter decision, under a statute almost identical with ours, the Supreme Court of Minnesota said:

> "The statute, it is clear, was not intended to include associations of this character. Its purpose was to authorize the courts to take jurisdiction over unincorporated associations engaged under a common name in some sort of business in which property is bought and sold, debts contracted—concerns owning and holding property, and incurring pecuniary liability—and not associations of the character of labor unions, having no property, engaged in no business occupation, in a proper sense of the term, and whose only function is the promotion of the interests and welfare of the persons who are members thereof."

The association in this case was not one from which the members derived any specific individual profit, or profit different from that which would accrue to the municipal community. Its purpose was to promote the common welfare, and it had no "business," in the sense of being engaged in a private commercial enterprise. To deny the application of section 388, Code of Civil Procedure, is not to say an aggrieved party may not enforce by suit a demand against such a noncommercial association. Such a party may have the right to sue the individuals composing the organization. The individuals then are entitled to be made actual parties to the suit and to have service of summons. The first proposition discussed is determinative of the appeal, but we think also that appellants' position is well taken upon the contention last adverted to.

The judgment and order are reversed.

We concur: CONREY, P. J.; WORKS, Judge pro tem.

34 Cal. App. 95

JACKS v. TAYLOR, County Treasurer. (Civ. 2019.)

(District Court of Appeal, First District, California. June 12, 1917. Rehearing Denied by Supreme Court Aug. 6, 1917.)

1. COUNTIES 🔑200—CLAIMS—TIME FOR FILING.

Claim against a county, for services performed under a contract with the grand jury in examining the books of county officers, filed a second time, more than one year after accrual of last item, after decision that claim was illegal, is not barred by Pol. Code, § 4075, since first filing within year satisfied the requirements of the statute, and second filing did not change nature of claim.

2. COUNTIES 🔑124(2)—UNAUTHORIZED CONTRACTS—RATIFICATION.

Board of supervisors has no power to ratify action of grand jury in employing experts for examination of books of county officers and agreeing to pay them more than compensation provided by Pen. Code, § 928, where grand jury did not assume to act as agent of board, but acted in independent capacity.

Appeal from Superior Court, Monterey County; Geo. H. Cabaniss, Judge.

Action by Will Jacks against James Taylor, as County Treasurer of the County of Monterey. From judgment for plaintiff, defendant appeals. Reversed.

Chas. B. Rosendale, of Salinas (Arthur H. Elliot, of counsel), for appellant. Daugherty & Lacey, of Salinas, for respondent.

PER CURIAM. This is a proceeding in mandamus. The petitioner in the court below will hereafter be referred to as the plaintiff, and the respondent in that court as the appellant. This controversy was before this court on a previous occasion in a proceeding in which the same relief was sought by the same plaintiff against the same defendant, the title of the case being identical with this case. See 24 Cal. App. 667, 142 Pac. 121. The facts of the controversy as they stood at the time that case was decided were fully stated in the opinion therein, and for those facts reference may be had thereto. Since that decision further action by the board of supervisors of Monterey county has made new issues in the matter; the former case has apparently been abandoned, and upon the new issues raised in this action plaintiff had judgment in the superior court, commanding the defendant to pay him $350 out of the county treasury. From this judgment the defendant prosecutes this appeal.

The facts additional to those recited in the former opinion are that on the going down of the remittitur in that case the claim of plaintiff was again presented to the board of supervisors, who thereupon adopted, after a preamble reciting that the employment upon which the claim was founded was necessary and for the benefit of the county, the following resolution:

> "Resolved, that this board hereby ratifies and approved the incurring of said expense by said grand jury as fully as if the same had been originally authorized by this board, and to the full extent of the power of this board to constitute said claim a county charge."

[1] The authority of the board of supervisors to ratify the action of the grand jury by the adoption of this resolution is disputed by the defendant, and he also contends that the second filing of this claim with the clerk of the board of supervisors, not having been made within one year of the date when the last item of the charge accrued, was barred by the provisions of section 4075 of the Political Code. That section provides that no account shall be passed by the board unless filed with the clerk within one year after the accrual of the last item thereof. This claim, as filed with the clerk after the decision of the former case, was the identical claim—the same paper, indeed, unchanged—which was filed with the clerk in the first instance, and we think the first filing thereof satisfied the requirements of the section cited, and that the second filing did not change the nature of the claim. In the opinion in the former case this court held this claim as then presented to be an illegal claim, and said:

> " 'That is not lawful which is contrary to an express provision of the law' (Civ. Code, § 1667); and the general principle is well established that a contract is illegal which is made in direct disregard of the provisions of a statute which provides for and regulates the making of such contract."

In support of this proposition numerous authorities were cited. The court further said:

> "Applying this general principle to the contract upon which the claim in controversy is alleged to have been founded, there is no escape from the conclusion, it seems to us, that such contract was illegal. Being so, it follows as a necessary consequence that the claim based thereon was also illegal, * * * and that therefore the board of supervisors had no jurisdiction to allow it. * * * The mere fact that the claim was allowed by the board did not invest it with a validity which it did not theretofore possess. * * * The original illegality of the claim in controversy constituted a good defense to the writ; * * * and if such claim was upon its face and in fact illegal then indubitably the treasurer was authorized to refuse payment."

[2] To this statement of the law, after re-examination, we adhere. It is argued that the board of supervisors might have joined with the grand jury in employing experts for the examination of the books of county officials, and have agreed to pay such experts in conjunction with the grand jury compensation for their services in excess of the compensation provided by section 928 of the Penal Code, and that hence the board of supervisors had power to ratify the action of the grand jury in entering into the agreement made by the grand jury in this case. The answer to this is that what the grand jury actually did was to attempt without reference to the board of supervisors to enter into an unlawful agreement to pay

experts a compensation which in amount directly violated the provisions of section 928 of the Penal Code. To understand that they had not in contemplation any action by the board of supervisors in the matter it is only necessary to observe that the purpose of the employment of experts by the grand jury, pursuant to section 928 of the Penal Code, was an examination, not only of the books of other county officials, but also of the books, accounts, and official acts of the supervisors themselves—an independent examination, not in any way under the authority of the board of supervisors. Ratification is the adoption and affirmance by one person of an act which another without authority has assumed to do as his agent. McCracken v. City of San Francisco, 16 Cal. 591. The grand jury in this matter were not the agents of the board of supervisors, and did not assume to act as such. They acted as an arm of the superior court, in a capacity entirely independent of the board.

Nothing in this opinion is to be construed as holding that the board of supervisors did not have power to allow the claim for the amount permitted by the statute.

The judgment is reversed.

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34 Cal. App. 28

RANDOLPH FRUIT CO. v. GALBREATH.

(Civ. 1831.)

(District Court of Appeal, Second District, California. June 6, 1917.)

1. Factors 🔑32 — Settlement — Conclusiveness.

Plaintiff, a company engaged in handling and marketing fruit, offered to handle defendant's crop of oranges and grape fruit, and defendant replied that he would let the fruit go through plaintiff's hands. Subsequently plaintiff wired defendant that it had sold two cars of oranges at $1.90 f. o. b., and defendant replied, accepting the offer and instructing plaintiff to wire him before selling any more. From time to time plaintiff made deposits to defendant's credit, and in reply to an inquiry stated that in remitting to defendant at prices specified, "less our packing and selling charges of 47½ cents per box, we are paying you for the fruit on the basis on which it was sold." In other communications it was represented that the price mentioned was the one at which the fruit had been actually bargained for. *Held* that, while it was the understanding that plaintiff's packing and sales charges were to be made against defendant, plaintiff could not recover back a portion of the amount paid defendant, on the theory that the prices quoted by it were not net prices, but subject to other charges and conditions of the Eastern market not at the time known to plaintiff, and that it had overpaid defendant, since, even though the transaction amounted to an agency, and not a sale, an agent, representing that goods are being sold at a certain definite price and making returns accordingly, cannot dispute the correctness of his returns and charge his principal with a greater amount of deductions, where no reasonable ground of error or excusable mistake is shown.

2. Appeal and Error 🔑1033(9)—Harmless Error—Errors Favorable to Appellant.

That the trial court's conclusions in favor of defendant, if followed, showed a greater amount due defendant than the court actually found, was an error favorable to plaintiff, and plaintiff could not complain thereof, where it in no way affected the correctness of the court's conclusion in favor of defendant.

Appeal from Superior Court, San Bernardino County; Frank F. Oster, Judge.

Action by the Randolph Fruit Company against G. W. Galbreath. From an order denying a motion for new trial, plaintiff appeals. Affirmed.

W. W. Butler, of Los Angeles, for appellant. Halsey W. Allen, of Redlands, for respondent.

JAMES, J. This action was brought by the plaintiff to recover, as for money paid out at the instance and request and for the benefit of defendant, the sum of $617.49, together with interest. Judgment was for the defendant. The appeal is taken from an order denying plaintiff's motion for a new trial and is presented on the judgment roll and a statement of the case.

[1] Plaintiff, in 1912, was engaged in the handling and marketing of fruit. In the same year defendant was the owner of an orchard which was then producing oranges and grape fruit. The orchard was located in San Bernardino county, Cal., while the defendant was a resident of the city of St. Louis, Mo. In the year mentioned one of plaintiff's officers, having apparently observed that there was some especially fine fruit in the orchard of defendant, wrote to the defendant this letter:

"Dear Sir: We were very much surprised to learn that you had sold your oranges at Highland, and felt sure that you did not know the condition there—therefore took the liberty of wiring you the facts in the case. A few days ago, since the frost, I made a careful inspection of your orchard, and have no hesitancy in pronouncing your crop the finest oranges I ever saw; they are not frozen, nor did I find any evidence of frosted fruit. It was only now and then that a tree in the top and the young shoots showed any evidence of being touched; but the fruit is in perfect condition. Your sizes are exceptional for this year. The majority of the oranges from other groves are small, and owing to the cold weather will not size up sufficiently to make them merchantable. This makes fruit of good size, such as yours, command a premium.

"I was afraid that they had misrepresented to you that the fruit was frozen, and, not knowing the exact condition, that you had not received the market value, took the liberty of telegraphing you. We have received your wire in reply, instructing us to call Mr. Norton, which we did immediately on receipt of same, but found him away from home. However, Mrs. Norton answered the telephone, and advised me that she had received a telegram from you, and was then endeavoring to reach Mr. Norton on the phone at Rialto. She stated that he would return this evening, and she would have him call me on the phone. I will advise you as soon as I have a talk with him as to just what is the status of affairs regarding the sale.

"Yours very truly, W. O. Randolph."

To this letter defendant made reply, stating that he had then pending a deal to sell his fruit on the trees, but had not signed the contract. He requested plaintiff to get in touch with his overseer, and to cover fully any offer the plaintiff had to make, and to state the price that plaintiff believed the fruit would bring. This last information was contained in a telegram to which plaintiff made the following reply:

> "Examined your orange crop yesterday again, also had a talk to-day with Norton. If you will allow me handle your crop and use my judgment will net you a great deal more money than you have been offered. Your oranges and grape fruit is in fine condition and by moving it slowly when we have good orders you will be more than satisfied with results. I can put it out on our orders. We can move half car your grape fruit now two fifty f. o. b. Highland. I feel sure can sell your oranges at dollar sixty-five to two dollars f. o. b. Please answer promptly. Holding grape fruit order open until hear from you. My advice is that the bulk of the crop should not be moved before the first of March to lighten up some of the trees. W. O. Randolph."

Defendant made reply by a lengthy letter. In that letter he stated that he had theretofore felt disposed to sell the fruit on the trees, but that he had finally decided to let the fruit go through plaintiff's house "with the understanding, of course, that, if I am not satisfied with the results obtained, I would have the privilege of changing to other packing houses." He added:

> "I wired you last night, and also notified Norton, and instructed him to have the grape fruit picked and delivered to you on request; also to pick the balance of the fruit from time to time as requested by you."

Instructions were also contained in the letter, directing deposits to be made on account of sales with a bank in the city of San Bernardino, and also regarding records of weights to be furnished. A telegram was also sent by the defendant, advising the plaintiff that he had instructed his superintendent to pick the grape fruit and fill the order mentioned in the previous communication of the plaintiff. Shortly thereafter plaintiff wired the defendant that it had "sold two cars your oranges for immediate shipment at one dollar ninety cents f. o. b." The reply came immediately:

> "Have instructed Norton to have two cars of oranges picked. Sold at one ninety f. o. b. Before selling more wire price first as may not want to sell but hold for higher market."

From time to time plaintiff made deposits to the credit of defendant in the San Bernardino bank designated by the defendant. Defendant later wrote, making some complaint, and asking for particulars as to sales made, and the reply came in the course of time. One of the inquiries was regarding the two car loads of oranges which the defendant was advised were to be sold for the price hereinbefore mentioned. Touching that matter, the letter of the plaintiff contained this statement:

> "In remitting you on the 759 boxes at the above prices, less our packing and selling charge of 47½ cents a box, we are paying you for the fruit on the basis on which it was sold."

Other statements contained in the letter were of similar import. However, a number of months after the shipment of the crop, or that portion of it handled by the plaintiff, this action was brought, wherein the plaintiff sought to recover back a portion of the money so paid to the defendant; the claim being that this money was paid as advances, and not as for a concluded sale of the fruit. There is no dispute but that, if it were a fact that the oranges and grape fruit were sold at the prices stated by the plaintiff in its letters and telegrams, there was made by reason of the alleged advances no excess payment over such prices to the defendant.

Plaintiff's position is that the entire transaction was an open matter, and that, when in its letters and telegrams a price was referred to, that price was not a net price to the defendant, but was subject to other charges and conditions of the Eastern market not at the time known to the plaintiff. This position is not at all borne out by the statements of the plaintiff as contained in its various letters and telegrams, especially in that letter written in reply to the defendant, when the latter complained about the returns and asked for more specific accounting. Defendant was told, for instance, that "in remitting you on the 759 boxes at the above prices, less our packing and selling charge of 47½ cents a box, we are paying you for the fruit on the basis on which it was sold." It is plain enough that the understanding to be derived from the various communications passing between the two parties was that the packing and sales charges were to be made against the defendant. However, when the defendant was informed that fruit had been sold at a certain price f. o. b. at the shipping point, the language used leaves little room for misunderstanding. The price to be returned was either the price mentioned when the fruit was on board cars after being handled and packed by the plaintiff, or those specific terms could mean nothing whatsoever. The trial judge found that the various advances had been made by way of settlement.

Whether we shall say that the transactions between the plaintiff and the defendant amounted to a sale of the defendant's fruit to the plaintiff, or whether we shall say that the plaintiff was operating merely as an agent, to our minds the conclusion must be the same, and that conclusion sustains the judgment of the trial court. Viewing the case as one of agency only, from all of the testimony it may very properly be deduced that the agent represented to its principal that fruit was being sold at a certain definite price and made returns accordingly. In such a case the agent may not be permitted to dispute the correctness of his returns, and later attempt to charge his principal with a greater amount of deductions, where no reasonable ground of error or excusable mistake is shown. It is very commonly held that a factor may by his words and acts make himself liable to an accounting for a specific price where goods are intrusted to his possession and for sale. Mechem on Agency, § 2557. In the communications passing from the plaintiff to the defendant, wherein the price to be obtained for the oranges and grape fruit was mentioned, it very clearly appears that the plaintiff intended to represent to the defendant that the price mentioned was the one at which the fruit had been actually bargained for. We think these circumstances sufficient to charge the agent accordingly.

[2] Appellant suggests, in conclusion, that the calculation made by the trial judge was erroneous, in that if his deductions were followed a greater amount would be due the defendant than the fact was actually determined to be. If the trial judge made such error, it was an error in favor of the plaintiff, and we think in no wise argues against the conclusions before expressed.

The order is affirmed.

We concur: CONREY, P. J.; WORKS, Judge pro tem.

34 Cal. App. 24

HOGAN v. ANTHONY et al. (Civ. 1874.)

(District Court of Appeal, Second District, California. June 6, 1917. Rehearing Denied by Supreme Court Aug. 4, 1917.)

1. SALES 🔑131 — RESCISSION — OPERATION AND EFFECT.

On August 12th defendants by an instrument in writing agreed to sell plaintiff an automobile truck for an amount payable in installments. On the 13th they leased the truck to plaintiff by a lease providing for deferred payments, evidenced by notes, as rental, and providing that plaintiff might purchase the truck for $1 at the end of the term. The truck was not delivered until after the execution of the lease and notes, and there was an oral understanding, when the first instrument was signed, that notes would be executed, and the facts showed that during the period between the execution of the contract and the execution of the lease the parties were engaged in closing a single transaction. *Held*, that the lease was the conclusion and culmination of the transaction, and by it the rights of the parties must be judged, and hence plaintiff's attempted rescission of the original contract was of no force or effect; that instrument being merely preliminary to the lease and abrogated by it.

2. SALES 🔑128 — RESCISSION — EVIDENCE OF RESCISSION.

In an action to enforce a rescission of a contract for the purchase of a motor truck, evidence *held* insufficient to sustain findings that plaintiff notified defendants that the truck was not as represented, and was valueless to him, that he returned the truck and defendants accepted and received it, but, on the contrary, to show that with plaintiffs' acquiescence defendants seized the truck for nonpayment of a deferred payment.

Appeal from Superior Court, San Bernardino County; J. W. Curtis, Judge.

Action by James P. Hogan against Earl C. Anthony and others. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Reversed and remanded.

E. W. Freeman and Paul Nourse, both of Los Angeles, for appellants. Ralph E. Swing, of San Bernardino, for respondent.

WORKS, Judge pro tem. This is an appeal from the judgment and from an order denying a motion for a new trial.

On August 12, 1914, the appellants, by a writing which we shall hereafter, for convenience, call the contract, agreed to sell respondent an automobile truck for the sum of $1,650. Of this amount $500 was paid at the time, under a recital that it was paid as a deposit to apply upon the purchase price, and the remainder was agreed to be met in 11 monthly installments of $100 each and an additional installment, at the twelfth month, of $50. On the next day, the 13th, the parties entered into a lease of the car, Hogan being the lessee; and he executed notes to one of the appellants for the deferred payments mentioned in the contract. The lease recited that the sum of $500 had been paid down, provided for the making of the 12 deferred payments as rental, mentioned the notes as having been given of even date with it, declared them to be a part of the lease, fixed a term coincident with the running of the notes, and provided that Hogan might purchase the truck at the end of the term for a consideration of $1. The car was not delivered to Hogan until after the execution of the lease and notes, as his own testimony shows. It is also to be stated that the evidence of appellants shows that, at the time the contract was signed, there was an oral understanding between the parties that Hogan would on the next day execute notes to cover the deferred payments. This Hogan did not deny.

The action is to enforce a rescission. The amended complaint sets up the contract and alleges a delivery of the truck under it; alleges that the instrument was entered into by Hogan because of the misrepresentations of appellants concerning the capacity of the truck, that the lease and notes were executed without consideration, and that Hogan returned the truck upon discovering the untruth of the representations. It also presents the other allegations necessary to the complete statement of such a cause of action, and demands judgment for a return of the money and of the notes. The trial court found with respondent and rendered judgment accordingly.

[1] The appellants contend that various of the findings are not supported by the evidence; but, so far as the points presented by them in that regard are necessary to be discussed in this opinion, the position of the appellants may be summarized thus: They insist that the attempted rescission of the contract can boot the respondent nothing, for the reason that the instrument did not evidence the final agreement between the par-

ties, but that their respective obligations must be measured by the terms of the lease. It has been determined in many instances, particularly in this state, in the case of Houser & Haines Mfg. Co. v. Hargrove, 129 Cal. 90, 61 Pac. 660, that a completed sale of property cannot afterward be changed to a conditional sale. In the case cited, sale and delivery had been entirely consummated, and the transaction was attempted to be altered two months later by a new and conditional agreement. The situation here is quite different. The facts above stated, and the entire record, which we have gone over carefully, disclose a situation, during the period between the execution of the contract and the execution of the lease, in which the parties were engaged in closing a single transaction. Of this transaction, the lease was the conclusion and the culmination, and by it must the rights of the parties be judged. The respondent does not claim to have rescinded the lease. He denies its existence, and expressly relies upon an alleged rescission of the contract, a paper merely preliminary to the lease, and which was abrogated by it. The findings to which appellants take exception are not sustained by the evidence.

[2] One of the findings objected to by the appellants is to the effect that respondent, upon discovery of the untruth of the representations appellants had made to him, informed them that the truck "could not be used by him in his said business in the manner represented by defendants, and that it was valueless to him," and that on September 18, 1914, he returned it to them, and they "accepted and received" it. The appellants claim, under appropriate allegations of the answer, that the truck was seized by them on the date mentioned in the finding, under a provision in the lease, for Hogan's failure to pay the first installment note, which fell due on September 13th, and that Hogan acquiesced in the seizure. The finding has no support in the evidence; but on the other hand, the theory of appellants as to the seizure of the truck is directly sustained by it. Hogan himself testified as follows as to what happened between him and a representative of appellants from September 13th, when the first note fell due, to September 18th, when he parted with possession of the truck after having used it in his business for over a month:

> "I told him how it was acting, * * * and he said, 'Well, you've got to pay that $100,' or 'There is $100 due;' and I said, 'No, I am not;' and he said, 'If you don't, we will make you;' and I said, 'All right, come and take it if you want it; but I am not going to pay any more until you make some settlement. I want somebody to come out here that knows something about it. I am willing to do anything agreeable, but I am not going to pay $100 until something is done;' and he said, 'We'll come and take the truck;' and I said, 'All right;' and he * * * drove off."

Later, but between the same dates, there was another meeting. Hogan says this is what occurred:

> "He spoke about the truck and about the $100, and wanted to know if I was going to pay it; and I said, 'No;' and he said, 'I am going to take the truck;' and I said, 'All right, but I think it would be better to make some settlement about it.' 'Well,' he said, 'if you want to pay the $100; if you don't, I will take the truck.' I said, 'I will go down to the icehouse and take the load off.' 'All right,' he said, 'I will go down;' he got in the machine and went down. He said, 'Don't you think you had better pay this note?' I said, 'I am not going to. This truck is no good to me and I will not pay any more money on it.' He said, 'I will tie this truck up;' and I said, 'Can you do it?' and he said, 'I have got the papers right in my pocket to do it;' and he said, 'If you don't want to give it up, I will go up town and get an officer and tie it right up;' and I said, 'You need not do that; if you want the truck, I will put it anywhere you say so;' and he said, 'Take it to that garage;' and I said, 'All right.' I took it to the house, took the body off and took it down."

This is all that occurred in connection with the surrender of the truck, or in an attempt to effect a rescission, except that, more than two months after the car was taken away, Hogan wrote a letter to applicants, in which he demanded a return of his money and of the 12 promissory notes, and said:

> "This truck, as you know, was not as represented, and has been returned to you."

These circumstances fail to show a rescission, even of the contract. It is unnecessary to consider any of the other points presented by the appellants.

The judgment and order are reversed, and the cause remanded.

We concur: CONREY, P. J.; JAMES, J.

(34 Cal. App. 158)

A. E. BARANGER & CO. v. MEYER, CAHN & TALBOTT et al. (Civ. 2227.)

(District Court of Appeal, Second District, California. June 19, 1917.)

1. Malicious Prosecution ⇨64(2) — Wrongful Attachment—Malice — Evidence—Sufficiency.

In an action for damages for a wrongful attachment, evidence *held* sufficient to sustain the court's finding that the attachment was levied without malice on the part of defendants.

2. Appeal and Error ⇨301—Review—Matters Not Included in Motion for New Trial.

Since no attack upon the portion of the court's finding to the effect that defendants were advised by counsel that attachment would lie was included in the motion for a new trial, appellant cannot, on appeal, insist that this part of the finding was not supported by the evidence.

3. Malicious Prosecution ⇨21(2)—Wrongful Attachment—Probable Cause.

The advice thus given by attorneys and its acceptance in good faith by the defendants were alone sufficient to establish probable cause justifying their acts in authorizing the levy of an attachment.

Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

Action by A. E. Baranger & Co. against Meyer, Cahn & Talbott, a corporation, and another. From an order denying its motion for a new trial, plaintiff appeals. Affirmed.

Olin Wellborn, Jr., and Stephen Monteleone, both of Los Angeles, for appellant. Collier & Clark and Arthur J. Abbott, all of Los Angeles, for respondents.

CONREY, P. J. Plaintiff appeals from an order denying its motion for a new trial. The action was brought to recover damages for the alleged wrongful and malicious acts of the defendants in procuring the seizure of certain merchandise out of the stock of merchandise of the plaintiff, under a writ of attachment issued at the instance of the defendants in an action in the superior court of Los Angeles county wherein the defendant the Frankoli Company was plaintiff and one A. E. Baranger was defendant.

The plaintiff bases its claim of right to a new trial upon insufficiency of the evidence to support certain of the findings. The specifications as shown by the transcript are that the evidence is insufficient to justify finding 3, and that portion of finding 2, which states "that said action was begun and prosecuted and said attachment levied without malice on the part of either or any of the defendants, and that said defendants, and each of them, had probable cause for the commencement and prosecution of said action and the levying of said attachment." Finding 3 relates only to the measure of damages to which the plaintiff would be entitled if the facts established a cause of action herein, and the finding concludes with the statement that the plaintiff "was not damaged by reason of the commencement or prosecution of said proceedings or the levying of said attachment excepting to the extent of the value of the goods taken under said attachment, to recover which damages plaintiff has prosecuted a separate and independent action in this court." In view of the conclusion which we are about to state sustaining that portion of finding 2 covered by the specifications of error, it is not necessary to discuss finding 3 or the evidence in support thereof.

The action against A. E. Baranger was commenced and the levy under the writ of attachment issued therein was made on the 31st day of May, 1912. The Frankoli Company brought that action as assignee of an indebtedness existing in favor of the assignor and against A. E. Baranger. Its right to prosecute that action and its good faith in so doing are not successfully controverted by the evidence herein. The plaintiff corporation came into existence in November, 1911; its stockholders being A. E. Baranger, A. M. Baranger, his wife, and Miss M. L. Jones. The articles of incorporation stated that one of its purposes was "to purchase and acquire the good will, agencies, business, accounts receivable, and lease now owned by A. E. Baranger, in the city of Los Angeles, county of Los Angeles, California, and to carry on and conduct said business and a general wholesale business in goods, wares, mdse., etc." That corporation actually transacted business in the city of Los Angeles from the time of its incorporation until the time of the seizure of part of its stock of goods by the sheriff under the writ of attachment to which we have referred. Without more extensively stating the evidence concerning the plaintiff's ownership of the stock of goods in its possession and A. E. Baranger's want of ownership of any interest therein, it may be admitted for the purposes of this decision that the property seized was the property of A. E. Baranger & Co. and was not liable to be held under an attachment for indebtedness of A. E. Baranger.

[1] But the evidence is sufficient to sustain the court's finding that the attachment was levied without malice on the part of the defendants, or either of them, and that there was probable cause therefor. The attorney for the defendants had examined the articles of incorporation, and from his examination of that and other records, together with the facts stated to him by his clients, had reached the conclusion that the merchandise in question was subject to attachment in the action against A. E. Baranger; that it was property which belonged to A. E. Baranger, and which had been transferred in fraud of his creditors. The fact that he was wrong in that conclusion is not material to the plaintiff's cause of action herein. In the specifications of insufficiency of the evidence to support stated portions of finding 2, appellant has excluded that portion of said finding wherein the court determined that:

> "Prior to the commencement of said action and the levying of said attachment said defendants and each of them, after a full disclosure of the facts in said matter, were advised by competent and reliable attorneys that said attachment would legally lie, and that said defendants, and each of them, relied and acted upon the advice of said attorneys in beginning and prosecuting said proceedings and levying said attachment."

[2, 3] Since no attack upon this portion of the finding was included in the motion for a new trial, appellant cannot now for the first time insist that this part of the finding is not supported by the evidence. The advice thus given by the attorneys and its acceptance in good faith by the defendants was alone sufficient to establish probable cause justifying their acts in authorizing the levy of attachment. Since the evidence shows that the court was justified in determining that the defendants did not hold actual malice against the corporation plaintiff herein, they could not establish malice except as the court might infer it from the fact of want of probable cause. Therefore a fact proved and found, which necessarily removes from the case the ground of want of probable cause, fully disposes of this action. "In addition to

the proposition that the evidence was of itself sufficient to constitute probable cause for the prosecution, the defendants were also entitled to the benefit of the rule that where one, before instituting such a prosecution, has in good faith consulted an attorney at law of good standing, has stated to him all of the facts of the case, and has been thereupon advised by such attorney that a prosecution would lie, and such person has acted honestly upon that advice, this, of itself, constitutes probable cause. The question is fully discussed and settled in Dunlap v. New Zealand, etc., Co., 109 Cal. 371 [42 Pac. 29]." Johnson v. Southern Pacific Co., 157 Cal. 333, 338, 107 Pac. 611, 613.

The order is affirmed.

We concur: JAMES, J.; WORKS, Judge pro tem.

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34 Cal. App. 66

FAIRBANK v. SUPERIOR COURT OF SAN JOAQUIN COUNTY. (Civ. 1682.)

(District Court of Appeal, Third District, California. June 7, 1917.)

1. Receivers 🔑60 — Preparation and Duration of Powers of Court.

A court is not justified, through the medium of a receiver, in arbitrarily withholding property from the owner's control and enjoyment for an indefinite and unreasonable time.

2. Mandamus 🔑28—Discretion of Court.

A court of equity cannot be compelled by mandamus to exercise its discretion in a particular manner.

3. Mandamus 🔑38—Courts—Abuse of Discretion.

The court having granted a decree for the support of a wife and children, and appointed a receiver, a motion to discharge the receiver, so that the husband could convey the property to another, was directed to the discretion of the court, and will not be interfered with by mandamus, where there has been no abuse of discretion.

4. Receivers 🔑60—Discharge—Discretion of Court—Evidence.

In mandamus by a husband to compel the court to grant his motion to discharge a receiver and allow him to sell the property, *held* under the facts and circumstances, that the court did not abuse its discretion in denying the motion.

Petition by Elbridge Fairbank for writ of mandate against the Superior Court of San Joaquin County. Writ denied.

M. P. Shaughnessy, of Palo Alto, F. A. Copestake, of Stockton, and Downey, Pullen & Downey, of Sacramento, for petitioner. Edward Van Vranken, of Stockton, for respondent.

CHIPMAN, P. J. Petitioner seeks the writ of mandate to compel the defendant to make an order discharging the receivership referred to in the petition, and permitting the transfer of the property held by the receiver to J. M. Henderson, Jr., subject to such liens, limitations, and restrictions as the court may deem necessary to safeguard the objects for which the receivership was created.

It appears that petitioner owns a life estate, with remainder over to his children, in certain real property described as follows: A farm, commonly known as the Barton ranch, situated in Sacramento county, containing about 320 acres, a tract of about 98 acres, known as the Soles ranch, in said county, 3½ acres, situated in the city of Stockton, at the intersection of Van Buren and Smith streets, lot 4, block 20, situated in Chinatown, said city, and that he owns no other property; that on July 17, 1914, the superior court of said San Joaquin county duly made and entered its decree, in an action commenced by Eliza M. Fairbank, wife of petitioner, for support of herself and the children of herself and petitioner, awarding $100 per month therefor, and appointing R. C. Pardee receiver of the said property of petitioner for the purpose of its management, collecting the rentals, and applying the same pursuant to said decree; that subsequently the sum of $100 was reduced to $80 per month because of the marriage of one of said children; that by said decree petitioner was enjoined from transferring any of said property, pending the further order of the court. The petitioner sets forth that petitioner had an offer from said Henderson to purchase petitioner's interest in said property upon terms "advantageous to petitioner," and that petitioner stated to the said Eliza Fairbank all the facts connected with said offer, agreeing, if she would consent thereto, to pay all back alimony, amounting to $440; also to pay a judgment lien resting on said property amounting to $230.50 and accrued interest, and to secure to her by a lien against the property the current alimony, or give any additional security the said Eliza might think necessary, all of which she refused; that thereafter petitioner filed a motion in the action of Fairbank v. Fairbank, a copy of which, and the affidavits, in support of said motion, of said Henderson and petitioner, are attached to the petition, together with the counter affidavits of said Eliza and said receiver and one Lafe Ward; that said motion came on to be heard March 19, 1917, at which time petitioner "made and filed a specific written offer, copy attached to the petition herein as Exhibit H; that at said hearing the superior court, Hon. George F. Buck presiding, refused to grant said motion, or to grant or make an order discharging said receiver conditioned on any terms whatever"; that petitioner and said Henderson are "willing and able to secure said Eliza M. Fairbank absolutely if said receivership is discharged," but the court refused to discharge said receivership, "regardless of such security as shall be given."

It is not necessary to set forth specifically the offer made in Exhibit H. Suffice it to say that it is substantially the same as was made to Mrs. Fairbank, and is sufficiently comprehensive to constitute what in an ordinary business transaction would be regarded by prudent business men as good and sufficient security for the payment of the amount decreed to be paid by the court. The financial ability of said Henderson to meet his proposed obligations is clearly shown. The following uncontradicted facts appeared from the affidavit of Mrs. Fairbank:

"That prior to the judgment in said action and the appointment of said receiver the said defendant had grossly wasted and squandered all the rents, profits, proceeds, and avails of said property in pursuance of a dissolute and dissipated mode of living, resulting in the actual abandonment of plaintiff and of plaintiff's and defendant's minor children, and of the withdrawal of all support and maintenance of plaintiff and of said children, and reducing them to a state of destitution bordering on starvation. That, since the judgment of said court constituting said receivership, said defendant has continued to pursue a similar course of conduct, with the exception that his excesses and dissipations have been limited to the extent of his being deprived of the income of said property now devoted to the maintenance of said plaintiff and children and to the redemption and clearance of said property from the charges and liens permitted to accrue against it by said defendant. That the income of the various properties, made the subject of said receivership, would have been at all times sufficient to have paid in full all the demands of said judgment and in addition to pay the defendant a yearly sum amounting to $300 and more, save for the improvident, wasteful, and extravagant handling of said property by said defendant prior to the appointment of said receiver, to wit: Neglect and failure to pay the state, county, and city taxes from time to time accruing against the said property, thereby adding heavy penalties and forfeitures, said taxes requiring redemption by the receiver; failure to insure the buildings on said property and to incur the necessary expenses of repair to preserve said buildings from actual dissolution by the elements; permitting a judgment by default to be obtained against him in the superior court of the county of San Joaquin, state of California, in reference to the encroachment of a building owned by said defendant upon the land of an adjoining owner to said property in the city of Stockton, settlement of which has of necessity been undertaken by the said receiver to prevent a sale of said property under execution. That prior to the appointment of said receiver the defendant had collected rents for the use and occupation of his various properties for periods ranging from one year to five months in advance, with the result that, when said receiver actually began receiving the rents from said properties, the various charges, as well as some six months' allowance granted the plaintiff by said judgment, had accumulated against the said properties, a detailed and itemized statement of which are fully set forth in the various reports and accounts of receiver on file in said action, to which reference is hereby made."

The following, taken from said affidavit, while containing few additional facts, sets forth some of the reasons which doubtless had weight with the court at the hearing of the motion:

"That in the event that the motion of Elbridge Fairbank now pending in the court, should be granted upon the conditions, restrictions, reservations, and liens therein proposed to be made and charged upon the property proposed to be transferred by Elbridge Fairbank to J. M. Henderson, Jr., the said plaintiff could, and in all probability at some future date would, be greatly prejudiced and injured by the discharge of said receivership and the substitution of an agreement in its stead with J. M. Henderson, Jr., notwithstanding that such agreement might impose liens and restrictions on said property for the security of her allowance for support under such judgment, in this: That any lien created by such agreement in favor of plaintiff would absolutely cease and terminate at the death of defendant, terminating his life estate in said property, and would be no security whatever for any sum or sums that might be due from the said J. M. Henderson, Jr., at the death of Elbridge Fairbank. That by the discharge of said receiver the said property would immediately pass from the jurisdiction and control of the superior court of the state of California and from the attendant protection afforded plaintiff in the collection of said judgment by the receiver, clothed with authority as an officer of said court and entitled to invoke its summary process in the ordinary performance of his duty as such officer without recourse to litigation outside the above-entitled action and without expense to the plaintiff; whereas, if at any future time an occasion might arise for the enforcement by plaintiff of any of the terms of such agreement proposed, she would be put to the necessity of instituting suits and entering upon litigation, the successful prosecution of which her circumstances would not permit. That the alleged financial standing and wealth of the said J. M. Henderson, Jr., would only more redound to plaintiff's detriment in the event that at any time under such proposed agreement it would be necessary for plaintiff to institute an action for the enforcement of her rights. That the proposed transfer of said property to J. M. Henderson, Jr., by Elbridge Fairbank, the defendant, would not result in any increased benefit to said defendant that could not be realized for said defendant under said receivership, in that the leases of said property from which the said J. M. Henderson, Jr., proposes to derive increased revenue are executed by said receiver from year to year only, and that any possible increased revenues could be equally as well realized from said property by said receiver without endangering any of the rights of said plaintiff under said judgment as aforesaid. That the title to said property vests in the children of plaintiff and defendant, at the death of defendant, in fee. That the administration of said receivership, by nature of its creation and continued existence, under the direct provisions and control of the superior court of the state of California, affords the fullest protection to the interests of the remaindermen in said property, which would be withdrawn upon the discharge of said receiver and the passing of the title in said life estate into the hands of strangers, upon whom would be imposed no duty to conserve the interest of the reversionary owners in said property."

Receiver Pardee, in his affidavit states:

"That all transactions had in connection with said properties and the administration of said receivership are set forth in detail in the several reports and accounts of receiver on file in said action. That affiant has given much time and attention to the leasing of the two ranch properties which J. M. Henderson, Jr., alleges on information and belief only to possess a rental value double the present rental, and therefore states that said properties are yielding their full rental value at the present time, in addition to being occupied by tenants of known responsibility and integrity, who have leased said property under covenants to keep up and maintain the same on lease terms running from year to year only. That any prospective tenants, desiring to pay increased rentals for said properties, are at all times at liberty to apply to the receiver to lease the same upon the terms now prevailing, subject to the approval of the court. That said property would have yielded the defendant an income of $300 and more per year over and above all charges imposed by said judgment and receivership, except for the improvident and reckless manner in which defendant had dealt with said property prior to the appointment of said receiver. * * * That the restraint upon the alienation of said property by defendant (a life interest only) imposed by said judgment, and the application of the rents received from same through said receivership, are the only proper safeguards to the collection of said judgment for plaintiff's support and maintenance that could be devised to meet the requirements of this particular case. That said defendant is not thereby deprived of any substantial benefit possible to be derived from the use of said property, so long as said judgment remains in force and constitutes a charge upon it. That the proposed discharge of the receiver and transfer of said property to J. M. Henderson, Jr., would at best create nothing more than the relation of debtor and creditor, with all the uncertainty attendant upon such relation, whether secured or unsecured. * * * That the expense of said receivership is but $100 per year, and is more than offset by a careful and prudent management of said property by the receiver under the supervision of the court. That such receivership affords the greatest measure of protection to the interests of the remaindermen in said property, the children of plaintiff and defendant, who are, by their close relationship to and dependence upon the parties to this action, proper to be considered in all matters relating to the property rights before the court for consideration in said action. That the monthly allowance directed to be paid by said judgment is for the support and maintenance of plaintiff and the minor children of plaintiff and defendant."

It appeared by the affidavit of said Ward that he is a farmer, and owns and cultivates lands in the vicinity of the lands in question situated in Sacramento county, and is familiar with rental values of said land, that the receiver is realizing its full rental value, and that such value could only be materially increased by means of reclamation from overflow of flood waters of Dry creek, but that "the expense of improvements would be prohibitive."

Petitioner concedes that a proper case was presented for the appointment of a receiver; no suggestion is made of any mismanagement of the property by the receiver, or that his compensation is excessive; and there was evidence that he is receiving the full rental value of the property, and that any additional earning capacity of the property can readily be availed of through the receiver. Petitioner's position will appear from the following statement in his brief:

"It should be noted at the outset that petitioner is not here asking this court to determine what particular security, terms, or conditions the lower court should have exacted as a consideration for discharging the receivership. Undoubtedly much would rest in the discretion of the lower court respecting such terms, security, and conditions. As to these matters, which would rest in the discretion of the lower court, we are asking no relief, as we concede that mandate will not lie to review a discretionary act, unless that discretion is abused. Our position is, however, that the law imposes the duty to terminate a receivership whenever the necessity for its existence ceases. In view of the fact that the affidavits and the offers made by petitioner eliminated absolutely every contingency which made the receivership necessary, provided the conditions exacted by the court were complied with, we contend that it was the duty of the court to prescribe what terms and conditions should be exacted. Its failure to do this was a failure to exercise its discretion, and in effect was a refusal to assume jurisdiction, and therefore mandamus will lie to compel it to do so."

Again, to make clear petitioner's position, it is said in his brief:

"We do not believe that the right to so hold a man's property when he is willing to obviate every necessity for a receivership will be upheld as the law of this state. Section 140 of the Civil Code confers broad power on the lower court to appoint a receiver in the first instance, but it surely cannot be successfully argued that it permits such court to retain a receivership, without regard to the security which a defendant may be able and willing to give. If the lower court in this case had attempted to fasten conditions upon the order discharging the receivership which were arbitrary and unreasonable, we think we would have been permitted even then by a writ of mandate to have compelled the imposition of reasonable conditions under the rule that, in that class of cases, mandate will lie to correct an abuse of judicial discretion; a fortiori, we are clearly entitled to compel a court at least to say what conditions and what security is necessary in order to permit petitioner to retake his property."

[1] It may at once be conceded that a court will not be justified, through the medium of a receiver, in arbitrarily withholding property from the owner's control and enjoyment for an indefinite and unnecessary period. Petitioner is not seeking restoration of the property to his own control. The facts show that he is utterly incapable of managing it and that it would be an abuse of discretion, should the court place it again in his control. What petitioner is seeking is that the property be taken out of the control of the court and the life estate be transferred to Mr. Henderson. There is no showing that this would result in any advantage to Mrs. Fairbank and her children not now enjoyed under the receivership. Petitioner alleged that the offer of Mr. Henderson "would be advantageous to petitioner," but in what way is not shown, other than through an increased income, and as to this the evidence is conflicting; the showing by respondent being that the property is now yielding all the rentals of which it is capable, and that any increase in income can as readily be accomplished through the receiver as through Mr. Henderson.

[2-4] It is a well-settled general rule that mandamus does not lie to control the discretion of a court or judicial officer, and, whatever exceptions there may be to the general rule, that a court cannot be made by mandamus to exercise its discretion in a particular manner. Kerr v. Superior Court, 130 Cal. 183, 185, 62 Pac. 479. In the instant case the motion was to discharge the receiver on the ground "that it is in the interests of the de-

fendant to convey said property as aforesaid; that the interests of the plaintiff were not to be affected in any manner prejudicially by reason of the granting of said motion." Concededly the motion was directed to the discretion of the court, but the court was not bound to exercise its discretion in a particular way, unless under the facts only one order was proper. Wood v. Strother, 76 Cal. 545, 18 Pac. 766, 9 Am. St. Rep. 249. The court, in the exercise of its discretion, denied the motion, and with its action we cannot interfere, unless it abused its discretion. Considering all the facts and circumstances, we cannot say the court abused its discretion. The case is not, in our opinion, one where "only one order is proper," which seems to be petitioner's contention. In the answer the respondent stated that he denied the motion—

"for the reason that the court in its discretion believed that the best interests of the plaintiff and her minor children would be promoted thereby, and for the further reason that such interests would be better protected and secured by permitting said receivership to stand than by substituting therefor contracts to be entered into by said J. M. Henderson, Jr., the said Elbridge Fairbank, or other persons, or by orders of said court imposing so-called liens or conditions of doubtful validity."

The writ is denied.

We concur: HART, J.; BURNETT, J.

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34 Cal. App. 153

McINERNEY et al. v. MACK. (Civ. 1874.)

(District Court of Appeal, First District, California. June 19, 1917. Rehearing Denied by Supreme Court Aug. 16, 1917.)

1. Damages ⇐81—Liquidated Damages—Averment and Proof.

In an action by plaintiff to recover $1,000 deposited with defendant real estate broker to secure performance of contract of sale, it was incumbent upon defendant, claiming the deposit as liquidated damages, to show that it was impracticable or extremely difficult to determine the actual damages in view of Civ. Code, §§ 1670, 1671, providing that a provision in a contract fixing in advance damages for a breach thereof is void except when from the nature of the case it would be impracticable or extremely difficult to determine the actual damage done; the mere stipulation of the contract being insufficient for that purpose.

2. Damages ⇐163(3)—Liquidated Damages—Presumptions.

Defendant's services being merely those of a real estate broker, bringing the parties to a sale contract together, if his compensation was not fixed, it will not be presumed that it was impracticable or extremely difficult to determine the actual damages for the breach of contract, and the agreement for stipulated damages was void in view of Civ. Code, § 1670.

Appeal from Superior Court, City and County of San Francisco; E. P. Mogan, Judge.

Action by P. J. McInerney and another against W. H. Mack. From the judgment and from an order denying his motion for a new trial, defendant appeals. Affirmed.

R. W. McKnight, of San Francisco, for appellant. Sullivan & Sullivan and Theo. J. Roche, of San Francisco, for respondents.

BEASLY, Judge pro tem. This is an appeal by the defendant from the judgment and from an order denying his motion for a new trial.

The complaint states simply that the defendant became indebted to the plaintiffs in the sum of $1,000 for money had and received by the defendant for plaintiffs' use and benefit. The defendant, answering, denies that he became indebted to plaintiffs in said or any sum of money had and received by him for plaintiffs' use and benefit, "or in any other manner or at all." As a further defense he avers that on January 31, 1914, he received from plaintiffs the sum of $1,000 in accordance with the terms of a written agreement which is made a part of his answer, and in which it is recited that the defendant, Mack, received the $1,000 from plaintiffs and agreed to hold and dispose of it in accordance with the agreement; that the plaintiffs were the owners in fee of three lots and improvements in a subdivision known as "Corte Madera Woods" and a six-room house thereon; that Anna M. Howes and Earl E. Howes owned a lot on Parnassus avenue in San Francisco with an apartment building thereon; and then provides that if within 45 days Mack shall secure from Mr. and Mrs. Howes a grant, bargain, and sale deed, conveying a clear McInerney title, free of incumbrance, except that of a trust deed for $5,000, to their property on Parnassus avenue, then if plaintiffs shall deliver a deed conveying the Corte Madera lots, free of incumbrance, together with $3,000 in money to a grantee to be designated by Mack, the latter will then deliver the Howes' deed to the plaintiffs. The contract further provides that if Howes and his wife should fail to execute the contemplated deed of their property or Mack should fail to deliver it to plaintiffs "upon their complying with the conditions stipulated upon their part," Mack would refund the $1,000 to the plaintiffs. The contract further contains the following provisions:

"In the event, however, that I secure the aforesaid deed from Anna M. and Earl E. Howes transferring and conveying the said property free and clear from all incumbrances as aforesaid, save and except the trust deed above mentioned, and offer to deliver the same to P. J. McInerney and William J. Madden within the above-mentioned period of 45 days and they shall fail or refuse to carry out the terms and conditions hereof, to wit: The delivery by them of a good and sufficient grant, bargain, and sale deed for the said property above described accompanied by an additional payment of $3,000, then and in that event I am to retain the $1,000 paid me this day as liquidated damages for their failure to carry out this transaction."

The agreement was signed by Mack and by McInerney and Madden. The only other allegation of the answer is that plaintiffs "failed and refused to comply with the conditions of the said agreement," and that by reason of said failure "the said plaintiffs were not entitled to receive the said sum of $1,000, or any part thereof," and, further, "that said plaintiffs have waived all their rights and claim to said sum." The trial court found all the facts, except the execution of the agreement, against the defendant, and gave judgment against him for $1,000 and costs.

Mack never actually obtained personal possession of a deed from Mr. and Mrs. Howes, but they executed a deed to their Parnassus avenue property, in which McInerney and Madden were named as the grantees, and left the same in the possession of their attorney. There is a conflict of evidence as to whether this deed was ever offered or tendered to either McInerney or Madden, but the court must be presumed, in support of its findings above mentioned, to have concluded that there was no offer or tender of this deed to the plaintiffs. The evidence indeed is strong in support of this position, Mack alone testifying to facts tending to support an offer by the attorney of Mr. and Mrs. Howes to deliver the deed, and the attorney himself refusing to corroborate this testimony of Mack, while the plaintiff McInerney, who was the active negotiator for himself and his cotenant in the transaction, positively stating that no such offer was made, and that he never knew of the existence of the deed referred to until the beginning of this action.

Upon the examination of the title to the Corte Madera lots it was found that a triangular piece of land three inches wide at the front of the property on Morningside Drive and tapering back to a point at a distance of 98 feet from the drive, had been omitted from the conveyance by which McInerney and Madden got title to the lots. This strip was of a value of from 75 cents to $2, and was situate on the side of the property farthest from the improvement thereon. The three lots themselves were of a value not exceeding $500; the value of the six-room house on the lots does not appear in the evidence to the bill of exceptions. McInerney and Madden asked and received from Mr. and Mrs. Howes, a 5 days' extension of time within which to perfect their title. At some time, which does not exactly appear, Mr. Howes died, and Mrs. Howes then became lukewarm, and, standing upon the failure of title to this triangular piece, refused to go forward with the deal, and the same thereupon fell through. This may be said to be absolutely all the material evidence in this case.

[1] Putting aside the question whether or not Mack fulfilled his agreement by offering the deed from Mr. and Mrs. Howes to McInerney, this case must be decided upon a vital proposition of law. Under the terms of sections 1670 and 1671 of the Civil Code, a provision in a contract fixing in advance damage for a breach thereof is void, except when from the nature of the case it would be impracticable or extremely difficult to determine the actual damage done. It is clear that defendant's case discloses nothing that brought it within the purview of the second of these two sections. Assuming that the defendant's evidence showed a breach of contract, this alone would not warrant him in retaining the $1,000. In order to entitle a defendant to retain a sum of money deposited with him as contingent liquidated damages for the breach of an obligation, it is incumbent upon him to show, not only by averment, but also by proof, that his case is within the exception contained in section 1671; for without an allegation bringing his case within the exception the pleading in that regard is insufficient, the presumption being, in the absence of such allegation, that such agreement is void. Thomas v. Anthony, 30 Cal. App. 217, 157 Pac. 823; Long Beach, etc., Dist. v. Dodge, 135 Cal. 401, 67 Pac. 499; Patent Brick Co. v. Moore, 75 Cal. 205, 16 Pac. 890; Pacific Factor Co. v. Adler, 90 Cal. 110, 120, 27 Pac. 36, 25 Am. St. Rep. 102.

In such an action as this, as a matter of defense, defendant must show to the court by proper pleadings and competent proof that the contract falls "within" the law permitting liquidated damages. This does not depend entirely upon the contract itself. Facts must be pleaded and proven from which the court can say as a matter of law that the contract for liquidated damages is valid because "from the nature of the case it would be impracticable or extremely difficult to fix the actual damage. The mere stipulations of the contract are insufficient for that purpose. Deuninck v. West Gallatin Irr. Co., 28 Mont. 262, 72 Pac. 620; Thomas v. Anthony, supra; Sherman v. Gray, 11 Cal. App. 348, 104 Pac. 1004; Los Angeles O. G. Association v. Pacific S. Co., 24 Cal. App. 95, 140 Pac. 295. In the latter case the rule is thus stated:

> "The rule stated in section 1670 of the Civil Code must be presumed to apply in all cases, unless the party seeking to recover upon the agreement shows by averment and proof that his case comes within the exception mentioned in section 1671."

[2] This is a simple case where a real estate broker was performing service in bringing persons together for the purpose of exchanging property. There is no allegation and no evidence tending to show that this was an unusual transaction. No reason appears why the commissions which Mack would have earned might not have been fixed in the contract itself, but there was no provision in the contract for the payment of commissions. The contract as to compensation is a most essential part of the contract of employment, and is always present in it either expressly or impliedly. When not expressed, it is an agreement to pay what

the service is worth. Ford v. Brown, 120 Cal. 551, 52 Pac. 817. Mack's injury because of the breach of this contract by McInerney and Madden, if it was broken, could be compensated by paying him at most his commission for his services, and his outlay, if any, of money as expenses in endeavoring to put the deal through. He was not a purchaser in any sense, but simply a broker. If he was to receive fixed commissions from the Howes and even from third parties, who are hinted to have been interested, this could have been proven. If he was to serve them and his compensation was not fixed, it will not be presumed that it would have been either difficult or impossible to establish by evidence the reasonable value of his services. No reason appears why it would have been difficult or impossible to establish what Mr. Mack did in attempting to effect this exchange and the reasonable value of the service so performed. Therefore it must be held that, without allegation and proof bringing him within the provisions of sections 1670 and 1671 of the Civil Code, Mack cannot be permitted to retain this $1,000, and as there is no such allegation and no such proof, the judgment and order denying the motion for a new trial must be affirmed; and it is so ordered.

We concur: RICHARDS, J.; KERRIGAN, J.

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34 Cal. App. 146

WILLIAMS v. HAWKINS et al. (Civ. 2095.)

(District Court of Appeal, Second District, California. June 16, 1917.)

1. LANDLORD AND TENANT 🔑230(1)—ACTION FOR DAMAGES—PLEADING.

Where a landlord who, after his tenants abandoned the premises, sublet on the tenants' account, in his suit to recover the difference between the agreed rent and the amounts received from the subletting failed to call the money sought to be recovered "damages," the failure was not fatal to recovery; a full statement of the facts relied on being set forth in the complaint.

2. GUARANTY 🔑4—ASSIGNMENT OF LEASE—LIABILITY OF ASSIGNEE.

Where a lessor, in agreeing to the assignment of a lease, and making his demand for an additional party thereto beside the assignee, used the word "guarantor," but the writing signed by the assignee and the additional party read, "I hereby agree to assume the within lease as assigned to me by the lessee and all responsibility thereunder," the additional party became responsible as a lessee, not merely as a guarantor.

3. LANDLORD AND TENANT 🔑128(1)—POSSESSION OF SINGLE LESSEE.

The possession of one of two lessees was the possession of both.

4. JUDGMENT 🔑714(3)—RES ADJUDICATA.

Judgment in a landlord's prior action against assignees of a lease to recover the difference between the agreed rent and amounts realized by sublettings concluded an assignee as to the question of the character and extent of his responsibility under the lease assignment; the second action being for amounts due covering months of the leased term other than those previously sued for.

5. APPEAL AND ERROR 🔑419(2)—NOTICE OF APPEAL—IDENTIFICATION OF ORDER.

Notice of appeal stating that the appeal was taken from the order of the court denying motion for new trial as entered May 24, 1915, the record showing that the motion was presented and denied June 14, 1915, did not sufficiently identify the order as of the date when it appeared to have been made.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by C. B. Williams against Ralph S. Hawkins, Charles N. Eager, and Caroline B. Eager, as executrix, substituted as defendant in place of Charles H. Eager, deceased. From an order denying her motion for new trial after adverse judgment, defendant Caroline B. Eager appeals. Order affirmed.

Wm. Crawford, of Los Angeles, for appellant. John C. Stick, of Los Angeles, for respondent.

JAMES, J. Appeal by defendant Eager from an order denying his motion for a new trial after adverse judgment had been rendered.

The plaintiff is the assignee of one Staub, who was lessor named in a lease by which certain premises in the city of Los Angeles were let for a term commencing on the 1st day of November, 1907, and ending on the 31st day of December, 1911, with option given to the lessees to renew for a further period. The latter option was not taken advantage of. The lease contained this term:

> "It is hereby covenanted and agreed that said lessees may let or underlet the said demised premises, or assign this lease, provided the parties to whom such letting or assigning shall be made are satisfactory to said lessors."

At the time of the making of the lease another party was named with Staub as lessor, but Staub afterwards acquired the interest of that party. In October of 1908, the lessee then occupying the premises assigned his interest to Ralph S. Hawkins. Staub was unwilling to accept the responsibility of Hawkins on the lease, and required another signer, whereupon Hawkins procured this appellant to sign with him, and the following indorsements were then made upon the lease, both indorsements being of the same date:

> "I hereby agree to assume the within lease as assigned to me by the lessee and all responsibility thereunder from date.
> "Ralph S. Hawkins.
> "Charles H. Eager."
>
> "I hereby accept Ralph S. Hawkins and Charles H. Eager as the lessee in the within lease. C. M. Staub."

It was alleged by the plaintiff that the defendants, on or about the 1st day of January, 1909, abandoned the premises, neglected to pay any further rent, and—

> "that the said C. M. Staub thereupon notified defendants that he would not release them from said lease, and that if they did not reoccupy said loft within a reasonable time, he [the said

Staub] would sublet said loft for said defendants, crediting said defendants on said lease with the amounts received from such subletting, the subletting being, however, subject to the re-entry of said defendants at any time within the term of the said lease."

The allegation followed showing the names of the persons and firms to whom the premises had been relet by the lessor for the defendants' benefit, and in detail gave the amounts received from each. Also that by computation it appeared that there was a balance of $600 due and owing for the term of months covered by the suit, which amount represented the difference between the rent agreed to be paid and the amounts which the lessor had received by his subletting.

It is first claimed that the complaint did not state a cause of action because, as counsel insists, the action was framed as an action solely upon the lease and not one for damages. The cases of Bradbury v. Higginson, 162 Cal. 602, 123 Pac. 797, and Respini v. Porta, 89 Cal. 464, 26 Pac. 967, 23 Am. St. Rep. 488, are cited. Those cases do establish it to be the law that where a tenant abandons leased property, the owner may relet the same for his benefit and recover as damages the difference between the amount received by subletting and the amount agreed to be paid. Had the complaint been lacking in its allegation of the facts showing precisely what had been done by and between the parties, and had the action been to recover strictly upon the lease, there might be some point to appellant's contention.

[1] But we do not think that because plaintiff failed to call the money sought to be recovered "damages," such failure was fatal to a recovery where a full statement of the facts upon which he relied was intelligibly and succintly set forth in his complaint. The findings as made by the trial court cover all of the material issues, and there was some evidence, which is shown by the bill of exceptions, sufficient to support such findings. One of the particular claims made by appellant is that the evidence was insufficient to warrant a finding that appellant became responsible as a lessee, the claim being that his responsibility was of the same nature as a guarantor. The written indorsements on the lease do not show this; neither does the evidence support that theory. Staub testified that he objected to Hawkins as an assignee of the lease, and that:

> "I asked a guarantor to be with him who was responsible. I said I would accept the transfer to Hawkins provided some one signed with him who was responsible. He suggested Mr. Eager, and gave me his name to look up, which I did. Eager's name was brought into the conversation, because I asked for an additional assignee with Hawkins—a guarantor, or some one to join with him in the acceptance of the lease who was good. I had no conversation with Eager as guarantor for Hawkins. Hawkins took the paper and went out and brought the instrument back with Eager's signature to the acceptance of the assignment. * * *"

[2, 3] The mere fact that the lessor used the word "guarantor" in making his demand for an additional party to the lease certainly could not have the effect of changing the actual contract as made by appellant Eager, and which was expressed in the writing above quoted. The lessor, according to the evidence, had no conversation with Eager at all; he merely accepted the contract of Eager as it was produced to him. That contract made Eager fully liable with Hawkins as a lessee. While it is claimed that there was no showing that Eager ever had possession of the premises, this appellant did not by his answer made to plaintiff's complaint, deny that Hawkins had had such possession. The possession of one of the lessees was the possession of both.

[4] It appears that a prior action was prosecuted by this same plaintiff and against the same defendants as here, the same subject-matter being relied upon for recovery, except that in the former action the amounts alleged to be due covered the months of the lease term preceding those here involved. That cause was decided adversely to the defendants, and brought on appeal to this court, where the judgment was affirmed. See Williams v. Hawkins, 20 Cal. App. 161, 128 Pac. 754. At the trial of this action the judgment roll in the last-mentioned case was introduced in evidence as showing a former adjudication of the essential matters involved in the present suit. On behalf of respondent it is insisted that the judgment in that action is conclusive upon this appellant as to all matters in controversy here, except as to the precise amounts now claimed. On the other hand, appellant insists that the judgment roll was not competent evidence, and should have been refused as such by the trial court. We are in accord with the position taken by respondent, that the judgment in the former suit did conclude this appellant as to the question of the character and extent of his responsibility under the lease assignment. Wiese v. San Francisco Musical Society, 82 Cal. 645, 23 Pac. 212, 7 L. R. A. 577; Reed v. Cross, 116 Cal. 473, 48 Pac. 491; Koehler v. Holt Mfg. Co., 146 Cal. 335, 80 Pac. 73; Louisville, N. A. & C. Ry. Co. v. Carson et al., 169 Ill. 247, 48 N. E. 402. In view of this former adjudication having been made, we have perhaps given unnecessary consideration in the foregoing to some of the contentions advanced by appellant.

[5] Respondent's counsel points to an error in the notice of appeal which we have not taken into account in what has been hereinbefore said and which, in view of the conclusions announced, is not necessary to be adverted to in much detail. The record shows that the motion for a new trial was presented and denied on June 14, 1915. The notice of appeal stated that the appeal was taken from the order of the court denying the motion for new trial as entered on the 24th day of May,

1915. The notice of appeal, therefore, did not identify correctly the order as of the date when it appears to have been made.

The order is affirmed.

We concur: CONREY, P. J.; WORKS, Judge pro tem.

34 Cal. App. 82

COLE v. MERCHANTS' TRUST CO. et al. (DE JERSEY, Intervener). (Civ. 2233.)

(District Court of Appeal, Second District, California. June 8, 1917. Rehearing Denied by Supreme Court Aug. 6, 1917.)

1. BROKERS 🔑9 — DURATION OF AGENCY—TIME AS OF THE ESSENCE.

Plaintiff on February 1, 1905, gave A. an exclusive agency for the sale of lots for 18 months. The contract provided that 10 per centum of the selling price of each lot, and the excess of such selling price over $250 on each lot, should be paid to A., that any amount in excess of $27,640 from the sale of all of the lots should be paid to A., that when plaintiff had received this amount he should transfer to A. all unpaid contracts and all unsold lots, and that time was of the essence of the agreement. In April, 1906, a new agreement was made between plaintiff, A., and a trust company, under which the trust company was to deliver contracts and deeds, and make collections and pay all except 10 per centum on each lot to plaintiff until he received the balance due him. The agreement further provided that it was intended to carry out the contract of February 1, 1905, as modified, by extending its life to February 1, 1907, and by directing the payment to plaintiff of all moneys out of the sale of lots above 10 per centum until he should be fully paid. *Held*, that the provision of the original contract that time was of its essence was not disturbed by the terms of the trust agreement; the contract period being merely extended.

2. BROKERS 🔑50—SUFFICIENCY OF SERVICE BY BROKER'S PERFORMANCE WITHIN TIME SPECIFIED.

In determining whether, prior to February 1, 1907, A. sold sufficient lots to yield the aggregate sum due plaintiff, plaintiff was not entitled to have excluded an amount paid by the trust company on his order for street improvements after February 1, 1907, or amounts paid after that date to satisfy liens for street work, and for taxes subsequently accruing, since, if sufficient sales had been made, plaintiff lost all interest in the property, and had no power to contract for or pay bills toward street improvements, and it was immaterial what became of the money collected after February 1, 1907.

Appeals from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by Cornelius Cole against the Merchants' Trust Company and another, in which Basil H. De Jersey intervened. From a judgment for plaintiff, and an order denying a new trial, the defendant named and the intervener appeal. Reversed and remanded.

Benjamin E. Page, Arthur C. Hurt, and Arthur F. Coe, all of Los Angeles, for appellant Merchants' Trust Co. Hunsaker & Britt, of Los Angeles, W. W. Middlecoff, of Visalia, and W. N. Goodwin and Joseph L. Lewinsohn, both of Los Angeles, for appellant De Jersey. M. O. Graves, C. C. Brown, Haas & Dunnigan, and Cornelius Cole, all of Los Angeles, for respondent.

WORKS, Judge pro tem. These are appeals from the judgment and from an order denying motions for a new trial.

By an agreement in writing, of date February 1, 1905, the respondent granted to the defendant Armitage and others, for the period of 18 months, an exclusive agency for the sale of a certain tract of land. At a later date the rights of all the grantees of the agency were lodged in Armitage by assignment. For that reason, as well as for convenience, the contract will be referred to as if it had been entered into, on the one part, by Armitage alone. The instrument provided, among other things, that Cole should forthwith subdivide the property; that he should subscribe a certain map delineating the subdivision and dedicate to public use all streets and alleys shown on it; that he should grade and gravel certain streets and sidewalks in the tract; that he should execute and deliver contracts for the conveyance of lots upon sales being made by Armitage; and that he should execute and deliver to purchasers deeds to lots upon the payment to him of $250 for each and every lot to be conveyed. Armitage was to forthwith advertise the lots for sale, maintain a sales office on or near them, and otherwise use due diligence to complete the sale of all the lots during the life of the agreement; was to pay all cost of subdividing the lots, of filing and recording the map, and of all certificates of title to the lots; was not to sell any lot for less than $250, nor upon time at a less rate than $25 at the time of sale and $10 per month, with interest at 7 per cent. after one year from date of sale; and was to be compensated "for lots sold, all of the price for which each lot is sold in excess of the rate of $1,000 per acre for the land, subject to this agreement, added to the cost of improvements to be made under this agreement." There were 27.64 acres in the tract. It was provided that the compensation just mentioned—

> "shall be as follows: Ten per cent. (10%) of the selling price of each lot out of the first moneys paid in on such sale. And after the first party shall have received two hundred and fifty dollars ($250.00) and interest, if any, on the sale of a lot, then the second parties shall be paid the balance received on such lot, and, finally, any amount received in excess of the sum of twenty-seven thousand six hundred and forty dollars ($27,640.00) and the actual cost of the improvements upon said tract, should any excess have been received by the first party. When the first party shall have received the full sum of twenty-seven thousand six hundred and forty dollars ($27,640.00), together with the cost of improvements on said land, and interest paid in on deferred payments, he shall transfer in due form to the second parties all unpaid contracts, mortgages, and obligations received on sale of lots, and duly convey to them all lots in said tract not

theretofore sold and conveyed. All interest, if any, on deferred payments for lots, shall inure to the benefit of the first party."

The contract concluded with the following paragraph:

> "Time is of the essence of this agreement, and, upon the failure of the second parties to keep the covenants on their part herein contained, this agreement shall, at the option of the first party, become null and void, and all right of said second parties shall end."

The parties proceeded to operate under this agreement, and by about April 4, 1906, Armitage had found purchasers for 96 lots. Twenty-three of these had been sold for cash, and deeds conveying them had been delivered by Cole. The remaining 73 lots were sold upon contracts for differing amounts. The avails of these transactions had been segregated between the parties under the terms of the agreement, and there yet remained due Cole, pursuant to those terms, the sum of $19,948.30. On April 4, 1906, Cole and Armitage made a new arrangement of their affairs under the contract, in the form of a trust agreement, to which the appellant Trust Company was a party. The agreement recited that the Trust Company had received and accepted the 73 contracts and also deeds to the unsold lots. The company obligated itself to receive moneys payable on the contracts of sale and to deliver deeds to the purchasers as balances due on contracts were paid; to pay first to Armitage 10 per cent. of the selling price under each contract as collections came in, except in the case of contracts on which he had already received 10 per cent. or a portion thereof, and on the latter to pay the balance to total ten per cent.; to pay to Cole the remainder collected on each contract until, together with certain other payments, he received the sum of $19,948.30; to execute contracts of sale on lots thereafter sold, upon the order of either Cole or Armitage, provided that sales made by Cole should not be for less than figures fixed by a certain schedule attached to the trust instrument; to pay to Armitage 10 per cent. upon the purchase price under contracts of sale so executed by it; to pay to Cole the remainder collected by it on such contracts until, from such collection and from amounts paid to him on old contracts, under the provision above noted, he received the sum of $19,948.30 already mentioned; to pay to Armitage, after the payment to Cole of that sum, all further collections under all contracts of sale, and also to execute to him deeds to all the lots then unsold; to pay to Cole all interests collected on all contracts of sale until the principal sum of $19,948.30 was fully paid him, the interest to be no part of that sum; to use such part of collections as might be necessary to make improvements determined by Armitage to be required on the property and to pay off liens, including taxes, such payments not to be considered as payments to Cole; and to pay off a certain mortgage and charge the amount against Cole's $19,000. The trust agreement ended with a provision to the effect that it was "intended to carry out the contract" of February 1, 1905, "as modified by extending the life of said contract to February 1, 1907, and by directing the payment to C. Cole of all money arising out of the sale of lots above 10 per cent. until he shall be fully paid, as directed."

The action was commenced by Cole, as late as February 6, 1913, against the appellant Trust Company alone, for a termination of the trust arrangement; his theory being that, through the failure of Armitage to finally carry out the agreements between them, time being of their essence, he had become the sole beneficiary under the trust. The appellant De Jersey, an assignee of Armitage, filed a complaint in intervention upon the claim that Armitage's beneficial interest in the trust had not terminated, and Armitage himself was later brought in as a party defendant The judgment declared the trust terminated, and directed the appellant Trust Company to reconvey to Cole the property yet remaining in its hands.

[1] The provision in the original contract that time was of its essence was not disturbed by the terms of the trust agreement. The period of 18 months, fixed in the contract, was by the trust arrangement extended to a period of 2 years, or until February 1, 1907, and that day became, upon the erection of the trust, the date to which the provision that time was of the essence was thenceforward to fasten itself. The time element in these transactions required only that Armitage should have sold before February 1, 1907, enough lots to produce to Cole from contracts of sale, as they matured, the sum of $19,948.30. The trial court adopted this theory and framed its findings of fact accordingly. The findings are to the effect that Armitage did not "sell a sufficient number of said lots * * * to yield to the said Cornelius Cole * * * either the said sum of $27,640 provided to be paid under said contract of date February 1, 1905, or the said balance of $19,948.30 due thereon at the time of" the creation of the trust. It is further found that time was of "the essence of said agreement," and that unless Armitage, before February 1, 1907, "did cause * * * sufficient contracts to be entered into for the purchase of lots * * * to yield the said sums to said Cornelius Cole hereinabove referred to, to wit, the aggregate sum of $27,640 net," Armitage did not become entitled to a conveyance of the property held by the Trust Company.

[2] The court found that there was due Cole, of the $19,000 item, the sum of $2,105.86, together with certain other amounts representing advances made or to be made by him, which raised the total amount due to $4,241.36, and there were other findings negativing the possibility that anything remained

due on outstanding contracts of sale. The appellants contend that there were several items of expenditure by the Trust Company, made during its management of the trust, which were not charged against the $19,000 to be paid Cole, but which should have been so charged. It is urged that, if those items had been charged to Cole, the balance of $4,241.36 found in his favor would have been extinguished, that the terms of the original contract and of the trust agreement thus would have been satisfied by Armitage, and he would have become entitled to conveyance from the Trust Company of the property remaining in its hands. One of these items is the sum of $4,263.57, paid long after February 1, 1907, on the order of Cole alone, to the Stutzer Cement & Grading Company for street work on the tract. Not only was the amount paid after the day named, but the contract with the grading company, entered into with it by Cole, under which the payment was made, was not executed until about two months after that date. It will be remembered that, under the trust agreement, street work in the tract was to be done upon the determination of Armitage alone.

The respondent meets the claim of appellants with the assertion that the election of Armitage to have streets improved and his consent to the payment of bills for such improvement was not necessary after February 1, 1907, as the trust had then terminated; but that is begging the very question involved in the contention of appellants. The Trust Company had on hand the money paid to the grading company for the street work as avails from contracts of sale upon deals made by Armitage before that date. The amount was applicable to the fund to be paid to Cole, namely, the $19,948.30, plus the other items to which he was entitled under the trust; and, leaving aside the question as to what extent it was made up of accumulations of interest—as all interest belonged to Cole under the arrangement—it would have more than met the item of $4,241.36 found by the trial court to be due Cole. Under such a state of affairs, Cole had lost all interest in the property, and had no power to contract for or to pay bills toward the improvement of streets within it.

Appellants also object to an item of $2,562.51 paid out by the trustee in 1909 to satisfy liens arising under the Vrooman Act for public street work done in the tract. The respondent claims that it was made the duty of the trustee to pay off such liens, but that suggestion does not meet the question. As we have just said about the other item to which objection is made, the trustee had this sum of $2,562.51 on hand as a result of sales made by Armitage. What might become of it years after February 1, 1907, no matter when it may have been collected, is a matter of no moment in the settlement of the question now confronting us, as, considering what we have said and what the trial court found concerning the provision that time was of the essence of the transactions between the parties, Cole had no right in the property after February 1, 1907, provided Armitage had made enough sales to net him the amount to be paid him.

Of the two items of $4,263.57 and $2,562.51, or, in all, $6,826.08, it is impossible for us to determine how much was interest which belonged to Cole as we are not furnished with the dates of the various contracts of sale and of the payments made upon them; but the rate of interest is fixed in the original contract which might be charged in such contracts of sale, and we can determine approximately the time the contracts might run. From these data we are compelled to conclude that so much of the amount last mentioned could not be interest as would prevent the remainder from more than meeting the balance of $4,241.36 found by the trial court to be due Cole, especially as it appears from the findings that $2,135.50 of that sum was credited to him on account of taxes, accruing in years after 1907, and paid or to be paid by him. This sum of $2,135.50 is, then, in the same category with the amount above mentioned as having been paid to satisfy Vrooman Act liens. The sum of $4,241.36 is therefore subject to a deduction of $2,135.50, leaving only $2,105.36 to be covered by so much of the $6,826.08 as was not interest belonging to Cole.

The judgment and order are reversed, and the cause remanded.

We concur: CONREY, P. J.; JAMES, J.

175 Cal. 668

BURT v. LOS ANGELES OLIVE GROWERS' ASS'N. (Sac. 2335.)

(Supreme Court of California. Aug. 6, 1917. Rehearing Denied Sept. 4, 1917.)

1. APPEAL AND ERROR 🔑1009(2)—REVIEW—FINDINGS OF FACT.

The only question on review of findings of fact on denial of reformation of a contract is whether there is substantial evidence supporting them.

2. REFORMATION OF INSTRUMENTS 🔑6—MISTAKE.

Where there is no meeting of the minds, there can be no reformation of a contract on the ground of mistake, but only a rescission.

3. REFORMATION OF INSTRUMENTS 🔑45(2)—EVIDENCE.

Evidence of the mistake, for which a written contract can be reformed, must be clear and convincing, and not loose, equivocal, or contradictory, leaving the mistake open to doubt; it being presumed the contract expresses the true intent and meaning of the parties.

4. REFORMATION OF INSTRUMENTS 🔑25—FAILURE TO READ—"MISTAKE OF FACT."

Failure to read a contract comprehendingly before execution, so as to perceive a mistake, must be satisfactorily explained and excused, to allow of reformation for "mistake of fact," defined by Civ. Code, § 1577, as one not caused by neglect of a legal duty on the part of the person making it.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Mistake of Fact.]

5. STIPULATIONS 🔑14(7)—AS TO EVIDENCE—CONVERSATION OF COUNSEL.

Conversation between counsel, at trial in an action for contract price of a crop of olives sold, *held* to mean that defendant had no further testimony, unless reformation of contract sought by defendant, but denied, was decreed.

Department 2. Appeal from Superior Court, Butte County; J. E. Barber, Judge.

Action by Grinnel Burt against the Los Angeles Olive Growers' Association. Judgment for plaintiff, and defendant appeals. Affirmed.

Jones & Jones, of Oroville, and Anderson & Anderson, of Los Angeles, for appellant. J. M. McGee, of Oroville, for respondent.

HENSHAW, J. Plaintiff sued defendant to recover the price of olives purchased by defendant from plaintiff under a written contract. The agreement was made on the 7th day of July, 1913, and was between the parties to this action. It provided:

> "That the party of the second part [defendant] does by these presents purchase all the crop of olives for the year 1913 growing on the trees situate on the following described real property: * * * That said party of the first part agrees to accept and the said party of the second part agrees to pay to the party of the first part for all the Mission & Mansanillo olives grown on said orchard aforesaid during the year 1913, the sum of one hundred and forty dollars ($140.00) per ton on the trees. That the party of the second part agrees to pick and harvest crop at its own expense as soon as said olives are in a condition to be harvested—i. e., when between red and purple in color—and to continue said work thereafter continuously until all are harvested. It is also agreed and understood that all windfalls or frosted olives shall count as part of the crop to be gathered and paid for as aforesaid: Provided, always, that all olives harvested prior to December 7, 1913, which are rendered unfit for pickling because of frost, shall be paid for at the rate of twenty-five ($25.00) dollars per ton on the trees. It is further agreed and understood that all the olives remaining on the trees in said orchard aforesaid after January 15, 1914, may be picked by the party of the first part at the cost and expense of the party of the second part, and be delivered at the factory of the party of the second part at Sylmar, Cal., at its own expense, and said party of the second part shall in addition thereto pay to the party of the first part for said olives aforesaid the sum of one hundred and sixty-five ($165.00) dollars per ton."

The complaint charged for nonpayment under the terms of the contract of the value of many thousand pounds of olives harvested by defendant, and for a lesser quantity not harvested, but left on the trees or as windfalls, payment for which it is alleged was due under the contract. It was further alleged that none of the olives which had been harvested prior to December 7, 1913, had been rendered unfit for pickling because of frost. Judgment was sought for the total amount of the value of these olives under the contract, amounting to $21,387.27, with interest and costs of suit.

The answer admitted the execution of the agreement. It denied the total quantity of olives harvested under the contract and declared a lesser amount. It denied that any olives were left unharvested in the orchard, but alleged that all of the crop was gathered. It denied that none of the olives harvested prior to December 7th were rendered unfit for pickling by frost. As an affirmative defense it sought a reformation of the contract, alleging in brief that the true understanding and agreement between the parties was that the plaintiff should bear all risk of frost and all damage occasioned by frost to all of the olives, provided such frost occurred prior to December 7, 1913, and that defendant should bear all risk of frost and all damage occasioned by frost if such frost occurred after December 7th, thereby meaning (to make the matter plain) that, if the olive crop was totally destroyed by frost before December 7th, defendant would be called upon to pay nothing, whereas, if it was not impaired by frost before December 7th, but was totally destroyed by frost occurring after December 7th, the defendant would be called upon to pay the full price of $140 per ton. It will be noted that the contract actually executed between the parties makes provision for reducing the price from $140 a ton to $25 a ton for only such olives as have been "rendered unfit for pickling because of frost," and which have been "harvested prior to December 7, 1913."

The grounds upon which reformation was sought are that neither defendant nor its agent "noticed or observed the fact that said contract did not correctly set forth the intent and agreement of the parties; but, on the contrary, the said agent and this defendant, by reason of mistake and inadvertence when said contract was executed, believed the same did correctly set forth said agreement, and executed said contract under such belief and mistake." It is further alleged that the plaintiff "undertook to draft the contract in accordance with the prior agreement between the parties," and "that the agent of the defendant relied upon the skill, ability, and fairness of the plaintiff to correctly draft said agreement, and by reason of his confidence in said plaintiff did not read said contract as carefully as he otherwise would have done." Still further it is alleged that the plaintiff at the time of the execution of the contract knew that the defendant and defendant's agent believed the contract correctly set forth the terms agreed upon in relation to the frost risk. And, finally, upon the matter of reformation, the answer set forth nondiscovery of the mistake "until about December, 1913." The answer alleged that at the time of discovery a very large part of the olive crop was injured by frost occurring on or about November 28, 1913; that this frost reduced the contract price of these damaged olives from $140 a ton to $25 a ton, which defendant offered to pay.

Under these issues trial was had. The court refused a reformation, found in favor of plaintiff, and gave him judgment as prayed for. From this judgment, and from the order denying its motion for a new trial, defendant takes this appeal.

[1] On appeal its principal attack is directed against the findings denying a reformation. It needs no citation of authority to the effect that in reviewing the attack upon these findings we need consider only whether there is substantial evidence supporting them and what that evidence is. It may be summed up as follows: Plaintiff, an attorney at law, had recently acquired an olive orchard, the crop of which for the season of 1913 defendant was anxious to purchase, writing to plaintiff as early as June 20th of that year:

> "We are very anxious to purchase your fruit, and are willing to deviate our form of contract to any extent within reason to cover points that might be suitable to you."

As these negotiations proceeded, plaintiff wrote, expressing confidence in his own ability to "draw up an acceptable contract." Defendant replied that it was "willing to meet your views as to details, and would be glad to have you draw up a memoranda of agreement, such as you will be willing to sign, and mail it to us for our acceptance." Later the defendant wrote: "We await with pleasure your contract." Then on July 3d defendant wrote that it had "a representative, Mr. Ryan," who would call on plaintiff, and expressed the hope that "you will be able to close a deal with him." Mr. Ryan arrived, thus clothed with powers to enter into a contract for the purchase of plaintiff's olives, and the result of personal negotiations between him and plaintiff was the execution of the contract here sought to be reformed. Mr. Ryan's power to execute the contract is not seriously questioned, and under the evidence cannot be. There were other firms and corporations in the field buying olives for pickling and oil-making. The price of olives was advancing. Mr. Ryan was perfectly familiar with the business of contracting for the purchase of prospective olive crops. There was a discussion between plaintiff and Mr. Ryan, as well as between plaintiff and Mr. Simonds, secretary of defendant, concerning the frost clause to be embodied in the contract, and upon this arises a conflict in the evidence. It appears that the olives in that section of the country had suffered severely in the season of 1911 from an unexpected and very unusual frost. It appears still further that normally in that section an olive crop ripens and may be wholly picked or harvested early in December. The substance of plaintiff's testimony is that he was willing to run the risk of and assume the damage occasioned by any frost occurring before December 7th, but that this damage was to be determined by an inspection of the harvested olives, as thus could be made certain the amount of damage which the olives had sustained, whereas it could be arrived at approximately only if the olives were still on the trees.

The testimony of defendant's witness, Ryan, the agent of defendant, authorized to enter into the contract, and Simonds, the secretary of the defendant, to whom the contract was sent for inspection and approval, and who wrote many letters to plaintiff, is to the effect that they understood that the whole matter of difference between them and their corporation and plaintiff was over the date of the frost liability clause, and not at all over the terms of the clause; that the terms were, and were understood to be, that for all damages to the olives occasioned by frost occurring before December 7th plaintiff should bear the loss, whether the olives were picked or unpicked, and that for all damage occasioned by frost occurring after December 7th defendant in like manner should bear the loss, in that it would be called upon to pay the full price of $140 per ton for these olives, even if their quality and value were thus impaired.

Here, manifestly, is a conflict in the evidence. But the argument of defendant's counsel is that the evidence of its two witnesses—Ryan, the agent, and Simonds, the secretary—establishes defendant's right to a reformation, because the evidence on behalf of plaintiff given by himself must be utterly rejected, and it must be rejected because the plaintiff is a "Dr. Jekell, and Mr. Hyde," who displayed "extraordinary gymnastic duplicity," "with utter disregard of the truth"; indeed, the picture drawn is that of a ravening wolf disguised under a delusive sheepskin, leading two innocent and confiding lambs into the thorny thicket of this contract, there turning on them, rending them, and fattening on their innocent bodies. Unfortunately, however, the picture lacks something of verisimilitude. True, Mr. Ryan testifies to a preliminary discussion with Mr. Burt at the latter's home, which discussion had to do with the frost date, and that after this was agreed upon as the 7th, they went together to the Oroville Chamber of Commerce, where Mr. Burt dictated the contract to a stenographer, it was transcribed, signed by both parties, and forwarded to Mr. Simonds for his approval. Mr. Burt's testimony is that he had prepared a draft of the contract, with omissions as to prices and dates, precisely in the form of the executed contract; that this was typewritten by the stenographer of the Oroville Chamber of Commerce; that this typewritten blank form of contract was submitted to Mr. Ryan at plaintiff's home and discussed with him. Its contents were agreed upon, its dates, the prices, and other like matters were there inserted, in the presence of Mr. Ryan, and together they went to the Oroville Chamber of Commerce, where he turned over this draft, asking the stenographer to prepare for him in typewriting three perfected copies, and that he dictated no word of it to her. This evidence was corroborated by the stenographer herself.

The contract thus executed was sent to Mr. Simonds for his approval. Mr. Simonds in turn must have read—indeed, he admits that he read—the frost clause of the contract. The clause itself is brief, and its meaning is expressed in plain and unambiguous English. But he says that, with his attention directed only to the date, which in the executed contract was December 7th, he struck out the 7th and substituted therefor the 10th of December, as giving the defendant more time for the gathering of the crop, and as decreasing defendant's liability to damage from frost and increasing plaintiff's liability. He wrote to Burt on the 8th of July, before Burt had entered into any correspondence with him relative to the executed contract, saying:

> "We have the contract which you drew up." "Relative to the date when the olives should be off the trees, we have changed it to the 10th."

Plaintiff objected, and the original date was restored. On July 17th he wrote again:

> "If we are not too much handicapped by rainy weather and the fruit matures, we will have it all off by the date mentioned. The extra three days would simply have given us that much more time in case of adverse conditions arising."

On July 10th he wrote to Burt that his inquiries indicated "that under years of normal temperature the freezing of your fruit would be reduced to a minimum." And on July 16th he wrote again:

> "Relative to the frost situation would say that, as far back as we have been able to procure any information in regard to the frosts in your district, we have found that there was only one year, which was in 1911, that the frost arrived before the fruit was ready to harvest."

As an instance of the artful deception which, according to appellant's counsel, was practiced by plaintiff upon the defendant, through its secretary, Mr. Simonds, is this from a letter written by Mr. Burt on July 8th to Mr. Simonds:

> "The damaging fall frost of 1911 was unprecedented. While such frosts are damaging, if before December 1st or so, to so great a degree, yet I know smudging insures us both—me in particular, of course."

Appellant's counsel finds in this a perfidious attempt to mislead defendant and asks why, "if the intent and understanding was not as we contend, and was as plaintiff now claims, and the lower court finds," did he use this language, since it implied, as defendant understood, that all damage occurring by frost before December 7th should be borne by him.

But it would seem that a complete answer is that both parties contemplated that the crop would be harvested by or before December 7th, and that if so harvested, and the harvested olives showed damages by frost, the loss would unquestionably fall on the plaintiff "in particular." But it would unprofitably prolong this opinion to discuss all of appellant's arguments against the weight of plaintiff's evidence. Upon the whole evidence, the court took the not unreasonable view that the contract meant what it said; that it was a not unconscionable requirement that the olives frosted before December 7th, for which frosting a reduction in price was to be made, should be harvested for inspection; and that there was, and in the nature of things could be, no concealment of the language of a contract, and no trick practiced upon two business men, agents and officers of defendant, to both of whom the contract was submitted for inspection and approval.

[2, 3] Upon the law of reformation appellant contends that, as its evidence shows that it did not understand that plaintiff was to sustain the loss of frost-damaged olives only as this might be disclosed after harvest, there was no meeting of minds upon the contract, and therefore it should be reformed. But the first difficulty with this position is that, if there was no meeting of minds, there was no mistake upon which equity could act by way of reformation. The reformation sought for under such circumstances would be the creation of a new contract between the parties, and one which they never entered into; for plaintiff's position, supported by the written contract itself, is that the latter expresses his own understanding, as well as the understanding of defendant. The only action open to the complaining party under such circumstances is an action, not for reformation, but for rescission. Ward v. Yorba, 123 Cal. 449, 56 Pac. 58; Hochstein v. Berghauser, 123 Cal. 684, 56 Pac. 547; Hearne v. Marine Ins. Co., 20 Wall. 488, 22 L. Ed. 395. Where so solemn an instrument as a written contract is sought to be reformed for mistake, "evidence as to the mistake must be clear and convincing, and not loose, equivocal, or contradictory, leaving the mistake open to doubt." Lestrade v. Barth, 19 Cal. 675. Every presumption in equity favors the view that such a contract as this, thus deliberately entered into, expresses the true intent and meaning of the parties. The burden of showing the contrary is upon the party seeking to avoid its plain terms. Under this evidence it cannot be successfully contended that the mistake was mutual, or that it was induced by plaintiff, by the suppression of any term in the contract, or even that it was known to plaintiff, or suspected by plaintiff, that defendant did not understand its terms. Nothing in the writings of defendant to plaintiff after the execution of the contract so establishes, and plaintiff's own testimony is to the contrary. This testimony is aided by the legal duty imposed upon a party to read such a contract before executing it. Hawkins v. Hawkins, 50 Cal. 558; Metropolitan Loan Ass'n v. Esche, 75 Cal. 513, 17 Pac. 675; Pope v. Armsby Co., 111 Cal. 159, 43 Pac. 589.

[4] And to the pleading and contention that these business men, dealing at arm's length with plaintiff in the matter of this contract, reposed confidence in him, and had the right to repose confidence in him, because they consented to his drawing the contract, and therefore were excused from intelligently reading it, it may be answered in the language of Robins v. Hope, 57 Cal. 497:

> "Certainly no relation is shown to have existed between him and them from which the law would infer such confidence and influence."

And finally, upon this subject, it should be said that, while it is quite true, as declared in Los Angeles & Redondo R. R. Co. v. New Liverpool Salt Co., 150 Cal. 21, 87 Pac. 1029, that the mere failure of a party to read an instrument with sufficient attention to perceive an error or defect in its contents will not prevent its reformation, this means no more than that when the cause of this failure is satisfactorily explained to the court of equity, that court will hold that the explanation or excuse of the failure relieves from the charge of the neglect of a legal duty, within the meaning of section 1577 of the Civil Code. The trial court in this instance manifestly took the view, either that the failure to read the contract comprehendingly was not sufficiently explained and excused, or that in fact the contract was read comprehendingly, and the defendant was but attempting to escape the consequences of a frost which it did not apprehend would occur, but which, having occurred, resulted in its injury. It is immaterial which of these two views the trial court in fact adopted. Either is sustainable under the evidence.

[5] The second complaint of appellant is that this action was only tried upon the question of reformation, and that the other matters upon which issue was joined were not tried, and that defendant to its injury was prevented from introducing upon those issues all of the testimony which it desired to present. The findings of fact declared the appearance of the parties by their attorneys at the time set for trial, the taking of the evidence of the respective parties before the court, its consideration of all of that evidence and the arguments of counsel, and the submission of the cause to the court for decision. It is not contended, nor can it successfully be contended, that evidence pro and con upon the issues (in addition to the issues tendered on the question of reformation) was not offered and admitted. Appellant's position is that it could and would have introduced more evidence, if it had not in some, not very clearly defined, way been misled into the belief that it could at some subsequent time introduce such evidence. Under the contract all of the olives were to be paid for at the rate of $140 a ton, saving such olives harvested by or before December 7th as were shown to be unfit for pickling by reason of frost, which impaired olives were to be paid for at the rate of $25 a ton. Evidence was introduced by both sides on this issue—whether or not there had been a frost, whether or not the olives had been frosted, whether or not the shriveled condition of some of them was due to frost, or due to drying winds, and plaintiff by this evidence manifestly established to the satisfaction of the court that the 19,821 pounds of olives harvested before December 7th were fit for pickling, despite the conflicting evidence introduced by defendant.

Another issue was as to the quantity of olives left unpicked on the trees by defendant after January 15th. It will be noted that there is a permissive clause in the contract, providing that after that date plaintiff may pick such olives and ship them to defendant, charging the cost of picking, packing, and shipping to defendant, and that for such olives so picked defendant was to pay $165 per ton. Issue was joined by the pleadings as to the amount of olives so left unpicked; the complaint charging that 21,559 pounds were so left, and the answer denying this and alleging that defendant had picked the whole crop. On the trial plaintiff introduced evidence showing that there were 21,559 pounds of olives left unpicked by defendant on his trees. The defendant's evidence was that of the witness whom it had employed to pick this olive crop. His testimony upon this point is as follows:

> "Q. Were there any olives left on the trees, after you quit picking the fruit, that were affected by the frost, and that shriveled in that third picking? A. Yes, sir. Q. You did not pick all the frosted olives, then? A. No, sir."

Defendant offered no further evidence as to the quantity of olives thus left unpicked, and the issue was thus tried and was determined in plaintiff's favor. It is manifest that at the trial defendant's serious effort was necessarily directed to a reformation of the contract. Under that contract it could not reduce the price even of frosted olives, if they were on the trees on December 7th, and under the contract defendant apparently had no evidence to countervail against that of plaintiff as to the quantity of olives which it actually left on the trees after January 15th. But under a reformation of the contract defendant could greatly reduce its liability by a showing, if it could make it, that the whole crop, or a very large part of it, was rendered unfit for pickling by reason of the frost, and this whether the olives were on or off the trees on and after December 7th. It appears that this was appreciated by the attorneys of both the litigants. Thus at one time the following colloquy took place between them:

> "Mr. McGee (appearing as counsel for plaintiff, to defendant's attorney): Have you any other witnesses?
>
> "Mr. Anderson (appearing as counsel for defendant): Yes; I have some witnesses here that I could put on out of order as to the condition of the orchard, but I understand that you will object to that testimony.
>
> "Mr. McGee: I want a judgment on the contract before—
>
> "Mr. Anderson (interrupting): Before we pass on to the other matter.
>
> "Mr. McGee: Yes; if the court upsets the contract, we will go on then with the other testimony.
>
> "Mr. Anderson: I think this is a proper position, and consequently we wish to put on our evidence as to the reformation feature before the rest."

This can be understood only as meaning that Mr. Anderson had evidence which would be pertinent touching orchard conditions after the court had adjudged his client to be entitled to a reformation. Again, after evidence had been taken by both sides regarding the temperature records, as showing or not showing frost, Mr. Anderson declared:

> "So far as the reformation of the contract is concerned, that is our case, except in so far as we might have to put in rebuttal evidence on that subject; but, in resting at this time we do it with the understanding we had yesterday, that the question as to the injury to the olives and the cause of injury, and the damage, if any, is to be left open in the event that we proceed further than this stage."

It is difficult to understand this language as meaning anything other than that defendant had no further testimony, unless the case was opened for the introduction of it under a decree of court reforming the contract. And finally, in a colloquy between court and counsel at the conclusion of the evidence, Mr. Anderson stated:

> "That closes the evidence on this branch of the case. What is your honor's desire as to the presentation of it?
>
> "The Court: The court will listen to suggestions from counsel—how do you mean?
>
> "Mr. Anderson: The presentation of argument on this branch of the case.
>
> "Mr. McGee: Let us go on and finish it up, and submit it to the court, and if the contract is upheld, it is ended, and if not, we will go on with the case.
>
> "Mr. Anderson: In that event, your honor will understand that this has been quite a long and exhaustive day. I would like to meet at 9 o'clock, and proceed with the argument, or at any hour that is agreeable."

We cannot construe this as meaning anything other than that Mr. Anderson wholly assented to the view expressed by Mr. McGee, and that the trial court was perfectly justified in so concluding.

Appellant's final contention is that, were it not for what it asserts is plaintiff's "extraordinary facility for falsehood," it would be "amazed" at his claim of a right to recover for that portion of the crop unharvested after January 15th. The contract provided that after January 15th the olives remaining on the trees "may be picked by the party of the first part." On January 15th plaintiff wired defendant that after that date it had no right to pick the olives remaining; that he was entitled to the exclusive possession of his property, and was entitled to pick the olives himself at $165 a ton, payable by defendant; that he would permit defendant itself (as being a saving to defendant) to pick the remaining olives at the same price. The defendant replied, insisting upon its right to finish the picking of the olives "within a reasonable time after January 15th, as the delay has been caused by causes beyond our control." To this, in turn, plaintiff replied that he would not change his previous offer. The evidence shows that after this telegraphic correspondence defendant did in fact pick some of the olives from the orchard with the permission of plaintiff. The evidence further shows, and the testimony has been quoted above, that defendant contended that it left none but frosted olives of the crop unpicked. The pleadings show that plaintiff was not insisting upon the $165 per ton, but only on $140 per ton, the regular contract price, for the quantity of olives which he established had been left unharvested. This asserted grievance is therefore without merit.

Wherefore the judgment and order appealed from are affirmed.

We concur: MELVIN, J.; LORIGAN, J.

175 Cal. 687

JARVIS et al. v. FREY et al. (L. A. 4034.)

(Supreme Court of California. Aug. 9, 1917.)

1. MECHANICS' LIENS 🔑141 — FORM OF CLAIM—DESIGNATION OF CONTRACTOR.

Lien claim sufficiently complies with Code Civ. Proc. § 1187, providing that it shall contain name of person to whom materials furnished, where it gives name of contractor who entered into contract with claimant under which it agreed to and did furnish him material used in building on which lien is claimed.

2. MECHANICS' LIENS 🔑147—FORM OF CLAIM—CONTRACT.

Where lien claim states contract price of materials furnished and small part of materials are not in fact furnished under fixed contract price, but under implied contract to pay the reasonable value, but total amount due is correctly stated, it is valid within Code Civ. Proc. § 1203a, as to effect of mistakes or errors in claim, in absence of fraud or intentional misrepresentations, where no party in interest can be injured by variance.

3. APPEAL AND ERROR 🔑1071(1)—FINDINGS—FAILURE TO SERVE ON PARTIES—EFFECT ON APPEAL.

Respondent cannot urge in support of judgment that copy of proposed findings was not served on it as required by Code Civ. Proc. § 634, where it recovered judgment it desired.

Department 2. Appeal from Superior Court, San Diego County; W. A. Sloane, Judge.

Action by W. H. Jarvis and another against A. Frey, Universal Lumber & Mill Company, and others. From adverse judgment, the Universal Lumber & Mill Company appeals. Reversed and remanded.

Frank Hodge and Wade Garfield, both of San Diego, for appellant. E. L. Thomas and Patterson Sprigg, both of San Diego, for respondents.

HENSHAW, J. The appellant, Universal Lumber & Mill Company, was a party to and cross-complainant in a consolidated action to enforce the payment of certain mechanics' liens. Defendant Frey was the owner, defendant Campbell the original contractor, and defendant and respondent Pacific Surety Company, a corporation, was the surety upon the contractor's undertaking, conditioned on the faithful performance by him of his contract, and binding the surety, should Campbell fail to do so, to pay for any materials or supplies furnished for and in the performance of his contract. The undertaking provided:

> "That all such claims shall be filed as required by section 2 of the act of the Legislature approved March 27, 1897, p. 201, entitled 'An act to secure the payment of claims of material men,'" etc.

After trial the court made its findings of fact and conclusions of law, denying to this appellant the right to enforce its lien for infirmities which the court found to exist in the lien claim as filed, which infirmities rendered it invalid. It reserved its decision touching the right of this appellant to a judgment against the Pacific Surety Company, defendant and respondent herein. Subsequently it gave its judgment for this respondent and against this appellant, based upon the identical grounds above noted, namely, the invalidity of the lien claims.

[1] The first fatal defect in the lien claim as found by the court lies in the fact "that it does not specify to whom the Universal Lumber & Mill Company furnished the materials, all statements therein referring to the same, being inferential only, and by way of legal conclusion, and that the same does not contain a direct or any statement of the fact as to whom said materials were delivered." Section 1187 of the Code of Civil Procedure provides that the claim of lien shall contain "the name of the person by whom he was employed, or to whom he furnished the materials, with a statement of the price, if any, agreed upon for the same and when payable." This lien claim stated that the Universal Lumber & Mill Company "supplied materials to be used, and which were actually used, in the construction of the building," which is sufficiently described. It then proceeded to declare:

> "That W. F. Campbell is the name of the contractor who, on or about the 20th day of January, 1911, as such contractor, entered into a contract with said Universal Lumber & Mill Company, under and by which it agreed to furnish to said contractor for said building certain lumber, millwork, and building material, and the following is a statement of the terms, time given, and conditions of said contract, to wit: * * * That the amount of the contract price for such material furnished as aforesaid is $3,739.38 in United States gold coin."

The lien claim then specifies the payments made on account of the contract price, and sets forth the remainder as being still due, unpaid and owing, after deducting all just credits and offsets. The trial court ruled all too rigidly in holding this lien claim to be invalid. Certainly if these liens were found in a civil pleading they would be sufficient to render the complaint impregnable to attack saving under special demurrer, and certainly also a less and not a greater precision is required in the setting forth of a lien claim than that which is exacted in the averments of a civil complaint. No one reading this lien claim could doubt for a moment that it means and clearly enough indicates its meaning that Campbell, the contractor of Frey (the owner of the property), for the erection of a building thereon, himself contracted with the Universal Lumber & Mill Company for the purchase of building material, which was to be used and which was in fact used in the construction of that building. Russ Lumber & Mill Co. v. Garrettson, 87 Cal. 589, 25 Pac. 747.

[2] The second finding upon which the conclusion of the invalidity of this lien claim was based is that it "does not truthfully contain a statement of the terms, time given, and conditions, * * * but, on the contrary, the statements therein contained that 'the amount of the contract price for said materials furnished as aforesaid is $3,739.38, in United States gold coin,' is untrue in fact; that there was an express contract between the defendant W. F. Campbell and the said defendant Universal Lumber & Mill Com-

pany, to furnish certain materials for $3,219 and an implied contract to pay quantum meruit for the balance of the materials furnished or to be furnished, which the court finds to be the sum of $520.38." It is true that in Wilson v. Nugent, 125 Cal. 280. 57 Pac. 1008, this court held that a lien claim which declared that the contract was for the payment of "the reasonable market value of the materials so furnished" was not supported by evidence of a purchase by the contractor at a fixed price, and that, the lien claim being wholly untruthful in this respect, and there being a fatal variance between it and the proof offered in its support, the right to a lien was lost. But such is not the case here presented. Section 1203a of the Code of Civil Procedure now declares that mistakes or errors shall not invalidate a lien claim unless "made with intent to defraud," or unless the court shall find that the rights of an innocent third party have intervened, and that the "notice of claim was so deficient that it did not put the party upon further inquiry in any manner." No such situation here results. The lien claim under the finding of the court is essentially true. By far the greater part of the material was furnished, as the lien claim declares, under a fixed contract price. The implied contract to pay the reasonable value of the material operated only upon a small portion of those materials. The total amount due is correctly stated as the court finds. There is a failure to find fraud or intentional misrepresentation, and manifestly no party in interest was or could have been injured by this insignificant variance. Nor does the court find that any one was so injured. This lien claim is clearly good within the principle enunciated in such cases as Harmon v. San Francisco, etc., R. R. Co., 86 Cal. 617, 25 Pac. 124, Continental Building & Loan Ass'n v. Hutton, 144 Cal. 609, 78 Pac. 21, Stockton Lumber Co. v. Schuler, 155 Cal. 411, 101 Pac. 307, Star Lumber & Mill Co. v. Porter, 4 Cal. App. 470, 88 Pac. 497, Lucas v. Gobbi, 10 Cal. App. 648, 103 Pac. 157, and Blanck v. Commonwealth, etc., Corporation, 19 Cal. App. 720, 127 Pac. 805.

[3] Respondent urges in support of the judgment that a copy of the proposed findings was not served on it within the five days required by section 634 of the Code of Civil Procedure. It is not made plain how this asserted error of the court can be used by respondent upon appeal to support a judgment. Nor even if this argument was open to him to make would a reversal be ordered without a showing of injury, and here it clearly appears that respondent received, under these findings, precisely the judgment which it desired. Such other matters as are urged against this judgment are disposed of by this court's order refusing to dismiss this appeal.

The judgment appealed from is therefore reversed and the cause remanded.

We concur: LORIGAN, J.; MELVIN, J.

(175 Cal. 666)

PEOPLE v. MOONEY. (Cr. 2079.)

(Supreme Court of California. Aug. 6, 1917.)

CRIMINAL LAW ⚿1186(7)—CONSENT TO REVERSAL—FORMAL APPLICATION—NECESSITY.

An appeal being regularly on the calendar, Attorney General's consent that the cause be reversed and remanded will not be considered, except on formal application, or motion by one of the parties, on notice to other parties interested.

In Bank. Appeal from Superior Court, City and County of San Francisco.

Action by the State against Thomas J. Mooney. From the judgment, defendant appeals. Consent of Attorney General to reversal not considered.

W. Bourke Cochran, of New York City, and Maxwell McNutt and John G. Lawlor, both of San Francisco, for appellant. U. S. Webb, Atty. Gen., and C. M. Fickert, Dist. Atty., and Edward A. Cunha, Asst. Dist. Atty., both of San Francisco, for respondent.

PER CURIAM. There has been brought to our attention a paper filed July 30, 1917, by the Attorney General, entitled "Consent that Judgment and Order be Reversed." It is stated therein by the Attorney General:

> "I hereby stipulate and consent that the judgment and order heretofore entered in this case by the trial court be reversed and the cause remanded for a new trial."

As substantially stated in the paper, this action of the Attorney General is not based on any assumption that the record on appeal discloses any cause for reversal; he saying in effect that he is not prepared to state that any cause for reversal is shown by the record, and that his action is prompted by matters outside the record, disclosed after the proceedings were terminated in the trial court, which led him to believe that justice would be subserved by a retrial of the cause.

We do not read the paper so filed as being an application, or as constituting anything more than a mere consent by the Attorney General that a reversal be had. No application or motion for reversal on any such ground has been made by the defendant, whose appeal, of course, is based solely on alleged errors in the proceedings in and action of the superior court, as the same are shown by the record on appeal. It appears to us that under these circumstances the court is not now called upon to determine whether any action in line with the consent of the Attorney General should or may be had. The appeal itself is regularly on our calendar for hearing in October of this year, and, in the absence of some application for earlier action, will come before us at that time for such action as may be deemed proper.

For the information and guidance of the various parties interested, we deem it proper to file this statement of our views, and to say further that, in view of the novelty of the suggestion of the Attorney General, and the serious question as to the right of this court under the provisions of our Constitution to grant a new trial except for error in the proceedings in the trial court, we will not consider the question of the advisability of the action suggested by the Attorney General's consent, except on formal application or motion by one of the parties addressed to the court, on notice to the other parties interested, including the disrict attorney of the city and county of San Francisco.

175 Cal. 619

COZAD v. RAISCH IMPROVEMENT CO.

(S. F. 7117.)

(Supreme Court of California. July 11, 1917. Rehearing Denied Aug. 6, 1917.)

1. MASTER AND SERVANT 🔑289(16)—INJURY — CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY.

Under evidence in servant's action for injury from sudden descent of conveyor of stone to concrete mixing machine, *held* question of contributory negligence in taking that route, rather than some other, was one for the jury.

2. NEGLIGENCE 🔑135 — INJURY — COMPARATIVE NEGLIGENCE—QUESTION FOR JURY.

Evidence that conveyor of stone to concrete mixing machine by sudden descent of which an employé passing under it was injured, ordinarily lowered gradually, that workmen frequently passed under it while elevated, and that it fell, either because of the engineer's negligence, or because the brake and clutch were defective, *held* to authorize conclusion by jury that the master was guilty of gross negligence, in comparison with which contributory negligence, if any, of employé was slight, authorizing recovery under St. 1911, p. 796, with diminution of damages in proportion to amount of negligence attributable to employé.

3. TRIAL 🔑296(3) — INSTRUCTIONS — ERRORS CURED BY OTHER INSTRUCTIONS.

The court having clearly stated the rule, under St. 1911, p. 796, that contributory negligence of injured servant is not a bar to, but only ground for diminishing recovery, where such negligence was slight and negligence of the master was gross in comparison, inaccurate statement that an employer must in all cases indemnify his employé for losses caused by employer's want of ordinary care was harmless.

4. NEGLIGENCE 🔑122(2) — CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.

It is only where plaintiff's own evidence raises a clear presumption of contributory negligence that defendant does not have the burden of proof thereon.

5. TRIAL 🔑108½, 127 — MISCONDUCT OF COUNSEL — REFERENCE TO INDEMNITY COMPANY.

There was no misconduct of plaintiff's counsel because of questions, asked in good faith, so far as appears, touching a juror's or witness' personal interest in favor of indemnity company, insuring defendant, or to lay foundation for showing contradictory statement of witness, that he would report liability to the indemnity company.

Department 1. Appeal from Superior Court, Sonoma County; Thos. C. Denny, Judge.

Action by D. W. Cozad against the Raisch Improvement Company. Judgment for plaintiff, and defendant appeals. Affirmed.

G. L. Stevick and Alfred C. Skaife, both of San Francisco, and W. F. Cowan, of Santa Rosa (L. A. Redman and Jewel Alexander, both of San Francisco, of counsel), for appellant. R. L. Thompson, of Santa Rosa, and R. A. Vitousek, of Healdsburg, for respondent.

LAWLOR, J. Action to recover damages for personal injuries. Defendant appeals from the judgment and from the order denying its motion for a new trial.

The plaintiff, D. W. Cozad, was at the time of the accident employed by the Raisch Improvement Company in paving a street in the city of Vallejo. He was foreman of a grading gang part of whose work consisted in the building of a curb line of concrete on the north side of the street. In connection with the work, a concrete mixing machine was used into which crushed rock and cement were conveyed by means of a "skip" or "conveyor" operated by a gasoline engine in such a way that when lowered it rested upon or at the base of a large pile of crushed rock, but when raised reached an elevation of about 12 feet, from whence the crushed rock and cement poured into the mixer. This skip weighed approximately 1,000 pounds. From its open end, when it was down, the rock pile extended backward or eastward a distance of about 40 feet. At the opposite end of the mixer the concrete was poured through a spout into wheelbarrows brought up by the laborers who carried it to the wooden forms for the curbing. To expedite the work, Cozad stationed a Greek laborer at the curb line just opposite the mixer, whose task it was to assist the men in pouring out the concrete from the wheelbarrows into the forms set in place for the curbing. A few minutes later, while on the other side of the mixer, Cozad noticed that the Greek was neglecting his duties, thereby delaying the work of the other men and jeopardizing the curb forms. As it was not practicable for Cozad's voice to be heard because of the noise of the revolving mixer, he hastened to reach him. The skip had just been raised to the top and was at the time held suspended in that position. Beneath it, between the mixer and the rock pile, was a clear passage straight to the place where the Greek stood. Although Cozad could have chosen a way around the rear of the mixer among the men going and coming with their wheelbarrows, climb over the pile of loose rock or walk some 80 feet around the eastern end of it, he started to "skin" or "skip" through, as he testified, before the skip began its descent. But as he passed under it, the skip suddenly descended and crushed him, causing the injuries complained of.

[1] Appellant, in making its motion for a nonsuit, and in its appeal from the order denying the motion, contends that in neglecting to take any of the three safe routes open to him, and in selecting the dangerous route, the plaintiff was obviously negligent, and therefore barred from recovery. Reliance is placed in support of the contention upon Douglas v. Southern Pacific Co., 151 Cal. 242, 90 Pac. 538, but in that case the employé voluntarily chose a way inherently perilous, where no occasion existed for him not to use the safe and usual way. Here there was evidence that the way selected was frequently used by plaintiff, as well as by the other employés. In the emergency presented it was the most practical and convenient way open to him. Moreover, it was not considered a dangerous or hazardous way; the reason assigned being that ordinarily the skip was controlled by a brake and clutch operated by the engineer in charge of the mixing machine, so that in its descent it was customarily stopped at an elevation of some 6 or 7 feet, and then lowered slowly to the ground as a protection to the workmen around the rock pile, and also to prevent racking and wrenching the machinery by precipitating the skip to the ground. Several of the workmen testified that they had come to rely upon this practice as a signal for them to get out of the way. Although this testimony was contradicted, the jury was entitled to find that ordinarily the way was safe. It ultimately proved dangerous because at the time of the accident either the brake slipped on account of water and grease having seeped under the brake bands, or because the engineer in charge permitted the skip to drop without the usual precaution. In this connection it is significant that as the skip fell the engineer was heard to exclaim with an oath: "I lost control of it." It is true that there was evidence tending to show that the brake frequently slipped, but it was not shown that this knowledge was ever imparted to plaintiff, or that he had reason to apprehend danger. Although the way chosen by him was more hazardous than any of the others, in our opinion it was not one which, under all the circumstances, it can be said as matter of law that a reasonable and prudent man would not have been warranted in adopting. The question was therefore properly left to the jury.

[2] Plaintiff's right to recover compensation for his injuries is governed by the provisions of the Roseberry Act. Stats. 1911, p. 796. Under that act contributory negligence does not completely bar a recovery where the contributory negligence of the injured employé "was slight and that of the employer was gross, in comparison." The showing made that the skip ordinarily was lowered gradually; that workmen frequently passed under it while it was elevated; and that it fell upon plaintiff, either because of the negligence of the engineer in charge, or because the brake and clutch were defective—are facts upon which the jury was entitled to base a conclusion that the defendant was guilty of gross negligence in comparison with which plaintiff's contributory negligence, if any, was slight. From a study of all the instructions given in reference to the doctrine of comparative negligence as declared by the statute, we conclude that the court stated the rule with sufficient clearness, and that the jury could not have been misled.

[3] We find no substantial merit in the objection to the instruction that "an employer must *in all cases* indemnify his employé for losses caused by the employer's want of ordinary care." Although the italicized phrase is not strictly accurate in view of the law of contributory negligence, the instruction nevertheless does not constitute prejudicial error when read in connection with the others touching upon the subject.

The jury was instructed that:

> "If the work is dangerous or hazardous, it is the duty of the employer to adopt and enforce reasonable rules for the protection of his employés in the performance of their duties."

A second instruction is to the same effect. But neither instruction has the effect of charging the jury, as is contended, that the law imposes upon defendant the absolute duty of adopting and enforcing such rules. Conceding that such a duty may be cast upon defendant in the event that the employés be required to work around dangerous machinery, the question whether the machinery was dangerous was left solely for the determination of the jury. There was testimony tending to establish the proposition that defendant probably had in fact adopted such a rule (the one referred to of stopping the skip part way in its descent), and that it was the violation of this rule which caused the injuries to plaintiff and not the failure to adopt one. Every engineer employed on the mixer, who was a witness in the case, testified that he observed the practice of checking the skip in its descent. The existence of such a custom was directly in issue. The verdict being in favor of the plaintiff, we are not prepared to hold that the jury did not find that such a practice had been followed, that it constituted a reasonable practice, and was relied upon by plaintiff, in consequence of which he suffered injury. That the jury, under the instructions given, plainly understood that defendant was not an insurer of its employés against injuries received in its employ, under the law as it then stood, and was only required to furnish a reasonably safe place in which they should perform their work, is also perfectly clear.

The appellant cites the case of Duffy v.

Hobbs, Wall & Co., 166 Cal. 215, 135 Pac. 1093, L. R. A. 1916F, 806, and claims that the court below disregarded the rule there laid down. But counsel for appellant has quoted in his brief a part only of a quotation made in that opinion from Sible v. Wells Bros. Co., 148 Ill. App. 109, the part which was not there applicable, and he omits the part which did apply to the question. The point decided in that case is that where a workman is himself delegated by the employer to see that a machine is in good repair, or that the place of work is made safe, he cannot recover of the employer for injuries caused by defects or dangers arising from his own neglect of that duty. The injury to the plaintiff in the present case was not so caused, and Duffy v. Hobbs, Wall & Co. has no application.

While the isolated portion of the instruction cited by appellant regarding the damages the jury might assess in the way of compensation is open to the objection that it tends to convey the impression that the jury might give play to emotions of sympathy, we find upon examining the remaining portion of the instruction, and others that were given, some at the appellant's own request, that the jury was fully and accurately informed as to the rule of law governing damages as expressed in section 3333 of the Civil Code.

[4] There is no force to the contention that the court erred in instructing the jury that the burden of proving contributory negligence rested upon the defendant. The exception to this general rule applies only where the plaintiff's own evidence raises a clear presumption of contributory negligence. McGraw v. Friend, etc., Lumber Co., 120 Cal. 574, 52 Pac. 1004. Such is not the case here.

[5] It appears that the defendant carried liability insurance and that the insurace company through its counsel actually conducted the defense. Appellant complains that plaintiff and his attorney took occasion to apprise the jury of this fact solely for the purpose of prejudicing the defendant. In each of the three instances complained of, an examination of the record discloses that the questions asked by the counsel, and the answers given, were competent and relevant for the respective purposes: First, of eliciting information as to whether a juror known to be a friend of the agent of the indemnity company was free from bias or prejudice; second, to lay a foundation for the impeachment of defendant's secretary by showing that he had not only made previous statements inconsistent with his testimony, but admitted to plaintiff the defendant's liability and stated his intention to make "a report to the indemnity company"; and, lastly, to expose the personal interest of one of defendant's witnesses. So far as appears, the questions were asked in good faith. Viou v. Brooks-Scanlon Lumber Co., 99 Minn. 97, 108 N. W. 891, 9 Ann. Cas. 318; Rinklin v. Acker, 125 App. Div. 244, 109 N. Y. Supp. 125. Indeed, a scrutiny of the entire record fails to reveal any evidence calculated to inform the jury that the case was actually being defended by the indemnity company, or that judgment, if rendered against the defendant, would be paid by the former. We know of no rule of law which would require a reversal for referring to the real party defendant of an action under such circumstances, while the propriety of eliciting information touching a juror's or witness' personal interest in favor of such interested indemnity company is, where the right is exercised within the sound discretion of the court not to be questioned on appeal.

Judgment affirmed.

We concur: SLOSS, J.; SHAW, J.

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175 Cal. 644

AVERY v. CHUCAWALLA DEVELOPMENT CO. et al. (L. A. 3929.)

(Supreme Court of California. July 18, 1917.)

1. Action ⟹50(9)—Joinder of Causes—Parties.

Cause of action against corporation to recover value of services and money paid out by plaintiff at its request may be joined with cause of action to enforce against its stockholders their proportionate shares of statutory liability.

2. Appeal and Error ⟹1040(11)—Harmless Error—Overruling Demurrer.

Where plaintiff in first four counts of complaint sues corporation to recover value of services and money paid out by him at its request, and in fifth realleges causes of action against corporation and charges defendant stockholders with proportionate shares of their statutory liability, court's overruling of stockholders' demurrers to first four counts, based on failure to implead them, is harmless.

3. Pleading ⟹127(2)—Issues—Admissions.

In action against corporation to recover value of services and money paid out by plaintiff at its request, admissions by him of payments received from it do not bind him against findings of court and judgment, where every allegation of complaint is denied, and issue joined thereon.

In Bank. Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by John R. Avery against the Chucawalla Development Company and others. From judgment for plaintiff, certain defendants appeal. Affirmed.

Edwin A. Meserve and Shirley E. Meserve, both of Los Angeles (J. D. Taggart, of Los Angeles, of counsel), for appellants. Flint, Gray & Barker and Henry S. Van Dyke, all of Los Angeles, for respondent.

HENSHAW, J. This appeal is on the judgment roll, without bill of exceptions. Plaintiff sued as assignee of A. H. Koebig and of A. H. Koebig, Jr. In the first four counts of his complaint he sued the defendant corporation to recover the value of his assignors' services and for moneys paid out by Koebig, Sr., at the instance and request of the defendant corporation. In the fifth count of his complaint he realleged all of the matters going to make up the causes of action against the corporation, and then charged the defendant stockholders with their proportionate shares of liability under the law. Demurrers of certain of the defendants were interposed and overruled. Their answers followed, and the court made its findings and gave its judgment in favor of plaintiff against the defendant corporation in the sum of $3,610, and in favor of the plaintiff and against certain stockholders for their proportions of this amount. The corporation and two of its stockholders have appealed.

[1] On appeal it is first contended that the demurrers should have been sustained for misjoinder of causes of action and for misjoinder of parties defendant. Both of these grounds go to the same proposition, namely, that our law does not permit a joinder of parties defendant and of causes of action when, as here, it is sought to charge in one action against the corporation for its liability and against its stockholders for their statutory liability. To permit this to be done, however, makes manifestly for the expeditious disposition of litigation, without working hardship to any party defendant, and for this reason it should be countenanced, if not forbidden. Nothing in our law forbids it. In Kennedy v. Savings Bank, 97 Cal. 93, 31 Pac. 846, 33 Am. St. Rep. 163, this precise procedure was had, and in Kiefhaber Lumber Co. v. Newport Lumber Co., 15 Cal. App. 37, 113 Pac. 691, an attack was made upon a complaint which did this upon the same grounds as those here presented. The Court of Appeal upheld the practice, and this court refused to rehear the case when a rehearing was urged upon this ground.

[2] The other grounds of demurrer revolve about the proposition which has just been decided. In varying terms it is declared on behalf of the appealing stockholders that their demurrers to the first four causes of action should have been sustained because they were not impleaded therein. The matter is hypertechnical. Each one of those four causes of action was embraced in the fifth count, in which they were included, so that it would have advantaged them nothing if their demurrers had been sustained to the first four counts, and they are injured in no respect because their demurrers were not sustained.

[3] It is next contended that it cannot be determined from the findings by what method the court fixed the sums due to plaintiff, and that therefore the judgment is not sustained. While the complaint, as indicated, charged in separate counts, the court treated the Koebigs' dealings with defendant corporation as being open and continuous services, and its findings of the amounts due are wholly within the pleadings. The whole matter of the indebtedness of the defendants to plaintiff's assignors was in issue. Defendants denied any indebtedness. The admissions in the complaint of payments, which appellants argue bind plaintiff, and necessarily result in establishing that the judgment given was for too large a sum, cannot be so used, against the findings and judgment, when every allegation of the complaint was, as here, denied, and issue joined upon every averment. Graham v. Harmon, 84 Cal. 181, 23 Pac. 1097.

The judgment appealed from is therefore affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOSS, J.; LAWLOR, J.

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175 Cal. 641

BALLOU v. AVERY et al. (BIG FOUR ELECTRIC RY. CO., Intervener).

(Sac. 2322.)

(Supreme Court of California. July 17, 1917.)

1. Jury ⟹14(6)—Trial by Jury—Equitable Issues.

An action to have a note declared void and surrendered for cancellation because it had been obtained by false and fraudulent representations was an action in equity in which plaintiff was not entitled to a trial by jury, and in which the court had jurisdiction to pass upon the existence of fraud or the want of consideration.

2. Bills and Notes ⟹92(6) — Consideration—Delivery of Stock.

A company's obligation to deliver stock upon payment of the buyer's note at its maturity constituted a consideration for the note.

3. Bills and Notes ⟹494—Fraud—Burden of Proof.

In an action to have a note declared void and surrendered for cancellation on the ground that it had been obtained by false and fraudulent representations, the burden of proving fraud was upon the plaintiff.

4. Appeal and Error ⟹1011(1) — Finding of Fact—Conclusiveness.

In such action, where the evidence on the issue of false and fraudulent representations are conflicting, the finding against the plaintiff could not be questioned.

Department 1. Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by George A. Ballou against Frank C. Avery and the Citizens' Bank of Visalia, Big Four Electric Railway Company, intervener. Judgment for intervener on condition, and plaintiff appeals. Affirmed.

Farnsworth & McClure, of Visalia, for appellant. Power & McFadzean and E. I. Feemster, both of Visalia, for respondent.

LAWLOR, J. In this action plaintiff prays that a promissory note in the possession of the defendant, Citizens' Bank of Visalia, be declared null and void, and that it be surrendered so that it may be canceled. Relief is sought upon the ground that defendant, Frank C. Avery, by means of false and fraudulent representations, which are set forth in the complaint, obtained the note from plaintiff without consideration, and at a time when he was old and unable to realize the consequence of what he was doing. It is alleged that the bank took the note with full knowledge of the manner in which it had been obtained. The bank answered, denying this and the other material allegations of the complaint, and claimed to have received the note from Avery as an innocent purchaser in the regular course of its business. It asserted the right to retain possession of the note until it was paid. But with permission of court, a complaint in intervention was filed by the Big Four Electric Railway Company setting forth that Avery, as its agent, had received the note solely in consideration of plaintiff's subscription for 5,000 shares of its capital stock, which it purposed to deliver to plaintiff, as agreed, upon payment of the note, and claiming that Avery had no authority to assign it to the bank. The company likewise denied the allegations of fraudulent representation and want of consideration. Defendant Avery defaulted. Judgment went for intervener, awarding it the possession of the note as prayed, but conditioned that in the event of its payment the bank should be entitled to receive a sum equivalent to the commission which the court found was earned by Avery on account of the sale of the stock to plaintiff.

[1] Plaintiff, in his appeal from the judgment, contends that the court below erroneously denied his demand for a trial by jury. A jury was in fact impaneled upon his request, and the necessary jury fees were paid by him, but upon the opposition of the defendant bank and intervener it was discharged by the court from further attendance. This was proper. Plaintiff's action is clearly one in equity, and the law is well settled that:

> "Where the case as made by the pleadings involves the application of the doctrines of equity and the granting of relief, which can be obtained in a court of equity, and not elsewhere, the parties are not entitled to a jury trial." Fish v. Benson, 71 Cal. 428, 435, 12 Pac. 454, 457.

This being so, the court clearly had jurisdiction to pass upon the questions of fact incidental to the equitable relief sought, such as the existence of fraud or the want of consideration. The intervener argues further that plaintiff cannot support his claim to a jury trial by the circumstance that the complaint in intervention seeks to recover possession of the note from the defendant bank. The point may be conceded. Plaintiff does not base his claim to a jury trial by reason of any of the legal issues which may have arisen between the intervener and the defendant.

[2] Appellant apparently questions the finding that there was a good consideration for the note because no stock was ever actually issued to him. It was found that the company had bound itself to deliver the stock upon payment of the note at its maturity. This constituted a consideration. It is not alleged that plaintiff has ever made any offer to pay the note, or that the company is not in a position to deliver the stock. In fact, the company in its answer expressly declared its intention to deliver the stock to plaintiff upon receipt of payment.

[3, 4] The burden of proving fraud was upon the plaintiff. We are unable to find that he has met this requirement in any essential particular. Placing the strongest import upon the testimony offered in his behalf, it falls short of showing that the representations alleged to have been made were actually false, that they were material and in good faith relied upon by him, or that they were made with intent to defraud. At the most the evidence is decidedly conflicting. The findings, therefore, cannot be questioned.

Judgment affirmed.

We concur: SHAW, J.; SLOSS, J.

(175 Cal. 632)

ROSSEN v. VILLANUEVA et al.

(L. A. 4033.)

(Supreme Court of California. July 13, 1917.)

1. Fraudulent Conveyances 🔑241(5) — Right to Attack—Conditions Precedent.

A creditor may attack a transfer as fraudulent when he has reduced his claim to judgment, and has endeavored, without avail, to collect the same by execution, although he has no specific lien upon the property transferred, and his judgment has not become final by affirmance on appeal, or by lapse of time in which to appeal.

2. Pleading 🔑8(15) — "Fraud" — Conclusions.

Merely alleging in terms that an act was fraudulently done will not be held sufficient; "fraud" for purposes of pleading being a mere conclusion of law.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Fraud.]

3. Pleading 🔑8(15)—"To Delay or Defraud"—Conclusion.

The intent "to delay or defraud" is a question of fact, and may be pleaded in so many words without stating the evidence or the specific facts which go to substantiate the charge in view of Civ. Code, § 3442, providing that the question of fraudulent intent is one of fact, and not of law.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Hinder, Delay, and Defraud.]

4. Fraudulent Conveyances 🔑163—Participation of Transferee in Fraud—Effect.

Where the transferee participates in the fraudulent intent, the transfer is void as to creditors, although a valuable consideration may have been paid, in view of Civ. Code, § 3439, providing that every transfer of property made with intent to delay or defraud is void against all creditors of the debtor.

5. Fraudulent Conveyances 🔑295(1), 301(1)—Intent to Defraud—Evidence—Sufficiency.

In a suit seeking to have a transfer by plaintiff's partner of an interest in the partnership to defendants declared void, and subject to satisfaction of an execution against the partner returned unsatisfied, evidence *held* sufficient to show fraud on the part of transferor and transferees.

Department 1. Appeal from Superior Court, San Bernardino County; Benjamin F. Bledsoe, Judge.

Action by Jesse H. Rossen against J. C. Villanueva and others. Judgment for plaintiff, and the unnamed defendants appeal. Affirmed.

R. E. Swing, of San Bernardino, for appellants. H. H. Chase, of San Bernardino, for respondent.

SLOSS, J. The plaintiff, Rossen, and the defendant Villanueva had been partners in the bottling business at San Bernardino. On April 4, 1913, the plaintiff sold his one-half interest in the property and business of the partnership to the defendants Seward and Owens, who thereafter, together with Villanueva, conducted the business under the name of Ranier Bottling Company. During the existence of the partnership between plaintiff and Villanueva the plaintiff had contributed a larger amount to the capital of the business than had Villanueva, and plaintiff had a claim against said Villanueva for one-half of the excess thus contributed by him. On or about March 1st Villanueva sold his interest in the partnership to Seward and Owens. On March 21, 1914, the plaintiff recovered a judgment against Villanueva for $592.46 on account of the claim above referred to. Execution on said judgment was issued and returned unsatisfied. The complaint alleged that Villanueva's sale and transfer of his interest in the partnership to Seward and Owens had been made with the intent and purpose of defrauding plaintiff out of the money so due him, and of preventing him from collecting the same, and that said Seward and Owens participated in said fraudulent intent, and took the transfer with the intent and purpose of assisting and aiding said Villanueva in evading payment of said indebtedness, and preventing plaintiff from collecting the same. It was further alleged that after said sale Villanueva had no property out of which his indebtedness to the plaintiff could be satisfied in whole or in part. The prayer was for judgment that the transfer to Seward and Owens be canceled and declared void, and that an alias execution be issued in the former action of Rossen v. Villanueva, empowering the sheriff to sell the said partnership interest of Villanueva.

The court found the foregoing facts in favor of the plaintiff, and rendered judgment for him as prayed. The defendants Seward and Owens appeal from the judgment.

The complaint contains, in addition to the averments which we have summarized, a number of additional allegations which were found by the court to be true. There is no occasion to recite their purport, or to discuss the sufficiency of the evidence to support the findings in their favor. The facts which we have stated are sufficient in themselves to entitle the plaintiff to relief.

[1] Under section 3439 of the Civil Code, every transfer of property made with intent to delay or defraud any creditor or other person of his demands is void against all creditors of the debtor. Under section 3442 of the same Code, the question of fraudulent intent is one of fact, and not of law. A creditor may attack a transfer as fraudulent when he has reduced his claim to judgment, and has endeavored without avail to collect the same by execution. Thornburgh v. Hand, 7 Cal. 554; Bickerstaff v. Doub, 19 Cal. 109, 79 Am. Dec. 204; Mesmer v. Jenkins, 61 Cal. 151; Brown v. Campbell, 100 Cal. 635, 35 Pac. 433, 38 Am. St. Rep. 314. This the plaintiff did here. He was not required to show that he had any specific lien, independent of the judgment, upon the property transferred by his debtor. Nor is it a prerequisite to the creditor's right that the judgment obtained by him shall have become final by affirmance on appeal, or by the lapse of the time in which an appeal might have been taken.

> "If he has put himself in a position to levy execution, he has done everything necessary to enable him to attack the transfer which hinders his enjoyment of his right." Sewell v. Price, 164 Cal. 265, 270, 128 Pac. 407; Jenner v. Murphy, 6 Cal. App. 434, 92 Pac. 405.

[2, 3] It is familiar law that a pleading which merely alleges in general terms that an act was fraudulently done will not be held good. Fraud, for purposes of pleading, is a legal conclusion. But the intent "to delay or defraud" a creditor is a question of fact (Civ. Code, § 3442), and may be pleaded in so many words, without stating the evidence or the specific facts which go to substantiate the charge (20 Cyc. 736; Threlkel v. Scott, 4 Cal. Unrep. Cas. 346, 34 Pac. 851; Anderson v. Bank of Lassen County, 140 Cal. 695, 74 Pac. 287).

[4] Where the transferee participates in the fraudulent intent, the transfer is void as to creditors, even though a valuable consideration may have been paid. Goodwin v. Hammond, 13 Cal. 168, 73 Am. Dec. 574; Swinford v. Rogers, 23 Cal. 234; Bull v. Ford, 66 Cal. 176, 4 Pac. 1175; Burke v. Koch, 75 Cal. 356, 17 Pac. 228. Here it is alleged and found that Seward and Owens took the transfer with the intent and purpose of assisting and aiding Villanueva in evading payment of his indebtedness to plaintiff.

[5] The only question is whether the evidence supports the findings of a fraudulent intent on the part of Villanueva and of the appellants here.

There was evidence tending to show that when the plaintiff, Rossen, sold his interest to the defendants, he advised them that he still retained a claim against Villanueva. The amount of this claim was in dispute, and the plaintiff and Villanueva finally agreed to submit it to the decision of a referee. On February 26, 1914, the referee made his findings and decision, fixing the indebtedness of Villanueva to Rossen at $547.16. From that date until the 5th of March following Rossen made daily efforts to find Villanueva, but did not succeed in locating him. During this time both Seward and Owens knew that plaintiff was trying to collect his claim from Villanueva. The evidence warrants the inference that Villanueva was concealing himself from Rossen. In response to plaintiff's repeated inquiries, Seward told him during this time that he did not know where Villanueva was. Seward had authorized the plaintiff to purchase Villanueva's interest on behalf of Seward and Owens for $1,700. On the 2d of March Seward and Owens bought Villanueva's interest from him for $900, they agreeing to assume the indebtedness of the firm. The transaction was conducted at Colton, instead of San Bernardino, where the business was located. On the 4th of March, two days after the appellants had made this purchase, Rossen told Seward that he had heard that a sale had been made in Colton of Villanueva's interest, and Seward said in response to this that he knew nothing about it. Seward, in testifying, admitted this; his explanation being that he did not "have to tell all his business." Owens, who closed the transaction with Villanueva, carried to Colton the amount of the purchase price in currency, and paid it in that form, although he and Seward had a bank account, and were in the habit of paying their larger bills by check. When Rossen asked Owens how much he had paid Villanueva, Owens answered that it was none of his business. Villanueva has not been seen by any of the parties concerned since this money was paid to him.

No extended argument is needed to demonstrate that the findings assailed are fully supported. The facts speak for themselves. The debtor's concealment, his subsequent disappearance, the unusual mode in which the appellants made their purchase (20 Cyc. 451), the secrecy surrounding the transaction (20 Cyc. 447; Daugherty v. Daugherty, 104 Cal. 221, 37 Pac. 889; Bush & M. Co. v. Helbing, 134 Cal. 676, 66 Pac. 967), the disingenuous conduct of the appellants and their active efforts to hide from the plaintiff the fact of their purchase (20 Cyc. 446), all these are badges of fraud so convincing that it may well be doubted whether findings in favor of the defendants could have been sustained. We may add that the evidence justifies the inference that the consideration paid was considerably less than the full value. The defendants had offered, a few days before their purchase, to pay $1,700 for Villanueva's interest, and the court was justified in treating this as evidence of value. The purchase for an inadequate consideration is an additional circumstance tending to show fraudulent intent.

The judgment is affirmed.

We concur: SHAW, J.; VICTOR E. SHAW, Judge pro tem.

175 Cal. 652

BAKER v. EILERS MUSIC CO. (L. A. 4043.)

(Supreme Court of California. July 31, 1917.)

1. APPEAL AND ERROR ⟹984(5)—MATTERS OF DISCRETION—REVIEW.

The discretion of the trial court in fixing a reasonable attorney's fee provided for by the notes sued on without the introduction of direct evidence will not be reviewed, in the absence of an abuse of discretion.

2. JUDGMENT ⟹663 — EVIDENCE — APPEAL PENDING.

A judgment roll offered in evidence was properly excluded because it was an attempt to prove a fact in issue by a judgment whose operation was suspended by appeal.

3. JUDGMENT ⟹650 — EVIDENCE — "FINAL JUDGMENT."

A judgment, to be admissible in evidence for the purpose of proving facts therein found, must be final, and if the action in which the judgment was given is still pending, the judgment is not final.

4. ABATEMENT AND REVIVAL ⟹8(2)—PLEA IN ABATEMENT — IDENTITY OF MATTER INVOLVED.

A plea in abatement is open only where the identity of the matter involved in the second action is such that the judgment in the first could be pleaded in bar as a former adjudication if that judgment were final.

5. SET-OFF AND COUNTERCLAIM ⟹60 — DEFENSE IN FORMER ACTION — FAILURE TO SET UP.

Where the damages occasioned to a tenant by eviction should have been pleaded as a counterclaim in the action by plaintiff landlord to recover the rent, the tenant is estopped from pleading it in the present action, in view of Code Civ. Proc. § 439, providing that if defendant omits to set up a counterclaim upon a cause of action arising out of the transaction, which is the foundation of plaintiff's claim, he cannot maintain an action against the plaintiff therefor.

6. APPEAL AND ERROR ⟹1170(10, 12)—HARMLESS ERROR — SIGNING OF FINDINGS AND JUDGMENT.

That a copy of the findings and judgment served on defendant's attorney was signed and filed before the expiration of five days, contrary to Code Civ. Proc. § 634, will not be considered, where it is not shown that defendant was deprived of a substantial right in view of Const. art. 6, § 4½.

Department 2. Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by R. M. Baker against the Eilers Music Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Frank Bryant, of Los Angeles, for appellant. Lucius M. Fall, of Los Angeles, for respondent.

HENSHAW, J. Plaintiff brought his action to recover upon two promissory notes executed by defendant to him. The notes are pleaded in hæc verba in the complaint, and each provides for the payment "of a reasonable attorney's fee if suit is commenced to enforce the payment." The total amount due on these notes was $12,200. Defendant answered by pleading a composition agreement, whereunder the notes were to be paid not according to their terms and tenure, but at the rate of $3,000 monthly. It may here be interpolated that no showing was made to support this asserted agreement, that the court found against it, and even if it were true, defendant was in default for nonpayment. Defendant also pleaded a cross-complaint, under which it asserted that it had been a tenant of plaintiff's premises under a lease, that it had been evicted from a portion of the demised premises, and that by reason of this eviction it had suffered damages in the sum of $50,000. After trial, judgment was given for plaintiff, and defendant appeals.

[1] It is not altogether easy to follow the contentions of appellant. The complaint charged for the amount due upon the promissory notes and a reasonable attorney's fee. The pleadings admitted the execution of the notes. The defense of a composition agreement for deferred payments failed utterly, and the defendant had deposited in a bank for plaintiff on account of these notes before the trial the sum of $12,200, principal and interest, leaving unpaid only the attorney's fee and costs, to be fixed by the court. Upon this statement being made to the court by plaintiff's attorney, the court fixed the attorney's fee in the sum of $1,000. Where a promissory note so provides for the payment of a reasonable attorney's fee, it is the province of the court to fix that amount in its discretion and without the introduction of direct evidence upon the matter, and only for an abuse of discretion—which does not here appear—will the court's action be reversed. Woodward v. Brown, 119 Cal. 283, 51 Pac. 2, 542, 63 Am. St. Rep. 108; Patten v. Pepper Hotel Co., 153 Cal. 461, 96 Pac. 296.

[2] The appellant offered the judgment roll in an action which bore the same title as this, but which in all other respects was totally different. That was an action by the landlord prosecuted against his tenant to recover one month's installment of rent. The defense was the eviction of the defendant from a portion of the demised premises, the refusal of the landlord to restore that portion of the demised premises, the rescission by defendant of the contract of lease and its surrender of its possession. Upon the trial of that action the court found in favor of this defense and gave judgment accordingly, from which judgment the plaintiff prosecuted his appeal. Upon the trial of this action defendant tendered the judgment roll, and stated that it was for the purpose of showing the eviction. At the time of this tender the appeal was pending. The court refused this judgment roll admission in evidence, and was right in so doing, for many reasons, only two of which need here be considered. First, the court's ruling was correct because the attempt was to prove by the introduction of a judgment, whose operation was suspended by appeal, a fact in issue, namely, the eviction. It should need no citation of authorities to show that this cannot be done.

[3] However, reference may be made to In re Blythe, 99 Cal. 472, 34 Pac. 108, and Feeney v. Hinckley, 134 Cal. 468, 66 Pac. 580, 86 Am. St. Rep. 290, which are direct adjudications to the effect that a judgment in order to be admissible in evidence for the purpose of proving facts therein found, must be a final judgment in the cause, and if the action in which the judgment was given is still pending, necessarily the judgment is not final.

[4] It is to be noted that this was not an attempt to abate the present action, and could not have been for the reason that the subject-matters and causes of the two actions were not even similar, much less identical, and of course it is the universal rule that a plea in abatement is open only where the identity of the matters involved in the second action are such that a judgment in the first could be pleaded in bar as a former adjudication if that judgment were final. Vance v. Olinger, 27 Cal. 358; McCormick v. Gross, 135 Cal. 302, 67 Pac. 766.

[5] The second reason is this: In the action for rent the counterclaim or cross-complaint for damages occasioned to the tenant by his eviction not only could have been pleaded, but should have been pleaded, and defendant's failure to plead it in that action estopped it from doing so in the present action. Indeed, it might have been offered by plaintiff himself to establish defendant's failure to plead his damages for eviction, and thus to estop him from his efforts to establish it in the present action. The matter is conclusively covered by section 439 of the Code of Civil Procedure, when it declares that:

> "If defendant omits to set up a counterclaim upon a cause arising out of the transaction set forth in the complaint as the foundation of plaintiff's claim, neither he nor his assignee can afterwards maintain an action against the plaintiff therefor."

To all of this appellant interposes the utterly frivolous contention that the judgment roll was admissible because respondent did not prove, nor offer to prove, that the judgment embraced in the judgment roll was on appeal to District Court of Appeal, and therefore, argues appellant, this court "is bound to assume that no such appeal had been taken." What the record does disclose upon this point is that upon the tender of the judgment roll by defendant's attorney the court asked whether the judgment had become final, and plaintiff's attorney responded:

> "The judgment roll was appealed from to the District Court of Appeals on the judgment roll without a bill of exceptions, and that appeal is now pending."

The court then ruled that the judgment roll would not be admitted in evidence for any purpose whatsoever, "as the pendency of the appeal renders it utterly useless in any respect in this case." To this appellant's attorney made no response other than to save his exception. He did not and does not contend that the appeal was not taken and was not in fact pending. He did not object to the insufficiency of the statement of counsel as not measuring up to legal evidence. He made not the slightest effort in the trial court, and makes none here, to show the contrary of the fact stated by the attorney for plaintiff. The practice of the law has indeed fallen on evil days if the statement of a sworn officer of the court under these circumstances, and where no objection is made to its sufficiency, may not be considered by the court itself. But in addition to this, for the reason last given, namely, that the defendant had lost its right to counterclaim for damages, the ruling of the court was sound, even though the judgment had been absolutely final in defendant's favor.

[6] It is last contended that a copy of the findings and judgment were served on defendant's attorney on May 22d, and were signed and filed on May 25th, and that thus violence was done to section 634 of the Code of Civil Procedure, which declares that the court shall not sign any findings prior to the expiration of five days' service upon all the parties, and that therefore defendant was "denied a substantial right." What that substantial right may have been we are not advised. Conceding it to have been error for the court thus to have signed and filed the findings within the five days' period allowed to appellant, it is incumbent on the latter to show more than this to work a reversal of the judgment. It is not sufficient for him to do as here he does, merely state that he was deprived of a "substantial right." He must in some manner make plain this fact to the court and disclose the nature of the substantial right of which he was deprived. Otherwise it becomes the duty of this court to disregard the error. Const. art. 6, § 4½. This appellant has failed to do.

Wherefore the judgment and order appealed from are affirmed.

We concur: LORIGAN, J.; MELVIN, J.

175 Cal. 657

BAKER v. EILERS MUSIC CO. (L. A. 4044.)

(Supreme Court of California. July 31, 1917.)

1. JUDGMENT 🔑714(3) — CONCLUSIVENESS — SUCCESSIVE ACTIONS FOR INSTALLMENTS OF RENT.

Where an action for an installment of rent was defended on the ground of a rescission of the lease, by a partial eviction and a termination of the relationship of landlord and tenant, a judgment for defendant, though not a bar to an action for a subsequent installment of rent, was an estoppel against a redetermination of the same issues, under Code Civ. Proc. § 1908, subd. 2, providing that a judgment is as to the matter directly adjudged, conclusive between the parties and their successors in interest litigating for the same thing, under the same title, and in the same capacity.

2. ABATEMENT AND REVIVAL 🔑8(2)—ANOTHER ACTION PENDING—IDENTITY OF ISSUES.

If such judgment had been suspended by an appeal, it could still be interposed in abatement of a second trial of the same issues, as the test of the soundness of a plea in abatement is whether the identity of the causes of action is such that a judgment in the first action can be pleaded in bar as a former adjudication or as an estoppel.

Department 2. Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by R. M. Baker against the Eilers Music Company. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Reversed.

Frank Bryant, of Los Angeles, for appellant. Lucius M. Fall, of Los Angeles, for respondent.

HENSHAW, J. In the present action plaintiff as landlord sued defendant as his tenant for the recovery of rent due under the written lease between the parties. A previous action to recover another monthly installment of this rent had been brought, tried, and determined in favor of the defendant in the superior court of the county of Los Angeles. The defense in that action was the eviction of the defendant from a portion of the demised premises, the refusal of the landlord to restore that portion of the demised premises on demand, the rescission of defendant of the contract of lease for this reason, and its surrender of possession. That case so tried resulted in a judgment in favor of the defendant, from which judgment the plaintiff appealed. Upon appeal the judgment was affirmed. Baker v. Eilers Music Co., 26 Cal. App. 371, 146 Pac. 1056. In the present action defendant pleaded in abatement the former trial and the decision of the court thereon; pleaded the judgment in its favor upon the same cause of action; the appeal from that judgment and the pendency of the appeal; and prayed an abatement, and therefore necessarily the postponement of the trial of this action on that ground. On the trial defendant offered the judgment roll in the former action and evidence of the pendency of the appeal, and all this evidence by the court was rejected.

[1, 2] In so rejecting it the court fell into serious and unmistakable error. Plaintiff's former action sought to impose a liability upon defendant for rent due under his written lease. The defense was nonliability owing to a rescission of the lease and a termination of the relationship of landlord and tenant. These issues lay at the foundation of every action which plaintiff could bring to recover rent. Once having had the

issues litigated and determined, it was not open to him to have them redetermined in successive actions. If the judgment in the first action in which these issues were tried had become final, that judgment could be interposed as an estoppel. If the operation of the judgment was suspended by appeal it could still be interposed in abatement of a second trial of the same issues. The argument of counsel, to the effect that "while the same parties are parties plaintiff and defendant in both actions and the same lease is involved in both actions, yet this action is for a different installment of the rent, and therefore the actions are not the same," is wholly specious and unsound. The cases upon which respondent relies are cases where it was sought to use a judgment the operation of which was suspended upon appeal as a bar, which, of course, cannot be done. Smith v. Smith, 134 Cal. 117, 66 Pac. 81, contains a discussion pertinent to the matter. The varying rules in different states as to the right to introduce judgments not final are considered; the difficulties under any rule pointed out, and, in discussing the method by which the fruits of a judgment on appeal might not be wholly lost to the one who has prevailed, it is said:

> "A much better mode to secure the benefit of the evidence, and to avoid a conclusion which may prove unjust, is to move for a continuance, as suggested in Rose v. Superior Court, 65 Cal. 570 [4 Pac. 577], and Brown v. Campbell, 100 Cal. 635 [35 Pac. 433, 38 Am. St. Rep. 314]."

So, too, in Greer v. Greer, 142 Cal. 525, 77 Pac. 1108, it is said:

> "As the former case was pending on appeal, the judgment could not have been pleaded as an estoppel. The plea of 'action pending' in its proper sense did not apply."

But in this case manifestly the plea in abatement was a good one. The test of the soundness of such a plea is that the identity of the causes of action must be such that a judgment in the first could be pleaded in bar as a former adjudication, or as an estoppel. Code Civ. Proc. 1908, subd. 2; Taylor v. Castle, 42 Cal. 371; Montgomery v. Harrington, 58 Cal. 270; McCormick v. Gross, 135 Cal. 303, 67 Pac. 766. So in Wiese v. San Francisco Musical Society, 82 Cal. 645, 23 Pac. 212, 7 L. R. A. 577, the plaintiff brought his action to recover sick benefits. The Musical Society set up a change in the by-laws, under which change plaintiff was not entitled to the benefit. In a previous action between the parties the same defense had been determined adversely to the defendant's position. This prior determination was held to estop the defendant from again maintaining the same defense. In Freeman v. Barnum, 131 Cal. 386, 63 Pac. 691, 82 Am. St. Rep. 355, the action was in mandate to compel the auditor to draw his warrant in favor of the petitioner for certain installments of salary asserted to be due petitioner as assistant district attorney. The auditor for defense asserted that the law purporting to authorize the payment of this salary was void, but in a prior action between the same parties for an earlier installment of salary the final adjudication had been against this defense. Further it was contended by the auditor that the board of supervisors had revoked the order of appointment of the assistant district attorney. But this matter, too, had been previously adjudicated and decided against the position of the auditor. It was here held that the prior judgment raised an estoppel against the presentation of these defenses. To like effect is Koehler v. Holt Manufacturing Co., 146 Cal. 335, 80 Pac. 73, where defendant had accepted an order under which it was to pay plaintiff the sum of $25 per month to be applied upon the purchase of a certain tract of land. In an action brought to enforce the collection of delinquent installments the defendant pleaded by way of estoppel that in a prior action to recover earlier installments it had pleaded nonliability by reason of the fact that its principal had countermanded the order, and upon trial judgment had passed in its favor, which judgment had become final. This court held the plea, while not sufficient to raise a technical bar, in that the installments involved in the suit were not identical, nevertheless was sufficient to raise a complete estoppel by judgment, saying:

> "The case comes clearly within the principle that a judgment operates as an estoppel to preclude the 'parties and privies from contending to the contrary of that point or matter of fact, which, having been once distinctly put in issue by them, has been, on such issue joined, solemnly found against them.'"

The judgment and the order refusing to grant appellant's motion for a new trial are reversed.

We concur: LORIGAN, J.; MELVIN, J.

(175 Cal. 625)

BIRD et al. v. AMERICAN SURETY CO. OF NEW YORK. (L. A. 4006.)

(Supreme Court of California. July 11, 1917.)

1. CONTRACTS ⟹166—REFERENCE TO DRAWINGS AND SPECIFICATIONS.

Where a contract for construction of a building contained no details, except that they were to be "conformable to drawings and specifications of even date herewith made by R. M. J., designer and signed by the parties," such drawings and specifications constituted a part of the contract, although contract did not in terms recite that they were attached thereto, or made a part thereof.

2. MECHANICS' LIENS ⟹74—OWNER'S LIABILITY LIMITED TO CONTRACT PRICE—NECESSITY OF FILING SPECIFICATIONS—"THE CONTRACT SHALL BE FILED."

To limit an owner's liability in mechanic's lien foreclosure to contract price as provided by Amendments of 1911 to Code Civ. Proc. § 1183 et seq., where contract and contractor's bond is filed, specifications which are a part of the contract must be filed with it, this being the law before the adoption of the amendments, and the fact that the former statute made the contract void for want of filing which the amendment does not do, being immaterial; the words "the contract shall be filed" meaning the same in both statutes, and comprehending the complete contract.

3. APPEAL AND ERROR 🔑171(1)—ADOPTION OF NEW THEORY ON APPEAL.

The theory upon which pleadings were drawn and the case tried cannot be abandoned and a new one adopted on appeal.

4. APPEAL AND ERROR 🔑171(1)—MECHANIC'S LIEN FORECLOSURE.

Where mechanic's lien foreclosures were consolidated with an action by the owner on a contractor's bond, record *held* to show that there was no change of theory on appeal from that upon which the pleadings were drawn and the case tried.

5. MECHANICS' LIENS 🔑108—PERSONS ENTITLED — "SUBCONTRACTOR" DISTINGUISHED FROM "MATERIALMAN."

One furnishing materials, to a person having a contract for all the brick and steel work in a building, was entitled to a materialman's lien, the person to whom the material was furnished being a "subcontractor" and not a mere "materialman," making the objections that a lien does not lie in favor of one who sells materials to a materialman inapplicable.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Materialman; Subcontractor.]

6. APPEAL AND ERROR 🔑1073(7)—HARMLESS ERROR—AMOUNT OF JUDGMENT—MECHANICS' LIEN FORECLOSURE.

The owners of a building were not injured by the awarding of amount of a materialman's lien in judgment against them, where such amount was deducted from the total. which otherwise would have gone to the subcontractor to whom the material was furnished.

7. MECHANICS' LIENS 🔑132(4) — TIME FOR FILING—CLAIM OF LIEN.

A claim of mechanic's lien filed within 30 days after filing of notice of completion of work, where 90 days had not elapsed from date of actual completion, was good in view of Code Civ. Proc. § 1187, declaring that the filing of such notice of completion shall be deemed equivalent to completion.

8. MECHANICS' LIENS 🔑315 — INDEMNITY — ACTION AGAINST CONTRACTOR AND SURETY COMPANY—DAMAGES.

In action by the owner of a building against the contractor and on the contractor's bond, the owner could recover rental lost by delay in completion and attorney's fees incurred in defending suits of lien claimants.

9. APPEAL AND ERROR 🔑694(1) — REVIEW — FINDINGS—CONCLUSIVENESS.

On appeal from judgment against surety company, executing contractor's bond indemnifying owner of a building, the findings will be deemed conclusive, where bill of exceptions did not specify any insufficiency of evidence.

Department 1. Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by Mary E. Bird and another against the American Surety Company of New York, consolidated with lien foreclosure suits. Judgment providing for foreclosure of liens, but that lien claimants could not recover against the surety company named, and that the plaintiffs should recover from defendant named, and as against the contractor, E. R. McLure. Defendant named appeals from judgment and from orders denying motion for new trial and to enter a different judgment on the findings, and plaintiffs appeal from the judgment, except that part allowing recovery from defendant named and the contractor, E. R. McLure. Judgment and orders affirmed.

Gibson, Dunn & Crutcher, of Los Angeles (Edward E. Bacon, of Los Angeles, of counsel), for appellants Bird. Bicksler, Smith & Parke, of Los Angeles, for appellant American Surety Co. of New York. Frank L. Borden and M. O. Graves, both of Los Angeles, for respondent J. E. White & Co. Frank L. Borden, of Los Angeles, for respondents Bell and Southern. Behymer & Craig, of Los Angeles, for respondent Frank Graves Sash, Door, and Mill Co. Cornelius M. Enns, of Los Angeles, for respondent Berry. H. A. Barclay, of Los Angeles, for respondent Los Angeles Pressed Brick Co. G. C. De Garmo, of Los Angeles, for respondent Pico Heights Lumber Co. and Smoyer. James, Smith & McCarthy, of Los Angeles, for respondent Cain. Wm. B. Ogden, of Los Angeles, for respondent Selfridge and others.

SLOSS, J. The plaintiff, Mary E. Bird, as owner, entered into a contract with E. R. McLure, as contractor, for the erection of a building on said plaintiff's lot in the city of Los Angeles. The contract price was $7,020, and American Surety Company, as surety, gave a bond in the sum of $3,510 to insure the performance of the contract. McLure commenced work, but did not carry it to completion, and the owner furnished the labor and materials necessary to complete the building. Claims of liens were filed by various persons asserting that they had furnished labor or materials to the contractor, and actions to foreclose such liens were brought. The lien claimants also sought a recovery against the American Surety Company. The owner, Mary E. Bird, brought a separate action against the surety to recover the damages which she had sustained through the contractor's default. The various lien foreclosure suits, together with the owner's action against the surety, were consolidated.

The court found that McLure abandoned work upon the building on or about the 1st day of October, 1913, while the same was unfinished; that the plaintiff gave to McLure notice in writing of her intention to complete the building, as provided for in the contract, and at the same time mailed to American Surety Company a written statement of the facts showing McLure's default, such statement being required by the terms of the bond. McLure and the Surety Company failed to further perform the contract, and the plaintiff went on with the work, completing the building on or about the 10th day of November, 1913. The plaintiff had paid to McLure, prior to his abandonment, the sum of $3,510. She paid for materials and labor provided by her to complete the building the sum of $1,162.32. Various claims of lien were filed, and the owner had incurred a liability of $500 for fees of counsel retained to defend against the actions brought to foreclose such liens. The owner had suffered a loss of $200 in rentals through McLure's default. In the main, the court found in favor of the allegations of the various lien claimants, the claims thus sustained amounting in all to over $4,800. The court concluded that the lien claimants were not entitled to recover against the surety. They have not appealed, and the propriety of this conclusion is not in question here. The judgment provided that the various liens should be foreclosed, and that the owner should recover from the surety the principal sum of the bond, $3,510, together with costs, amounting to $89.90. The American Surety Company appeals from the judgment, from an order denying its motion for a new trial, and from an order denying its motion to enter a different judgment on the findings. The plaintiffs Mary E. Bird and her husband, R. J. Bird, appeal from the judgment, except that part thereof adjudging that the plaintiff Mary E. Bird recover from the American Surety Company and the contractor, McLure.

The transactions here in controversy took place after the mechanic's lien law had undergone the sweeping changes worked by the amendments of 1911 to section 1183 et seq. of the Code of Civil Procedure. At the time of the trial of the present actions, this court had not yet passed on the validity or the scope of these amendments. Since then we have rendered a series of decisions which settle a number of the points raised by counsel in their briefs. The general validity of the statutory scheme, and particularly of the provision for a bond, contained in section 1183, was definitely upheld in Roystone Co. v. Darling, 171 Cal. 526, 154 Pac. 15. The argument that the owner's constitutional rights are violated by making him liable for any sum in excess of the price which he has agreed to pay was there met and answered. The opinion pointed out that, under the proper interpretation of the statute, the owner may limit his liability to the contract price by complying with two conditions: (a) the filing of the original contract in the office of the county recorder before the commencement of the work; and (b) the filing with such contract of a bond of the contractor, in an amount not less than 50 per cent. of the contract price, such bond to be conditioned, among other things, for the payment in full of the claims of all persons performing labor upon or furnishing materials to be used in such work. If the owner complies with these conditions, his property is free from any claim in excess of the contract price agreed upon between him and the original contractor. If, however, he fails to so comply, those furnishing labor or material are entitled to liens upon the property for the value of the labor done and the materials furnished. The requirement of the bond as a condition to the limitation of the owner's liability is not in violation of any constitutional right. In Hammond Lumber Co. v. Willis, 171 Cal. 565, 153 Pac. 947, decided shortly after the Roystone Case, it was held that a bond given under the statute is valid and enforceable, even though such bond and the contract to which it refers have not been filed, and there has been a failure, consequently, to limit the recovery of the lien claimants to the amount of the contract price.

In the case at bar the court gave judgment in favor of the lien claimants for the full amount of their claims, which exceeded, in the aggregate, the balance of the contract price due from the owner to the contractor. This was proper, because, as the findings show, the owner had not filed the contract in accordance with the terms of section 1193.

[1] The contract provided that McLure should build a two-story frame building, consisting of two stores and four three-room apartments, "all to be conformable to the drawings and specifications, of even date herewith, made by R. M. Jackson, designer, and signed by the parties." The contract itself contained no further description of the contractor's undertaking, and the character and details of the work to be done by him could not be ascertained without resort to the drawings and specifications. Such drawings and specifications, therefore, constituted an essential part of the building contract, even though the contract did not in terms recite that they were attached to and made a part of it. Greig v. Riordan, 99 Cal. 316, 33 Pac. 913; Pierce v. Birkholm, 115 Cal. 657, 47 Pac. 681.

[2] Prior to 1911, the statute provided that a failure to file the contract, or a memorandum thereof, rendered the contract wholly void. In this state of the law, it was thoroughly settled that, where the plans and specifications were a part of the contract, they must be filed with it. The present statute does not make the contract void for want of filing, but does require that it shall be filed in order to restrict the recovery to the amount of the contract price. No distinction can be drawn between the two statutes with respect to what constitutes a filing of the contract. If, under the one, the plans and specifications forming part of the contract must be filed, they must equally be filed under the other. The fact that, under the two statutes, different consequences result from a failure to file the contract does not justify a holding that the words "the contract * * * shall be filed" have different meanings in the old and the new law.

[3, 4] The appellant surety company argues that the pleadings were drawn and the case

tried upon the theory that the contract had been duly filed, and that this theory cannot be abandoned and a new one adopted after the appeal is taken. The contention would be sound (Pac. Portland Cement Co. v. Hopkins, 162 Pac. 1016), if the assumption upon which it is based were supported by the record. But it is not. It may be that the pleadings of the owner and of the surety company went upon this theory. This was not, however, a suit between them alone. The lien claimants were parties, and their actions had been consolidated with that of the owner. Some, at least, of these claimants filed complaints containing no allegation of the making or filing of a contract between the owner and the original contractor. Furthermore, the findings recite that all of the parties in the actions for the foreclosure of liens had been permitted "to amend their respective complaints by alleging that the plans and specifications for the construction of said building were not filed or recorded." It is not true, therefore, that either the pleadings or the findings were framed upon the theory that a contract had been duly filed. It may be added that the American Surety Company, in its motion to set aside the judgment, and in its notice of intention to move for a new trial, specified, among the grounds for relief, that "the entire contract, including plans and specifications, was not filed as required by law." Under these conditions, this appellant is hardly in a position to claim that the case is within the rule declared in Pacific Portland Cement Company v. Hopkins.

[5, 6] It is urged that the court should not not have given judgment in favor of the Los Angeles Pressed Brick Company, which had furnished materials to one Southern. The claim is that Southern himself was only a materialman, and that a lien does not lie in favor of one who sells materials to a materialman. Roebling's Sons Co. v. Humboldt, etc., Co., 112 Cal. 288, 44 Pac. 568. But it is not the fact that Southern was a mere materialman. His contract was to do all the brick and steel work in the building. He was clearly a subcontractor. Hihn-Hammond Lumber Co. v. Elsom, 171 Cal. 570, 154 Pac. 12. Furthermore, Southern himself filed a lien, and the amount awarded to the brick company was deducted from the total which would otherwise have gone to Southern. The appellants are not injured, therefore, by the action of the court in awarding the amount of its claim to the brick company directly.

[7] One of the successful lien claimants, Smoyer, filed his claim of lien December 12, 1913. The court found that the building was completed November 8, 1913, and accepted and occupied November 10, 1913. Both of these dates were more than 30 days before the filing of the claim. But the court found, further, that the owner filed a notice of completion on November 12, 1913. The claim of lien was filed within 30 days after this date. Section 1187 of the Code of Civil Procedure declares that any of several acts, one of which is the filing of such notice, shall be deemed equivalent to a completion. In Hughes Manufacturing Company v. Hathaway, 161 Pac. 1159, this court decided that the claim may be filed within 30 days after the filing of the notice of completion, provided that 90 days have not elapsed from the date of actual completion. Smoyer, therefore, was not too late. The same considerations are applicable to the objection made to the foreclosure of the lien of Frank Graves S. D. & M. Company.

[8] The rentals lost by delay in completion, and the attorney's fees incurred in defending against suits were proper charges in favor of the owner against the contractor, and against the surety company, which had given a bond to indemnify the owner against any loss or damage arising by the failure of the contractor to faithfully perform his contract, and for the payment in full of the claims of all persons performing labor upon, or furnishing materials to be used in, the work. Hampton v. Christensen, 148 Cal. 729, 84 Pac. 200; Tally v. Ganahl, 151 Cal. 418, 90 Pac. 1049.

[9] The surety company argues that the owner failed to comply with certain conditions of the bond. The complaint alleges, however, full compliance on the part of the plaintiff, Mary E. Bird, with all of the terms, conditions, and covenants of the contract, and of the bond, and the court found this allegation to be true. The evidence is brought up by means of a bill of exceptions, settled by the court. The American Surety Company, which proposed said bill, failed to incorporate therein any specifications of insufficiency of the evidence. The findings must therefore be taken as conclusive here. Code Civ. Proc. § 648; Hawley v. Harrington, 152 Cal. 188, 92 Pac. 177. For the same reason, we cannot consider the merits of the claim that the owner was required to show the value of her property. The argument is that, since the lien claimants recovered no personal judgment against the owner, but could enforce their claims against her property alone, she could be damaged only to the extent of the value of her property, which might be less than the aggregate of the liens. Without expressing any opinion regarding the soundness of this contention, it is sufficient to say that the complaint alleges, and the court has found, that, by reason of the failure of the contractor and the surety to perform the terms and conditions of the contract and bond, the owner has been damaged in a sum exceeding $3,510. In the absence of any specification of insufficiency, we cannot inquire whether there was evidence to support this finding of the ultimate fact of damage.

The judgment and the orders appealed from are affirmed.

We concur: SHAW, J.; VICTOR E. SHAW, Judge pro tem.

34 Cal. App. 162

KERNER v. SPIEGL. (Civ. 2055.)

(District Court of Appeal, First District, California. June 20, 1917. Rehearing Denied by Supreme Court Aug. 16, 1917.)

1. MUNICIPAL CORPORATIONS 🔑706(6) — STREETS — INJURIES TO PEDESTRIANS — EVIDENCE—SUFFICIENCY.

Evidence *held* to present a question for the jury whether defendant, in driving his automobile along a city street, in doing which he injured plaintiff, was guilty of negligence.

2. NEW TRIAL 🔑102(1)—DILIGENCE—NECESSITY OF SHOWING.

It is not error to refuse a new trial on the ground of newly discovered evidence, in the absence of a showing of diligence.

Appeal from Superior Court, City and County of San Francisco; A. E. Graupner, Judge.

Action by Anita Kerner against L. M. Spiegl. From a judgment denying plaintiff's motion for new trial, she appeals. Affirmed.

Hamilton A. Bauer, of San Francisco, for appellant. Walter H. Linforth, of San Francisco, for respondent.

RICHARDS, J. This is an appeal from an order denying plaintiff's motion for a new trial. The action was one for damages alleged to have been sustained by the plaintiff through an accident arising from the negligent operation of the defendant's automobile. The defendant in his answer denied that the accident occurred through any negligence on the part of himself or the operator of his automobile, and alleged that the plaintiff's injury occurred through her own negligence. The action was tried by the court sitting without a jury, and the findings and judgment of the court were in favor of the defendant upon both these issues. The plaintiff did not appeal from the judgment, but moved for a new trial upon the ground of the insufficiency of the evidence to justify the decision of the court, and also upon the ground of newly discovered evidence, and she now appeals from the order of the court denying her said motion for a new trial.

The facts of the case which form the basis of the findings and judgment of the court were briefly these: On the evening of December 10, 1913, the defendant, in his automobile driven by his son, a driver of several years' experience, was proceeding westerly along the northerly side of Post street in the city of San Francisco at a rate of speed testified to as not exceeding 10 miles an hour. The night was dark. It was raining, and the roadway was slippery. As the automobile was in the act of crossing Post street, a wagon, driven by some person unknown, suddenly undertook to turn up Post street in such a way as to require the operator of the automobile to immediately change the course of the machine and cross over near to the southerly side of Post street in order to avoid a collision. At this moment the plaintiff and a companion going northward on the westerly side of Polk street stepped off the curb into Post street, carrying a raised umbrella and attempting to cross said street. When discovered by the driver of the automobile, and when they in turn became aware of its proximity, the plaintiff and her companion were about 3 feet from the curb of Post street and 3 or 4 feet in front of the machine. The driver made every effort to stop the machine in order to avoid a collision, but could not do so fully, and the machine struck the plaintiff and her companion, knocking them down, bruising them both somewhat, and injuring their clothing through contact with the car and muddy street. The machine came to a standstill immediately after the impact, and no part of the automobile went over either of the ladies.

The foregoing facts were presented to the trial court, and its findings based thereon were to the effect that the defendant was not guilty of any negligence in the operation of his said automobile under the circumstances immediately preceding and attending the occurrence of the accident, but that the plaintiff was negligent in stepping into the roadway of Post street in front of said automobile, without looking to see whether any automobiles were approaching the place where plaintiff was about to go on said roadway, and that her injuries were caused thereby.

[1] The plaintiff insists that the findings and judgment of the court should have been in her favor upon the facts. We are unable, however, to say that the question of negligence arising out of the foregoing facts was a question of law, which should have been resolved in plaintiff's favor. It was rather a question of fact, which the court, sitting as a jury, had a right to resolve in favor of either party to the action; and its discretion in so doing will no more be subject to review by this court than would the discretion of a jury have been, had the case been submitted to a jury.

[2] The plaintiff further contends that her motion for a new trial should have been granted upon the ground of newly discovered evidence; but upon this point it is sufficient to say that the affidavit upon which this phase of the motion was predicated was wholly insufficient in its showing of reasonable diligence to procure the alleged newly discovered evidence prior to the trial of the cause.

For the foregoing reasons, the order denying plaintiff's motion for a new trial is affirmed.

We concur: BEASLY, Judge pro tem.; KERRIGAN, J.

34 Cal. App. 802

FORDYCE v. SPIEGL. (Civ. 2056.)

(District Court of Appeal, First District, California. June 20, 1917. Rehearing Denied by Supreme Court Aug. 16, 1917.)

Appeal from Superior Court, City and County of San Francisco; A. E. Graupner, Judge.

Action by Maud M. Fordyce against L. M. Spiegl. Judgment for defendant, with order denying motion for new trial, and plaintiff appeals. Affirmed.

Hamilton A. Bauer, of San Francisco, for appellant. Walter H. Linforth, of San Francisco, for respondent.

RICHARDS, J. The facts of this case are in all respects identical with the facts in the case of Anita Kerner v. L. M. Spiegl (No. 2055) 166 Pac. 1013, pending in this court, and this day decided, and the opinion in that case is equally applicable to the present one.

The order denying the plaintiff's motion for a new trial is affirmed.

We concur: BEASLY, Judge pro tem.; KERRIGAN, J.

34 Cal. App. 129

McCORD et al. v. MARTIN et al. (Civ. 2043.)

(District Court of Appeal, First District, California. June 15, 1917. Rehearing Denied by Supreme Court Aug. 13, 1917.)

1. ASSIGNMENTS 🔑24(3) — ASSIGNMENT OF CAUSE OF ACTION FOR FRAUD AND DECEIT.

Naked actions for fraud and deceit are not the subject of assignment.

2. ASSIGNMENTS 🔑24(3)—CAUSES OF ACTION FOR FRAUD — SALE OF CORPORATE STOCK — STATUTE.

A stockholder in a company owning oil mining claims was more familiar with the property than the other stockholders, and, learning that a third person desired to purchase 20,000 shares of the stock of the company, he induced other stockholders to place his and their stock in escrow in one block in a bank, to be taken by the third person on making payment of $5 a share, though such third person was willing to pay $8 a share, which he later did to the stockholder, who, with the secretary of the company, appropriated the difference. *Held*, that the several causes of action of the other stockholders were assignable, under Civ. Code, §§ 953, 954, 1044, since they were not merely causes of action for fraud and deceit, but involved substantial rights of property.

Appeal from Superior Court, Santa Clara County; J R. Welch, Judge.

Action by J. W. McCord and others against J. D. Martin and William Lindemann. From judgments for each defendant on his separate demurrer to the amended complaint, plaintiffs appeal. Judgments reversed.

Bradley & Bradley, of Visalia, for appellants. W. B. Wallace, of Visalia, in pro. per. Morrison, Dunne & Brobeck, of San Francisco, and Lamberson, Burke & Lamberson, of Visalia, for respondents.

RICHARDS, J. These are appeals from judgments in favor of each of the two defendants upon their separate demurrers to the plaintiffs' amended complaint. The same and the single question involved in each appeal is as to whether or not the 25 causes of action set forth in the complaint were assignable to the plaintiffs, who sue as the assignees thereof. General and special demurrers, similar in form and substance, were presented by each of said defendants to each of said causes of action. The court made a general order sustaining said demurrers, without leave to amend. It seems to be conceded that the order of the court sustaining these demurrers was based upon the general ground that the complaint fails to state a cause of action in any of its counts, because of the nonassignability of the claims sued upon. To that question this court will therefore address itself, regardless of any uncertainty in the complaint assailed by the special demurrers; for as to these the trial court, had it based its orders sustaining the demurrers upon any of the special grounds, should have granted leave to amend.

The facts of the case as revealed by the averments of the plaintiffs' complaint are these: The 25 persons who are the assignors of the causes of action set forth in the complaint were stockholders in a corporation known as the Lost Hills Mining Company, incorporated in the year 1909, having its principal place of business at Hanford, Kings county, Cal., and being the owner of a number of oil mining claims in Kern county, in said state. The assignors of plaintiffs owned an aggregate of 36,800 shares of the capital stock of said corporation, amounting to a controlling interest therein. In the month of October, 1909, the corporation entered into a contract with the firm of Martin & Dudley, by which the latter were granted the right to enter upon and occupy said lands and drill wells therein for the purpose of developing its oil possibilities. In the event of finding a successful well, the firm was to have a certain interest in the property. The defendant J. D. Martin, who was one of the members of said firm, was also at the time, and thereafter continued to be, a stockholder of the corporation. The firm of Martin & Dudley assigned their interest in said contract to another corporation, known as the Lake Shore Oil Company, of which said corporation Martin & Dudley owned about one-half of the capital stock; the said J. D. Martin being a director in said last-named corporation. Considerable work was done upon the properties of the Lost Hills Mining Company under this contract during the year which followed, and said Martin became very familiar with the lands and oil values and possibilities of said property, much more so, in fact, than any of those of his fellow stockholders who were to be the assignors of the plaintiffs herein, none of whom resided in that region or had any knowledge of the value of the lands of their corporation as oil-producing properties. In the year 1911 said J. D. Martin learned that one George W. Cameron, of San Francisco, was desirous of purchasing not less than 20,000 shares of the capital stock of the Lost Hills Mining Company, and would be willing to pay therefor $8 per share, and that, if he could succeed in purchasing said stock of the Lost Hills Mining Company for said price, he would also be willing to buy certain other properties in which the firm of Dudley & Martin and the Lake Shore Oil Company were interested. Upon learning these facts, as the complaint alleges, said Martin devised a scheme by which he was to effect a sale of all the properties in which he was interested to Cameron, as a part of which he was to induce the said assignors of plaintiffs to place their stock in escrow in one block, to be taken up by an undisclosed purchaser at the price of $5 per share. In order to carry out said scheme, said Martin sought the aid and co-operation of his codefendant Lindemann, who was the secretary of the Lost Hills Mining Company, and to whom, for his share in the scheme, he promised a portion of the profits to spring from the consummation of the transaction by which Martin and Lindemann would appropriate the difference between $5 and $8 per share upon the transfer of said stock. The scheme was carried into effect. The defendants represented to their fellow stockholders that there was an undisclosed purchaser for their stock who was to pay $5, and no more, per share for the same, provided it was placed in escrow in one block in a certain bank, to be taken by such purchaser upon making said payment; that the said stock was not worth more than $5 per share, and could not be sold for more; and that said Martin and Lindemann would themselves join with their fellow stockholders in placing their stock also in said escrow to be sold at $5 per share. Relying upon these false and fraudulent representations upon the part of said Martin and Lindemann, and upon the superior knowledge of the situation possessed by them, and having no knowledge to the contrary, the assignors of the plaintiffs placed their stock in said escrow for transfer to said undisclosed purchaser thereof at the price of $5 per share; and thereafter said Cameron went to the bank where said stock had been placed, and received said stock, paying to the bank on account of said assignors of plaintiffs the sum of $5 per share therefor, and also paying to said defendants the additional sum of $3 per share, the balance of the real purchase price of said stock, which sum they received and have ever since retained. Upon learning of the fraud which had been practiced upon them, the assignors of plaintiffs transferred their respective claims, demands, and causes of action against said Martin and Lindemann to the plaintiffs herein in trust for collection, whereupon said plaintiffs instituted this action.

[1] We are unable to give our concurrence to the views of the trial court in sustaining the defendants' demurrers without leave to the plaintiffs to amend upon the ground that the causes of action set forth in the complaint were not assignable. It is true, as the respondents contend, that naked actions for fraud and deceit are not the subject of assignment under long and well settled rules of equity. But the state of facts set forth in the plaintiffs' amended complaint and above recited does not present a case where the plaintiffs are seeking to recover upon assigned claims for damages for naked fraud and deceit, involving no substantial right of property in plaintiffs' assignors. On the contrary the facts, in our opinion, clearly show that the defendants, by means of their alleged fraudulent and deceitful acts and conduct, were enabled to come into possession of an amount of money representing the difference between $8 a share, which the respective stockholdings of plaintiffs' assignors in the Lost Hills Mining Company were really worth, and for which they were actually sold, and the sum of $5 per share, which was all that the plaintiffs' assignors received for their said stock by reason of the defendants' fraudulent and deceitful representations. This sum of money, amounting to the exact damages claimed in this action, was a sum of money which these defendants must be equitably held to have received and retained for the use and benefit of the plaintiffs' assignors, the right to recover which was a substantial part of their cause of action against said defendants. It is not disputed that the form of assignment to plaintiffs was sufficient to cover the entire equitable and property rights and claims of the plaintiffs' assignors in the premises, and was thus a transfer of much more than a mere naked right of action for fraud and deceit, since it included also the right to recover the respective sums of money which the defendants had received for the use and benefit of plaintiffs' assignors, and to which in equity they were justly entitled.

[2] This being so we are entirely satisfied that these several causes of action were assignable under sections 953, 954, and 1044 of the Civil Code. Henderson v. Henshall, 54 Fed. 320, 330, 4 C. C. A. 357; Fox v. Hale & Norcross S. M. Co., 108 Cal. 478, 41 Pac. 328. The earlier cases cited by respondents in support of the rulings of the trial court will not be found to be in conflict with the views above expressed, for in each of them the decision of the cause upon appeal is expressly limited to the statement of the rule that a naked right to sue for fraud and deceit is not assignable. The recent case of Greenlee v. Los Angeles, etc., Bank, 171 Cal. 371, 153

Pac. 383, is also clearly distinguishable from the case at bar upon the facts, and, as to its law, lends more support to the appellants' contention than to that of the respondent, for the plain intimation of the learned justice writing the opinion in the case is that, if an interest in property passes by the terms of the assignment, it gives to the assignee the right to enforce the remedies of his defrauded assignor.

For the foregoing reasons, we are of the opinion that, in so far as the general demurrer was concerned, the trial court was in error in sustaining it upon the stated ground of the nonassignability of the several causes of action, and that, as to the point made upon special demurrer, the trial court exceeded its discretion in undertaking to sustain these without leave to the plaintiff to amend.

Judgment reversed.

We concur: LENNON, P. J.; KERRIGAN, J.

34 Cal. App. 107

CRITTENDEN v. ST. HILL. (Civ. 1946.)

(District Court of Appeal, First District, California. June 13, 1917. Rehearing Denied by Supreme Court Aug. 6, 1917.)

1. ELECTION OF REMEDIES 🔑3(1)—REMEDIES SUBJECT TO ELECTION.

Where defendant was in default in the payment of rent for plaintiff's premises, and plaintiff brought an action for the rent, in which defendant interposed a cross-complaint, preventing plaintiff from dismissing the action, the institution of the action was not an election of remedies, or a waiver of the right to maintain an action for the possession of the premises, precluding plaintiff from bringing an action of unlawful detainer; there being no payment or acceptance of rent, or valid tender of the rent, and no element of estoppel, making it inequitable or unjust to allow the plaintiff to recover in the action of unlawful detainer.

2. ELECTION OF REMEDIES 🔑1—NATURE OF DOCTRINE.

The basis of the doctrine of the election of remedies is found in the proposition that, where there is by law or by contract a choice between two remedies which proceed upon opposite and irreconcilable claims of right, the one taken must exclude and bar the prosecution of the other.

3. ELECTION OF REMEDIES 🔑3(1)—REMEDIES NOT INCONSISTENT.

Where the law affords distinct, but not inconsistent, remedies, an election to follow one does not operate as a waiver of the other.

4. ELECTION OF REMEDIES 🔑3(1)—INCONSISTENT REMEDIES.

Inconsistent remedies may in general proceed concurrently; but the satisfaction of the claim by one remedy puts an end to the enforcement of the other.

5. PLEADING 🔑8(11) — FACTS OR CONCLUSIONS—OWNERSHIP.

In an action of unlawful detainer, an allegation of plaintiff's ownership of the property was not objectionable as a conclusion of law, especially where the allegation was made by way of an amendment during the trial, and no demurrer was interposed thereto, or denial thereof made.

Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by William C. Crittenden against Constance St. Hill. From a judgment for plaintiff, defendant appeals. Affirmed.

John T. Thornton and Leo C. Lennon, both of San Francisco, for appellant. William A. Nunlist and William M. Simmons, both of San Francisco, for respondent.

LENNON, P. J. This is an action in unlawful detainer. The pleaded and proven facts of the case show, substantially, that on the 10th day of June, 1914, the defendant herein and one Everson entered into a lease of the premises in controversy. Plaintiff acquired title to the demised premises from Everson on December 14th of the same year. Immediately following this change of ownership, disputes arose between the plaintiff and defendant concerning the legality of the lease held by the latter, which finally culminated in litigation between them. Finally, however, the plaintiff, on July 3, 1915, agreed to waive his objections to the sufficiency of the lease, and further agreed not to disturb the defendant in the possession of the premises, in consideration of her paying the arrears in rent, which, at that time, amounted to $1,260, and covering a period of 6 months at the monthly rental of $210 as stipulated in the lease. The rent not being paid as thus agreed, plaintiff commenced an action on the 6th day of July, 1915, to recover the same from the defendant, and in that action sued out an attachment. The defendant, on the 16th day of July, filed her answer to the complaint therein, together with a counterclaim for damages, and at the same time procured a release of the attachment. That action and the issues arising therein are still pending, undetermined. On July 15, 1915, another month's rent became due, and the defendant offered to plaintiff the sum of $210, conditioned upon his giving a receipt for the rent for that period. Plaintiff refused to comply with this condition, upon the ground that, if he did so, it would constitute an admission upon his part that only that sum was due as rent, and would also prejudice his right to institute the present unlawful detainer suit. A similar receipt was presented each month as the rent became due, and until the time of the trial of the present action. On the 16th day of July, plaintiff demanded of defendant the possession of the leased premises, or payment to him of the rent, amounting at that time to the sum of $1,470, which was the aggregate of the rent due for 7 months, from the 15th day of January, 1915, to the 15th day of August of the same year. This demand not having been complied with, plaintiff therein on the 28th day of July instituted the present action in unlawful detainer to recover possession of the leased premises.

Defendant filed her answer herein, and after trial, which was had on the 13th day of January, 1916, judgment was rendered in favor of plaintiff and against defendant for possession of the leased premises, for the forfeiture of the lease, and for the sum of $2,520 as rent for a period of 12 months accruing up to the time of the trial, together with attorney's fees and costs. The appeal is from the judgment.

The principal point presented in support of the appeal and urged for a reversal is contained in the contention that the defendant was justified in retaining possession of the premises without payment of rent, because of the fact that, prior to the service of the notice to quit, respondent had commenced the action for rent hereinbefore referred to, and therefore, it is asserted, that the legal effect of the commencement of such action was to affirm the lease, the lawfulness of her possession, and to recognize her tenancy as existing up to the period sued for, and that this action precluded the plaintiff from commencing the unlawful detainer action, except for breaches occurring subsequent to such period. In other words, the defendant contends as a matter of law that, when she became in default, respondent had an election of two remedies: He could either commence an action for rent, or he could institute unlawful detainer proceedings; but, having elected to pursue the former, he thereby affirmed the lease and waived his right to the latter remedy. The evident intention of the plaintiff in invoking the aid of the law was to collect from the defendant the rent of the premises which she admittedly occupied and enjoyed from January 15, 1915, without the payment of any rent, and it is manifest that he had no intention of either confirming the lease or insisting upon a forfeiture thereof in its strict sense.

[1-4] In our opinion the mere institution of the rent action did not have the legal effect claimed for it, nor did it indicate a waiver of the right to maintain an action for the possession of the premises. By the original action plaintiff was seeking to recover the rent due him, and, being resisted in that action, he has resorted to a more expeditious proceeding to accomplish this result. The basis of the doctrine of election of remedies is founded in the proposition that where there is, by law or by contract, a choice between two remedies, which proceed upon opposite and irreconcilable claims of right, the one taken must exclude and bar the prosecution of the other. This doctrine is, therefore, generally regarded as being an application of the law of estoppel. 9 Ruling Case Law, p. 956 et seq. Here no such element exists. There was no payment or acceptance of the rent, or any offer to pay, except the offers made upon the condition that defendant had no right to exact; nor does the record disclose any element of estoppel which makes it inequitable or unjust to allow the plaintiff the fruits of the judgment appealed from; nor are the two actions, in our opinion, inconsistent. One is for the income of the property; the other, for the possession of the property itself, which is in part based upon the latter default. In Arnold v. Krigbaum, 169 Cal. 146, 146 Pac. 423, Ann. Cas. 1916D, 370, it is held that the action for unlawful detainer is one for the recovery of the possession of property primarily, and that the rent found due is a mere incident to the main object. The rights litigated in the two actions are therefore entirely different; and where the law affords distinct, but not inconsistent, remedies, the election to follow one does not operate as a waiver of the other. American Process Co. v. Florida, etc., 56 Fla. 116, 47 South. 942, 16 Ann. Cas. 1056. All inconsistent remedies may in general proceed concurrently; but, of course, the satisfaction of the claim by one remedy puts an end to the enforcement of the other. Id. Here there was no satisfaction of the action instituted for the recovery of the rent, because it never went to judgment, and respondent had no power to dismiss the same, by reason of the fact that the defendant, in addition to her answer, interposed a cross-complaint for damages. We conclude, therefore, that under the circumstances of this case the filing of the action for rent did not preclude respondent from proceeding in unlawful detainer.

[5] Appellant further contends that the complaint fails to state a cause of action, for the reason that the respondent failed to properly connect himself in the allegations of his complaint with Everson, the original lessor of the defendant, and that his allegation of ownership is in form a mere conclusion of law. There is no merit in this contention (Johnson v. Vance, 86 Cal. 128, 24 Pac. 863); and especially is this contention without merit when considered in the light of the fact that the allegation complained of was made by way of an amendment during the course of the trial, and no demurrer was interposed thereto, or denial thereof made. Furthermore, no injury is shown to have resulted to the appellant therefrom.

The judgment is affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

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34 Cal. App. 75

GAY v. MILWAUKEE BREWERY OF SAN FRANCISCO. (Civ. 1983.)

(District Court of Appeal, First District, California. June 8, 1917. Rehearing Denied by Supreme Court Aug. 6, 1917.)

1. PRINCIPAL AND SURETY ⚿66(1)—LIABILITY—LIMITATION AS TO AMOUNT.

Where liability of surety, under a bond given by tenants to secure payment of rent, was limited, it was not, because it had been partly reimbursed by lessees, liable for more than amount stated in bond.

2. PRINCIPAL AND SURETY 🔑171—RIGHTS AS TO CREDITORS — RECOVERY OF PAYMENT BY MISTAKE.

Where liability of surety on a bond, given by a tenant to secure payment of rent, is limited, it can recover amount in excess of that called for by its bond, paid by it under mistake of fact.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Mary Gay against the Milwaukee Brewery of San Francisco. From a judgment for defendant, plaintiff appeals. Affirmed.

Bourdette & James and Franklin T. Poore, all of San Francisco, for appellant. Walter Perry Johnson, of San Francisco, for respondent.

PER CURIAM. By this action plaintiff seeks to recover rent under a lease, and to hold the defendant as surety under a bond given by it to secure its payment. In defense of the action the defendant pleaded that its liability was expressly limited by the terms of the bond to the sum of $5,000, and averred that in accordance with the demands of the plaintiff made upon it monthly it had paid thereunder the full sum of $5,000, and that its entire liability was thereby extinguished. With its answer the defendant filed a cross-complaint, in which it was set forth that it had, in addition to the $5,000, paid by mistake the sum of $550, and prayed judgment against the plaintiff for this amount. It recovered judgment in accordance with its prayer, and the appeal is by plaintiff from such judgment.

It appears from the record that the defendant was reimbursed by the lessees, its principals, a portion of the amount paid by it under the bond, and the only question here presented is whether or not a surety is required to account to the obligee of the bond for such payments; it being the contention of the plaintiff that the defendant as surety is liable for the amount stated in the bond above and beyond any sum that it may have received from the lessees by way of reimbursement.

[1] We do not think that this contention can be maintained. The defendant, as surety, having paid to plaintiff all that it undertook to pay under the bond, is under no obligation to pay any further sum. Upon payment by it of the rent as it became due, the lessees became liable to the defendant for the amount so paid, and the defendant had a right to pursue them for its return, and any amount so recovered would not inure to the benefit of the lessor. The defendant having responded to all the requirements of its contract of suretyship, no further liability can be imposed upon it.

The judgment is affirmed.

Addenda to Opinion on File.

[2] In the opinion on file in this cause we omitted to refer to the contention of appellant—although we had considered it and found it untenable—that the $550 paid by respondent in excess of the amount called for by its bond was paid voluntarily, and consequently cannot be recovered by it. As is to be gathered from the opinion already filed, the evidence establishes that this payment was made through a mistake of fact. The trial court, therefore, was not in error in holding that it could be recovered, and in rendering judgment accordingly.

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34 Cal. App. 92

HENRY COWELL LIME & CEMENT CO. v. SMITH. (Civ. 2125.)

(District Court of Appeal, First District, California. June 9, 1917. Rehearing Denied by Supreme Court Aug. 6, 1917.)

1. ASSIGNMENTS FOR BENEFIT OF CREDITORS 🔑342—ESTOPPEL TO ATTACK.

A creditor, who, after an assignment for benefit of creditors to representative of Board of Trade, attends creditors' meeting and presents his claim, with knowledge of assignee's purpose to close debtor's business, waives all objections to the regularity of the assignment and assignee's title to the assets, although he does not know until afterwards, but before sale of assets, of assignment by first assignee to second, both acting for the Board of Trade, but does not object until after sale.

2. ASSIGNMENTS FOR BENEFIT OF CREDITORS 🔑352—ACTION AGAINST ASSIGNEE—FINDINGS.

In an action by a creditor against an assignee for benefit of creditors, a finding that plaintiff consented to the assignment necessarily implies that plaintiff's attorney, on whose actions finding is based, had authority to present claim and consent to assignment.

Appeal from Superior Court, City and County of San Francisco; Geo. E. Crothers, Judge.

Action by Henry Cowell Lime & Cement Company against Henry L. Smith. From a judgment for defendant, plaintiff appeals. Affirmed.

Hatch & Hatch, of San Francisco, for appellant. J. G. De Forest, of San Francisco, for respondent.

PER CURIAM. One Draeseke, being in failing circumstances financially, on the 9th day of October, 1913, executed an assignment of his property to Jesse A. Muller, as trustee for the benefit of Draeseke's creditors, and on the 15th day of October, Muller and Draeseke executed another assignment of the same property for the same purpose to the defendant Henry L. Smith. Smith was secretary of the San Francisco Board of Trade, and the assignments to him and Muller were both made for the purpose of closing up Draeseke's business and paying the proceeds of the sale of his property to his creditors ratably. Pursuant to these assignments and during the month of October, 1913, Smith took over Draeseke's property. Draeseke was at the time of these assignments indebted to the plaintiff in the sum of $450. On October 14, 1913, defendant called a meeting of Draeseke's creditors to be held at 2 o'clock p. m. of that day. Notice of this meeting was given to the plaintiff, and an admission of service of this notice was signed by the plaintiff and is in evidence here. Plaintiff's attorney attended that meeting. It was held pursuant to the notice, and on the 16th day of October, 1913, and with full knowledge of the assignment to Muller and its purpose, the attorney for the defendant delivered to the Board of Trade—whose representatives both Muller and Smith were in the whole transaction—a statement of the plaintiff's account with Draeseke, together with a letter in which it was stated that the writer understood that the affairs of Draeseke were being settled through the Board of Trade, and asked to be advised as to the action already taken and future action which might be taken in the matter. On October 28, 1913, the defendant sold the property of Draeseke which was in his hands under the assignment to him, and subsequently made a dividend of the proceeds. All the creditors except the plaintiff received and accepted their dividends from the defendant. The plaintiff refused to do this, and brought action against Draeseke, and on November 6, 1913, levied an attachment in said action upon all funds in the defendant Smith's hands belonging to Draeseke. The plaintiff subsequently obtained judgment in that action against Draeseke, upon which execution was issued against the property of Draeseke, and served by the sheriff upon the defendant Smith, by which levy was made upon all moneys in Smith's hands belonging to Draeseke. The defendant answered the levy of the execution with the statement that he had no funds in his hands belonging to Draeseke. The writ was returned unsatisfied, and this action was thereupon begun against Smith for the amount of the judgment. The trial court found on all the issues against plaintiff, and the plaintiff appeals from the judgment entered pursuant to these findings.

[1] The vital finding is that plaintiff consented to these assignments. It is contended by the defendant that the attendance of plaintiff's attorney at the meeting of creditors of October 14, 1913, and the subsequent presentation of plaintiff's claim with full knowledge that the affairs of Draeseke were in the hands of the Board of Trade for settlement, constituted a consent to the assignment, or, to put it in other words, a waiver of objections thereto. This contention we think must be sustained. There is a general rule that a creditor who files his claim under such an assignment thereby waives all objections to the regularity of the assignment and to the title of the assignee to the assets. Lacy v. Gunn, 144 Cal. 511, 78 Pac. 30. And it is well settled that, where one comes in under the assignment and proceedings in such a way as to entitle himself to share in the dividends arising from the assets in the hands of the assignee, he waives all objections to the title of the assignee to such assets. Appeal of Smith, 86 Mich. 149, 158, 48 N. W. 864. Many other cases laying down a similar rule might be cited, but these are sufficient. The appellant certainly placed itself within this rule. It filed its claim with knowledge of the purpose of the assignee to close Draeseke's business, and gave no sign of its dissent until the property which was the subject of the assignment had been sold.

Plaintiff's counsel contends that neither he nor his client acted with full knowledge of the facts; but the only fact which it is seriously contended they did not know was that of the second assignment. They certainly knew of this on October 18th, and waited thereafter until October 30th before objecting in any way to the assignment to Smith. We do not attach much importance to this contention for another reason, and that is that both Smith and Muller were acting at all times for the Board of Trade, and this plaintiff's counsel at all times knew; and the change of assignments, therefore, did not affect plaintiff's rights in any way.

[2] It is contended that plaintiff's counsel had no authority to assent to the assignment upon the ground that an attorney has no authority to compromise a claim; but the trial court's finding that the plaintiff consented to the assignment necessarily implies a conclusion on the part of the trial court that plaintiff's counsel did have authority to present the claim to the Board of Trade and to consent to the assignment, and the trial court having so found upon what we consider sufficient evidence, the judgment cannot be disturbed upon that ground.

The judgment is affirmed.

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34 Cal. App. 218

SHUEY v. MULCREVY, County Clerk.

(Civ. 2153.)

(District Court of Appeal, First District, California. June 29, 1917. Rehearing Denied July 28, 1917; Denied by Supreme Court Aug. 27, 1917.)

1. Railroads 🔑164—Trust Deed.

A trust deed, whereby a railroad company granted all of its property to a trust company in trust as security for the payment of its bonds and attached interest coupons, was in effect a mortgage.

2. Railroads 🔑134(2) — Assumption of Mortgage Obligations—Effect.

Where one railroad leased the property of another, subject to a mortgage, and agreed to pay the interest on the bonded debt of the other road, and perform all the covenants of the deed of trust securing the bond issue, the lessee assumed the obligation of the other so far as the payment of interest on the bonds was concerned, thereby becoming a principal debtor as between the two roads, the other road becoming surety, and if the mortgagee or a beneficiary under the mortgage sought to enforce its right against the lessee, it was required to sue to foreclose the mortgage, and, in case of deficiency, could pursue the lessee therefor, since a creditor is entitled to enforce all collateral obligations for the payment of his debt which a person standing in the situation of a surety for others holds for his indemnity.

Petition for writ of mandate by Herbert S. Shuey against H. I. Mulcrevy, as County Clerk of the City and County of San Francisco, and ex officio Clerk of the Superior Court, etc. Alternative writ discharged.

William A. Nunlist, of San Francisco (C. Irving Wright, of San Francisco, of counsel), for petitioner. Jesse H. Steinhart, of San Francisco, for respondent.

PER CURIAM. In this proceeding an alternative writ of mandate was issued by this court, directed to the respondent, commanding him to issue a writ of attachment in a certain action entitled "Herbert S. Shuey, Plaintiff, versus Oakland, Antioch & Eastern Railway, a Corporation, Defendant," or to show cause why he has not done so. In the year 1910 the Oakland & Antioch Railway issued bonds in the amount of $2,000,000, and executed and delivered to the Anglo-California Trust Company, as trustee, a mortgage or deed of trust, whereby it granted to said trust company all of its property, in trust, as security for the payment of said bonds. This mortgage or deed of trust has not been foreclosed and is now valid and existing. Thereafter, on March 18, 1912, the Oakland & Antioch Railway leased to the Oakland, Antioch & Eastern Railway all of its roadbed and equipment; the lessee went into possession of the property under the lease, and has ever since been receiving the income thereof. The consideration for the lease consisted of a number of covenants by the lessee, including the following:

> "(c) To pay all fixed charges, including taxes and interest on the bonded indebtedness hereinbefore referred to, and do, keep, and perform each and all of the covenants, terms, and conditions of the mortgage or deed of trust securing the bond issue hereinbefore referred to, including the payment of said bonded indebtedness as the same matures and is due and payable."

The petitioner here (plaintiff in the attachment action) is the holder by assignment of a number of coupons detached from certain of the above-mentioned bonds. Said coupons being unpaid when due, the petitioner on March 8, 1917, commenced an action against the Oakland, Antioch & Eastern Railway in the superior court of the city and county of San Francisco, and applied therein for a writ of attachment. Respondent refused to issue the writ upon the theory that under the circumstances above outlined the obligation was secured, and therefore fell within the provisions of sections 537, 538 of the Code of Civil Procedure, whereupon this proceeding in mandate was commenced.

[1] The trust deed referred to in the petition which was given as security for the payment of the bonds and the interest coupons attached thereto must be regarded as, and is in effect, a mortgage (McLane v. P. & S. V. R. R. Co., 66 Cal. 606, 612, 6 Pac. 748; Banta v. Wise, 135 Cal. 277, 279, 67 Pac. 129); and it is conceded that in an action by the bondholders against the Oakland & Antioch Railway, mortgagor, the former could not, by virtue of the provisions of the sections of the Code of Civil Procedure just mentioned, procure a writ of attachment. But the petitioner contends that the promise of the Oakland, Antioch & Eastern Railway to pay the bonds and interest was an original independent contract, based upon an executed beneficial consideration, which promise is not in any way secured by said trust deed, and that the duty of the respondent, therefore, was to issue the writ of attachment demanded. Whether or not this contention is correct depends entirely upon the nature of the contract under review. As before stated, the Oakland, Antioch & Eastern Railway took over the property of the Oakland & Antioch Railway subject to a mortgage, and as part of the same transaction agreed to "pay the interest * * * on the bonded indebtedness * * * and * * * perform all the covenants * * * of the mortgage or deed of trust securing the bond issue."

[2] By this clause of the agreement under the rule adopted in this and many other jurisdictions the Oakland, Antioch & Eastern Railway assumed the obligation of the Oakland & Antioch Railway so far as the payment of interest on the bonds was concerned, thereby becoming the principal debtor as between the two railway corporations, and the Oakland & Antioch Railway the surety; and if the mortgagee or a beneficiary under the mortgage seeks to enforce its right against the Oakland, Antioch & Eastern Railway, the lessee, it must sue to foreclose the mortgage, and should there be a deficiency it may pursue the lessee therefor. This rule is based on the ground that a creditor is entitled to enforce all collateral obligations for the payment of his debt which a person standing in the situation of a surety for others holds for his indemnity. The application of this principle is made possible by the aid of the doctrine of equitable subrogation, under which the lessee, by the assumption of the debt, has become, as to the lessor, the principal debtor, the lessor occupying thereafter the position of surety.

In the case of Pa. Steel Co. v. N. Y. City Ry. Co., 198 Fed. 721, 117 C. C. A. 503, a lessee railroad, in consideration of the lease, assumed and agreed to pay the interest on the bonded indebtedness of the lessor railroad. Bondholders sought to collect from the lessee the amount of interest coupons without foreclosing their mortgage. The court held that according to the authorities of the state of New York the mortgaged property was the primary fund for the payment of the indebtedness secured thereby, and that it necessarily followed that the assumption clause, "if constituting a promise for the benefit of the mortgage bondholders, was merely a promise to pay any deficiency after exhausting the mortgage security"; and, says the court, further, "granting that the promise would be for the benefit of the bondholders, and that it would support a direct action by them, it would not change its constitutional character." The lessee would be liable for any deficiency existing after exhausting the security of the mortgage. The doctrine has found frequent application in cases where the grantee of the mortgagor assumed the mortgage debt. In all such cases in this state it is held that the grantee becomes the principal debtor, and the mortgagor becomes the surety; and if the mortgagee seeks to enforce his rights against the grantee he must sue to foreclose the mortgage. In Davis v. Davis, 19 Cal. App. 797, at page 800, 127 Pac. 1051, at page 1052, the court (quoting Williams v. Naftzger, 103 Cal. 438, 37 Pac. 411) said:

> "An agreement on the part of a grantee to pay and discharge a mortgage debt upon the granted premises for which his grantor is liable renders the grantee liable therefor to the mortgagee, and in an action for the foreclosure of the mortgage, if the mortgaged premises are insufficient to satisfy the mortgage debt, judgment may be rendered against him as well as against the mortgagor for the amount of such deficiency. This liability results from the familiar doctrine in equity that a creditor is entitled to the benefit of all securities or collateral obligations that his principal debtor may have given to the surety for the payment of the debt. By the conveyance of the mortgaged premises and the assumption of the mortgage debt by the grantee, the latter, as between him and his grantor, becomes primarily liable to the mortgagee, and his vendor becomes his surety. * * *"

In Roberts v. Fitz Allen, 120 Cal. 482, 52 Pac. 818, the defendant "assumed and agreed to pay the mortgage." The court said:

> "Appellant claims that his liability accrued April 14, 1890, when he assumed and agreed to pay the mortgage as part of the purchase price of the property; that his obligation was a separate and distinct undertaking, disconnected from the original promise of Fitz Allen; * * * but such is not the law in this state. The rule is thoroughly well established that, where the grantee of the mortgagor assumes the payment of the mortgage as part of the purchase price, he becomes, as to the mortgagor, the principal debtor and the mortgagor the surety. Williams v. Naftzger, 103 Cal. 438 [37 Pac. 411]; Hopkins v. Warner, 109 Cal. 133 [41 Pac. 868]. The liability of the grantee in such a case is the indebtedness secured to be paid by the mortgage. But it must be enforced by foreclosure; and a deficiency judgment may be entered against him only upon the security—the mortgaged premises—becoming exhausted. Code Civ. Proc. § 726; Biddel v. Brizzolara, 64 Cal. 362 [30 Pac. 609]; De Costa v. Comfort, 80 Cal. 507 [22 Pac. 218]; Thomson v. Bettens, 94 Cal. 82 [29 Pac. 336]; Williams v. Naftzger, 103 Cal. 438 [37 Pac. 411], and cases therein cited; Tulare County Bank v. Madden, 109 Cal. 314 [41 Pac. 1092]."

See, also, Daniels v. Johnson, 129 Cal. 415, 61 Pac. 1107, 79 Am. St. Rep. 123; Tuohy v. Woods, 122 Cal. 665, 55 Pac. 683; Page v. Chase, 145 Cal. 578, 79 Pac. 278; 20 Am. & Eng. Ency. of Law, 993.

There is a conflict of authority as to the effect of such an assumption clause. In Massachusetts, for example, it has been held that the mortgagee acquires no right whatsoever against the party who assumes the mortgage. This is so held because the common-law doctrine is followed that a person who is not a party to a contract cannot sue thereon. Coffin v. Adams, 131 Mass. 133; Biddel v. Brizzolara, supra. In Colorado, Illinois, Iowa, and a number of other states it has been held that the assumption clause gives a new and independent right to the mortgagee. Under this doctrine the obligation of the Oakland, Antioch & Eastern Railway is not connected in any way with the mortgage, and is unsecured. In Maine, Michigan, New Jersey, North Carolina, North Dakota, Vermont, Virginia, Washington, and in the United States Supreme Court, the doctrine is the same as in California.

As before stated, the principle here involved is most frequently discussed in cases where there has been a grant of an estate in fee; but in so far as the assumption clause is concerned there can be no difference based on reason between the grant of a leasehold interest and one of an estate in fee.

Writ discharged.

(34 Cal. App. 193)

SARGENT et al. v. COREY et al. (Civ. 2040.)

(District Court of Appeal, First District, California. June 26, 1917. Rehearing Denied by Supreme Court Aug. 23, 1917.)

1. SPECIFIC PERFORMANCE 🔑21, 24—CONTRACT TO DEVISE—ENFORCEMENT.

While a man may ordinarily make a valid agreement to dispose of his property in a particular way by will which a court of equity will specifically enforce by treating his heirs as trustees and compelling them to convey the property according to the contract, a contract, whereby the husband of testator's sister relinquished his parental rights to his minor children in consideration that on the death of the testator and his wife, or the survivor, the children should succeed to their property, will not be enforced where testator, after the death of his first wife remarried without disclosing such agreement to his second wife, and had a daughter by her, as in such case the equities of such children were not equal to those of the second wife and her daughter.

2. PLEADING 🔑248(4)—AMENDMENT—NEW CAUSE OF ACTION.

Plaintiffs, in an action to recover realty under a contract whereby testator in consideration of a surrender to him of a father's rights, agreed that plaintiffs should succeed to his property, could not amend their complaint by setting up the execution of a joint will by testator and his wife in their favor, not revoked during the lifetime of testator's wife, since such amendment presented a new cause of action.

Appeal from Superior Court, Monterey County; G. W. Nicol, Judge.

Action by Rose C. Sargent and others against Elfrida Eade-Johnson Corey and another. Judgment for defendants, and plaintiffs appeal. Affirmed.

C. F. Lacey and J. A. Bardin, both of Salinas, Andresen & Sargent and Maxwell McNutt, all of San Francisco, for appellants. Chas. W. Slack, W. W. Sanderson, and Chauncey S. Goodrich, all of San Francisco, for respondents.

LENNON, P. J. The plaintiffs in this action sought to secure a decree that the defendants hold in trust for them certain real property which, by a deed of gift dated October 24, 1908, was conveyed by Hiram Corey to the defendants Elfrida Eade-Johnson Corey, his second wife, and Augusta Eleanor Corey, his daughter, who was the issue of his second marriage.

The gist of the plaintiffs' case is found in the contention that the conveyance attacked was executed in violation of the rights of the plaintiffs arising out of an oral contract pleaded and proven to have been entered into by and between Hiram Corey and Rose Corey, his first wife, and Charles Littlefield, the father of plaintiffs, wherein the latter agreed to surrender unto Hiram and Rose Corey, his then infant children (the plaintiffs herein), and forever relinquish all of his rights as a parent of said children in consideration of the promise of Hiram and Rose Corey that upon the death of the survivor of them the plaintiffs herein "should and would succeed" to the property then owned or thereafter acquired by said Hiram and Rose Corey.

The circumstances attending and surrounding the alleged agreement as revealed by the record substantially stated are these: Hiram and Rose Corey were married in the year 1856. Hiram Corey and Sarah Littlefield, the mother of the plaintiffs, were brother and sister. Sarah Littlefield died on June 1, 1871, and left surviving her a husband, Charles Littlefield, and three children, the plaintiffs herein, who at that time were all of tender age. After the death of Sarah Littlefield the Coreys took the three children to their home and reared them as their own. The Coreys had then been married some 15 years, were without children of their own, and no issue was thereafter born to them. Rose Corey died in March, 1900, leaving no property. Thereafter, on the 22d day of May, 1901, Hiram Corey married the defendant, Elfrida Corey, and in the following year as the result of this marriage the defendant Augusta Eleanor Corey was born. She was the sole issue of that marriage. On October 24, 1908, Hiram Corey executed to his wife and child a deed of conveyance of certain real and personal property worth approximately $200,000, and deposited this deed with the Bank of Salinas, Monterey county, with directions to hold the same until his death and then to deliver it to the defendants. Hiram Corey died in September, 1913, when the bank as directed delivered the deed, followed by the institution of this action.

The trial court found that the contract between the father of plaintiffs and Hiram and Rose Corey had been made upon an adequate consideration to the respective parties thereto, but further found that Elfrida Corey never had notice or knowledge, actual or otherwise, of the making, existence, or terms of said contract until after the death of her husband; that while said contract was just and reasonable when made, it inherently became unjust to the defendant widow and child; that it was terminated by the marriage of Hiram Corey and the defendant Elfrida, in May, 1901; and that by reason of such marriage and the birth of issue therefrom the deed of gift to the wife and child cannot be regarded as a violation of the contract. Accordingly judgment was entered for the defendants, from which the plaintiffs have appealed.

[1] It is evident from the record before us that the judgment of the court below was impelled by a consideration of the case of Owens v. McNally, 113 Cal. 444, 45 Pac. 710, 33 L. R. A. 369, and in our opinion that case is decisive of the case at bar. In the case cited the facts were substantially these: One Lawrence McNally, aged 54 years, represented to his niece, Maria B. Owens, that he had property but no one to care for him, and that if she would leave her home and parents and thereafter live with and care for him, he would bequeath to her all property which he might own at the time of his death. McNally died intestate, and the niece instituted an action against the widow and other heirs for specific performance of the agreement. Mr. Justice Henshaw, the author of the opinion in that case, after a very able and clear discussion of principle and authority bearing upon the law and the facts of the case—which latter were in all their essential features the same as those in this case—concluded and declared that while a man ordinarily may make a valid agreement binding himself to dispose of his property in a particular way by last will and testament, which a court of equity will specifically enforce by treating his heirs as trustees, and compelling them as such to convey the property according to the contract, nevertheless such a contract will not be specifically enforced where the man marries after making it, leaving his wife in ignorance thereof, as marriage under such circumstances is sufficient to warrant the court in withholding equitable relief.

There is nothing in the facts of the case at bar differentiating it from the McNally Case save and except that they present in our opinion a stronger reason for the application of the rule there laid down; for in addition to the rights of a wife and widow there involved, we have here the rights of a minor child. Here too the equities of the defendants are more potent than those in the

McNally Case. The marriage was not only fruitful, but endured 12 years as against 8 months in the McNally Case; the defendants here are widow and minor child; there they were widow and collateral relatives, so that whatever may be said with reference to the equities of the plaintiffs in the present case, they certainly are not superior, nor even equal, to those of the defendants.

Counsel for the appellants argue that the rule laid down in the McNally Case is mere dictum. We do not consider it. The point was necessarily decided in that case, and the rule has since been followed in many similar cases that have arisen in California and other jurisdictions, and its correctness reiterated and reaffirmed. McCabe v. Healy, 138 Cal. 81, 70 Pac. 1008; Flood v. Templeton, 148 Cal. 374, 83 Pac. 148; Rogers v. Schlotterback, 167 Cal. 35, 138 Pac. 728; Stewart v. Smith, 6 Cal. App. 152, 91 Pac. 667; Barry v. Beamer, 8 Cal. App. 200, 96 Pac. 373; Dillon v. Gray, 87 Kan. 136, 123 Pac. 878; Bernard v. Benson, 58 Wash. 191, 108 Pac. 439, 137 Am. St. Rep. 1051.

Appellants suggest that as the value of the property involved is large, and it having been found inequitable to impress a trust upon all of it in their favor, some equitable division according to the equities of the parties should have been made. To do so would be to make and enforce a contract different from the one made by the parties, and the trial court, of course, had no power to do any such thing.

[2] The only other question presented for consideration is the ruling of the trial court denying the motion of plaintiffs to amend their complaint by setting up the alleged execution of a joint will by Hiram and Rose Corey in favor of plaintiffs, which will, it is claimed, was not revoked during the life of Rose Corey. The purpose of the amendment was to raise the issue as to whether or not after the execution of such alleged joint will it was within the power of Hiram Corey, by a subsequent marriage or by means of a deed of gift to his wife and daughter, to divert the property here claimed in a course contrary to the provision of such joint will, it being the claim of the plaintiffs that the joint will constituted an executed covenant by the Coreys to stand seised for the benefit of the Littlefields, who thereby acquired vested rights in the property. The reply of respondents to this contention—which we think is complete—is that the proposed amendment presented a new cause of action, namely, the assertion of rights under a supposed executed testamentary contract made in 1889 between Hiram and Rose Corey, whereas the cause of action pleaded and tried was wholly founded on the alleged executed contract of 1871, to which the two Coreys and Charles Littlefield were parties. And furthermore, even admitting that the execution of the mutual will was proven, it does not appear that it was the result of a contract between Hiram and Rose Corey, or was intended by them to be irrevocable. Estate of Learned, 156 Cal. 309, 104 Pac. 315.

Upon the whole we are of the opinion that the refusal of the court to permit the proposed amendment was a proper exercise of discretion, and should not be disturbed.

The judgment appealed from is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

34 Cal. App. 1

OXFORD v. IMPERIAL SOUTHSIDE WATER CO. (Civ. 2279.)

(District Court of Appeal, Second District, California. June 1, 1917.)

Appeal and Error ⚷417(1) — "Notice of Appeal"—Sufficiency.

A notice, stating that plaintiff "desires and intends to appeal" from the judgment, and that he "has appealed," closing with a request that a transcript of the testimony, etc., be made up and prepared, is not a "notice of appeal," within Code Civ. Proc. § 940, providing that an appeal is taken by a notice stating that an appeal is taken from "the judgment," etc., or section 941b, requiring that the notice must "identify" the judgment, etc., appealed from with reasonable certainty.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Notice of Appeal.]

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by Clark Oxford against the Imperial Southside Water Company. From the judgment, plaintiff appeals. Defendant's motion to dismiss the cause from the calendar granted.

H. L. Welch, of El Centro, for appellant. Haines & Haines, of San Diego, and Noland & Kibbey, of El Centro, for respondent.

CONREY, P. J. Motion to dismiss.

Upon due notice to opposing counsel, defendant presented to the court this motion for an order dismissing this cause from the court's calendar on the ground that no notice of appeal has at any time been served, either as required by section 940 of the Code of Civil Procedure or as required by section 941b of that Code. The notice upon which plaintiff relies as a notice of appeal herein omits the words necessary to constitute a notice of appeal. It states that the plaintiff "desires and intends to appeal" from the judgment and that he "has appealed therefrom," and closes by requesting that a transcript of the testimony, etc., be made up and prepared. This is not a notice of appeal. The law relating to this matter is clearly stated, and the principal decisions on the same point are cited in Estate of Faber, 168 Cal. 491, 143 Pac. 737.

The motion to dismiss is granted.

We concur: JAMES, J.; WORKS, Judge pro tem.

34 Cal. App. 177

McDONAGH v. INDUSTRIAL ACC. COMMISSION OF CALIFORNIA. (Civ. 2329.)

(District Court of Appeal, Second District, California. June 23, 1917.)

Master and Servant ⟹417(7)—Workmen's Compensation Act—Findings of Commission—Review.

Findings of the Industrial Accident Commission based on conflicting evidence will not be disturbed on certiorari.

Proceedings by John A. McDonagh before the Industrial Accident Commission of the State of California, for compensation under the Workmen's Compensation Act (St. 1913, p. 279). From the decision of the Commission, McDonagh petitions for a writ of review. Findings and award of Commission affirmed.

M. J. McGarry, of Los Angeles, for petitioner. Christopher M. Bradley, of San Fancisco, for respondent. Duke Stone, of Los Angeles, for defendants Western Indemnity Co. and American Woman Film Co.

JAMES, J. Return has been made upon an alternative writ of review issued herein. Petitioner was injured by the overturning of a conveyance in which he was riding, and he applied to the respondent Industrial Accident Commission for an order directing certain allowances to be made to him under the provisions of the act of the Legislature. The Commission found in favor of the petitioner as against J. Farrell MacDonald, but determined by its findings that no contract of employment existed between petitioner and the American Woman Film Company at the time of the accident. Petitioner was not satisfied with the finding exonerating the film company, and prosecuted this writ for the purpose of having reviewed the evidence heard by the Commission. It is claimed that the evidence is insufficient to support the finding in favor of the film company, and that the uncontradicted evidence established that at the time petitioner received the injuries for which compensation was asked he was regularly pursuing his work under contract of employment with the company named. Of course it will be conceded at the outset that, in order to allow petitioner's contention, it must appear from the evidence without any conflict whatsoever that the employment existed as claimed. The testimony of the petitioner as submitted to the Commission was that he had been first employed by one Parker, the general manager of the film company, as publicity man; that the company desired to produce a certain picture the scenario of which had been written by Mrs. Emerson, president of the film company; that as the company desired a man competent to direct and oversee the production of the picture, he (the petitioner) introduced J. Farrell MacDonald to Mrs. Emerson, and that a contract was entered into by which MacDonald undertook to arrange the scenes and supervise the taking of the picture. By this contract, which was shown in evidence, it appeared that, so far as the work of taking the picture was concerned, MacDonald was to act in the capacity of an independent contractor, and for a certain fixed sum have the picture taken, furnishing all necessary appurtenances and assistants. Petitioner testified that his arrangement with Parker provided for a compensation of $50 per week for his services as publicity man, and that after the making of the contract with MacDonald, Parker, general manager of the company, requested MacDonald to employ petitioner as one of his assistants in the taking of the picture, which MacDonald did, agreeing to pay therefor the sum of $50 per week. This latter compensation was regularly paid, so petitioner testified, by MacDonald while the work of taking the scenes was in progress. On the day the accident occurred the petitioner, together with other members of the company engaged in the making of the picture, were returning from a "location," or place where they had been at work with the camera. For some reason the conveyance in which they were riding was overturned, and petitioner was thrown out, suffering quite severe injuries by reason of which he was confined to the hospital for a considerable length of time thereafter, and several operations were required to be performed upon one of his limbs. From the statement of the evidence now given it appears that if the petitioner at the time of the accident was performing work solely within the requirements of his engagement with MacDonald, the film company would not be responsible for any injuries suffered by him, for the reason that, as before noted, MacDonald was an independent contractor, with the absolute right to engage, hire, and discharge and direct his own assistants. The contention of petitioner as expressed generally in his evidence, was that at all times while working under his engagement with MacDonald he was also performing duty as a publicity agent for the film company for which Parker, the general manager, had promised to pay him the sum of $50 per week. Parker was not produced as a witness, it being stated that he was not within the jurisdiction of the Commission. In the course of his testimony, when petitioner was asked to define closely the character of his work, he gave answers which were not positive or very specific in elucidation of that proposition. For instance, he was asked this question:

"Then you considered while you were on location in their affairs—as you assisted in the direction of the taking of this picture, you were in the employ of J. Farrell MacDonald as assistant director, and at the same time you were publicity man for the American Woman Film Company. Is that correct?"

To which answer was made as follows:

> "Substantially correct. It is such a technical thing I can't decide that, and I am not going to answer it."

Mrs. Emerson, the president of the company, while admitting that Parker, the general manager, could have made a contract of employment without the knowledge of other members of the concern, stated that the company never had any publicity work to do, except in connection with the particular picture that was being manufactured and for which MacDonald was employed, and that the books of the film company only showed petitioner's name as being engaged in the taking of the picture as one of the four men employed by MacDonald—that she had never heard of petitioner as being publicity man for the company. She further testified that, because of some objection made by petitioner to her accompanying the company while the camera was being used, she had requested of Parker and other members of the concern that petitioner be discharged, and was informed that petitioner's employment was with MacDonald, and that the company had no authority over him and no right to discharge him. All of the circumstances and conditions affecting the matter of the work of MacDonald and this petitioner in taking the picture were quite fully laid before the Commission. Enough has been indicated in the foregoing to justify the inference that at the time of the accident at which petitioner received his injuries he was working for MacDonald and not performing any contractual duty toward the film company. Notwithstanding the fact that petitioner testified directly that he had been employed by Parker, the Commission was not bound to take that statement and exclude the evidence of pertinent circumstances which pointed toward another conclusion. Proof of such conditions and circumstances inconsistent with the statements of petitioner had the effect of producing a substantial conflict in the evidence. When we have reached that point the functions of this court in the matter of the review are at an end. This matter was before the Commission on original hearing, and a rehearing was afterwards granted, further testimony heard, and the findings as previously made reaffirmed. There was some evidence to support these findings as made.

The findings and award of the Commission are affirmed.

We concur: CONREY, P. J.; WORKS, Judge pro tem.

34 Cal. App. 33

PASADENA REALTY CO. v. CLUNE.
(Civ. 1646.)

(District Court of Appeal, Second District, California. June 6, 1917.)

APPEAL AND ERROR 🔑757(1)—BRIEFS—REFERENCES TO EVIDENCE.

Under Code Civ. Proc. § 953c, as to appeals taken under the alternative method, appellant's brief, or supplement thereto, must contain portions of record he desires to call to attention of the court, and mere references to transcript on file by page is not sufficient.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by the Pasadena Realty Company against W. H. Clune. From judgment for defendant, plaintiff appeals. Affirmed.

C. J. Willett and William A. Spill, both of Pasadena, for appellant. Valentine & Newby, of Los Angeles, for respondent.

JAMES, J. This action was brought to recover an amount of money alleged to be owing to the plaintiff by the defendant. After hearing the evidence introduced on behalf of the plaintiff, the trial court, on motion, ordered judgment of nonsuit, which was duly entered. This appeal was then taken from that judgment. The appeal was taken under the alternative method; the typewritten transcript of the judgment roll and evidence comprising more than 200 pages.

The appellant in its opening brief, in order to illustrate the argument made, refers to various parts of the record and testimony by reference to the typewritten transcript, giving the page thereof, but prints no portion of that testimony in the brief, except one letter, which is shown to have passed from the defendant to the plaintiff. Respondent urges the objection that, under such a condition of the brief of appellant, the points made for reversal are without sufficient showing as to the state of the record to entitle them to be considered.

Under the provisions of the statute regulating appeals under the alternative method, we are compelled to agree wholly with this contention. Section 953c, Code of Civil Procedure, referring to appeals taken under the alternative method, provides, in part, as follows:

> "* * * Said record shall be filed with the clerk of the court to which the appeal is taken and no transcript thereof need be printed. In filing briefs on said appeal the parties must, however, print in their briefs, or in a supplement appended thereto, such portions of the record as they desire to call to the attention of the court."

Appellant, as respondent suggests, has failed to comply with the mandatory direction of the statute. In order to ascertain whether there is merit in the contentions of appellant, the court would be compelled to examine the typewritten transcript, and look therein for the testimony and copies of the documents relied upon, instead of in the brief of appellant, where such testimony and records should have been printed. This the court is not required to do. Marcucci v. Vowinckel, 164 Cal. 693, 130 Pac. 430; Wills v. Woolner, 21 Cal. App. 528, 132 Pac. 283; Miller v. Oliver et al. (Sup.) 163 Pac. 357.

It may be further observed that we think the suggestion of respondent is well made when it is said that the purpose of the statute requiring the matters relied upon to be printed in the brief is not only for the benefit of the appellate court, but also for the benefit of the respondent. The typewritten transcript, under the alternative method, is filed in the appellate court, and it is a very reasonable requirement that the respondent, when served with the appellant's brief, should have before him as a part of that brief a showing of the precise matters in printed form which he is called upon to reply to. A mere reference to the transcript on file by page, as made in the appellant's brief, would compel the respondent to visit the office of the clerk of the court and inspect the reporter's transcript. The alternative method has disadvantages in practice. The hope may be expressed that at some time the Legislature, having in mind the idea of simplifying procedure, will furnish to the bar and the courts one method of appeal only, or repeal the statutory rules of procedure and leave these matters for regulation by rules of court.

The judgment appealed from is affirmed.

We concur: CONREY, P. J.; WORKS, Judge pro tem.

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33 Cal. App. 790

SMITH v. LOBB et al. (Civ. 2033.)

(District Court of Appeal, First District, California. May 31, 1917.)

1. TENDER ⚷15(2)—TIME AND MODE—WAIVER OF OBJECTIONS.
Any objections to time and mode of tender, not having been made at the time nor till trial, are deemed waived.

2. TENDER ⚷15(6)—CERTIFICATE OF DEPOSIT.
Tender of a certificate of deposit in payment of a money obligation is good unless objected to.

3. TENDER ⚷13(4)—EFFECT.
Under Civ. Code, § 1500, providing that an obligation for payment of money is extinguished by a due offer of payment if the amount is immediately deposited in the creditor's name with a bank of good repute and notice thereof given the creditor, and section 1504, that an offer of payment or other performance, duly made, though the title to the thing offered be not transferred to the creditor, has the same effect on all the incidents of the obligation as a performance thereof, a lessor with a right to terminate the lease by paying the lessee an amount due, having left with such a bank an indorsed certificate, and it having, as he requested, notified the lessee that it was there subject to his order, and informalities having been waived by the lessee's failure to object, the lease was thereby terminated and the obligation extinguished.

Appeal from Superior Court, Fresno County; Geo. E. Church, Judge.

Action by G. Albert Smith against George Lobb and others. From an order granting plaintiff a new trial, defendants appeal. Reversed.

M. K. Harris and H. P. Brown, both of Fresno, and John G. Covert, of Hanford, for appellants. C. K. Bonestell, L. L. Cory, and Frank Kauke, all of Fresno, for respondent.

KERRIGAN, J. This is an appeal by defendants from an order granting a motion for a new trial in an action for conversion after verdict and judgment for defendants. The plaintiff and defendant George Lobb had entered into a lease, under which Lobb, the lessor, might, on the 1st of December of any year during the life of the lease, terminate it by paying to the plaintiff, the lessee, such amount as might be due him for certain reclaiming and leveeing work which the lease provided he was to do and for which he was to be paid a stipulated sum per acre. The amount that was due the plaintiff on December 1, 1913, under this arrangement is not disputed; but he asserts that the defendant Lobb did not at that time pay him that amount, or make a legal tender thereof, in an effort by said defendant to terminate the lease. If this be true, it follows that the lease was not canceled, and that plaintiff was entitled to a certain proportion of the crop raised on the demised premises in the year 1914, which was withheld by said defendant, and which withholding forms the basis of the conversion alleged in the complaint. The case was tried before a jury, and judgment went for the defendants, but the trial court granted plaintiff's motion for a new trial on the ground, as was admitted at the oral argument of this appeal, that the trial court was of the opinion that it had fallen into error in admitting certain evidence offered by defendants relating to an alleged tender by defendant Lobb to the plaintiff of the amount of money necessary to terminate said lease.

We are of the opinion that the evidence in question was properly admitted by the court, and that consequently its order granting a new trial upon the ground indicated was erroneous.

[1, 2] The facts regarding the tender are that the defendant, desiring to pay to the plaintiff the amount of money necessary under the provisions of the lease to effect its termination, and having said sum in his possession, attempted on the 1st day of December, 1913, to find the plaintiff, diligently looking for him at places where he was most likely to be found. Failing to find him, he on the following day left a properly indorsed certificate of deposit for the amount in question with a bank of excellent standing convenient to plaintiff's place of business, and requested the bank in writing to notify the

plaintiff that the certificate of deposit was there subject to his order. The bank, however, having misunderstood its instructions, notified the plaintiff that the certificate of deposit had been left with it to be held "pending settlement" between the plaintiff and said defendant "in regard to some levee work." About two weeks later the plaintiff called at the bank to ascertain the particulars of the deposit, and he then learned that the certificate of deposit was properly indorsed and was then subject to his order, and that he could have the certificate itself or its equivalent in money. This tender, as we understand the record, was kept good. Neither at that time nor at any time prior to the trial did plaintiff object to the time or to the mode of the tender, and hence, under the settled rule, he must be deemed to have waived any objection that he might have made thereto. It has been held that the tender of a check or of a certificate of deposit in payment of a money obligation is good unless objected to. Mitchell v. V. C. M. Co., 67 N. Y. 280; Becker v. Boon, 61 N. Y. 317. See, also, Rhorer v. Bila, 83 Cal. 51, 23 Pac. 274; Kofoed v. Gordon, 122 Cal. 320, 54 Pac. 1115; Hidden v. German S. Bank, 48 Wash. 384, 93 Pac. 668; Civ. Code, §§ 1489 and 1501.

[3] The tender being made in good faith, and any informalities in the deposit in the bank of the amount due him being waived by plaintiff's failure to object to it as made, the lease was thereby terminated and the obligation of said defendant to plaintiff extinguished. Civ. Code, §§ 1500, 1504; Colton v. Oakland Sav. Bank, 137 Cal. 376, 70 Pac. 225; Baker v. S. F. Gas Co., 141 Cal. 710, 75 Pac. 342; 38 Cyc. 132, 163.

It thus appearing that the evidence of tender and deposit with the bank was properly admitted, it follows that the court erred in finally holding otherwise and in granting upon that ground the motion for a new trial.

The order is reversed.

We concur: RICHARDS, J.; BEASLY, Judge pro tem.

(34 Cal. App. 117)

BETKOUSKI v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al. (Civ. 2360.)

(District Court of Appeal, Second District, California. June 14, 1917.)

1. Municipal Corporations 🔑124(5)—Removal of Officers — Conflict between Statute and Charter.

Where, in acts of the Legislature and in the provisions of municipal charters, there are set down modes of procedure for the removal of municipal officers which are inconsistent with each other, the charters will control.

2. Municipal Corporations 🔑124(5)—Removal of Officers—Specific Provisions.

A method of effecting the removal from office of a municipal officer must be specifically provided; exercise of the right or power cannot be predicated upon mere general declarations of municipal power, however broad.

3. Municipal Corporations 🔑124(5)—Repeal by Implication—Charter of City.

Los Angeles City Charter, § 18, providing that if any officer of the city during his term shall vote on or participate in any contract or transaction in which he is interested, he shall, upon conviction, forfeit his office and be punished, is not so inconsistent with the recall provisions of the charter that a repeal by implication results.

4. Criminal Law 🔑90(2)—Police Court—Jurisdiction—Statute.

Under St. 1913, p. 469, relating to the jurisdiction of police courts in cities of the first and one-half class, section 2, providing that the court shall have exclusive jurisdiction of all misdemeanors punishable by fine, imprisonment, or both, and section 3, providing that each of the police judges shall have the powers of a police magistrate, and have jurisdiction to try all charges of misdemeanors committed within the city's jurisdiction, jurisdiction of misdemeanor charges of every nature is not conferred upon the police court of such a city, but the jurisdiction is limited by section 2.

5. Criminal Law 🔑90(3)—Removal of Officer — Jurisdiction of Police Court — Charter.

The police court of the city of Los Angeles cannot, in any event, exercise jurisdiction over charges against an officer of the city under the charter, section 18 providing that if any officer, during his term, shall vote on or participate in any contract or transaction in which he is interested, he shall, upon conviction, forfeit his office, and be punished for misdemeanor, unless the misdemeanor is punishable by fine, by imprisonment, or both.

6. Municipal Corporations 🔑174 — Misconduct of Officer—Charter.

By Los Angeles City Charter, § 18, as amended in 1911, providing that if any officer of the city, during his term, shall vote on or participate in any contract or transaction in which he is interested, he shall, upon conviction, "forfeit his office, and be punished for misdemeanor," an offending officer was not punishable by fine or imprisonment; the proper reading of the statute being that he should "forfeit his office and thus be punished for a misdemeanor in office."

7. Criminal Law 🔑90(2) — Jurisdiction —Charges against City Officer.

Charges made against an officer of the city of Los Angeles, pursuant to its charter, section 18, providing that if any officer, during his term, shall vote on or participate in any contract or transaction in which he is interested, he shall, upon conviction, forfeit his office and be punished for misdemeanor, unless the misdemeanor is punishable by fine, by imprisonment, or both, are not triable in the police court of the city, but the officer must be tried in the superior court on an accusation lodged against him under Penal Code, §§ 758 to 772.

Petition for writ of prohibition by Martin F. Betkouski against the Superior Court of the State of California in and for the County of Los Angeles and Honorable Gavin Craig, Judge thereof. Alternative writ dismissed, and prayer for peremptory writ denied.

Oscar Lawler and A. I. McCormick, both of Los Angeles, for petitioner. Thomas Lee Woolwine, Dist. Atty., and Geo. E. Cryer, Chief Deputy Dist. Atty., both of Los Angeles, for respondents.

WORKS, Judge pro tem. This proceeding was instituted to restrain respondent from going forward with the trial of petitioner under an accusation presented by the grand jury pursuant to the provisions of sections 758–772 of the Penal Code. Petitioner is a member of the city council of the city of Los Angeles, and the accusation charges him with a violation of the provisions of section 18 of the charter of the city and demands his removal from office. Section 18, so far as it is material to this controversy, reads as follows:

> "No member of the council shall be financially interested, directly or indirectly, in any contract, sale or transaction to which the city is a party. No city official shall vote on or participate in any contract or transaction in which he is directly or indirectly financially interested. No city official shall be financially interested, directly or indirectly, in any contract, sale, or transaction to which the city is a party and which comes before said official, or the department of the government with which he is connected, for official action. If any officer of the city shall, during the term for which he was elected or appointed, so vote or participate, he shall, upon conviction thereof, forfeit his office and be punished for misdemeanor."

This litigation presents, among other points, the principal question whether, in order to effect the removal of a member of the council under section 18 of the charter, resort may be had to the procedure by accusation and trial under the sections of the Penal Code already mentioned. Section 758 provides that:

> "An accusation in writing against any district, county, township, or municipal officer, for willful or corrupt misconduct in office, may be presented by the grand jury of the county for or in which the officer accused is elected or appointed"

—and the sections following it outline the procedure to effect a removal pursuant to the accusation, including a trial by jury in the superior court.

The petitioner premises the specific points presented by him upon a citation of the provisions of the Constitution and of the decisions of the courts, all indicating a state policy looking toward a complete exercise of the right of local self-government by charter cities, including the right to appoint, elect, recall, and remove their officers. This premise may be conceded, and its existence is not denied by the respondent.

The petitioner next asserts that the city of Los Angeles has, to use his own language, "assumed to herself every vestige of municipal power to the very last atom." This statement, too, may be taken as true, but with a limitation: We will assume, for the sake of argument, that the city has, by its charter, taken unto itself the right to exercise every municipal function which under the Constitution it may exercise, and which does not require, from its very nature, the installation of a special system or plan for its exercise. There are many governmental functions which are capable of use only through the erection preliminarily of special machinery through which they may operate. For instance, however broad the powers of a city may be, under the provisions of its charter, its inhabitants cannot, under that instrument alone, legislate by means of the initiative unless the charter presents a specific plan for the exercise of the right; and this will be so, necessarily, even if the instrument provides in so many words that the people may legislate through the initiative. Many other instances of a similar nature might be cited.

But let us proceed to the consideration of other questions which may be regarded as somewhat preliminary to the main question in the case. The petitioner contends that where, in acts of the Legislature and in the provisions of municipal charters, there are set down modes of procedure for the removal of officers which are inconsistent with each other, the charters will control, and cites Dinan v. Superior Court, 6 Cal. App. 217, 91 Pac. 806; Craig v. Superior Court, 157 Cal. 481, 108 Pac. 310; Gibson v. Civil Service Commission, 27 Cal. App. 396, 150 Pac. 78; and Spader v. Rolph, 29 Cal. App. 774, 156 Pac. 977.

[1] There can be no doubt either of the existence or of the propriety of the rule. It is but a part of the state policy already mentioned as contemplating a full measure of the right of local self-government in cities, and the particular point has found expression in the Los Angeles charter itself, as petitioner points out. Section 196 provides that all elective officers, to which class the members of the council belong, "shall, except as otherwise provided in this charter, serve for two years, and until their successors have been elected and qualified." But the existence of this charter provision has nothing whatever to do with the question whether the sections of the Penal Code may be invoked to establish the method of a removal from office the cause for which is prescribed by section 18 of the charter, for the last-mentioned section clearly and fully meets the challenge laid down in section 196 by providing, in effect, that one guilty of the acts denounced by its provisions shall not "serve for two years." Section 18 furnishes the exception called for by section 196, and there is certainly nothing in the latter, considered alone, which forbids our searching outside the charter for the machinery through which to make the provisions of section 18 effective. Section 196 does not necessarily relate to the question of mode of removal, as distinguished from cause for removal, and as section 18 provides a complete scheme for removal so far as cause is concerned, we are bound to find a mode somewhere, if it be possible so to do. If no mode be pointed out in the charter and one can be found elsewhere, Dinan v. Superior Court, supra, and the other cases cited with it, do not stand in the way of re-

sort to such a mode, for they refer only to the dominance of charter provisions over conflicting statutory provisions.

All laws for the removal of public officers are properly divisible into two parts: First, a cause for removal must be either stated, or understood; second, a method of effecting the removal must be specifically provided. The charter of Los Angeles includes at least two systems under which it is attempted to provide for removals. One of these is the recall, as to which the cause for removal is merely understood to exist in the mind of the individual elector and is not assumed to be stated in the charter, but the method of exercising the right is provided with great care. The other plan for removal is that set forth in section 18. There the cause of removal is distinctly stated; but what of the method of the exercise? Where is it to be found?

[2] A method of effecting a removal from office is required, from the very nature of things, to be specifically provided, as truly as the same thing may be said of the method of exercise of the right of initiative or of the recall, and its exercise cannot, of course, be predicated upon mere general declarations of municipal power, however broad.

The petitioner insists that the two schemes for removal from office under the charter are cumulative, and that the right to remove for the causes stated in section 18, whatever may be the method, is superseded by the right to remove by the recall, and we must dispose of this point before we answer the question propounded toward the close of the preceding paragraph. As a part of the argument on this question of cumulative remedies, it is pointed out that proceedings for removal under section 18 might be instituted in a given case, that in the same case and for the same cause resort to the recall might be had, and that the results under the two methods of procedure might be different and opposed to each other, and in aid of the argument the petitioner cites Hodges v. Tucker, 25 Idaho, 563, 138 Pac. 1139. That case does decide that cumulative remedies for removal for the same cause are not to be tolerated, as they are likely to result in opposite conclusions; but it may be disregarded, for the cumulating remedies there in question were presented, respectively, by a special act operating in the nature of a charter and by a general act of the Legislature, and, further, the special act contained provisions showing an intention upon the part of the Legislature to make it a complete and exclusive plan for the government of cities coming within its scope. This case, then, presents a showing of conflict between distinct systems of legislation, is akin to our own decisions as to the effect of conflicting charter and statutory provisions, and is, after all, to be classed with Dinan v. Superior Court, supra, which it, indeed, cites, and the other cases like it.

[3] It is to be remembered that the present litigation exhibits an instance of alleged cumulative or conflicting provisions for removal found in the same scheme of legislation, the charter itself. But for the fact that they were adopted at different times, section 18 and the recall provisions of the charter stand upon the same footing. We are therefore really asked to determine, so far as this particular question is concerned, whether there is such an inconsistency between the two that a repeal of one by implication results from the adoption of the other. We cannot think that it does. Section 18 contemplates a judicial investigation into certain specific charges which are to be made, in form, against an alleged erring officer. The recall provides for the removal of officers at the will of the electors of the municipality, upon reasons, good or bad, satisfactory to the individual consciences of the electors. Even if a recall petition should state, as reason for recall, the same matters which might be made the subject of investigation under section 18, any elector might vote for recall upon entirely distinct and different reasons appearing to him to be equally or more cogent and convincing. If a recall should result at the polls in such a case and, at or near the same time, an acquittal of the same officer should result from an investigation under section 18 of the charges specified in the recall petition, it could not be said and could never be shown that the results were conflicting or even inconsistent. The judicial inquiry would have ended an investigation into specific charges against the officer. The recall election would have thrown open the entire range of the official life of the individual, and made his incumbency of the office depend upon the accumulated judgment of the electorate based upon, not only his minutest official acts, but also upon his private reputation and character. If a city official were proceeded against under both section 18 and the recall provisions of the charter, the recall petition containing "a general statement of the grounds for which such removal is sought" (Charter, § 198p, subd. 1), in which were set forth substantially the charges made under section 18, and the result was favorable to the officer in each proceeding, he would retain the office, but, on the other hand, if it were unfavorable in either, a forfeiture of the post would result. These views, in addition to their consonance with reason, find support in Hilzinger v. Gillman, 56 Wash. 228, 105 Pac. 471, 21 Ann. Cas. 305, and in the circumstance immediately to be mentioned.

That the electors of Los Angeles never intended the recall provisions of the charter to supersede section 18 is apparent for another reason. It is true that section 18 was in the charter at the time of its original adoption in 1889, but its form was then far different from that of the present section. It then denounced but a part of the acts which are by the present enactment made wrongful, and declared that upon a conviction of the officer, "besides the penalty that may be imposed by a court of competent jurisdiction, the council shall declare the office vacant, and any person convicted of a violation of this section shall be forever disqualified from holding any office under this charter." The provisions for a recall were first imported into the charter in 1903, and section 18 remained in its original form in the interim, and also afterward until 1911, when, at the same time with the adoption of extensive amendments of the recall provisions, the people voted an amendment which made the section exactly what it is now as to the question of penalty, although it was again amended and thus put into its present form throughout in 1913. This continued solicitude for the amendment and, consequently, for the existence of section 18 forces a conviction that it is operative, concurrently with the recall provisions of the charter, for the removal of city officials, provided a mode may be found through and by which the causes for removal named in it may be made beneficially effective.

Petitioner's next contention presents the main question in the case. It will be noted that, after denouncing the acts which may occasion a removal from office, section 18 is to the effect that the erring officer "shall, upon conviction * * * forfeit his office and be punished for misdemeanor." The peculiar character of this clause will be noted at once. It is so worded that it is apparently susceptible of various constructions. Is a forfeiture the only punishment prescribed by the section, or is a fine to be exacted and an imprisonment directed, in addition? Upon the settlement of this question may depend the solution of the problem whether an action resulting from a charge under the section is to be tried in the superior court or in some other forum. The petitioner contends that the section declares the commission of the denounced acts the commission of an ordinary misdemeanor, with a forfeiture of office as an incident, and that charges under it are triable only in the police court. This contention is presented in two branches, the first of which is that the police court of Los Angeles is controlled, in the exercise of its jurisdiction, by provisions of the city charter. In this branch of petitioner's argument he presents a complete scheme for removal from office under the charter, the cause of removal being found in section 18, the method being pointed out in the provisions concerning the jurisdiction of the police court. These latter provisions are found in section 101, where it is provided that the police court shall "have exclusive jurisdiction of * * * all misdemeanors punishable by fine or by imprisonment in the county jail or by both." Under this language charges made pursuant to the provisions of section 18 cannot be tried in the police court unless offenses thereunder are punishable by fine or imprisonment, or by both. The second branch of the argument on this question is to the effect that offenses under section 18 are triable in the police court pursuant to the provisions of an act of the Legislature passed in 1913, relating to the jurisdiction of police courts in cities of the first and one-half class, which includes Los Angeles, and found in Statutes 1913, p. 469. Under this branch of the argument petitioner abandons much that he has said concerning the supremacy of charter provisions over statutory enactments in the matter of removals from office, and presents a scheme for removals upon cause stated in the charter and by a method of removal prescribed in the statute. The jurisdiction of the police court under the act of 1913 is the subject of section 2. So far as the section is now of interest it provides that the court "shall have exclusive jurisdiction of all misdemeanors punishable by fine or by imprisonment, or by both such fine and imprisonment, committed in the city where such police court is held." Section 3 of the act provides that each of the police judges "shall be and have the powers of a police magistrate and shall have power and jurisdiction * * * to try all charges of misdemeanor offenses committed within its jurisdiction," etc.

[4, 5] The petitioner contends that the language of this latter section confers upon the police court jurisdiction of misdemeanor charges of every nature, but the act cannot receive such a construction. The jurisdiction of the court over misdemeanors is fixed by section 2, and that jurisdiction, in so far as it relates to misdemeanors, is limited to the kinds of misdemeanors which are "punishable by fine or by imprisonment, or by both such fine and imprisonment." Section 3 was plainly framed for the purpose of conferring upon each of the judges, when acting alone, the power to exercise the full jurisdiction of the court; and its language to the effect that each of them may "try all charges of misdemeanor offenses committed" within the jurisdiction of the court is perforce limited by the provisions of section 2 to the effect that the jurisdiction is only over misdemeanors punishable by fine or imprisonment, or by both. We do not hold, however, that other parts of section 3 may not confer jurisdiction as to matters, other than misdemeanors, not mentioned in section 2; but, certainly, the two sections must be read together in determining the extent of the jurisdiction of the court over misdemeanors, and such a reading impels the conclusion we have just announced. Therefore, upon both branches of petitioner's argument contending for a jurisdiction in the police court over the offense with which he is charged, the situation is the same. That court cannot, in any event, exercise jurisdiction over charges under section 18 of the charter unless the "misdemeanor" therein mentioned is punishable by fine or by imprisonment or by both.

The respondent contends that the only punishment possible under section 18 is a forfeiture of office, and the history of the section casts much light upon the question. We have already seen that, as it originally stood in 1889, the section provided for a forfeiture of office, for a disqualification to further hold office; all this, however, "besides the penalty that may be imposed by a court of competent jurisdiction." By the amendment of 1911 the people of the city withdrew the language just quoted, and we are bound to assume that they did so with a substantial purpose in view. The amendment of that year provided that an officer convicted under the section should "forfeit his office and be punished for misdemeanor," the amendment of 1913 was identical as to the portion of the section now in question, and so it has ever since remained. The purpose of the people, in 1911, in removing from the section the reference to the ordinary penalty to be imposed by a court of competent jurisdiction can have been only to dispense with such penalty. It is reasonable to suppose, aside from the evidence furnished by the amendment, that such was their intention. The usual penalty for the commission of a misdemeanor is insignificant when compared with the forfeiture of office which may follow a conviction under the section. In 1911 Los Angeles had become a city with a population in excess of 300,000 souls, and the penalty of a forfeiture of an important office under its government, together with the consequent fall of the incumbent in the estimation of those who had placed him there, had become a penalty indeed. The ordinary punishment for a misdemeanor was hardly mentionable in connection with it.

[6] We are convinced that, at least from 1911 forward, the "misdemeanor" meant by the section was not punishable by fine or imprisonment; that it was of the character usually referred to as misdemeanor in office or misconduct in office; in fact, that the intention of the people in adopting it was as if it read that an erring officer should "forfeit his office and thus be punished for a misdemeanor in office." In legal effect, taking both its history and its phraseology—which latter is susceptible of such a construction, irrespective of the question of history—it does so read.

[7] We have, then, reached the conclusion that charges made pursuant to the provisions of section 18 are not triable in the police court, and petitioner's contention that such is the place of trial is at an end. There is now no difficulty in the way of determining that the petitioner must be tried in the superior court, and upon the accusation lodged against him under the sections of the Penal Code, section 758 and those following it. There is no conflict between those sections and the charter, for they occupy a field which it does not invade. There is apparently no other procedure than that outlined in the sections mentioned to which resort may be had in order to render section 18 of the charter effective and the language of section 758 expressly countenances such a resort, for it provides for the presentation by the grand jury of "an accusation in writing against any * * * municipal officer, for willful or corrupt misconduct in office."

The alternative writ of prohibition heretofore issued is dismissed, and the prayer for a peremptory writ is denied.

We concur: CONREY, P. J.; JAMES, J.

(34 Cal. App. 16)

PEOPLE v. VAUGHAN. (Cr. 657.)

(District Court of Appeal, First District, California. June 4, 1917.)

1. HOMICIDE 🔑254—SECOND DEGREE MURDER—EVIDENCE—SUFFICIENCY.

Evidence *held* sufficient to support verdict of murder in the second degree.

2. HOMICIDE 🔑338(3)—PREJUDICIAL ERROR—EXAMINATION OF DEFENDANT.

That in a homicide case the district attorney was permitted to ask defendant, a witness in his own behalf, whether he considered he had done wrong in killing B., and that defendant answered, "No," was without prejudice.

3. CRIMINAL LAW 🔑865(1)—COERCING JURY.

After the jury had deliberated some hours, they asked the court whether a recommendation of mercy would be followed if made by them. In reply the court stated: "It is your duty to find a verdict, and you have an absolute right to make a recommendation." Court then explained that, except in case of a verdict of murder in the first degree, the court will not be compelled to follow the jury's recommendation. *Held*, that the language used by the court did not coerce the jury into returning a verdict, as, when taken in connection with the instruction previously given, that the jury were the sole judges of fact, it meant no more than that the matter of finding a verdict rested with the jury.

4. CRIMINAL LAW 🔑865(1)—COERCING JURY.

Nor did the latter part of the court's statement, to the effect that in case of a reasonable doubt as to the degree of crime they must find the lower degree, indicate to the jury that they were expected to return a verdict of murder.

5. CRIMINAL LAW 🔑829(14)—REFUSAL OF INSTRUCTIONS—PREJUDICIAL ERROR.

The court's refusal to give an instruction that the jury must disregard answers stricken from the record and must draw no inferences from what they might think to be the court's opinion as to the weight to be attached to the evidence or the credibility to be given to a witness was without prejudice to defendant, where the court instructed the jury that they were the sole judges of the fact, and that the court had nothing to do with the questions of fact or the credit to be given witnesses.

6. HOMICIDE 🔑341 — REFUSAL OF INSTRUCTIONS—PREJUDICIAL ERROR.

Where the instruction given contained all of the requested instruction with the exception of a single sentence, which sentence, when taken in connection with the entire instruction, was devoted, not to distinguishing between murder and manslaughter, but between degrees of murder, and defendant was convicted of the lesser degree of murder, he was not prejudiced by failure to give the requested instruction.

7. **Criminal Law** 🔑829(16)—Refusal of Instructions—Prejudicial Error.

Where accused's testimony did not differ materially from that of other witnesses and was sufficient of itself to justify his conviction, refusal to grant a requested instruction, directing attention specifically to defendant, was without prejudice, where the instructions given by the court stated the rules as to weighing the testimony of all witnesses.

Appeal from Superior Court, Alameda County; J. J. Trabucco, Judge.

Compton Vaughan was convicted of murder in the second degree, and he appeals from the judgment and from an order denying his motion for a new trial. Affirmed.

H. S. Henion, of Oakland, and R. McMurchi, for appellant. U. S. Webb, Atty. Gen., for the People.

BEASLY, Judge pro tem. The defendant was convicted of murder of the second degree for killing George Barnet at Calaveras dam in Alameda county on June 15, 1916, and appeals from the judgment and from an order denying his motion for a new trial.

[1] The first point made on this appeal is that the evidence is insufficient to support the verdict of murder of the second degree. With this contention we cannot agree. The deceased and the defendant quarreled over a card game of which the defendant was the banker. During this quarrel the defendant got possession of a small sum of money which he admits belonged to the deceased. The two men separated after hard words had passed between them. The defendant armed himself, and the men met in a bunkhouse where both slept, and renewed the quarrel. After some violent language, in which both indulged, the deceased either struck or shoved the defendant, and the latter fell to the floor against the wall. On regaining his feet the defendant fired a shot into the floor. He then brought his arm up slowly and fired two shots into the abdomen of the deceased, killing him. The deceased was unarmed, and the defendant knew this. The men were of about equal weight and physical strength. It is clear from the evidence that the defendant was in no danger of any serious injury at any time, and that he could at any time have stopped the trouble by paying back to the deceased the small sum of money in his possession which he admitted belonged to the deceased. The jury were fully justified in finding from the evidence—indeed it would be difficult to believe otherwise—that defendant provoked the quarrel by cheating deceased in the card game, and that he did not retire from the quarrel when he had ample opportunity to do so. There were other facts in evidence, but none which weakened those stated. Whether these facts showed murder of the second degree was a question for the jury. The evidence is sufficient to sustain a finding that the defendant killed Barnet unlawfully and with malice aforethought.

[2] Appellant complains that the district attorney was permitted to ask him, when a witness in his own behalf, whether at any time he considered that he had done wrong in killing Barnet. He answered, "No." In effect this was saying that he always considered his conduct justified and free from blame. He could not have been prejudiced by this answer.

[3] After the jury had deliberated for some hours they asked the court whether a recommendation of mercy would be followed if made by them. In reply the court made this statement:

"The proposition is this, gentlemen: It is your duty to find a verdict, and you have an absolute right to make a recommendation."

The court then explained that except in case of a verdict of murder in the first degree the court would not be compelled to follow the jury's recommendation. The explanation was elaborate and accurate, and at its end, in response to a question by the foreman, the court stated that if the jury should find the defendant guilty of murder, and there should still remain a reasonable doubt as to the degree of the crime, they must find the lowest degree. The defendant complains that by the language first above quoted the court coerced the jury into returning a verdict. We do not so understand it. Taken with its context and the instruction previously given that the jury were the sole judges of the facts, it seems to us that this discussion between the court and the foreman of the jury meant no more than that the matter of finding a verdict rested with the jury.

[4] The further complaint is made that the latter part of this instruction, in which the court told the jury that in case of a reasonable doubt as to the degree of the crime they must find the lower degree, indicated to the jury that they were expected to return a verdict of murder. We do not so interpret it. It would be straining the language of the court to put such a construction upon it. It was a correct statement of the law, and at the time and under the circumstances in which it was given was favorable rather than unfavorable to the defendant. It must be read with all the other instructions; and the court instructed the jury fully as to the verdicts of "guilty" which might be found by them; and they certainly could not have misunderstood this instruction, which was made necessary, indeed, by the questions asked by the foreman.

This disposes of the questions presented upon the oral argument.

The defendant in his brief complains that many instructions asked by him were not given to the jury, and that several instructions given on the court's motion were erroneous.

[5] The court refused to give an instruc-

tion requested by defendant, to the effect that the jury must disregard answers stricken from the record, and must draw no inferences from what they might think to be the court's opinion as to the weight to be attached to the evidence or the credibility to be given to witnesses; but the court instructed the jury that they were the sole judges of the facts, and that the court "had nothing to do with the questions of fact or the credit to be given witnesses," and our attention is not directed to any answer stricken out which is of such character as to make necessary the giving of that part of this instruction relating to answers stricken from the record. Nor did the court, so far as we can find from an examination of the record, at any time in any way indicate that it had any opinion as to the weight to be attached to the evidence of any witness or as to the credence to be given any witness. Indeed the instruction above quoted, that the court had nothing to do with the credibility of the witnesses or the weight to be attached to their testimony, completely answers the objection that the defendant was prejudiced by the court's refusal to give this instruction.

[6] Complaint is made of the refusal of the court to give defendant's proposed instruction numbered 10. With the exception of a single sentence this instruction was embodied in the court's own instructions. Defendant now claims that by omitting this sentence the court left the jury uninstructed upon an important distinction between murder and manslaughter. The entire instruction from which this sentence is taken was devoted, not to distinguishing between murder and manslaughter, but between the degrees of murder. This sentence in its context had nothing to do with manslaughter, nor would the jury have so understood it had it been given. It was directed solely to the distinction between murder of the first degree and of the second degree. As the defendant was convicted of the lesser degree of murder, he was not prejudiced by the failure of the court to give this instruction to the jury.

Defendant's instruction No. 13, which the court refused to give in the language proposed, was given in every proper detail, although in other language, in the court's instructions. It may be further observed that this instruction as proposed by the defendant was presented in language so broad and in form so argumentative when considered in connection with the evidence that the trial court may well have considered that in the state of the evidence in this particular case it was calculated to cause the jury to think that the court believed the defendant to have killed Barnet in self-defense, and so to have committed the homicide in defending himself. The same may be said as to defendant's proposed instruction No. 16. The court briefly but accurately instructed the jury upon the law of self-defense, and that part of the instruction where the court was asked to say to the jury that they "were not bound to draw nice distinctions from appearances" was well suited to lead the jury to infer that the judge thought technical reasoning upon the evidence necessary to reach the conclusion that the defendant was guilty; whereas in this case the evidence was clear, and no nice or close reasoning was necessary to a decision that the defendant was guilty.

[7] An instruction was also requested in which, directing attention specifically to the defendant who was a witness in his own behalf, the court was asked by him to recite to the jury the rules under which they should consider his testimony. This instruction the court did not give, but stated the same rules in its instructions given to the jury as to how they should weigh the testimony of all witnesses. This case will not be reversed because the defendant was not singled out, nor the jury directed to him, particularly when the court recited the rules under which the evidence of all witnesses was to be considered. One part of this instruction is usually given, viz., "that the defendant's testimony should not be rejected simply because he was the defendant." But we do not think the failure to give this instruction in this particular case prejudiced the defendant in any substantial right, for the reason that the defendant's testimony did not differ materially from that of the other witnesses, and was sufficient of itself to justify his conviction of murder of the second degree.

The instruction given as to the right of a person when assailed to stand his ground, taken together with and considered in the light of the evidence, correctly stated the law upon that point, and left nothing to be desired on the part of the defendant.

The other instructions complained of need no discussion. The court committed no prejudicial error in giving them.

The judgment and order are affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

34 Cal. App. 21

McDOUGALD, Treasurer, v. WULZEN.

(Civ. 2067.)

(District Court of Appeal, First District, California. June 6, 1917.)

1. APPEAL AND ERROR ⟹842(1) — REVIEW — QUESTIONS OF LAW OR FACT.

In a proceeding to collect an inheritance tax on a transfer of real property, whether deeds to the property were made in contemplation of death, and to take effect after death, were questions for the trial court to decide upon the facts, and its findings could only be disturbed if there was no evidence sufficient to sustain them.

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

2. Taxation ⚷879(1) — Inheritance Tax — Transfers Subject—Evidence.

Evidence *held* sufficient to sustain findings that deeds executed by a man 83 years old to his wife, 1½ years before his death, were not made in contemplation of death, and to take effect after death.

Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

Action by John E. McDougald, Treasurer of the City and County of San Francisco, against Anna Wulzen. Judgment for defendant, and plaintiff appeals. Affirmed.

Hartley F. Peart, of San Francisco, and U. S. Webb, Atty. Gen. (William A. Sullivan and Gus L. Baraty, both of San Francisco, of counsel), for appellant. James R. Kelly, of San Francisco, for respondent.

BEASLY, Judge pro tem. This is a proceeding to collect an inheritance tax on certain real property situate in the city and county of San Francisco, and conveyed by Frederick H. Wulzen, deceased, to his wife, Anna Wulzen, on July 26, 1909. The right to collect this tax is urged on two grounds, viz., that the transfer of the property was made in contemplation of death, and was not to take effect as to the grantee until after the death of the grantor. The trial court found against the plaintiff on both of these contentions, and these findings are attacked on this appeal. Whether the evidence supports them is the only question before the court. The matter is governed by the Inheritance Tax Law of 1905 (St. 1905, p. 341).

A recital of the evidence in some detail seems proper. Mr. Wulzen, the grantor, was 83 years old on July 26, 1909. He was in reasonably good health for one of his years. He and his wife were about to celebrate the fiftieth anniversary of their marriage. He had gotten to a point in life where the care of his property annoyed him, and he told Mrs. Wulzen that he "did not wish to be longer bothered with it," and that he would give her the property to do with as she wished. The services of a notary public were thereupon engaged, and he drew deeds conveying the property from the husband to the wife, which on their face are absolute and unconditional. These deeds were executed, and the parties being both present the deeds were, under the direction of the notary, who was also present, delivered by Mr. Wulzen manually to Mrs. Wulzen. The notary was permitted to testify that this delivery was "without condition." Mrs. Wulzen, after keeping the deeds about the house for a few days, handed them to a son of the parties, with instructions to place them in a safe deposit box, which the son did. This box was rented in the name of the grantee and this son. Mr. Wulzen, the grantor, although he had access to it, never visited it. No change was made after the making of the deeds in the manner of dealing with the property. Mrs. Wulzen gave directions as to any necessary repairs or alterations of the property, as she had always done, and the rent was paid at the family residence to any member of the family who was present when the tenant called with it. There is no evidence, however, that the grantor ever received it. Checks were, however, still sometimes drawn in his name by tenants, when payment was made by check. This money, received as rent, was kept in the house, used for family expenses as needed, and when a considerable sum had accumulated from the unused portion thereof it was deposited in bank to the credit of both the grantor and grantee, a course of business followed by them during many previous years. Both the grantor and grantee had access to the money while in the house, but there is no evidence that the grantor ever used any of it. One and one-half years elapsed after the deeds were delivered before the death of the grantor. He was suffering from no lingering or chronic illness during this time, and died of an acute trouble—pneumonia. The deeds were not recorded until after the grantor's death; Mrs. Wulzen explaining that she knew little of business, and that they were recorded at the suggestion of her niece, who, after Mr. Wulzen's death, told her that the recording of the deeds was necessary.

[1, 2] Upon these facts, so stated at length, we are asked by the appellant to say as a matter of law that the trial court was wrong in holding that these conveyances were not made in contemplation of death. This we cannot do. Whether the deeds were made in contemplation of death, and to take effect after death, or not, were questions for the trial court to decide upon the facts before it, and its findings on that subject could only be disturbed, if there were no evidence sufficient to sustain them. In this case we think the evidence sustains the findings.

Estate of Reynolds, 169 Cal. 600, 147 Pac. 268, relied upon by appellant, is clearly distinguishable from this case. In that case the grantor was the victim of a mortal disease, and knew when he executed the deeds that his days were numbered. Accordingly the lower court in that case found, and the Supreme Court sustained the finding, that the deeds were made in contemplation of death—a conclusion which was inevitable from this and other facts in evidence in that matter. Here the grantor was in no immediate fear of death. Although an old man, he was, as has been said, suffering from no disease, and was in good health for his years. Besides this, the circumstances under which the deeds in this case were delivered were susceptible at least of the construction that they were absolute, and were made with a distinct purpose other than escaping inheritance taxes, viz., that of freeing the grantor from the burden of longer caring for his property. While it may be conceded that, if the trial court had found that these deeds from Mr. to Mrs. Wulzen were made in contemplation of death, or to take effect after the grantor's death, this court would have sustained such finding, still the trial court having found otherwise, and its function being to place a construction upon the evidence before it, and it appearing to us that the construction so given the transaction is not unreasonable, we cannot disturb its findings.

The judgment is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

34 Cal. App. 53

GODSIL v. SAN JOAQUIN COUNTY BUILDING TRADES COUNCIL OF CALIFORNIA et al. (Civ. 1657.)

(District Court of Appeal, Third District, California. June 6, 1917.)

APPEAL AND ERROR 🔑356—TIME FOR APPEAL —DISMISSAL FOR DELAY.

Under Code Civ. Proc. § 939, authorizing appeals from judgments or orders of the superior court within 60 days from the entry of the judgment or order, where an order denying a motion to recall and vacate an execution was entered in the minute book of the court on May 25th, an appeal taken August 6th was too late, and must be dismissed.

Appeal from Superior Court, San Joaquin County; C. W. Norton, Judge.

Action by Richard Godsil against the San Joaquin County Building Trades Council of California and others. From an order denying a motion to recall and vacate an execution, the defendant Plumbers' Union, No. 492, appeals. Appeal dismissed.

George Appell, of San Francisco, and R. L. Beardslee, of Stockton, for appellant. A. H. Carpenter, of Stockton, for respondent.

CHIPMAN, P. J. Defendant Plumbers' Union, No. 492, appeals from an order made by the superior court of San Joaquin county, denying appellant's motion to recall and vacate the execution issued in said action.

It appears, from the bill of exceptions, that plaintiff commenced an action in said superior court, on December 6, 1912, against a number of defendants, including appellant, and, after service of summons, no appearance having been entered by this appellant, on application of plaintiff's attorney, made January 4, 1913, the clerk of said court entered the default of defendant on that day, and, on January 23, 1915, the clerk, on motion of plaintiff's counsel, entered judgment in favor of plaintiff against the several defendants, including appellant. The execution was in the usual form and was issued on January 23, 1915. The motion to recall the execution was heard and denied on May 24, 1915, and, as stated in the notice of appeal, the order was "duly entered on the 25th day of May, 1915, in Minute Book No. 3 of Department 3 at page 711 of the records of said court." Notice of appeal was filed August 6, 1915.

Respondent makes the point that the appeal was taken more than 60 days after said order was made and entered in the minutes of the court, and must be dismissed (citing Code Civ. Proc. § 939; Doyle v. Republic Ins. Co., 125 Cal. 15, 57 Pac. 667; Harper v. Hildreth, 99 Cal. 265, 33 Pac. 1103; McCourtney v. Fortune, 42 Cal. 387). Appellant makes no reply to the point, nor do we think reply can be successfully made.

The appeal is dismissed.

We concur: HART, J.; BURNETT, J.

34 Cal. App. 98

CHASE et al. v. STEVENS et al. (Civ. 2225.)

(District Court of Appeal, Second District, California. June 12, 1917.)

WILLS 🔑78, 79—REVOCABILITY—WILL BASED ON CONSIDERATION.

H., who had been supporting his sister, F., wrote her, asking, and, in a considerate way, insisting, that she should make a will giving him or his estate any property of which she might die possessed. She made the will as required and sent it to H., whereupon he wrote her, stating that now he would know that, in the event of anything happening to him, she would be provided for, thus indicating that, if she had refused to make the will, her future support would not have been as generously provided for. Shortly afterwards he made a will, which was still in force at his death, in which he bequeathed her $5,000 and provided for further support to be given her from a trust thereby created. *Held*, that the sister's will was supported by an ample consideration, and was irrevocable.

Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by Ernest W. Chase and others against Elinor A. Chase Stevens and another. From a judgment in favor of the defendant Paul Stewart, and an order denying a new trial, plaintiffs appeal. Reversed.

Waldo M. York and Enyeart & Holton, all of Los Angeles, for appellants. T. M. Stewart, of Los Angeles, for respondent.

JAMES, J. This appeal is taken by the plaintiffs from a judgment entered in favor of respondent Stewart, and from an order denying their motion for a new trial.

The action was brought for the purpose of having declared irrevocable a certain will made by Florence E. Chase, and to have injunctive order restraining the defendants from contesting the said will, and restraining them from offering for probate a will claimed to have been executed by the said Florence E. Chase subsequent to the execution of the will first above mentioned. Florence E. Chase was a sister of Horace W. Chase. Horace W. Chase lived in the city of Los Angeles at the time of his death, and his sister was a resident of the state of Maine. Horace W. Chase died in June, 1911. Florence E. Chase died in April, 1912. For a number of years prior to his death Horace W. Chase had furnished to his sister the means for her support, and in a will made in February, 1911, provided a legacy in the sum of $5,000 to be paid to the sister, and also made provision for further support to be given her from the trust estate which was created under his will. The plaintiffs herein constituted the members of Horace W. Chase's immediate family and are beneficiaries under his will. In the year 1910 Horace W. Chase wrote to his sister, suggesting it as his desire that she make a will leaving the property that she might die possessed of to him or his estate. The sister responded at once, forwarding the will required. Her letters, as are here exhibited by the record, were full of expressions of gratitude for the generosity and kindness of her brother, and in those letters she declared her willingness to do anything that he might ask of her. After Florence E. Chase had so made the will, and it had been received by Horace W. Chase, the latter wrote to his sister, declaring that now he would know that, in the event of anything happening to him, she would be provided for. He later made the will which we have before referred to, wherein he made further provision for the support of his sister in the event that death should overtake him. Only a few months elapsed, as will be noted by comparison of the dates, from the time that Horace W. Chase made his will until he died. After his death, it appears that the sister, disregarding the injunctions of her brother and his solemn requests to her, in which she made full acquiescence, executed another will, devising the property that she might die possessed of to Elinor A. Chase Stevens, one of the defendants herein. This alleged last will of Florence E. Chase was offered for probate in Maine. The beneficiary thereunder assigned to respondent Paul Stewart an interest in the legacy of $5,000 left by Horace W. Chase to Florence E. Chase. Elinor A. Chase Stevens and said Paul Stewart thereupon offered for probate in Los Angeles county this alleged last will of Florence E. Chase, and sought to have set aside proceedings in probate which had been had in the matter of the first will as made by Florence E. Chase according to the request of her brother.

This action was then commenced. Summons was published and personally served in the state of Maine as against the defendant Elinor A. Chase Stevens, and the time having expired for her appearance, default was entered, and the judgment prayed for followed. Later the defendant Elinor A. Chase Stevens made a so-called "special" appearance, and asked that that default and judgment be set aside, which motion was denied. The action then proceeded to trial as to respondent Paul Stewart. There was no conflict in the evidence; the court's judgment being based upon a finding that there was no consideration extended by Horace W. Chase to support the making of the first will of Florence E. Chase; that because of lack of sufficient consideration no contractual rights arose in favor of Horace W. Chase sufficient to make the act of Florence E. Chase in executing the first will irrevocable. To this determination of the trial court we are not prepared to assent. Florence E. Chase, prior to the time of making the will, had received for many years support from her brother. This brother, desiring that benefits which he had conferred and would confer in the future upon his sister should, when she no longer had use for them, be returned to him or his estate, requested and in a considerate way insisted that she should make the will as required by him. She on her part, extolling his generosity and kindness, declared that she was ready to do anything that he desired. After the will was made Horace W. Chase wrote the sister in one of his letters that he was then satisfied, and that if anything happened to him she would now be assured of support. This latter expression indicates that it was in the mind of Chase that, had his sister refused to make the will as he desired it to be made, her future support would not have been as generously provided. He later made his will, in which specific provision was made for the sister.

The evidence, to our minds, indicates that there was a distinct understanding that Horace W. Chase should not relinquish ownership in the property which he had and would place at the disposal of his sister for her support, in so far as there remained any excess at the time of her death over and above that actually needed or used for the purpose mentioned. Taking this view of the case, we think that ample consideration is necessarily implied upon which to conclude that the making of the first will by Florence E. Chase was an act done pursuant to a valid understanding or agreement between her and her brother. That being true, it follows that the first will of Florence E. Chase was irrevocable, as it is asserted to be on behalf of appellants. Furthermore, every equitable consideration lends its weight in the direction of enforcing good faith toward Horace W. Chase and his heirs and beneficiaries.

It may be remarked that a determination of the merits of this case will be without any substantial effect as fixing the rights of the parties under the several wills mentioned, for that matter has already been finally resolved in favor of these appellants. See Matter of the Estate of Florence E. Chase, 169 Cal. 625, 147 Pac. 461. However, at the oral argument it was urged that the matter of the recovery of costs incurred by the parties could only be settled by a consideration of the merits of the appeal. We have taken up the one vital question, and given no attention to others which are argued at some length in the briefs.

Under the conclusions expressed, it follows that the judgment and order must be set aside.

The judgment and order are reversed.

We concur: CONREY, P. J.; WORKS, Judge pro tem.

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34 Cal. App. 150

WALKER et al. v. BAUMEISTER et al. (Civ. 1985.)

(District Court of Appeal, First District, California. June 18, 1917.)

1. BROKERS 🔑8(3)—EVIDENCE OF AGENCY—SUFFICIENCY.

Where there is evidence that brokers who negotiated trade of two lots procured loan for purpose of erecting building on one of them, that lender in accordance with his custom in similar transactions paid brokers amount of loan and paid no further attention to deal, leaving to them even matter of ascertaining that title was clear, court is justified in concluding that broker was agent of lender.

2. APPEAL AND ERROR 🔑1011(1)—REVIEW—FINDINGS OF FACT — CONFLICTING EVIDENCE.

The trial court's findings of fact will not be disturbed where there is conflict in evidence.

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Action by Sydney J. Walker and another against Bernhardt H. Baumeister and another. From judgment for plaintiffs, defendants appeal. Affirmed.

R. F. Mogan and Joseph F. Bluxome, both of San Francisco, for appellants. R. W. Gillogley, of San Francisco, for respondents.

BEASLY, Judge pro tem. The plaintiffs owned an improved lot on London street in San Francisco which they exchanged with McArthur Bros., a firm of building contractors, for a lot on Twentieth street in said city. The Twentieth street lot was unimproved, and by the terms of the contract under which the exchange was effected McArthur Bros. agreed to erect a seven-room dwelling house thereon, and to convey it to the plaintiffs in exchange for their property free of all incumbrances except a $2,500 mortgage. Coffin & Co., a firm of real estate brokers, acted as the agents in effecting this exchange. Neither the McArthurs nor the plaintiffs had the money to pay for the erection of the building on the Twentieth street lot, and Coffin & Co., through an employé of theirs named Woodfield, secured the money from the defendant Bernhardt H. Baumeister. Thereupon the plaintiffs conveyed their property to McArthur Bros., and the latter in turn conveyed their Twentieth street lot to the plaintiffs, and the plaintiffs executed to Baumeister and his wife, the other defendants, a promissory note for $2,500, and secured the same by their mortgage to Baumeister on said lot. Baumeister turned over to Coffin & Co., through Woodfield, his check for $2,000. Six hundred and twenty-five dollars of this money Coffin & Co. paid out as the building progressed to McArthur Bros. for erecting the same, and before the building was complete Coffin & Co. became bankrupt, and the remainder of Baumeister's money in their hands was found to be uncollectible. Thereupon Baumeister paid $500 additional to McArthur Bros.

The trial court upon the submission of this cause found that the defendants had paid to plaintiffs the sum of $1,125 and no more. This finding was necessarily predicated upon the conclusion that Coffin & Co. were the agents of Baumeister to hold and disburse the $2,000 represented by the check, because no money except the $500 above referred to was paid to the plaintiffs or for their use by Baumeister, unless we regard as so paid the $2,000 check delivered to Coffin & Co. The finding that no more than $1,125 was paid by the defendants to the plaintiffs is of course disputed, and the ground of the dispute is a contention on the part of the defendants that Coffin & Co. were not their agents, and that the finding to the contrary is not supported by the evidence.

It is a significant fact in this connection that Dr. Baumeister, after delivering the $2,000 check to Woodfield, paid no futher attention whatever to the deal. He left even the matter of ascertaining that the title was clear to Woodfield. The manner in which this transaction was conducted for Baumeister was in accordance with his regular course of business with Coffin & Co. He had made other loans in the same way, Coffin & Co. holding the money and disbursing it as the buildings upon which the loans were made progressed and the security thus became sufficient for the respective loans.

[1, 2] There can be no serious question but that Coffin & Co. in holding this money and disbursing it were acting for the protection of Baumeister, who seems from his own testimony to have left everything to them. The lower court cannot be reversed for concluding from this evidence that Coffin & Co. were the agents of Baumeister in this matter. The fact that there is other evidence, some of which comes from the plaintiffs themselves, pointing to a contrary conclusion cannot change the matter, for here the well-settled rule applies that, there being a conflict of the evidence, this court will not disturb the finding.

The appellants claim that the judgment is too large by $50. This $50 is claimed to have been due from McArthur Bros. to Coffin & Co. as a commission for securing this loan from Baumeister and to have been credited to McArthur Bros. in Coffin & Co.'s books; but as the lower court found that the loan was made to the plaintiffs, and as there is no competent evidence that this $50 was paid by Coffin & Co. to McArthur Bros., this point also must be determined against the appellants.

For these reasons the judgment is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

CALIFORNIA REPORTER

167 PACIFIC REPORTER

(175 Cal. 680)

BORN v. CASTLE et al. (S. F. 7309.)

(Supreme Court of California. Aug. 8, 1917.)

1. VENDOR AND PURCHASER 🔑31—RIGHT TO RESCIND—MISTAKE.

Where plaintiff paid deposit required by proposed contract of purchase of land, without knowing that defendant had changed it by reducing time allowed plaintiff to examine title from 60 to 30 days, no contract was ever made, and plaintiff may recover deposit on discovery of mistake.

2. VENDOR AND PURCHASER 🔑341(1)—RIGHT TO RESCIND—LACHES.

Delay of plaintiff in bringing action to recover deposit, made by him under mistaken belief that contract for sale of land had been entered into, was not laches, where he did not discover the mistake until, on trial to enforce the contract, it appeared from the evidence introduced by defendant, and there was no fault on his part in failing to make the discovery sooner, and defendant knew of mistake and suffered no prejudice on account of the delay.

3. APPEAL AND ERROR 🔑1079—ERROR WAIVED IN APPELLATE COURT—FAILURE TO ARGUE EXCEPTIONS.

The court will not examine alleged errors in admission and exclusion of evidence where appellants merely complain of them generally and point out where exceptions relating to them may be found in the record without arguing them.

4. PARTNERSHIP 🔑143—RIGHT TO RESCIND—ACTION—PARTIES.

An action to recover deposit, made by plaintiff under mistaken belief that a contract for purchase of land had been entered into with partnership of which defendant was a member, does not lie against it where the land belonged to defendant who took and retained deposit.

5. COSTS 🔑71—RIGHT TO COSTS.

In an action against a partnership to recover deposit, brought under the mistaken belief that contract for the purchase of land had been made, not with one of its members, but with it, partnership is not entitled to costs on entry of judgment in its favor where it knew of mistake when deposit was made, and plaintiff did not learn truth until after suit begun.

Department 2. Appeal from Superior Court, City and County of San Francisco; Adolphus E. Graupner, Judge.

Action by S. A. Born against A. E. Castle and others. From judgment in favor of plaintiff, defendants appeal. Affirmed as against defendant named, and reversed as to other defendants.

J. K. Johnson, of San Francisco, for appellants. Randolph V. Whiting, of San Francisco, for respondent.

LORIGAN, J. This is the second appeal taken in this action, which was brought to recover the sum of $2,000 paid by plaintiff in negotiations respecting the purchase of a lot of land in San Francisco. The original complaint was framed on the theory that a contract for the sale and purchase of the property had been entered into between defendants and plaintiff; that defendants had failed to comply with its terms, and plaintiff was therefore entitled to the sum of $2,000 deposited with defendants at the time the alleged contract had been entered into between them. During the trial of the action under the original complaint, however, it was disclosed by evidence produced on the part of defendants that the contract alleged, and upon which plaintiff based his right of action, had never been executed by both parties; that, while a form of contract for the sale and purchase of the property described had been prepared for signature by them both, and the $2,000 sued for had been paid as a deposit by plaintiff to persons purporting to represent defendants as their agents, and said sum paid over to defendants, still no contract had ever been executed between the parties, nor was any agreement ever reached between them respecting terms of sale and purchase of said property. In fact, it appeared clearly that the $2,000 involved in the action was paid by plaintiff and accepted by defendants through one purporting to act as agent of the latter under a misapprehension and mutual mistake of both parties upon the subject. When during the trial this condition appeared from the evidence, plaintiff moved the court for leave to file an amended complaint in conformity to this proof and setting up the facts showing such misapprehension and mutual mistake respecting the execution of a contract between them under which the deposit was paid. The court refused to grant plaintiff leave to do so, and after judgment for defendants plaintiff appealed, presenting thereon the correctness of the ruling of the trial court in denying his said application. The appeal was heard by the District Court of Appeal, which reversed the judgment, holding that the trial court should have allowed the filing of the amended complaint, and remanded the cause, with directions to the lower court to allow plaintiff to do so. Born v. Castle, 22 Cal. App. 282, 134 Pac. 347. On remission to the trial court said amended complaint was filed, the cause tried, and a judgment entered in favor of plaintiff. It is from this judgment and an order denying their motion for a new trial that the defendants take this appeal.

The substantial points made for a reversal are not many nor difficult of disposition. It is claimed that the finding of the court that there was a mutual mistake by both parties in believing that an acceptance had been made of certain terms of sale and purchase of the property, that a contract in writing had been executed by the parties embodying them, and the further belief that the payment of the money by plaintiff to defendant had been made in conformity with such an executed contract, was not justified by the evidence. But there can be no doubt on this subject. There is no substantial difference between the evidence presented on the first trial, which it was held on appeal clearly required allowing the filing by plaintiff on his motion of an amended complaint as to mutual mistake, and that presented on this second trial, resulting in the finding that there was such mutual mistake and in awarding a judgment in his favor based upon it.

Recurring to that evidence briefly: It appears that Baldwin & Howell, real estate agents in San Francisco, had applied to defendants for written authorization to sell this property for them, which they refused to give, informing them, however, that the first real estate agency that came to them with a bona fide offer at a specified price might have the property for sale. On the same day that this application for authorization to sell was sought from defendants an employé of said Baldwin & Howell called on the agent of plaintiff at the office of the latter with a view of effecting a sale to the plaintiff. The negotiations of these respective agents on the subject resulted in a form of contract being drawn up by them for their supposed parties principal, whereby it was agreed that plaintiff was to purchase the property for a sum specified in the prepared contract and to pay to defendants $1,000 as a deposit on account; that plaintiff was to have 60 days to examine title to the property, and certain circumstances were specified respecting this examination of the title and respecting the title itself, under which the $1,000 was either to be returned to plaintiff or forfeited. The contract also contained a provision that it was made subject to the approval of the owners of the property. This form being thus prepared, the employé of Baldwin & Howell negotiating the contract thereupon signed it for the defendants. The agent of plaintiff signed it in his behalf, and in conformity to its terms paid to the employé of Baldwin & Howell for the defendants the $1,000 deposit called for. Thereafter, and on the same day this contract was prepared and signed, it was presented by the said employé of Baldwin & Howell to the defendants at their office, and the $1,000 turned in there. Defendants, however, refused to approve or affirm the contract. Another agreement was prepared by them in its place as to the sale and purchase of the property differing from the first in this that it required a deposit of $2,000 instead of $1,000, and allowed only 30 days instead of 60 for an examination by plaintiff of the title to the property. While these were the only changes, they were, of course, changes in regard to material matters from the original contract. Defendant A. E. Castle who claimed to be the sole owner of the property immediately, with the assistance of other members of the firm then in the office thereof, prepared and then signed and approved this second contract as thus drawn, and delivered it to the agent of Baldwin & Howell, as embodying his terms for the sale of the property. For some reason or other this contract was never delivered to the plaintiff or his agent nor presented for his approval by the employé of Baldwin & Howell who took it, or any one else, and in fact plaintiff never learned of the facts concerning the rejection of the first contract and the making or existence of the latter one until these matters were disclosed in the testimony produced by defendants upon the first trial, some four years thereafter. On the same day that these contracts were drawn and after the preparation of the second one the employé of Baldwin & Howell informed plaintiff that the defendants demanded a deposit of $2,000 instead of $1,000 which the plaintiff forthwith made. This was the only information he did give him on the subject. He was not informed that there had been any other change in the contract originally signed or that it had not been approved by defendants or that any other contract had been drawn, but, on the contrary, was permitted to believe that in every other respect than the amount to be deposited the contract stood as originally drawn.

[1] There can be no question but what the evidence established these facts, and as a clear result therefrom it is apparent that there never was any contract as to the sale and purchase of this property entered into between the parties; no consideration for the payment of the money by plaintiff nor justification for its receipt and retention by defendants. It was clearly a payment of money made under a mutual mistake of fact, and which, under a familiar principle of law, plaintiff was entitled to recover back on discovery of the mistake. It is unnecessary to cite authorities to this proposition, which is not and cannot be questioned. It is further unnecessary to consider other evidence in the case bearing on the destruction of the records in the great fire of April 18, 1906, during the period specified in the contract for the examination of title, and its legal effect, the seasonableness of the demand of plaintiff for the return of the deposit and what the relation of the employé of Baldwin & Howell, who secured the second contract, was to the respective parties to this action in the obtaining of it. These matters would only be important in the event that there had been in fact a contract entered into between the parties plaintiff and defendants and under which the deposit was made. There was none. In fact, the action of plaintiff under his amended complaint was necessarily based on the theory of the nonexistence of such a contract and to recover a payment made in the honest, but mistaken, belief of both parties that one had been executed between them. As the evidence clearly supported this theory and the finding on it, it is immaterial to consider other evidence which might have been pertinent had a contract in fact been made.

[2] It is further contended that the plaintiff was guilty of laches in bringing his action for the recovery of the deposit. This, of course, can only apply to the present phase of the action—the recovery of this money on the ground that it was paid to defendants by mutual mistake of the parties. But plaintiff honestly believed, as is apparent from the evidence, that the original contract had been entered into between himself and the defendants, and was proceeding to enforce his right under that belief, when on evidence produced by the defendants it appeared to him for the first time during the trial that the contract on which he was suing had never been executed. The first that plaintiff learned of the mutual mistake concerning this execution of the contract was at that time. There was no fault on his part in failing to make the discovery earlier; the mistaken belief was induced by the conduct of the employé of Baldwin & Howell, who, at least after the second contract was delivered to him by defendant A. E. Castle, was the agent of defendant to communicate the fact of nonapproval of the first and the tender of the second contract in its place. Defendants, during the several years intervening between the bringing of this suit and its first trial, knew that plaintiff was depending in good faith upon the existence of a contract which they knew had never been made. No prejudice whatever resulted to them or any of them from the delay complained of. Under these circumstances there was no laches on the part of plaintiff. This was so held by the District Court of Appeal when the same point was made by defendants there in attempted justification of the ruling of the trial court denying plaintiff leave to amend—a conclusion which was approved by this court in denying a rehearing in the case.

[3] Complaint is made of a large number of rulings of the trial court on the admission and exclusion of testimony. But all that appellants do respecting these rulings is to complain generally of them and to point out where the exceptions relating to them may be found in the record. They do not assert in what respect the rulings are objectionable or make any argument concerning them. This being so, we will not examine points thus perfunctorily made. If counsel will not discuss them, neither shall we. Pigeon v. Fuller, 156 Cal. 702, 105 Pac. 976.

[4] The last point made is that the judgment is erroneous. The court entered judgment against the defendants as copartners under the firm name of Castle Bros. and against the defendant Albert E. Castle individually. It is claimed that the judgment

against the copartnership was unwarranted, and we agree with appellants on this point. It is no doubt true that the agent of Baldwin & Howell and plaintiff's agent believed that the property belonged to the partnership when negotiations respecting it were first opened up and the original form of contract prepared, and the $1,000 was turned in at the office of Castle Bros. by him when the employé of Baldwin & Howell went there with reference to an approval of the first contract. The property, however, stood in the name of Albert E. Castle, and the deposit paid in at the office of the partnership was taken by him, and he still retains it. The partnership had nothing to do in the matter except as we shall mention presently. The judgment is therefore reversed so far as it runs against the partnership of Castle Bros.

[5] This reversal shall, however, be without costs to this appellant partnership, because, while it did not own the property or receive the deposit money, its members knew that plaintiff and the employé of Baldwin & Howell believed that the partnership did own it; that they were conducting negotiations on that assumption and that the deposit was paid into the office in the belief that the firm was the proper person to receive it; that the several members of the firm were called in and conferred with the employé of Baldwin & Howell as to the terms and conditions which Albert E. Castle inserted in the second contract; they all knew—the firm and A. E. Castle—that plaintiff believed the partnership to be the owner of the property and was suing it to recover the deposit, in the honest belief that the firm had signed the contract of sale and received the money, a belief of which at no time, under the pleadings or otherwise, until some time during the first trial, did the firm disabuse him. Under these circumstances we think it only fair that the partnership should bear the burden of any expense it may have been put to in this litigation.

The judgment and order in favor of plaintiff against A. E. Castle are affirmed, with costs. The judgment and order against the partnership of Castle Bros. are reversed, without costs.

We concur: HENSHAW, J.; MELVIN, J.

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175 Cal. 693

DUNCAN v. DUNCAN. (L. A. 4536.)

(Supreme Court of California. Aug. 10, 1917.)

1. DIVORCE ⚷249(2)—QUESTION RAISED—DECREE FOUNDED ON STIPULATION.

Where decree for the wife on her cross-complaint in a husband's divorce suit recited that the disposition made of both pieces of property described in the complaint was founded on the stipulation of the parties made in open court, no question could be raised on the husband's appeal concerning the adjudication of property rights.

2. DIVORCE ⚷178—STIPULATION—JUDGMENT AS BARRING APPEAL.

Neither husband nor wife, by complying with their stipulation, made in open court in the husband's divorce suit, as to their property rights, the stipulation being carried into the decree, waived the right to appeal from other independent parts of the decree, since, to bar the right of appeal on the ground of acquiescence, the acts relied on must be such as to clearly and unmistakably show acquiescence, and must be unconditional, voluntary, and absolute, and, where a judgment or decree relates to distinct matters, acquiescence as to one will not bar an appeal as to the others.

In Bank. Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by Hamilton B. Duncan against Elizabeth Duncan. From a judgment for defendant on her cross-complaint, plaintiff appeals. On motion to dismiss. Motion denied.

Peyton H. Moore, of Los Angeles, for appellant. Oscar Lawler and A. I. McCormick, both of Los Angeles, for respondent.

SLOSS, J. Motion to dismiss appeal. The action is one for divorce instituted by the husband. The wife answered, and filed a cross-complaint, asking that a divorce be granted her. The complaint alleged that two pieces of real estate standing of record in the name of the wife were community property, and asked for a decree so declaring. The answer claimed that all of this property was the separate estate of the wife. Findings were waived, and the court made its interlocutory decree, adjudging that the defendant was entitled to a divorce from the plaintiff. It further adjudged that one of the parcels described in the complaint was the separate property of the wife, and that the other was the community property of the parties. The plaintiff appeals from the judgment.

The motion to dismiss the appeal is based upon the ground that the plaintiff and appellant has, since the taking of his appeal, accepted the fruits and benefits of the judgment which he now seeks to attack. By affidavit it is made to appear that since the making of the interlocutory decree, and since the taking of the appeal, the wife (respondent in this appeal) has been in possession of the property adjudged to be community estate, and received the rents thereof. She has, however, pursuant to the judgment and the appellant's demand, accounted to him for one-half of said rents, and has paid one-half of the installments due on a mortgage, and one-half of all other charges against said property; the other half thereof being paid by plaintiff.

[1] It appears that while the notice of appeal is general in its terms, the only points raised by appellant in his brief relate to the determination that he is not, and that defendant is, entitled to a divorce. No question is raised concerning the adjudication of property rights, and, when we come to look

at the decree, we see that no such question could be raised. The decree recites that the disposition made of both pieces of property described in the complaint is founded upon the stipulation of the parties made in open court. The payments mentioned in the affidavits of the moving party were payments called for by the terms of the stipulation thus carried into the decree.

[2] In order to bar the right of appeal on the ground of acquiescence, "the acts relied upon must be such as to clearly and unmistakably show acquiescence, and it must be unconditional, voluntary, and absolute; and, where a judgment or decree relates to two or more distinct matters or demands, acquiescence therein as to one of such matters or demands will not bar an appeal as to the others." 3 C. J. 665, 666; Coffman v. Bushard, 164 Cal. 663, 130 Pac. 425. The issues regarding the status of the property were removed from controversy by the agreement of the parties, and were thus severed from the dispute over the right to a divorce. The decree, and the stipulation carried into it, evidently contemplated that the terms of the agreement were to be carried into effect at once. It cannot fairly be held that either party, by complying with this agreement, waived the right to appeal from other and independent parts of the decree.

The motion to dismiss is denied.

We concur: ANGELLOTTI, C. J.; SHAW, J.; VICTOR E. SHAW, Judge pro tem.; HENSHAW, J.; MELVIN, J.

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175 Cal. 696

TREMBLE v. TUMAN et al. (S. F. 7071.)

(Supreme Court of California. Aug. 10, 1917.)

1. Contracts ⟹354 — Inconsistency Between General and Special Verdicts.

In an action by the owner of land against the contractor to erect a building thereon and the latter's surety, special verdicts that the contractor did not have men working on the building every working day between two dates, that on the latter date the job was taken away from the contractor and finished by the owner, and that the contractor agreed with the owner, etc., that she might complete the job, were not inconsistent with general verdict against both defendants, the contractor and his surety, abandonment being squarely an issue in the case, and the general verdict construable as a finding of such abandonment, while the special verdicts could be reconciled with the general verdict.

2. Trial ⟹359(1) — Inferences Favoring General Verdict.

All inferences and intendments favor the general verdict, so that answers to special interrogatories cannot be enlarged by inferences to vitiate general verdict.

In Bank. Appeal from Superior Court, Alameda County; W. S. Wells, Judge.

Action by C. E. Tremble against G. E. Tuman and the United States Fidelity & Guaranty Company. From a judgment for plaintiff against defendant Tuman, he appeals. Reversed, with directions to enter judgment for defendant Tuman and against the Guaranty Company.

Stetson & Koford, of Oakland, for appellant. Thomas, Beedy & Lanagan, of San Francisco, for respondent.

HENSHAW, J. Plaintiff, the owner of land upon which the defendant Tuman had contracted to erect a building, brought this action against that contractor and against his codefendant, United States Fidelity & Guaranty Company, surety upon the undertaking given by the contractor conditioned upon the due and faithful performance of his contract.

The complaint charged a failure and breach of the contract upon the part of Tuman, an abandonment of the contract, and the taking over and completion of the work by the plaintiff.

The fourteenth clause of the building contract under which the work was done made provision as follows:

> "Should the contractor, at any time during the progress of the work, refuse or neglect, without the fault of the owner, architect, or superintendent, to supply a sufficiency of materials or workmen to complete the contract within the time limited herein, or any lawful extension thereof, for a period of more than three (3) days after having been notified by the owner in writing to furnish the same, the owner shall have power to furnish and provide said materials or workmen to finish the said work; and the reasonable expenses thereof shall be deducted from the amount of the contract price."

Upon this the complaint charged in paragraph 5 of the amended complaint as follows:

> "That Mr. Tuman failed to complete the apartment house within the time provided in the contract, and refused to supply a sufficiency of materials or workmen to complete the contract within the time limited; that Mrs. Tremble notified Tuman in writing to furnish such materials and workmen, but that Tuman continued for a period of four days after notice to refuse and neglect to furnish such materials and workmen; that plaintiff thereafter immediately commenced the completion of the said contract and apartment house building, and continued so to do diligently and with all possible dispatch, and completed the same at the earliest possible date. * * *"

The complaint also charged:

> That after the construction of the building had progressed beyond the time provided in the contract for the second payment "the contractor abandoned said building, said building contract, and the construction of said building, * * * and thereafter did nothing towards the completion or construction of said building; that prior to said abandonment by said defendant Tuman said plaintiff delivered to said defendant," etc.

The Fidelity & Guaranty Company in its answer denied this abandonment. The issue of abandonment was thus directly in the case. Moreover, the jury was specifically instructed upon the question of abandonment thus:

> "You are instructed that, if you find from the evidence that the defendant Tuman abandoned his contract for the construction of the apartment house at any time before the completion

thereof by him, you may return a verdict for the plaintiff."

Special interrogatories were submitted to the jury, which, in addition to the answers thereto, returned its general verdict against both defendants. Because of the conceived inconsistency between the special verdicts and the general verdict, the court refused to enter judgment in favor of the plaintiff against the defendant bonding company and gave judgment against the contractor alone. The soundness of its ruling in this regard is the question presented on this appeal.

The special issues upon which the lower court gave judgment for the defendant corporation are the following:

> "Question: Between October 24, 1911, and November 14, 1911, did Mr. Tuman have men working on the building every working day? Answer: No.
>
> "Question: Did Mrs. Tremble or Mr. Reed take the job away from the defendant contractor and finish the building herself? If so, when did she take over the job? Answer: Yes; November 14, 1911.
>
> "Question: Did Mr. Tuman or Mr. Graves agree with Mr. Reed that Mrs. Tremble or Mr. Reed might take the job out of their hands and complete it herself? Answer: Yes."

[1, 2] There is no inconsistency between these special verdicts and the general verdict under which the jury held the bonding company liable. It is the rule that all inferences and intendments favor the general verdict, and, this being so, the answers to special interrogatories cannot be enlarged by such inferences and intendments so as to vitiate the general verdict. Clementson, Special Verdicts, pp. 134, 135. This court has said:

> "The rule is that the general verdict imports a finding in favor of the plaintiff on all the averments of the complaint material to his recovery." Merritt v. Wilcox, 52 Cal. 238.

As we have said, abandonment was squarely in issue in the case. The general verdict is to be construed as a finding of such abandonment, and it is in the light of this finding that the special verdicts are to be read and reconciled with the general verdict if reasonably possible. It is not only reasonably possible, but no difficulty arises in so doing. In narrative form the special verdicts, read in connection with the general verdict, amount to this: For nearly a month before November 14, 1911, the contractor had ceased to work on the building. Then on November 14th plaintiff, holding that the contractor has thus abandoned his contract, decided to take over the work of construction. A conference was had between the plaintiff and her architect, upon the one hand, and the contractor, on the other, and the contractor agreed to this. Such is not only the fair and reasonable construction of these special verdicts, but it is the most obvious one.

Wherefore the judgment appealed from is reversed, with directions to the trial court to enter judgment in favor of appellant and against respondent, United States Fidelity & Guaranty Company, under the general verdict of the jury.

We concur: ANGELLOTTI, C. J.; MELVIN, J.; LORIGAN, J.; SHAW, J.; SLOSS, J.; LAWLOR, J.

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175 Cal. 719

BERGER v. SUPERIOR COURT OF SACRAMENTO COUNTY. (Sac. 2623.)

(Supreme Court of California. Aug. 14, 1917.)

1. CONTEMPT 🔑54(4) — AFFIDAVIT — SUFFICIENCY.

The affidavit by which a contempt proceeding is instituted must state facts constituting the offense in order to support an adjudication of contempt.

2. INJUNCTION 🔑228 — VIOLATION — CONTEMPT—PERSONS LIABLE.

Petitioner, who was not a member of, or connected as aider or abettor or in any other way with defendant union, and not a party to the suit enjoining it and certain officers thereof from picketing plaintiff's place of business, could not be adjudged guilty of contempt for a violation of the mandate.

3. INJUNCTION 🔑228 — VIOLATION — CONTEMPT—PERSONS LIABLE.

Where an injunction runs also to a class of persons through whom the enjoined party may act, such persons, though not parties to the action, may be adjudged guilty of contempt for a violation of the injunction.

In Bank. Certiorari by Charles E. Berger against the Superior Court of Sacramento County, Hon. Chas. O. Busick, Judge, to review an order adjudging petitioner guilty of contempt. Order annulled.

Henry B. Lister, of San Francisco, and Charles B. Harris, of Sacramento, for petitioner. W. T. Phipps, of Sacramento, for respondent.

ANGELLOTTI, C. J. This is a proceeding in certiorari to review an order of the superior court of Sacramento county, adjudging petitioner guilty of contempt for violation of the terms of a final judgment of said court, enjoining certain parties therein named, "their officers, members, agents, clerks, attorneys and servants" from "picketing" or causing to be picketed the place of business of the plaintiffs in the action with any placard or device having on it words and figures as follows: "This theater is unfair to organized labor, indorsed by Central Labor Council"—or any other placard or device having words of similar import and form, or from displaying any such placard or device in front of or in the immediate vicinity of said place of business. The parties named in the judgment as so enjoined were all the defendants in the action, being a Motion Picture Operators' Union and certain officers thereof. The petitioner, Berger, was not a party to the action, and was not named in the judgment. The affidavit on which the contempt proceeding was based shows merely the following: Some five months after the judgment was given he did "picketing" in front of plaintiff's place of business, "by walking and parading back and forth in front of said premises, and carrying on his person a conspicuously displayed sash, which sash bore words conspicuously displaying in large letters, to wit: 'Unfair to organized labor.'" He was then personally served with a copy of said judgment, but nevertheless continued his acts. It was for this alleged disobedience to the terms of the judgment that he was adjudged guilty of contempt by the court and punishment was imposed. There was no allegation whatever in the affidavit, which constitutes the foundation of the contempt proceeding, to the effect that petitioner was a member of the defendant Motion Picture Operators' Union, or that there was any connection, either as aider, abettor, or in any other way, between him and any of the enjoined parties, or that he was an officer or member or agent or clerk or attorney or servant of any such party. So far as appears therefrom or from the findings of the judge of the superior court he was an absolute stranger to the proceedings, having no connection, direct or indirect, with any of the parties, and not acting in concert with any of them. The claim that, although an entire stranger to the proceedings, he was guilty of contempt, is based entirely on the fact that he had actual notice of the terms of the injunction, by reason of the service of a copy thereof upon him, and because of this actual notice is bound by its terms equally with those against whom it runs.

[1] It is thoroughly settled in this state that the affidavit by which a contempt proceeding is instituted, in order to sufficiently support an adjudication of contempt, must state facts constituting the offense. It is the complaint in such a case, and if defective in that respect, the adjudication cannot stand. So we are not concerned here with any question whether the lower court might properly infer, as mere matter of evidence, from the facts set forth in the affidavit, that petitioner was acting in concert with the enjoined parties as an agent or servant of some kind or as an aider or abettor, or in support of their claims. Such was neither the charge against him nor the conclusion of the lower court. The judgment of contempt was based solely on the fact that he did the specified thing, with actual notice that other persons were enjoined from doing the same thing by a judgment in a civil action to which he was not a party, and which did not, by its terms, prohibit him from doing anything.

[2, 3] It seems manifest on principle that this affidavit did not charge a disobedience of the judgment. The judgment enjoining was not a judgment in rem, of course, but strictly one in personam. Ordinarily only the parties to an action and their successors are bound by a judgment given in an action inter partes. In matters of injunction, however, it has been a common practice to make the injunction run also to classes of persons through whom the enjoined party may act, such as agents, servants, employés, aiders, abettors, etc., though not parties to the action, and this practice has always been upheld by the courts, and any of such parties violating its terms with notice thereof are held guilty of contempt for disobedience of the judgment. But the whole effect of this is simply to make the injunction effectual against all through whom the enjoined party may act, and to prevent the prohibited action by persons acting in concert with or in support of the claim of the enjoined party, who are in fact his aiders and abettors. As we have said, this practice is thoroughly settled and approved by the courts, and there is a fair foundation for a conclusion that persons so co-operating with the enjoined party are guilty of a disobedience of the injunction. But despite expressions in some authorities that at first blush lend support to the contention of respondent, it is generally held that a theory of disobedience of the injunction cannot be predicated on the act of a person not in any way included in its terms or acting in concert with the enjoined party and in support of his claims. Most of the cases cited by learned counsel for respondent relate to a person so included or so acting. The situation as to the law in this regard is, as we think, correctly set forth in the opinion of the New York Court of Appeals in Rigas v. Livingston, 178 N. Y. 20, 70 N. E. 107, in which it was said:

> "It is true that persons not parties to the action may be bound by an injunction if they have knowledge of it, provided they are servants or agents of the defendants or act in collusion or combination with them. * * * Authorities illustrating the rule might be cited to an indefinite extent, but the underlying principle in all cases of this class, on which is founded the power of the court to punish for the violation of its mandate persons not parties to the action, is that the parties so punished were acting either as the agents or servants of the defendants or in combination or collusion with them or in assertion of their rights or claims."

This was approvingly quoted by the same court in People, etc., v. Marr, 181 N. Y. 463, 74 N. E. 431, 106 Am. St. Rep. 562, 3 Ann. Cas. 25, and we think it is unquestionably correct. Even in the federal cases relied on as establishing that under the practice of the federal courts an absolute stranger to the proceedings having actual notice of the injunction may be punished as for a contempt in the event of action by him in contravention of its terms, it is recognized that his contempt is not for disobedience of the injunction. The only theory upon which such decisions declare he may be held at all under such circumstances is set forth in the opinion in Garrigan v. United States, 163 Fed. 16, 89 C. C. A. 494, 23 L. R. A. (N. S.) 1295, where it was said that "he is not chargeable for breach or violation of the injunction, in the well-recognized sense of those terms applicable to parties," and therefore no remedial contempt proceedings, "for the benefit and enforcement of the rights" of parties to the suit could be maintained against him, and that the proceedings and conviction must be regarded as "distinctly criminal in their nature," and solely "to punish for acts in contempt of the power and dignity of the court." We think it manifest there can be no disobedience of an injunction by a person who is not included in the mandate of the court, either by name or as a member of a class of persons which is properly included, and who is not acting as an aider and abettor of one so included in the assertion of his claims. The injunction here was not one prohibiting the picketing of plaintiff's premises by any and all persons, one running against the whole world, as it were, but simply one prohibiting *certain* persons and classes of persons from picketing, and only those who may fairly be held to be included in its terms can *disobey* the same.

We are entirely at a loss to see how, there being no disobedience of the injunction charged, as we have shown, there can be any conviction of contempt based on the theory that the affidavit or complaint shows acts "in contempt of the power and dignity of the court," acts, as referred to in Garrigan v. United States, supra, in defiance of the "command of the court," and constituting an "interference with or obstruction of the administration of justice." There was no "command" of the court addressed to petitioner in any way, by name or as a member of any class, and it was not charged that he was acting in concert or connection with or in aid of any party to whom the command was addressed. How then can it be said that he was acting in defiance of the command of the court, or in any way interfering with the execution of that command against those to whom it was addressed? Nor can we see in the matters charged any interference with "the process or proceedings of a court." Code Civ. Proc. § 1209, subd. 9. We are firmly of the opinion that the only logical view in such cases as the one at bar is that we have set forth from Rigas v. Livingston, supra, and that for such acts as are described in the affidavit herein there can be no adjudication of contempt unless the same constitute a disobedience of the injunction.

A similar question was presented to us in the matter of Otto et al. v. Superior Court, S. F. No. 8121, which was decided from the bench on March 5, 1917, against the claim here made by respondent. The views of the court were then orally stated, and no written opinion was filed.

As we have already suggested, what we have said bears not at all upon the right of a court, in a case where contempt is sufficiently charged by complaint or affidavit, to make such reasonable inferences from the evidence as to the character in which a party acted as are warranted by such evidence. But in this case, as already shown, we have neither charge nor findings by the lower court of matters showing what amounts to a disobedience of the injunction by the petitioner.

In view of our conclusion on this point, other points made by petitioner need not be considered.

The order adjudicating petitioner guilty of contempt and prescribing a penalty therefor is annulled.

We concur: SLOSS, J.; SHAW, J.; VICTOR E. SHAW, Judge pro tem.; MELVIN, J.; HENSHAW, J.

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175 Cal. 740

MAUNDER v. POZZO et al. (L. A. 3993.)

(Supreme Court of California. Aug. 16, 1917.
Rehearing Denied Sept. 13, 1917.)

1. TRIAL 🔑68(1)—REOPENING CASE.

Refusal after submission to reopen case for newly discovered evidence is not error, it being cumulative, and there being no satisfactory showing that it could not have been procured at the trial by exercise of due diligence.

2. MASTER AND SERVANT 🔑208(1)—ASSUMPTION OF RISK—EXPRESS AGREEMENT.

Where the employer expressly assumes obligations as to safe place to work, the employé does not assume all the risks ordinarily incident to his employment.

Department 2. Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Action by R. S. Maunder against Emil A. Pozzo and another, partners as the Pozzo Construction Company. Judgment for plaintiff, and defendants appeal. Affirmed.

Haas & Dunnigan, of Los Angeles, for appellants. Wilbur Bassett and W. G. Van Pelt, both of Los Angeles, for respondent.

MELVIN, J. Defendants appeal from a judgment for damages for personal injuries and from an order denying their motion for a new trial.

Defendants were general contractors engaged in the erection of a building. Plaintiff was a subcontractor who had undertaken the construction of the stairs in the building. While he was employed about his task he was struck by a piece of brick falling from the floor above the temporary stairway upon which he was at work. The result was an injury which caused the loss of one of plaintiff's eyes. Judgment was given in his favor for $1,200.

Before the findings were signed, but after the taking of testimony had closed, and the litigants on both sides had rested, defendants moved to reopen the case for the taking of further testimony relative to the defense of the statute of limitations. The court denied the motion, and such denial is specified by appellant as error. The complaint set forth the date of the alleged accident as the 10th day of January, 1912, while in the answer it was described as having happened during the month of December, 1911, and a defense was pleaded which was based upon the alleged bar of subdivision 3 of section 340 of the Code of Civil Procedure; the complaint having been filed on January 4, 1913. The court found that the accident happened on the 10th of January, 1912, and this finding was supported by the testimony of plaintiff, together with that of his daughter and the statement of his physician, who said that he first treated plaintiff's injury on January 11, 1912. Defendants offered testimony in conflict with that of plaintiff and his witnesses, but the newly found evidence described in the affidavits supporting the motion to reopen the case was offered upon the theory that the records of the plumbing inspector's office showed completion and inspection of the rough plumbing in the building prior to the date mentioned by plaintiff, and, that other evidence proved that one Sherrin, admittedly an eyewitness to the accident, did no work in the building after the rough plumbing had been finished.

[1] But the newly discovered evidence was merely cumulative. It is a matter of common knowledge that records of inspection of plumbing are kept, and of course, if these records tended to contradict the plaintiff in the present case, due diligence on the part of defendants would have developed that fact before the close of the trial quite as easily as at a later time. Because, therefore, the offered evidence was cumulative, and because defendants did not satisfactorily show that they could not have procured it at the trial by the exercise of due diligence, there was no error committed by the trial court in the denial of the motion to reopen the case for further trial. Estate of Walker, 148 Cal. 162, 82 Pac. 770; Chalmers v. Sheehy, 132 Cal. 459, 64 Pac. 709, 84 Am. St. Rep. 62; Wood v. Moulton, 146 Cal. 317, 80 Pac. 92.

The evidence showed that certain men in the employ of defendants were removing rubbish consisting partly of broken bricks from a floor of the building. Plaintiff, who had constructed a rough stairway, was carrying a timber up to the floor where the men were at work when a piece of brick was impelled into the space left for the stairway. The fragment struck him and inflicted the injury described in his complaint.

[2] The court found that, upon plaintiff's objection that he was in danger when other workmen were employed on the parts of the building above him, defendants promised to exercise care and provide a safe place for him to work. It is evident from his pleading that plaintiff did not rely solely upon the duty imposed by law upon defendants to provide him with a safe place in which to perform his labor, but he alleged and the court found that his employers had expressly assumed such obligation. Under the pleading and proof there was no sufficient support to the theory of defendants that plaintiff had assumed all of the risks ordinarily incident to his employment, and that the accident was the result of one of such usual dangers. The proof of the removal of the rubbish in the manner and at the time shown was, under all of the circumstances, sufficient to support the finding of negligence.

No other alleged errors require discussion. The judgment and order are affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

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175 Cal. 737

SARGENT v. PALACE CAFÉ CO.

(L. A. 3981.)

(Supreme Court of California. Aug. 16, 1917.)

1. CORPORATIONS 🔑312(4) — DIRECTORS — DEALING WITH PROPERTY TO OWN ADVANTAGE.

S., a director, had been owner of all the stock of a corporation, but two shares were held respectively by K. and W. solely to qualify them as directors. S. entered into a contract with K. whereby he agreed to sell him all the stock of the corporation. Pursuant to the agreement the shares were transferred to K., part of the purchase price being paid in cash, and notes given by the corporation for the balance. All the directors and stockholders shared in the transaction whereby the notes were given, but S. and K. were the only real parties in interest. *Held*, in an action by the assignee after maturity of one of the notes, that the note was not subject to the rules making void actions of directors in dealing with the property or credit of a corporation to their own advantage.

2. CORPORATIONS 🔑467 — NOTES — ACCOMMODATION INDORSEMENTS.

A private corporation having a capital stock may with the consent of all directors and stockholders become the accommodation indorser of a commercial paper, provided corporate creditors are paid.

3. CORPORATIONS 🔑467—NOTES—INDEBTEDNESS OF STOCKHOLDER.

A corporation may execute its note for the personal indebtedness of its sole stockholder, and no one but the creditors can complain.

4. CORPORATIONS 🔑316(1) — TRANSACTIONS BETWEEN DIRECTORS AND CORPORATION — PURCHASE OF DIRECTORS' PROPERTY.

A sale to a corporation by its directors of their own property at their own price is not void at the instance of the corporation itself if at the time of the transaction the directors were the only stockholders and only beneficiaries.

5. CORPORATIONS 🔑99(2)—PRIVATE CORPORATIONS—PURCHASE OF DIRECTORS' PROPERTY.

The principle that a corporation may issue all of its stock in payment for property which it has received is applicable to a case where the individual who is the alter ego of a corporation transfers his entire holding of stock to another.

Department 2. Appeal from Superior Court, San Diego County; W. A. Sloane, Judge.

Action by James Sargent against the Palace

Café Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Lane D. Webber, of San Diego, and Walter T. Gunn, of Danville, Ill., for appellant. Morganstern, McGee, Henning & Hendee, of San Diego, for respondent.

MELVIN, J. James Sargent, as assignee of his brother, Nicholas F. Sargent, successfully sued on a promissory note given by the defendant corporation. The assignment was made after the maturity of the instrument. Defendant appeals from the judgment.

The defendant interposed three defenses to the action. The first was improper execution of the note by the corporation founded upon the claim that the payee was one of the three directors who pretended to authorize the execution of the note; that without his vote and that of other interested persons the resolution of authorization could not have been passed; that in his fiduciary capacity as a director he could not deal with the corporation to his own advantage; and that, the contract being void, the note based upon it should not be enforced. The second defense was alleged lack of consideration for the note, and the third that the note was merely an accommodation paper, the issuance of which by the corporation was ultra vires.

[1] It clearly appears from the testimony and the findings that Nicholas F. Sargent had been the owner of all of the stock of the Palace Café Company (a corporation), but that two shares were held respectively by Otto Kessler and J. E. Wadham solely to qualify them as directors. At the time of the transaction in question Nicholas F. Sargent and Otto Kessler entered into a contract whereby the former agreed to sell to the latter all of the stock of the corporation for $17,000. Ten thousand dollars of this sum was paid in cash, and the balance was evidenced by two promissory notes of the corporation, one for $3,000, which was subsequently paid, and one for $4,000, the note involved in this litigation. The sole consideration for the execution and delivery of said note was the sale of the stock of the corporation in part payment for which the note was given. While it is true that all of the directors and stockholders shared in the transaction whereby the notes were given, Sargent, who owned the stock before the transfer, and Kessler, who owned it afterwards, were both parties to the negotiation, and were the only real parties in interest, the Palace Café Company being a "one-man corporation." The purchaser and seller of the business preferred to act through the corporation; no one was deceived; the bargain was partly consummated even to three payments of interest on the note here in litigation; and we find no proper excuse in the record for the attempt to interpose technical defenses to the payment of the note executed as a part of the purchase price.

It appears that after the payment of the installment of $10,000 in cash Mr. Sargent caused all of his stock, 198 shares, to be transferred to Mr. Kessler. Upon the latter's request, one share was issued to Mr. Wadham and one to Mr. Sargent, and while thus representing the owner of all of the stock as mere nominal stockholders, these two joined with him in the unanimous action of the directory by which the notes were made and given by the corporation. To hold that under such circumstances they were subject to the rules making void the actions of directors in dealing with the property or credit of a corporation to their own advantage would be to sacrifice substance to form, justice to artifice. Shortly after the formal action by which this note came into existence, the plaintiff and Mr. Wadham resigned from the directory, surrendered their stock, and were succeeded by two other persons selected by the owner of the "one-man corporation." When the note for $3,000 was paid, Mr. Sargent was not a stockholder, nominal or otherwise, nor did he hold such relation to the corporation when the payments of interest were made on the note here involved.

[2, 3] This is not the case of an officer and director of a corporation as such, dealing with himself as an individual. It is one in which, there being no adverse interest of creditors involved, all of the officers and all of the stockholders dealt with Sargent as an individual and issued to him a note the consideration of which, so far as he was concerned, was his parting with something of value. The rule covering transactions of this sort is thus stated by a distinguished writer:

> "The theory of a corporation is that it has no powers except those expressly given or necessarily implied. But this theory is no longer strictly applied to private corporations. A private corporation may exercise many extraordinary powers, provided all of its stockholders assent and none of its creditors are injured. There is no one to complain except the state, and, the business being entirely private, the state does not interfere. * * * There is no rule of public policy which prohibits a private corporation having a capital stock from becoming the accommodation indorser of commercial paper, provided such indorsement is made with the knowledge and assent of all the directors and stockholders, and provided corporate creditors are paid. * * *
>
> "A corporation may execute its note for the personal indebtedness of its sole stockholder, and no one but the creditors of the corporation can complain."

Cook on Corporations (7th Ed.) vol. 1, c. 1, § 3.

[4] This statement of the law, supported by abundant authority, is a complete answer to all of appellant's contentions. This court has repeatedly held that a sale to a corporation by its directors of their own property at their own price is not void nor voidable at the instance of the corporation itself if at the time of the transaction the directors were the only stockholders and the only beneficiaries of the trust. Kellerman v. Maier, 116

Cal. 416, 48 Pac. 377; Garretson v. Pacific Crude Oil Co., 146 Cal. 184, 79 Pac. 838; Smith v. Martin, 135 Cal. 247, 67 Pac. 779; Turner v. Fidelity Loan Concern, 2 Cal. App. 122, 83 Pac. 62, 70.

[5] This court has also decided that it is quite within the power of a corporation to issue all of its stock in payment for the property which it has received (Whitten v. Dabney, 171 Cal. 621–624, 154 Pac. 312; Lum v. American Wheel & Vehicle Co., 165 Cal. 657, 133 Pac. 303, Ann. Cas. 1915A, 816), and where, as here, the individual who is the alter ego of a corporation transfers his entire interest to another person the same principles apply. Nor is there any failure of consideration because the corporate entity as such does not receive assignment of the purchased stock for which it becomes bound to pay. Indeed, the practical result of a transfer of all of the stock of a corporation to itself might be to leave it without officers to conduct its affairs. In the matter of consideration as well as that of corporate power the court will equitably look through the mere form to the reality of the transaction, and will treat it, in a case like this, as a sale and purchase of a business by individuals.

The judgment is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

175 Cal. 691

ATOLIA MINING CO. et al. v. INDUSTRIAL ACC. COMMISSION et al. (L. A. 4978.)

(Supreme Court of California. Aug. 10, 1917.)

1. Master and Servant 🔑375(1) — Workmen's Compensation Act — Scope of Employment.

Where it was the approved custom in mines similar to defendant's for departing shift of shot firers to return within a reasonable time after firing shots, where all had not exploded, to investigate and prevent injury to next shift, and miner was injured after having returned for that purpose after hours, by negligence of mine guard in performance of his duties, injury grew out of and occurred in the course of his employment within Workmen's Compensation Act (St. 1913, p. 279), since custom manifestly makes for protection of owners in lessening liability of injury from unexploded blasts by oncoming shifts, and miner was in performance of duty to his employer.

2. Master and Servant 🔑373—Workmen's Compensation Act—Cause of Injury.

Where miner, in returning to his home after hours, is shot by mine guard who believed he was justified in so doing, he is entitled to recover under Workmen's Compensation Act, since he was injured by negligent performance by fellow employé of an act within general scope of his duties.

In Bank. Proceedings under the Workmen's Compensation Act by J. D. Mason to obtain compensation for personal injuries, opposed by the Atolia Mining Company, the employer, and the California Casualty Company, the insurer. Compensation was awarded and a writ of review prayed by the employer and the Insurance Company against the Industrial Accident Commission. Award sustained, and writ discharged.

Gavin McNab and Oliver B. Wyman, both of San Francisco, for petitioners. Christopher M. Bradley, of San Francisco, for respondent.

HENSHAW, J. Review to consider an award of the Industrial Accident Commission. J. D. Mason was employed as a miner by the Atolia Mining Company, petitioner herein. He was working on a night shift. His hours of labor ended at 2 o'clock a. m. It was a part of the duty of the men of the shift to drill blasting holes, load them with explosives, and fire the shots at the end of their work. Upon the morning of his injury he and two of his fellows had drilled 14 holes, had loaded them, and when upon the point of leaving the mine had lighted the fuses and ascended the shaft about 100 feet, where they waited, listened, and counted the explosions, as it was their duty to do. They counted but 12 explosions instead of 14. The evidence shows that it is the mining practice under such circumstances either to report the missed shots to the superintendent, or for the miner to safeguard the property and prevent injury to the next shift working in the same place, by making investigation and doing something toward remedying the conditions. It is further in evidence that in small mines such as the Atolia the established mining practice is for one or another of the departing shift which has fired the shots to investigate, and, if possible, remedy the dangerous situation left by the charges which have not exploded; also that because of the smoke, gas, and fumes caused by these explosions it is prudent to wait a reasonable length of time for their dissipation before visiting their locality. Under these circumstances it is shown that plaintiff, an experienced miner, who declares that it was "second nature for me to do those things; I have done it all my life," went to his tent about 200 yards away, washed his face and hair, for he worked bareheaded, and returned to the mine. His fellows on the shift lived a longer distance from the mine, and they went on home. He revisited the scene of the explosions about 20 minutes after. His investigation disclosed that all of the shots had been fired, which not infrequently occurs, as sometimes two or more of them go off simultaneously, and the detonation sounds as one discharge. So he ascended the shaft, and, carrying his miner's light, proceeded to his tent. Guards had been placed around the mine to prevent theft of its ores ("high-grading," as this form of theft is called by the miners). While he was walking to his tent he was, without warning and while still carrying his light, shot from the rear by one of the guards employed by defendant.

The contention under this writ is that, his hours of labor having ceased, even though he was engaged in protecting his master's property, he was but a volunteer and cannot recover. Again it is contended that the evidence shows that Mason was the victim of a premeditated and unjustifiable assault, and therefore cannot recover.

[1] Upon neither of these grounds can this award be annulled. The recognized custom of miners, carried out with the knowledge and approval of the mine owners (a custom which manifestly makes for the protection of the mine owners themselves, in lessening the liability of injury from unexploded blasts by the oncoming new shift, ignorant of the conditions), becomes in all essentials for this award a part of the duty of the miner in the performance of his work, and his injuries thus resulting grew out of and occurred in the course of his employment.

[2] Upon the second proposition, while unquestionably it was a heedless and reckless thing for the guards thus to have shot a man without more investigation as to his character and intentions than was here shown to have taken place, yet every legal presumption favoring innocence, the argument will not be sustained that these guards deliberately perpetrated an assault to commit murder. To the contrary, it will be held that the man who fired the shot, himself the chief guard, believed that the circumstances justified him in so doing, and that thus he was acting within the line of his own employment, and under this view Mason, having been injured by the negligent performance of an act within the general scope of the duties of the employé inflicting the injury, is entitled to his recovery.

The award is sustained, and the writ discharged.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; SHAW, J.; MELVIN, J.; LAWLOR, J.

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175 Cal. 724

In re EMERSON'S ESTATE. (L. A. 5012.)

(Supreme Court of California. Aug. 15, 1917.)

1. Executors and Administrators 🔑122(3) — Fees — Expenses in Making Application.

A special administrator is not entitled to credit on his account for railroad fare and expenses in journeying from another state wherein he lives for the purpose of procuring the appointment.

2. Executors and Administrators 🔑122(3) — Fees — Expenses in Making Application.

The special administrator was not entitled to expenses incurred in going from this state to Iowa to withdraw moneys there belonging to the estate, where he did not show a necessity for the trip.

3. Executors and Administrators 🔑52 — Money Due from Administrator — Evidence.

The unsupported testimony of administrator that there was an oral agreement between him and deceased under which he was discharged from liability for money due deceased being self-serving and the testimony of oral admissions against interest by a man since deceased *held* insufficient to show that the $9,000 owed by the administrator to the brother had been accepted by him in payment of all demands against the administrator, in view of Code Civ. Proc. § 2061, subd. 4, providing that oral admissions of a party ought to be received with great caution.

4. Witnesses 🔑133 — Competency—Transactions with Decedent.

An administrator who is sought to be charged with a sum of money borrowed by him from deceased cannot testify that such sum was received in settlement of a long-standing indebtedness on the theory that he is not seeking to enforce a claim against the estate, but merely resisting a claim made by the estate against him, in view of Code Civ. Proc. § 1880, subd. 3, forbidding the admission in evidence upon a claim against the estate of a deceased of any matter occurring before his death.

Department 2. Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

In the matter of the estate of Thomas B. Emerson, deceased. Appeal from an order and decree of the court of probate settling the first and final account of Collins P. Emerson, special administrator. Reversed, with instructions.

James W. Miller, John E. Carson, and Hanson, Hackler & Heath, all of Los Angeles, for appellants. Irwin, Smith & Rosecrans and Fred N. Arnoldy, all of Los Angeles, for respondent.

HENSHAW, J. This is an appeal from an order and decree of the court in probate settling the first and final account of Collins P. Emerson, special administrator of the estate of Thomas B. Emerson, deceased. Thomas B. Emerson died intestate, a resident of the county of Los Angeles. Collins P. Emerson is his brother. He came from Iowa to California, applied for and received letters of special administration upon the estate of the deceased. He qualified and acted. Thereafter he sought, under section 1339 of the Code of Civil Procedure, to procure the probate of a will of his brother which he averred was destroyed after his death. Failing in this, he moved for a new trial, and appealed from the order denying it. This appeal is considered in Estate of Emerson, 170 Cal. 81, 148 Pac. 523. For the present purpose it is sufficient to say that he produced a writing which he asserted was a copy of this destroyed will. His testimony concerning it was thoroughly discredited, and it is perhaps unnecessary to add that by its terms he was a beneficiary of his brother's bounty to the extent of one-third of his estate. The widow of Thomas B. Emerson, deceased, then applied for general letters of administration, and her application was opposed by this special administrator, who also petitioned for general letters. The widow received the appointment, and the special administrator filed his first and final account of his special administration of the affairs of the estate.

The account as first presented set forth the amounts of money belonging to the estate of his brother which he had drawn from several banks, and it is noteworthy that in each instance he failed to report the amounts over the face of these bank accounts, which he had received from the banks by way of interest in addition to the principal sums. He only did so after his account as first presented was attacked for these as well as for other reasons. His explanation as to why he had failed to charge himself with these additional moneys thus received as interest may be given in his own language:

> "I charged myself with $1,575.68 from the City National Bank of Clinton, Iowa. That was not the exact amount which I withdrew from that bank. There was $1,912.88. I left out the interest in my account. I do not know why I did not charge myself with it. I received the money."

[1] Upon filing his revised or amended account these interest charges were, of course, included, and they were all allowed but one, for the sum of $48.04, which unquestionably and admittedly he received by way of interest upon his intestate's account in the German-American Trust & Savings Bank. Respondent, indeed, admits that the failure of the court to charge the special administrator with this amount was due to oversight, and, this being recognized, we may pass on to certain other minor items before we come to a consideration of the principal sum in controversy. These minor items are two. The special administrator claimed, and the court allowed him, a credit of $116.13 for railroad fare and expenses in his journey from Cedar Rapids, Iowa, where he lived, to California, made for the purpose of applying for letters of special administration. The expense was incurred before he was appointed and for the purpose of procuring the appointment. Had the services of the special administrator proved even of great value to the estate—and here quite the reverse is true—this would not have been an allowable item. This was expressly decided in Estate of Byrne, 122 Cal. 260, 54 Pac. 957, 1015, and the item should therefore have been disallowed.

[2] The second minor item, also allowed by the court, is for $143.36 for railroad fare and expenses incurred by the special administrator in going from Los Angeles to Cedar Rapids to withdraw the moneys belonging to the estate on deposit in banks at Cedar Rapids, Iowa, and at Clinton, Iowa. Not one word is shown as to the necessity for this trip. It is plainly inferable, the special administrator having personal interests of his own in Iowa, that the trip was made in furtherance of those interests, and the benefit of the estate was made an excuse therefor. But aside from this, it is beyond controversy that everything which the administrator did, he could have done by requests upon these banks to transfer these deposits upon forwarding to them certified letters showing his authority in the matter of the estate, and such, as this court is well advised, is the usual practice of prudent administrators. To bolster up this claim the administrator testifies that:

> On this trip "I succeeded in getting $257.25 as interest from the bank. I also succeeded in finding a contract on some property that my brother owned, which I formerly owned and sold him, and afterwards I sold it for him and the contract had not been fulfilled; the payments had not been made, and the balance on that payment was $495.00. That contract I got."

The remainder of his evidence dealt with inconclusive journeys and inquiries which he made, prompted, as he says, "for the reason that there was a large shrinkage in my brother's estate that he was reputed to be worth." It strains credulity to believe that he succeeded in getting $257.25 as interest from the bank because the president was his "personal friend," and not because it was interest due on the deposit. It would require more convincing evidence to lead us to believe that the president of a national bank thus juggled with and illegally dissipated its depositors' funds. But it is quite noteworthy in this connection to observe that this $257.25 interest which he thus secured as fruits of his journey east was a part of the money which he did not account for, which he would have retained if his first account had not been attacked, and which, upon attack, he admitted belonged to the estate. And finally, whatever may have been the eastern shrinkage in the value of his brother's estate, it suffered a very marked and decided shrinkage at the special administrator's own hands in California, as we shall see when we pass on to the next item.

[3] The heirs of the deceased sought to charge this special administrator with $9,000, admitted by him to have been borrowed from his brother shortly before that brother's death. The special administrator sought to relieve himself from this, not under any denial of the receipt of these moneys, which he admitted, but by his own unsupported testimony that after having received these moneys there was a business settlement of his affairs with his brother, who was and for a long time had been owing him money, under which settlement the $9,000 was accepted by him in payment of all his demands against his brother, so that at the time of his brother's death neither stood indebted to the other in any sum whatsoever. This unsupported evidence of an oral agreement, made in the presence of nobody and evidenced by no writing, the court accepted to the fullest extent and ruled accordingly. It did this, we regret to state, in violation of positive law and against the overwhelming weight of the counter showing.

This subject-matter, as indicated, falls under two heads: First, the weight of the evidence itself, assuming its admissibility; and, second, the question of its admissibility. First as to the weight of evidence. Preliminarily it is to be noted that the evidence is self-serving, in that it exonerates the witness giving it from a liability to the estate of his deceased brother in the sum of $9,000 with interest, which liability, saving for his own testimony, is fixed against him. Second, the evidence is of oral admissions against interest by a man whose lips are sealed in death. What then does the law say of such evidence (assuming now its admissibility)? The Code of Civil Procedure declares (2061, subd. 4) that the evidence of oral admissions of a party ought to be received with caution by the jury. In Mattingly v. Pennie, 105 Cal. 514, 39 Pac. 200, 45 Am. St. Rep. 87, this court in bank said, "no weaker kind of testimony could be produced." Again in bank (Austin v. Wilcoxson, 149 Cal. 24, 84 Pac. 417) this court has said:

> "It is not stating it too strongly to say that evidence so given under such circumstances must appear to any court to be in its nature the weakest and most unsatisfactory."

Says Lord Romilly, Master of the Rolls, in Crouch v. Hooper, 16 Beaven, 182:

> "It is always necessary to remember that in these cases, from the nature of the evidence given, it is not subject to any worldly sanction, it being obviously impossible that any witness should be convicted of perjury for speaking of what he remembers to have been said in a conversation with a deceased person."

Therefore, proceeds the learned judge, he has never experienced any difficulty in rejecting and disregarding such evidence. And, as Vice Chancellor Van Fleet of New Jersey said (Lehigh Coal & Navigation Co. v. Central Railroad Co., 41 N. J. Eq. 167, 3 Atl. 134), speaking of such witnesses as this special administrator:

> "It is obvious that their position in the case makes it the duty of the court to examine their testimony with a jealous care, and to scan it with a watchful scrutiny. They are masters of the situation, and swear without fear of contradiction. * * * The safe administration of justice demands that in such a case there should be either satisfactory corroborative evidence, or that the evidence of the living party should be so full and convincing as to persuade the court of its entire truth."

And, finally, the text-writers show that the courts are all in accord in thus weighing such evidence, and here suffice it to cite 2 Moore on Facts, §§ 877, 1150, 1166; 1 Taylor, Evidence, § 648; Wigmore on Evidence.

What, then, is the evidence of the special administrator, and what is the weight to be accorded to it under these well-settled rules? In its essence it was that as a result of business transactions had with his brother in 1870, his brother owed him $2,800. "My brother was owing me from a transaction dated back in 1870." As to this transaction he and his brother never had a settlement, and this principal sum with accrued interest formed the basis of the claim which he put forth in his account, and the basis of the oral settlement which he says he had with his brother just previous to the latter's death. Second, he conveyed to his brother farming lands for $5,800 for a debt owed by him to his brother. This conveyance was made subject to an oral agreement with his brother, whereunder his brother promised when he sold these lands to restore to this administrator all over the amount of $5,800 which he might receive therefor. Third, in some evasive and not wholly comprehensible way, he owned a half interest in a bank, which nominally his brother owned, and which his brother had sold at a profit. So much for the special administrator's evidence in outline. Upon the other hand, it was shown by the records of the deceased, by letters in the voluminous correspondence which had passed between the two, that this administrator was and for long years had been a most persistent and importunate borrower of moneys from his brother, evidencing in many instances his debts to his brother by his promissory notes; that from time to time his brother forgave him these debts and returned the notes with no dollar of principal or interest paid thereon, in one instance the amount of the notes so returned with interest easily amounting to $10,000. This administrator testifies that he paid every dollar of those notes, but upon examination it appears that he meant that he paid them because they were canceled against this vague indebtedness existing since 1870, and even as to that indebtedness, originating, as he says in 1870, and resting for its authenticity solely upon the testimony of this witness, when asked, "Your brother owed you at that time (1870)?" he replied, "No, he owed me—yes sir, practically owed me $2,800." And elsewhere he declares that his brother's "indebtedness arose in 1874 in the sum of $2,800." It has been said that during all of these 35 or 40 years he was a persistent and importunate borrower from his brother. The evidence is abundant that his brother forgave him these debts. There is not the slightest evidence that he ever paid any of them, saying as he said he paid them by canceling them against his brother's indebtedness to him. Not only do his letters abundantly bear this out, but he testifies that he borrowed from his brother "hundreds of times," though elsewhere he declares in flat contradiction to this statement that "it is not a fact that I was a constant borrower from my brother up to his death." But more significant than this is the circumstance that his letters, covering all of these years, requesting and even begging his brother to lend him money, speaking of his financial difficulties and the importunate demands of his creditors, never in one instance (saving as hereinafter will be noted) contained the slightest claim, reference, or suggestion that his brother owed him anything, and when interrogated upon this the record shows the following:

> "If your brother was owing you at that time, why did you not say something to him about his indebtedness? A. Well, that is a matter which we have always left unsettled."

Moreover, repeatedly in his letters to his deceased brother are found such expressions as this from one of them:

"I trust that I may be spared in health to fully pay you every cent with interest that I owe you." "I hope to be in shape to return, before 1910 rolls round, a portion of these loans."

The one instance, to which reference has just been made, is the following: The special administrator testified that in the spring of 1911 he did write to his brother, suggesting a settlement of this long-standing open account between them, and formal demand is made upon the administratrix and heirs to produce this letter which the witness says he mailed to his brother and to which he asserts he received a reply. The response by the contestants is that they had no such letter. Then the special administrator produced a carbon copy of it which was admitted in evidence.

Here it may not be amiss to remember that he produced a similar copy of the destroyed will of his brother, by which he was devised one-third of the estate. This letter is as follows:

"Now Brother Bent, I think that we should get our matters fixed up and know where we stand in event that we should meet with some misfortune. We should fix the Seville sale which you made up, as the matter has never been settled. You have the books and know the amount which was credited on them just before we closed out the bank. I think that the notes which you have and also Collins' paper should be canceled and returned to me and credited on this account, which would leave a balance due me on the deal. You also have some notes which belong to me and which you hold the security for."

What the special administrator says was the reply to that letter is here given:

"Los Angeles, Cal. May 2, 1911.

"Bro. Coll—If I am as well as I am now will start for Cedar Rapids about the 15th and as we are all liable to meet with accidents so we should be prepared to a certain extent, so you will find your notes inclosed which I have canceled and paid in full. I shall also cancel the other note of $3,896.00 that is in safety box in bank; also the one against Collins P. Emerson, Jr., paid. Hope weather will be settled by the time I get there. May this find you all well, and don't worry about me, as I am far from being on my last legs. Benton."

It is most significant that this so-called reply makes no reference to the letter requesting a settlement, makes no reference to a settlement, and upon the face of it is but another example of the dead brother's generosity in forgiving the special administrator's debts and returning to him the evidences of them. But in addition to the fact that the notes thus returned with interest upon them certainly equaled $10,000, we find the witness still importuning his brother to lend him money, and never intimating that the moneys which he received and hoped to receive are anything other than loans. Thus on December 30, 1912, after he has begged his brother to lend him money, his brother sends him $8,000 "to square him up," and asks him whether this will be sufficient. In reply the witness writes an effusive letter of thanks, and continues:

"Now you ask me the question whether the amount sent ($8,000) was sufficient to square up. In reply would say that I could use five hundred more, but I am ashamed to ask it. That would place me out of the clutches of every individual and leave my indebtedness entirely with you."

Upon this he is sent another thousand dollars, and these two sums make up the $9,000 in controversy.

It has been said that while the administrator's claim is based upon an indebtedness of $2,800, which he asserts was owing to him by his brother in 1870, and which with accrued interest compounded he further says makes up the indefinite amount which he declares his brother owed him, he also testified to a land transaction whereby his brother took over the title to a farm which the witness owned, for $5,800, agreeing to pay him when he disposed of the farm the difference between $5,800 and the selling price; that his brother sold the farm for something like $9,000, which left about $3,000 due to the witness. Here again it is noteworthy that while he testifies that he never had a settlement with his brother over the $2,800, he did make over this farm to him "for the sum of $5,800 in some of our settlements." Elsewhere he testifies that his deceased brother did not pay him for the farm—

"except in the way I owed him and turned the farm over to him for what I was owing to him. I deeded the farm to him in partial payment for what I was owing to him."

Therefore this transaction, too, had its origin in a debt due from the witness to his deceased brother. The nature of the transaction, according to the special administrator's testimony, has been sufficiently indicated. The agreement, if there were an agreement, was oral. It was entered into in 1904, and the deceased brother, who thus took the title to the ranch, sold it for $8,600, taking a mortgage for $7,800 on account of the purchase price. The interest on this mortgage it appears indisputably was year by year turned over to this witness, not as his due, but as loans from his brother, who took the witness' promissory note for $429 for several years, this sum representing the interest upon the mortgage. In the end the deceased gave back to his brother these canceled notes without payment thereon. It was not until September 20, 1912, that, after foreclosure of this mortgage for $7,800, the deceased received through his attorney in Iowa $9,078.65, which was deposited to his credit in an Iowa bank. It was $9,000 of this money which the special administrator secured as a loan, and which is the amount here in controversy. It is the difference between this $5,800 and this $9,000 which he says was his. But this witness was with his brother after the proceeds of the foreclosure had been placed to the latter's credit, and there was introduced in evidence a statement which the special administrator admitted was in his deceased brother's handwriting. That statement showed "Paid C. P. E. (Collins P. Emerson) for farm $8,500" instead of $5,800. It showed the proceeds from the farm and the expenditures on account thereof, in short it was a complete statement of profit and loss in connection with the purchase, and it showed a loss to the deceased, which by his statement he threw off, of $1,039.70, and in the deceased's own handwriting it finally bore the declaration, "Settlement between C. P. and T. B. E." Notwithstanding the witness' denial that there had been such settlement, it will not be denied that the statement has evidentiary value.

The third element of indebtedness lies in the fact that the deceased brother purchased an interest in a bank in Miles, Iowa, and was for a time in partnership with Mr. Miles, the original owner of the bank. In time Mr. Miles sold his interest to Thomas B. Emerson for about $12,000, the bill of sale of all that interest running to Thomas B. Emerson, with no reference whatsoever to Collins. Notwithstanding the fact that this special administrator's account charges upon an unsettled indebtedness due to his brother from him in 1870, which had increased by 1874 to $2,800, his evidence upon these matters is that he was a secret partner with his brother in this purchase, and that his money, this $2,800, was a part of the purchase. Even more than that, he says that when his brother came to buy out Mr. Miles for $25,000 (though the purchase price declared in the bill of sale and transfer from Miles was about $12,000), he took his payment of one-half of the $25,000, $12,000, in a valise and gave it to his brother. Here again the writings of the brother are in flat contradiction to the statement. Thus he writes to his brother:

> "Bro. Coll. How will you be fixed for money about the first of March? I may need a little. I shall make Mr. Miles a proposition when we come to settle up, to give or take. Don't think he will sell, but should he do so will want to pay him every cent and I might want $10,000, at least what is coming to me."

Later he writes to his brother to the same effect, saying that he will not want to exceed $3,000, but asking him to be prepared to let him have that should necessity require it, and he adds:

> "Smith wrote me saying he would loan me $3,000, but I don't want to borrow."

Thus it appears that the debt founded upon the interest in the bank is quite as shadowy and unsubstantial as that asserted to be founded upon the sale of the farm.

This review of the evidence serves to establish the nature of the claims and demands which the special administrator declared existed against his brother and which form the basis of the settlement of their open account, dating back to 1870.

What, then, was that settlement? The evidence of it is the wholly uncorroborated testimony of a conversation had with his brother when the latter was on his deathbed. The special administrator gives two versions of this oral settlement had with his brother by which his admitted debt of $9,000 was extinguished. He was present at his brother's house in Los Angeles when that brother was in bed with his last illness. While there the latter's—

> "wife went down town, and while she was gone we had an opportunity of talking our matters over, and I said to him, 'Benton, how will we arrange for this money you have let me have?' He said, 'I owe you on the Estherville land deal a little over $3,000. I have paid to you, turned over to you in May when I was in Cedar Rapids, your notes, which was applied upon my account, and together with this $6,000; will wipe out what I owe you and what you owe me.' He says, 'Is that satisfactory?' I says, 'Entirely so.'"

Some weeks after, testifying again, he gives the following version:

> "I said to him, 'How do you want this matter fixed that we have, this money that you have let me have?' I said, 'Do you want me to give a note?' He said, 'No, you don't need to give me any note.' He said, 'I owe you on the Seville Manufacturing matter, and I owe you on the Estherville farm, and what you owe me on the $9,000 one should offset the other.' He had turned me over some notes on May 11, 1903, and he said, 'Is that satisfactory?' and I said it was."

The "Seville Manufacturing matter" is the asserted original $2,800 indebtedness which we have heretofore considered. The "Estherville land deal" involves the asserted debt of $3,000 due from the deceased to this plaintiff which, as before shown, is wholly disproved by the deceased's own records, as is the evasive testimony of the special administrator concerning his interest in the bank. A slight, but unnecessary, computation, moreover, would show that, treating the $2,800 as a debt existing and continuing to exist since 1870, and compounding interest upon it, the total amount would not equal the moneys, aside from the $9,000, which this special administrator had received from his brother, which moneys were clearly gifts, though described by the special administrator as being partial settlements of their affairs. But this is by no means all. After his brother's death he made out to and in his brother's name his promissory note for $6,000, apparently upon the theory that he might be able to cancel the remaining $3,000 of the $9,000 indebtedness by his testimony of his deceased brother's indebtedness to him in the sum of $3,000 on the "Estherville farm deal." He not only writes this note and hands it to the widow, but enters it as an asset of the estate, and only upon the settlement of his account does he seek to avoid its legal effect by this showing previously considered of the settlement with his brother, accompanied by the following extraordinary explanation of the reasons for which he gave the note: His brother was dead; the widow brought to him a large envelope containing a number of his papers; it contained notes, and he sat down and proceeded to make a list of them. The widow left the room and returned. "She had a blank note with her, and she says, 'This is $6,000,' and I started in to make it up, and after reading the account—to make it in ten years without interest. Of course, I supposed it would be settled at any time, and I started in to make it, and she said, 'No,' she said, 'Don't make it that way.' She was crying, feeling bad, and I turned around and made it payable when the Benton county farm was sold. That is the history of the note." This note he handed to the widow. This is all the explanation offered for his execution and acknowledgment of an indebtedness of at least $6,000, made without the slightest pressure or coercion, and made immediately after he testifies there had been a complete settlement with his brother, under which he owed his brother nothing—a settlement which itself was made neither in the presence nor with the knowledge of any other person.

The testimony of this special administrator stands alone. It is not corroborated in the slightest particular, for the testimony of his wife to the effect that she, too, understood that her husband was to have all the sale price of the farm over $5,800, is negligible, and on the face of this record it is plain that this evidence is inherently improbable, and is as thoroughly discredited as it is discreditable.

[4] The second consideration touching the admissibility of the evidence requires but brief consideration. Subdivision 3, § 1880, of the Code of Civil Procedure, in terms forbids the admission of evidence in any proceeding against an executor or administrator upon a claim or demand against the estate of a deceased person as to any matter or fact occurring before the death of such deceased person. Eliminating from consideration for the moment the fact that the man who was admittedly debtor to the estate in the sum of $9,000 happened also to be its special administrator, apart from that relationship the case presented is an admitted claim due to the estate, the validity of which the debtor seeks to destroy by a showing of an oral settlement and extinguishment of that claim. The theory of respondent, adopted by the court, is that the special administrator was not, within the meaning of the statute, seeking to enforce a claim against the estate, but was merely resisting a claim made by the estate against himself. Such is entirely too narrow a construction to be given of the statute. His method of resistance is to assert a counterclaim, and the mere fact that he is satisfied to ask for a cancellation of his indebtedness without asserting a right to recovery under this settlement in no wise militates against the fact that his evidence is essentially the evidence of a counterclaim. He declares that he had such a counterclaim; his account shows that it was a counterclaim upon a debt of $2,800 arising in 1870, and with the lips of his brother sealed by death he is permitted to testify to a settlement exonerating him from liability upon a claim barred for years by the statute of limitations. This case in principle is controlled by Moore v. Schofield, 96 Cal. 486, 31 Pac. 532, and Stuart v. Lord, 138 Cal. 672, 72 Pac. 142. It appears therefore that the court in probate erred as seriously in admitting the evidence as it did in giving weight to it, and for both reasons the decree appealed from is reversed, with instructions to the court in probate to disallow the contested items and to charge the special administrator with the amounts of them.

We concur: LORIGAN, J.; MELVIN, J.

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175 Cal. 711

BOWDEN v. BOWDEN. (L. A. 3985.)

(Supreme Court of California. Aug. 13, 1917.)

Contracts 🔑111 — Agreement to Resume Marital Relations—Validity.

Where a wife sued for divorce, and, on her agreeing to dismiss the action, her husband promised to pay her $3,000 should he at any time in the future do any act which would be a cause for divorce, the agreement providing that the $3,000 was payable on the date of any such act, but that no part should be paid to the wife should she give the husband any cause for divorce, such agreement was valid and based on good consideration.

Department 2. Appeal from Superior Court, Los Angeles County; Willis I. Morrison, Judge.

Action by Ottillie K. Bowden against Rolandus F. Bowden. From judgment for plaintiff and an order denying new trial, defendant appeals. Judgment and order affirmed.

John C. Stick, of Los Angeles, for appellant. Trippet, Chapman & Biby, of Los Angeles, for respondent.

HENSHAW, J. Differences had arisen between Ottillie K. Bowden, plaintiff herein, and Rolandus F. Bowden, defendant herein, which resulted in an action for divorce commenced by the wife against her husband in October, 1909. At the time they held community interests in property, real and personal. While this action was pending, on November 4, 1909, the spouses entered into an agreement whereunder the community property was divided between them. The wife agreed to dismiss the pending action for divorce and together they agreed as follows:

> "The undersigned, Rolandus F. Bowden, does hereby promise to pay his wife, Ottillie K. Bowden, the sum of three thousand dollars, should he at any time in the future cruelly treat, abandon, desert, or cease to live with the said Ottillie K. Bowden, as husband and wife, or do any other act which would be a cause for a divorce; the three thousand dollars to be due and payable on the date of any such cruel

treatment, desertion, or abandonment on the part of Rolandus F. Bowden of his wife to take place or when he should commit any act giving her cause for a divorce: Provided, however, that no part of this sum shall be paid to the said Ottillie K. Bowden should she cruelly treat, desert, or abandon or cease to live with the said Rolandus F. Bowden or do any other action which would be a cause for a divorce."

Thereafter, on the 13th day of May, 1910, the wife commenced a second action for divorce against her husband upon the ground of cruelty. The husband defaulted, an interlocutory decree in favor of the wife was entered, and it became final on March 18, 1912. Thereafter, on February 13, 1913, the wife commenced this action, demanding payment of $3,000 under the written agreement above set forth. The husband answered, the cause was tried, judgment was entered for plaintiff, and the husband has appealed.

Upon the appeal the single proposition urged is that a contract such as this is against the policy of our law under the decisions of this and other courts. The California cases upon which reliance is placed are Loveren v. Loveren, 106 Cal. 509, 39 Pac. 801, and Pereira v. Pereira, 156 Cal. 1, 103 Pac. 488, 23 L. R. A. (N. S.) 880, 134 Am. St. Rep. 107. Loveren v. Loveren is not even remotely in point. There the agreement between the spouses was in the nature of a collusive arrangement, based upon a division of the community property, under which it was to be made easy for one of the spouses to secure a divorce from the other, and this court very properly declared that:

> "The authorities are uniform in holding that any contract between the parties having for its object the dissolution of the marriage contract, or facilitating that result, * * * is void as contra bonos mores."

In the Pereira Case, while the facts are somewhat different, the principle controlling the construction of the agreement is, and is said to be, the same as that declared and above quoted from Loveren v. Loveren. The wife had brought her action for a divorce upon the ground of extreme cruelty against her husband. While the action was pending the parties became reconciled and resumed marital relations. Then on a certain date, in pursuance of negotiations which were pending, they entered into a contract which recited the pendency of the action for divorce, declared an express waiver by plaintiff of her grounds of divorce and an agreement to dismiss the action, and it then proceeded to declare:

> "That if the husband should thereafter so conduct himself as to give the wife a new cause of action for divorce, and she should establish the same in a subsequent action against him, * * * the husband should thereupon pay to the wife $10,000, which should be a full satisfaction, settlement, and discharge of all claims of the wife in such action 'for alimony, costs, counsel fees, support, maintenance of herself, homestead, homestead right, property, and benefit of every kind and character;'" still further, that the wife (regardless of any increase in the fortune of the husband) waived, abandoned, and relinquished all claims and demands by her on her part in or to any or all of the husband's property or property rights, whether then owned or thereafter acquired.

The opinion points out, amongst other things, that this amount was wholly disproportionate to the value of the husband's fortune, that for certain grounds of divorce the wife could justly be awarded much more than the $10,000, and that the existence of such a contract could not be a deterrent to the husband from violating his marriage vows and giving his wife cause for divorce, but would only "encourage him to yield to his baser inclination and inflict the injury." Wherefore, says this court, quoting from Loveren v. Loveren, supra:

> "Any contract between the parties having for its object the dissolution of the marriage contract, or facilitating that result, * * * is void as contra bonos mores."

Of exactly the same character is the case of Newman v. Freitas, 129 Cal. 283, 61 Pac. 907, 50 L. R. A. 548, which therefore calls for no more than this mention.

Manifestly, then, these cases cannot be successfully invoked to defeat the contract here before us; for precisely what, in its essence, is this contract? Postnuptial differences had arisen between the spouses which had resulted in an action for divorce brought by the wife against the husband. They were the owners of community property, real and personal. The husband sought a reconciliation, and it was accorded him. The law favors such reconciliation, unless it be effected upon terms expressly forbidden or upon terms expressly disapproved, or, in other words, unless the term be against the express mandate of the law or against public policy. Did the wife in this contract surrender any of her marital rights? None whatever. Did she in any way make it easier for her husband to inflict on her any marital wrongs? Not in the least. Did she extend, actually or impliedly, any inducement to him to commit such wrongs, either upon the theory that she would get a divorce because of them, or that he would be less mulct financially than, saving for the contract, he would be (which is the Pereira Case) if he did commit such wrongs? Nothing of this appears in the contract. In brief, what the contract does do is to reserve to the wife without impairment all of her marital rights, to reserve to the husband without impairment all his marital rights, to waive upon the part of neither their legal or equitable rights for any wrong which either might commit against the marriage status, but simply to impose upon the husband the duty, in addition to that which the law imposes, of observing his marital vows and obligations, or, failing to do so, to pay to the mistreated wife something in addition to that which the law would award her in her action based upon such mistreatment either for divorce or for separate maintenance. It is impossible to read this contract in any other light. So far from the consideration being base, it is worthy and commendable. It neither asks nor invites the husband to do a wrong. It endeavors to deter him from doing wrong by making him liable to a penalty in addition to that imposed by law if he does do wrong.

On principle, therefore, we hold that neither the consideration nor the purpose of this contract is base, but that both are worthy, and that, whatever may be said touching the invalidity for lack of consideration only of such a contract, if it be an antenuptial contract, it is not without consideration where a wife has suffered such wrongs from her husband and has condoned his offenses, has resumed with him the marriage relation, and re-established the marriage status, all of which the law favors, upon condition, not improperly imposed by virtue of sad experience, that he shall not again offend. Such a wife has found the legal obligation to be insufficient. It would indeed be a harsh rule which after such an experience should say that she may not invoke other aids in her efforts to induce her husband thereafter to remain true to his marriage vows. The cases that hold that an antenuptial agreement to this effect is without consideration are based upon the view that at the outset of the relationship the law itself imposes the prescribed duty upon both spouses, and that therefore there is no consideration where one spouse agrees that if he does offend in the future he will pay a penalty in addition to that which the law may exact. We need not discuss nor even collate these cases, as they are not addressed to the situation here before us. But, upon the other hand, cases which are addressed to the situation here presented are numerous, and overwhelmingly they uphold the validity of contracts such as this. It may be well to consider briefly a few of them. Thus in Terkelsen v. Peterson, 216 Mass. 531, 104 N. E. 351, the husband and wife had separated because of his faults. An agreement was entered into through the medium of a trustee looking to the resumption of marital relations, and under this agreement it was covenanted that the husband would comport himself in all respects as it was his duty to do, and that, in the "event of his drinking or ill treating the wife resulting in her leaving him again, he would be liable for her comfortable maintenance and support." The Supreme Court of Massachusetts, in an opinion written by Rugg, Chief Justice, held that the consideration for such an agreement was not the performance by either the husband or wife of their marital duty, nor was it invalid as an agreement to separate, but that it would be sustained as an agreement for the re-establishment of the family and to make better provision for the wife's support in the event that the husband again offended. In Duffy v. White, 115 Mich. 264, 73 N. W. 363, the Supreme Court of Michigan was called upon to consider the same question. There the husband discovered his wife's infidelity and had separated from her. Afterward, by mutual agreement, the parties resumed marital relations under a written trust in pursuance of which a portion of the separate property of the wife was conveyed by her through a trustee to the husband, the trust providing that out of the income the husband should deposit monthly to his wife's account one-half of the income, and the remaining one-half should be used for the maintenance of their minor child and for himself. Later the wife eloped with another man, and subsequently sought to avoid this agreement upon the ground that its consideration was without validity. The Supreme Court of Michigan declared:

> "It has been held in this state that a conveyance of property by a husband to his wife in consideration of the discontinuance of a meritorious suit for divorce, and the resumption of marital relations, was upon a valid and sufficient consideration; and the same has been held elsewhere, almost without exception. * * * In Burkholder's Appeal, 105 Pa. 33, the contract provided among other things, for the payment of certain sums in case of a subsequent separation. The case arose after the termination of the marriage by death, and the contract was enforced."

The court said upon this point:

> "The provision in the contract in the present case is peculiar. It does not offer any premium to the wife to bring about a separation. On the contrary, it places a penalty upon it. So it cannot be said to be a contract 'looking to and favoring a separation' at her instance. As to the husband, it does not enlarge his right to a separation beyond that given by law, if we construe the contract in the light of surrounding circumstances. A proper inference from its provisions, and the circumstances under which it was made, justify us in a restriction of the term 'flagrant misbehavior or desertion' to such as would be ground for divorce. If this claim does not enlarge his rights beyond those existing by law, we do not see how it can be said that the provision was illegal and void as against public policy."

Changing the sex of the spouses, the language of the Pennsylvania case has direct applicability to the present one. In Hite v. Hite, 136 Ky. 529, 124 S. W. 815, the husband, when intoxicated, beat and maligned his wife, giving her ground for divorce. She had separated from him and resumed marital relations, he promising to make suitable provision for her support if his course of conduct again compelled her to leave him. This agreement was based upon her waiving or condoning his past offenses and living again with him as his wife. The agreement was in writing, and, says the Supreme Court of Kentucky:

> "This was ample consideration to support the contract. * * * It [the law] favors the reconciliation of husband and wife. A contract for the re-establishment of a ruined home is one which equity is swift to approve. Whether the contract in question is contrary to public policy is not to be determined from one clause of it, but from the whole instrument. The contract as a whole does not tend to produce es-

trangement between husband and wife. They were already estranged. The contract brought them together, and, taken as a whole, it is in aid of the marital relation, and is therefore not opposed to public policy, but in accord with it. Thus its execution is sanctioned by the law, and it should be upheld, unless appellant's contention that he was deceived in its execution is supported by the proof."

In Montgomery v. Montgomery, 142 Mo. App. 481, 127 S. W. 118, the Supreme Court of Missouri was called upon to consider an antenuptial contract entered into, of course, before offense given by the husband and before the possibility of reconciliation or condonation. The Supreme Court of Missouri upheld this contract, holding that it was not without consideration, notwithstanding that it obliged the husband to do no more than the law itself declared he should do, and that such a contract would not tend by its very nature to create an estrangement between the spouses, and it based its conclusion upon cases such as the one before us, declaring that as to those cases, where the end is the reconciliation and the re-establishment of a ruined home, "contracts looking to that end are guarded with zealous care." In Howell v. Howell, 42 Okl. 286, 141 Pac. 412, there had been a disagreement between the spouses and a threat of divorce. A reconciliation was effected under contract which declared:

> "It is understood that the consideration of this agreement is that said Minnie H. Howell return and again assume the marital relations with William T. Howell, intending to live with him as long as he shall abstain from the use of alcoholic beverages."

The familiar grounds of invalidity were urged against this contract, but the Supreme Court of Oklahoma declared:

> "As we view it, the contract was in contemplation of, and for the very purpose of, effecting a reunion rather than of providing or looking forward to another separation; in fact, it had this result, and for three years thereafter they lived together. Having this view of the contract, it is not open to the objection urged."

In Reamey v. Bayley, 11 Atl. 438, the Supreme Court of Pennsylvania held that a bond given by a husband in pursuance of a postnuptial agreement between him and his wife, which agreement stipulated that the bond, whose penalty only became due on the contingency of the husband not treating his wife kindly and faithfully, is not void, and upon maltreatment of the wife by the husband payment of the bond may be enforced by action. In Sommer v. Sommer, 87 App. Div. 434, 84 N. Y. S. 444, the Supreme Court of New York held that, a contract looking to reconciliation and a resumption of the marriage relations which provided that, if the husband should desert the wife or fail to support her, she should immediately become vested with her dower interest in his realty, is not against public policy, but in harmony with it. Bishop (1 Bishop, Marriage and Divorce, § 76) declares the principles of the adjudications to be that:

> "An agreement to abandon the pending divorce suit and renew cohabitation, being in aid of marriage, accords with public policy, and the courts will enforce a promise founded upon it as a consideration."

Under the conviction that enough has been said to establish the validity of this agreement and to render unnecessary any further discussion, the judgment and order appealed from are affirmed.

We concur: LORIGAN, J.; MELVIN, J.

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175 Cal. 699

In re LOYD'S ESTATE (two cases).

HICKS v. LOYD et al. (two cases).

(L. A. 4488, 4489.)

(Supreme Court of California. Aug. 11, 1917.)

1. Executors and Administrators 🔑358(2)—Sale of Land—Appeal—Statute.

Under Code Civ. Proc. § 963, subd. 3, granting right of appeal from an order for sale or conveyance of real property, the objection to an appeal from an order of the probate court directing the executors of a decedent to sell all of the lands owned by him in another state, and to transmit the proceeds to California for distribution, that the order was not appealable because not an order to sell real estate, but an order requiring the executor to execute the will or show cause why they should not be removed, was frivolous.

2. Executors and Administrators 🔑138(8)—Power to Convert Realty—Election by Devisees.

An election by all the devisees of realty to take the realty in kind destroyed the power of the executors under the will to convert the land into money.

3. Descent and Distribution 🔑4—State Law Controlling Disposition of Decedent's Realty.

Lands owned by a California decedent in the state of Iowa at the time of his death were controlled as to their disposition by the laws of Iowa, the laws of the state governing the transmission of title to realty within the state, save only when and as the laws of the state in terms permit their modification.

4. Descent and Distribution 🔑47(1)—Omitted Child—Statute.

Under Civ. Code, § 1307, providing that a child omitted from testator's will has the same share in the estate as if testator had died intestate, an omitted child cannot take under the will, since he is permitted to take at all because he has been omitted therefrom.

5. Conversion 🔑1, 2—Equitable Conversion—Statute.

Civ. Code, § 1338, providing that, when a will directs conversion of real property into money, such property and all its proceeds may be deemed personal property from the time of testator's death, is merely declaratory of the doctrine of equitable conversion, and as to lands in Iowa of the decedent, a resident of California, is governed by the laws of Iowa.

6. Conversion 🔑15(2)—Equitable Conversion—Constructive Conversion.

Where the will of a California decedent provided that his Iowa lands should be sold and the proceeds distributed, there was not an actual conversion, but a constructive conversion merely; the distributees all electing before sale to take the property in kind.

7. CONVERSION 🔑2, 22(3)—EQUITABLE CONVERSION—RECONVERSION.

Where the will of a California decedent provided that his Iowa realty should be sold and the proceeds distributed amongst his 12 children, and the children and the widow, who had elected to take, not under the will, but under the laws of California and of Iowa, elected to take the property in kind, the Iowa court confirming the election and decreeing title to the Iowa lands in the children and the widow, the children and the widow effected a reconversion wholly superseding the equitable conversion of the Iowa lands by the will, which reconversion destroyed all powers of sale vested in the executors, and left the beneficiaries the owners of the whole legal and equitable title; the law controlling being the Iowa law.

8. EXECUTORS AND ADMINISTRATORS 🔑138(1)—POWER TO SELL REALTY—TITLE ACQUIRED BY EXECUTOR.

Where testator conferred power to sell lands on his executor, regardless of who acquired title to the land, the executor took exactly the quantity of interest which the purpose of his trust required, and in whomsoever title vested, whether it was allowed to descend by operation of law, or was transferred to the executor, or descended to the devisees, it was for the purpose specified by the will.

9. CONVERSION 🔑22(3)—EQUITABLE CONVERSION—RECONVERSION.

The reconversion of a decedent's realty directed by his will to be sold, that the proceeds may be distributed, may take place at any time during the period of constructive conversion and prior to actual conversion by sale, and is effected when all the parties beneficially interested, by some explicit and binding action, elect to take the property in its original form.

10. CONVERSION 🔑22(3) — RECONVERSION — PARTIES.

The joinder of a pretermitted heir with the devisees of the will in the reconversion of real estate converted by the will into personalty is unnecessary.

11. CONVERSION 🔑22(3) — EQUITABLE CONVERSION—RECONVERSION.

Where there is a failure of all parties in interest to join in an election to take in kind lands directed by testator to be sold for distribution, no reconversion takes place, and the equitable conversion worked by the will still stands, but the failure is no bar to a subsequent reconversion by act of all the parties in interest before sale.

12. EXECUTORS AND ADMINISTRATORS 🔑35(1)—REMOVAL—SUSPENSION OF ORDER BY APPEAL.

Where executors appealed from an order of the probate court, but the court nevertheless revoked their letters testamentary for failure to observe the order, the revoking order was illegal, since the appeal suspended its operation.

In Bank. Appeal from Superior Court, Los Angeles County; W. H. Thomas, Judge.

Petition by Charles Hicks against Elizabeth J. Loyd and others, executors of the estate of George E. Loyd, deceased, to compel the executors to sell all the lands owned by deceased in a certain state at the time of his death, etc. From an order directing the executors, and from decree removing them for disobedience of the order, the executors appeal. Order and decree reversed.

M. F. Harrington, of O'Neill, Neb., R. C. Noleman and Hammack & Hammack, all of Los Angeles, and M. W. Frick, of Rockwell City, Iowa, for appellants. Valentine & Newby, of Los Angeles, and T. W. Duckworth, of San Bernardino, for respondent.

HENSHAW, J. By the first of these appeals this court is asked to review an order made by the court in probate, in terms directing the executors of the estate of George E. Loyd, deceased, who died testate, who at the time of his death was a resident of the state of California, and whose will was probated in this state—

"to sell all of the lands owned by said deceased at the time of his death in the state of Iowa, and to transmit the proceeds arising from the sale thereof to the county of Los Angeles, state of California, for distribution in accordance with the laws of the state and in pursuance of the last will and testament of said George E. Loyd, deceased. Be it further ordered that, if the said executors fail, neglect, or refuse to sell the said land situated in the state of Iowa owned by the said George E. Loyd at the time of his death, they show cause in this court on or before the 1st day of September, 1915, at 10 o'clock a. m. of that day, why they should not be removed as executors of the last will and testament of George E. Loyd, deceased, and why an administrator with the will annexed should not be appointed in their stead to execute the power of sale," etc.

The appeal in L. A. No. 4489 is from the decree of the court removing the executors for disobedience of the order above quoted. The questions presented upon both appeals are interrelated. Wherefore one consideration will do for both.

[1] Respondent's objection addressed to appeal in L. A. No. 4488, that the order itself is not appealable because "it is not an order to sell real estate, but is an order requiring the executors to proceed to execute the will or to show cause why they should not be removed," is frivolous. Section 963, subd. 3, Code of Civil Procedure, grants a right of appeal from an order "against or in favor of directing the partition, sale or conveyance of real property," precisely such order as was here made.

George E. Loyd, deceased, married in the state of Iowa and accumulated property therein. Twelve children were born to him, and they and his wife, who also survived him, are all recognized as devisees under his will. Eight or nine years before his death Loyd and his wife moved to California, and here resided until his death. He acquired property in this state; it was his domicile, and his will was here probated. Besides his property in California he left properties of large value—some of it real estate—in the state of Iowa. Charles Hicks, not mentioned in the will, entered proceedings in the estate to have his status declared as that of a bastard son of the deceased, who, in writing, signed in the presence of a competent witness, had acknowledged himself to be the father of the child. He prevailed in his effort (Estate of Loyd, 170 Cal. 85, 148 Pac. 522), and was thus instituted as a pretermitted heir of the deceased, since his name was not mentioned, nor was he in any way referred to in the will.

[2, 3] All of the property in California testator gave, devised, and bequeathed to his wife, with the provision that whatever remained at the time of her death should be divided amongst his children. All of the property in the state of Iowa the will directed should be "sold by my executors for such price as they deem proper, at public or private sale, without order or orders of sale from any court, but subject to approval of the court having jurisdiction of such matters in the county wherein such property is situated." The proceeds arising from this disposition of the Iowa properties were to be distributed equally amongst his 12 children. The realty in Iowa was and is of large value. The widow made her election to take not under the will, but under the laws of California and the laws of Iowa. This determination gave her an estate in the real property in Iowa. All the devisees of the Iowa real property under the will, including the widow, elected to take the Iowa lands in kind. This election, if good, destroyed the power of the executors under the will to convert these lands into money. When the executors were cited to show cause and ordered to make the sale of the Iowa real estate, they answered, with evidence, establishing this election of the devisees and the widow to take in kind. But it being conceded, or at least not successfully questioned, that the laws of Iowa do not recognize any right of inheritance in a pretermitted heir, as do the California laws, and as under no ancillary proceedings could Charles Hicks by inheritance succeed to any interest in the Iowa real estate as such, its disposition being unquestionably controlled by the laws of that state, it is at once apparent that it became greatly to the interest of Charles Hicks to cause the Iowa real estate to be sold and the proceeds of the sale brought to California for distribution, as thus only, if at all, he could obtain a share of it. To this end, therefore, these proceedings were directed in the probate court, and resulted, so far as that court was concerned, in the success of his efforts. Thus having sufficiently outlined the matter in controversy, we may proceed to a consideration of the merits.

1. The status of Charles Hicks as a pretermitted heir is completely determined by section 1387 of the Civil Code, and his rights as such pretermitted heir are wholly defined by sections 1306 and 1307 of the same Code. Section 1306 deals with the rights of a child born after the making of a will; section 1307 with the rights of an omitted child (or children of a deceased child). But in their essence the rights are identical, so that it is for convenience merely that they have been defined in separate sections. Section 1307 deals specifically with the rights of Charles Hicks, but in both sections the language of the Code defining those rights is practically identical, so that the constructions put by this court upon 1306 have direct applicability upon the question of the meaning of 1307. By 1306 the after-born child "succeeds to the same portion of the testator's real and personal property that he would have succeeded to if the testator had died intestate." By 1307 the omitted child "has the same share in the estate of the testator as if he had died intestate, and succeeds thereto as provided in the preceding section," the language of which we have just quoted.

[4] It is manifest that upon reason alone such a child does not and cannot take under the will, since he is permitted to take because he has been omitted from the will. The intent of the testator as expressed in such a will is clear. It is to give his property to others to the exclusion of the omitted heir, and this intent is not affected by the fact that the omission to name the pretermitted heir was or was not intentional. As the omitted heir, in contemplation of the law entitling him to inherit, was never in the testator's mind, by no stretch of imagination can it be said that the testator designed any of the provisions of his will to apply to that heir. In accordance with this reasoning our cases all hold, as necessarily they must, that such an heir does not and cannot take under the will, but takes (wherever by will the testator has disposed of all of his property) in opposition and in hostility to that will. Pearson v. Pearson, 46 Cal. 609; Estate of Wardell, 57 Cal. 484; In re Grider, 81 Cal. 571, 22 Pac. 908; Smith v. Olmstead, 88 Cal. 582, 26 Pac. 521, 12 L. R. A. 46, 22 Am. St. Rep. 336; Painter v. Painter, 113 Cal. 371, 45 Pac. 689; Estate of Smith, 145 Cal. 118, 78 Pac. 369. In Smith v. Olmstead, supra, it is said:

> "We are unable to construe these sections otherwise than as declaring that the pretermitted child succeeds immediately by operation of law to the same portion of the testator's real property as if no will had been made; that as to such portion the testator is to be regarded as dying intestate, and its succession is directed by law, and not by the will."

In the later case of Estate of Smith, supra, the same unescapable doctrine is declared, and it is said:

> "And, so far as such child is concerned, the will is to be considered as not existing."

Respondent herein advances the utterly fallacious argument that this doctrine and rule of construction have been changed by amendments added to sections 1306 and 1307 in 1905 (St. 1905, p. 606), which amendments, identical in both sections, are found in the addition to each of its final sentence. But by this amendment the rule that, so far as concerns a pretermitted child, "the will is to be considered as not existing," was not and could not have been changed. The amendment merely changed the embarrassing conclusion to which this court had been forced, that the rights of such pretermitted child to real property were not divested by the sale of such property, even though the sale in all other respects was legal and valid.

[5] 2. The doctrine of equitable conversion is fully recognized in this state. Section 1338 of the Civil Code is but declaratory of that equitable doctrine, in saying:

> "When a will directs the conversion of real property into money, such property and all its proceeds must be deemed personal property from the time of the testator's death."

And such cases as In re Walkerly, 108 Cal. 627, 41 Pac. 772, 49 Am. St. Rep. 97, Fatjo v. Swasey, 111 Cal. 628, 44 Pac. 225, and Bank of Ukiah v. Rice, 143 Cal. 265, 76 Pac. 1020, 101 Am. St. Rep. 118, recognize the doctrine to the fullest extent. Nevertheless, bearing in mind that the land which is to be or is not to be affected by the application of this doctrine is land in the state of Iowa, that the will provides for the approval of any sale of the Iowa lands by the appropriate courts of that state, and that even without such provision the descent, devise, distribution, in short, the whole question of the devolution of title of Iowa lands, is wholly subject to the jurisdiction of the Iowa courts under the Iowa law, consideration must be paid to that law in reviewing the facts touching conversion, nonconversion, or reconversion which are here presented and argued. Preliminarily, however, it may be said that so well established is the doctrine that the laws of the state govern the transmission of title to land within the state that in passing we need do no more than direct attention to such cases as McCormick v. Sullivant, 10 Wheat. 202, 6 L. Ed. 300; Clarke v. Clarke, 178 U. S. 186, 20 Sup. Ct. 873, 44 L. Ed. 1028; Clopton v. Booker, 27 Ark. 482; Van Wickle v. Van Wickle, 59 N. J. Eq. 317, 44 Atl. 877; Guarantee Trust, etc., Co. v. Maxwell (N. J. Ch.) 30 Atl. 339; Lynch v. Miller, 54 Iowa, 516, 6 N. W. 740. It may be added that no principle of law is better founded nor more firmly established than the foregoing, and that it is subject to no modification saving when and as the laws of the state, locus rei sitæ, in terms permit such modification. It is idle for respondent to argue that such a modification is found in a statute of Iowa which provides, touching the execution of wills alone, that the laws of Iowa will recognize a will as having been duly executed provided it be in writing, subscribed by the testator, and be executed in the mode prescribed by the law of the place of execution. Iowa Code, § 3309. For it is too plain to call for discussion that this section of the Iowa Code was designed merely to give authenticity and validity to wills in so far as their execution is concerned, and has not the slightest reference to the meaning and construction of such wills.

[6] In setting forth the facts touching the asserted conversion and reconversion of this Iowa real estate, it will be assumed that an equitable conversion was worked by virtue of the language of the testator's will, for this assumption, as we shall see, is borne out by the law of Iowa. Nevertheless, it was not an actual conversion, but a constructive conversion merely, and all the devisees of this land, the 12 children and the widow—all the parties, in short, who were recognized by the will—elected to take the property in kind. They did this not only before there was any actual conversion by sale (for such actual conversion has never taken place), but even before Hicks filed his petition which resulted in the orders and decrees here under review. After the admission to probate in California of the will of the deceased it was likewise duly admitted to probate in the state of Iowa in the district court of Monona county, where these lands were situated, and within a very short time after the death of Loyd the devisees of these lands elected to take the land as land. In due time the widow joined therein. The written election so to take was filed in the district court of Monona county, Iowa, and that court on the 3d day of September, 1913, entered its judgment and decree confirming this election, and decreed full and complete title to these lands in the 12 children and the widow. By this decree Charles Hicks, at all times a resident of and domiciled within the state of Iowa, was denied any interest in or to any part of these lands. Thereafter certain of the children, owners of undivided interests in these lands and tenants in common with the others, instituted their action in partition and to quiet title, and made Charles Hicks a party defendant, under allegations asserting his claim of ownership to a portion of the land and denying the validity of his claim. Charles Hicks appeared and asserted title, and at the time when the probate court in California made the orders here in question this action to quiet title was pending in the Iowa court, which subsequently entered its decree conclusively adjudicating that neither Charles Hicks nor the executors of the last will and testament of George E. Loyd, deceased, had any title or interest in or to the Iowa lands, and fully establishing the title to these lands in the widow and the 12 children. This last statement of fact is not made as having any bearing upon the determination, which must here be based upon facts existing at the time the orders appealed from were made. But it tends to establish the improvident nature of those orders of the probate court of California in attempting to force the executors to do what the courts of Iowa would not have recognized, and to punish them by ousting them from their offices for their refusal to obey the first order directing them to sell the lands, from which order they had duly taken their appeal.

[7, 8] These, then, are the facts, and under them not the slightest doubt can be entertained but that the parties in interest and

owners of this land under the will of the deceased effectuated, as they had the right to effectuate, a reconversion which wholly superseded the equitable conversion, which destroyed all power of sale vested in the executors and left the beneficiaries under the will the owners of the whole legal and equitable title. The law controlling the foregoing statement is, of course, the Iowa law, but the decisions of the Iowa courts leave the matter in no doubt. Thus in Atlee v. Bullard, 123 Iowa, 274, 98 N. W. 889, the question presented was whether the will effectuated an equitable conversion and whether the election of the devisees under the will to take the land as land reconverted it into land and vested the fee title in the devisees, notwithstanding the power and order of sale contained in the will. In the Atlee Case the devisees had all elected to take the land as land and not to have it sold. One of the questions presented was whether a judgment was a lien on this land. If the equitable conversion obtained, the land was personal property and not subject to the judgment lien. If the reconversion back into land obtained, it was argued that the judgment lien would attach. Says the Supreme Court of Iowa:

> "The parties to this action, being all who have any right to claim under the will of the testator, having elected to treat the property as real estate instead of personalty, must be held to have effected a reconversion, if, indeed, an equitable conversion ever took place. We must therefore hold that the judgment in favor of the German-American Bank and George Marshall became liens upon the interest or share of Fannie Bullard in said lands."

And the conclusion was that the lien of the judgment attached. In Boland v. Tiernay, 118 Iowa, 59, 91 N. W. 836, the devisees, a brother and sister, had elected to take the land, and the brother had transferred his interest in one of the 80 acres to his sister. The estate was closed, but the executor, deeming it his duty to do so under the power conferred upon him by will, made a sale of the land and accounted for the proceeds of the sale. It was contended by the sister that the sale was null and void. The Supreme Court of Iowa, with elaboration and approval, reviews many authorities from other states in harmony with the Iowa cases, and declares:

> "The 80 acres of land in Plymouth county, though constructively, was not actually, converted. The title, by the terms of the will, passed to the beneficiaries, with the power of sale by the executor added. That power was for the purpose of administration only, and failure to exercise it cannot be permitted to defeat the devise. As said in Greenland v. Waddell, 116 N. Y. 242, 22 N. E. 367, 15 Am. St. Rep. 400: 'The executors took no title in the real estate as such. They were vested with a power to deal with it as personal estate for the purpose of the execution of the trust created by the will.' Appellant seems to think that conferring the power of sale on the executor necessarily passed the title to him. Regardless of who acquired the title, he took 'exactly that quantity of interest which the purposes of the trust required.' In whomsoever the title vested, whether it was allowed to descend by operation of law, or was transferred to the executor, or descended to the devisee, it was for the purpose specified. Ebey v. Adams, 135 Ill. 80, 25 N. E. 1013, 10 L. R. A. 162; 2 Jarm. Wills, 305, 306. The language used by the court in Eneberg v. Carter, 98 Mo. 647, 12 S. W. 522, 14 Am. St. Rep. 664, is particularly applicable: 'In the present case there was certainly no express devise in fee to the executor, nor are there any such words in the will as to raise a fee in him by force of a strong implication. Therefore the fee remained in the heirs at law, both by the devise to them as well as by the statute of descents, until it should be devested by a sale by the executor under the terms of the will; and until such sale no conversion could occur.' Nothing has happened to divest the plaintiff of the title to this land, acquired under the will and the conveyance of her brothers. [This holding that the fee title in such a case passes to the beneficiaries, subject only to the power of sale, which may be defeated by a reconversion, is supported by the courts of other states.] * * * If those who take under a will may thus dispose of their interests by conveyance or sale, as is conceded by appellant, we can think of no reason for depriving them of the right to elect to take the thing devised themselves, rather than the proceeds derived from its sale. If the right to the proceeds depends upon some contingencies, of course, the election before may not take effect until such contingency is ended."

We have quoted thus at length from the decisions of the Supreme Court of Iowa because, for the reasons already given, its law is controlling upon this question. But that it is the universal law wherever the principles of English equity obtain will be established beyond peradventure by reference to such cases as Bank of Ukiah v. Rice, 143 Cal. 265, 76 Pac. 1020, 101 Am. St. Rep. 118; Harris v. Ingalls, 74 N. H. 342, 68 Atl. 34; Griffith v. Witten, 252 Mo. 627, 161 S. W. 713; Howell v. Tompkins, 42 N. J. Eq. 305, 11 Atl. 333; Duckworth v. Jordan, 138 N. C. 520, 51 S. E. 109; Meekins v. Branning Mfg. Co. (D. C.) 224 Fed. 202.

[9] This reconversion may take place at any time during the period of constructive conversion and prior to the actual conversion by sale. Griffith v. Witten, supra. It is effected when all the parties beneficially interested in the property, by some explicit and binding action, direct that no actual conversion shall take place and elect to take the property in its original form. Duckworth v. Jordan, supra.

Did all the parties beneficially interested so indicate their election; or is Charles Hicks such a party beneficially interested, for whose nonjoinder the reconversion could not in law or equity take place? What has previously been said touching the well-settled doctrine that a pretermitted heir does not take under a will, but in hostility to it, should be in and of itself a sufficient determination against this asserted right of Hicks. But the cases are numerous and uniform to like effect. The question has more often arisen when a widow has been put to her election between her legal dower or other rights and the rights conferred upon her by will, and it is universally held that she is bound by her election.

[10] If she takes under the law, she can invoke the will in no way. If she takes under the will, she can have no recourse to her rights under the law, and many of these cases have to do with attempts to enforce equitable conversions. Thus in Cunningham's Estate, 137 Pa. 621, 20 Atl. 714, 21 Am. St. Rep. 901, the testator directed his real property to be converted into cash and distributed. The widow elected not to take under the will. Under the law she was entitled to take a larger percentage of the personalty than the realty. She contended that the will, notwithstanding her election to take under the law, effectuated an equitable conversion of the realty, and that one-half of the proceeds inured to her benefit. Said the court:

> "The election which the widow is required to make is between rights, not between benefits. She has the right to abide by her husband's disposition of his property, or the right to override it and claim under the intestate law. These rights are inconsistent and cannot coexist. * * * The law does not permit her to say there is a will for conversion, and no will as to her share."

The Supreme Court of Kentucky in Barnett's Administrator v. Barnett's Administrator, 1 Metc. (58 Ky.) 254, reaffirming the same doctrine, gives an added reason in the following language:

> "Although a new character may have been in the most unequivocal terms impressed upon property by means of the trust for conversion, yet such constructive character is liable to be determined by the act of the persons beneficially entitled, who may at any time before the conversion actually occurs elect to take the property in its then condition. This right is wholly inconsistent with that claimed on behalf of the widow. For if the devisees, before a conversion of the lands, should elect to take the property on its actual, instead of its destined state, a conversion would be thereby prevented, and the character of the property be changed from that impressed upon it by the testator to that which it actually possesses."

In Ashelford v. Chapman, 81 Kan. 312, 105 Pac. 534, it is said:

> "If the widow take under the statute, the principle that there is no will as to her forbids that she should enlarge any of her rights under the statute by an appeal to the will. She is a stranger to it, and has no standing to compel others who take under the will to comply with provisions which might increase her distributive share of the estate."

To the same effect are Geiger v. Bitzer, 80 Ohio St. 65, 88 N. E. 134, 22 L. R. A. (N. S.) 285, 17 Ann. Cas. 151, Northrop v. Marquam, 16 Or. 173, 18 Pac. 449, and James v. Hanks, 202 Ill. 114, 66 N. E. 1034, where the husband, as heir of his wife, was insisting upon the same doctrine as is urged by respondent, and it is said:

> "If a testatrix directs her lands to be sold for the particular purpose of paying certain gifts to legatees, the conversion does not give * * * the proceeds the quality of personalty for the benefit of her husband, as her heir at law."

Underlying all of these cases is the same principle, of strict applicability to this respondent—the principle that one who does not take under a will can claim no benefits from that will. So here the testator's clear and unmistakable design was that his children and widow should have the Iowa property to the exclusion of Charles Hicks. What the law gives him as a pretermitted heir he takes outside of and in hostility to the will, and it is not open to him to invoke nor to ask the aid of the court in probate to enforce any of the provisions of the will for his benefit.

But it is next said that the respondent had the right to invoke the provisions of the will because he was a party interested in the subject-matter, and in this reliance is placed upon Atlee v. Bullard, supra. A reading of the case demonstrates how fallacious respondent's effort is to detach a single phrase from its context, for only those are interested in the subject-matter who are the beneficiaries of the particular devise under the will. And finally it is said that the election of the devisees and widow was nugatory because there was a time when one of the children, a Mrs. Gent, did not join in the formal election to take the land as land, though subsequently she did so. The sole effect of a failure of all the parties in interest to join in the election is that no reconversion takes place and the equitable conversion still stands.

[11] But this is no bar to a subsequent reconversion by the act of all the parties in interest before sale, since, being all of the parties in interest, no one has or can have legal or equitable right to complain of the election when finally made.

[12] 3. It appears, therefore, that the order of the court directing these executors to sell the lands in Iowa was improvidently made, and should never have been made, by virtue of the fact that all of the parties in interest had elected to take those lands in kind. It appears further that the executors duly appealed from this order, as they had the right to do, and that their appeal suspended the operation of the order, and that nevertheless the court revoked their letters testamentary. Nothing need be added to these facts, which in and of themselves condemn as illegal this last order and decree appealed from.

Wherefore the order appealed from in L. A. No. 4488 and the decree appealed from in L. A. No. 4489 are both and each is reversed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOSS, J.; MELVIN, J.; LAWLOR, J.

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34 Cal. App. 184

ROWLEY v. DAVIS. (Civ. 2232.)

(District Court of Appeal, Second District, California. June 25, 1917. Rehearing Denied by Supreme Court Aug. 23, 1917.)

1. ADVERSE POSSESSION ⚿16(1), 21—CHARACTER OF POSSESSION—STATUTE.

Under Code Civ. Proc. § 323, providing when land is deemed to be adversely possessed and occupied, the planting to grain and part to orchard constituted an adverse possession, but the renting of part of the land as a camping ground did not comply with the statute.

2. ADVERSE POSSESSION 🔑114(1)—SUFFICIENCY OF EVIDENCE.

Evidence in an action to quiet title *held* not to sustain plaintiff's claim of title by adverse possession as to part of lot.

3. QUIETING TITLE 🔑42—AFTER-ACQUIRED TITLE—SUPPLEMENTAL COMPLAINT.

Plaintiff in an action to quiet title had no right to file a supplemental complaint showing after-acquired title, if in fact he had no title at the commencement of the action.

4. QUIETING TITLE 🔑39—CROSS-COMPLAINT—DEFENSE—AFTER-ACQUIRED TITLE.

In an action to quiet title, a cross-complaint filed by defendant, after plaintiff had acquired the title of a defendant and cross-defendant, tendered new issues and set up a cause of action relating to the date of filing the cross-complaint, and the fact that plaintiff had then acquired a title was available to him as a defense to the cross-action, and was provable under his claim of ownership as pleaded by his answer to the cross-complaint.

5. VENDOR AND PURCHASER 🔑227—BONA FIDE PURCHASER—NOTICE.

In an action to quiet title, wherein plaintiff claimed under a deed, which was in fact intended as a mortgage, a declaration of the grantor that her deed was intended as a mortgage, nowhere defining any instrument affecting the title to any part of the lot, could not impart actual notice of an interest claimed therein, even if read by a person purchasing from her grantee.

6. VENDOR AND PURCHASER 🔑231(2)—BONA FIDE PURCHASER—NOTICE—STATUTE.

Under Civ. Code, § 2950, providing that a purported absolute conveyance intended to be defeasible on certain conditions is not affected, as against any person other than the grantee, or his heirs or devisees, or persons having actual notice, unless an instrument of defeasance is recorded in the county where the property is situated, subsequent purchasers from such grantee, who were neither heirs nor persons having actual notice of the conditions affecting the deed, were not bound to search the records to ascertain whether a purported declaration of defeasance had been made.

7. VENDOR AND PURCHASER 🔑229(6, 7)—BONA FIDE PURCHASER—NOTICE—RECORD.

The recording laws are intended as a protection, and not as a menace, to existing titles, and it is against the policy of the law to permit the use of the public records as a means by which strangers to existing titles may cloud those titles and impair the values thereof to their owners, and hence a sheriff's sale of a judgment debtor's interest in certain lands did not constitute any assertion of rights against her grantee, having apparent title under a deed, though intended as a mortgage.

Appeal from Superior Court, Los Angeles County; S. E. Crow, Judge.

Action to quiet title by Q. J. Rowley against W. J. Davis and others, with cross-complaint by defendant Davis. Judgment for plaintiff, motion for new trial denied, and defendant Davis appeals. Judgment and order affirmed.

Charles Lantz and Davis, Lantz & Wood, all of Los Angeles, for appellant. Kendrick & Ardis and Geo. W. Adams, all of Los Angeles, for respondent.

CONREY, P. J. The defendant appeals from the judgment and from an order denying his motion for a new trial. The complaint stated a cause of action against defendant Davis and others to quiet the plaintiff's title to land in Los Angeles county, described as lot 38 of the Monte Vista tract, containing 20 acres, as shown by a recorded map. The answer of defendant Davis denied plaintiff's ownership of the west 3 acres of the north one-half of said lot, and alleged that said defendant is the owner of those 3 acres. By cross-complaint the same defendant alleged that he is the owner of said west 3 acres, and set forth the transactions by virtue of which he claims to have acquired title. Cross-complainant's claim of title is based upon a sheriff's deed, issued to him as the purchaser at a sheriff's sale made pursuant to a writ of execution upon a judgment rendered against F. H. Barclay and A. G. Hupp. The sheriff's sale took place on September 5, 1906, and the deed to cross-complainant was made on September 10, 1907. The cross-complaint further alleged that Anna G. Hupp, on March 6, 1899, executed an instrument in the form of a deed to Oscar Doolittle, which deed was recorded July 3, 1900, and included 2½ acres along the westerly side of the north half of said lot 38; that said deed was in fact a mortgage made to secure the payment of an indebtedness to said Doolittle, and that the cross-defendants, before receiving a deed to said property, had notice of this fact; that at the time of said levy, sale, and deed said property stood of record in the name of Oscar Doolittle. Cross-complainant prayed judgment that plaintiff take nothing by his action, except as to those portions of lot 38 not including said west 3 acres; that, if said instrument executed to Oscar Doolittle be determined to be a mortgage, the court ascertain the amount of money loaned by Doolittle to Anna G. Hupp, and the amount, if any, which is due to said Doolittle, or his successors in interest, upon said loan; and that plaintiff be enjoined from asserting any claim to said 3 acres adversely to cross-complainant. The plaintiff answered the cross-complaint, and made denials which covered the material issues tendered thereby. The findings and decree confirm the plaintiff's title as claimed by him and negative the claims asserted by the defendant.

[1, 2] The evidence includes the plaintiff's chain of title as shown by recorded conveyances. From that evidence it appears that at the time of commencement of this action on October 17, 1911 (assuming that said instrument executed by Anna G. Hupp to Oscar Doolittle was a deed of grant and was not a mortgage), the title to the west 156 feet of the north half of lot 38, amounting to a little more than 2⅓ acres of land, was vested in one Alice Huse, and not in the plaintiff, and that the plaintiff was the owner of all other portions of said lot. The plaintiff, Rowley, also claimed title by adverse possession, as

well as under deeds of transfer. He testified that he had possession of the property described in the complaint since December, 1901. "My use of the tract which I occupied consisted of planting to grain, and part in orchard, and I rented part as a camping ground. My claim of title is under a deed from J. H. F. Jarchow. I have paid all taxes levied against that property since I purchased it down to the present time, and I occupied it during all said time, claiming it as my own against all persons and the whole world." Tax receipts were produced by the witness for the 5 years beginning with 1907, and for one other year, on portions of lot 38; but none of them included the west 2½ acres. Later in his testimony he said that he had possession of the whole tract "until the adverse possession of Mr. Hansen and then Mr. Huse," and that the strip claimed by Mr. Huse extended back a depth of 140 feet on the west side. "The balance of the tract I had undisputed possession of during the past 10 or 11 years." Section 323 of the Code of Civil Procedure provides that:

> "For the purpose of constituting an adverse possession by any person claiming a title founded upon a written instrument, or a judgment or decree, land is deemed to have been possessed and occupied in the following cases: 1. Where it has been usually cultivated or improved. 2. Where it has been protected by a substantial inclosure. 3. Where, although not inclosed, it has been used for the supply of fuel, or of fencing timber for the purposes of husbandry, or for pasturage, or for the ordinary use of the occupant. * * *"

There is no evidence that the land was protected by an inclosure, or that it had been used for any of the purposes named in subdivision 3. All of the testimony heard was directed to show that the land had been "usually cultivated or improved" by the plaintiff. To the extent that his use of the tract consisted in "planting to grain and part in orchard," he complied with the requirements of the statute. To the extent that he "rented part as a camping ground," such use of the property did not comply with the statute. In his testimony the plaintiff did not say how much of the land was used as camping ground; but other testimony in the case indicates in a general way that the camping ground was located on the western side of lot 38. We think that the evidence was not sufficient to sustain Rowley's claim of title by adverse possession, so far as the west 156 feet of the north half of lot 38 is concerned. Although, as we have stated, the record title to the west 156 feet of the north half of lot 38 at the time of commencement of this action apparently was vested in Alice Huse, and not in the plaintiff, it should here be noted that, without objection from the defendant, the court received in evidence a deed dated April 3, 1912, recorded June 25, 1912, whereby Alice Huse conveyed to the plaintiff, Q. J. Rowley, all of her interest in said lot 38.

[3, 4] Referring to the record thus presented, appellant insists that the judgment should be reversed, because the action must be determined upon the facts as they existed at the time of the commencement of the suit; "Rowley not having pleaded any after-acquired title." It is true that the plaintiff did not attempt to supplement his complaint by a statement showing title acquired after the action was commenced; also it is the law that he would not have a right to file a supplemental complaint showing after-acquired title, if in fact he had no title at the commencement of the action. Imperial Land Co. v. Imperial Irrigation District, 173 Cal. 668, 161 Pac. 116, L. R. A. 1916D, 676, note. But the cross-complaint of the defendant Davis was not filed until after plaintiff Rowley, had acquired the title of the defendant and cross-defendant Alice Huse. By filing that cross-complaint the cross-complainant tendered new issues, whereby he set up a cause of action which relates to the date of filing the cross-complaint. This he had the right to do. Johnson v. Taylor, 150 Cal. 201, 208, 88 Pac. 903, 10 L. R. A. (N. S.) 818, 119 Am. St. Rep. 181. The fact that Rowley had at that time acquired the title of Mrs. Huse was available to him as a defense to the cross-action, and was provable under his claim of ownership as pleaded by his answer to the cross-complaint. If this were not so, a defendant by filing a cross-complaint would be able to prevent the plaintiff from dismissing an action which had been prematurely brought, and might thereby obtain "on the merits" a judgment which possibly would permanently cut out the just rights of the plaintiff, by preventing him from thereafter litigating the title with the cross-complainant. We therefore are of the opinion that the judgment should be sustained, if the evidence is sufficient to support Rowley's title as existing at the time of filing the cross-complaint.

From the deeds shown in evidence we are satisfied that, at the time of the execution of the deed by which it is claimed that Anna G. Barclay (who afterwards became Anna G. Hupp) purported to convey to Oscar Doolittle 2½ acres along the west side of the north half of lot 38 of the Monte Vista tract, she was not the owner thereof. But for the purposes of this decision the situation may be considered to be the same as if she had been such owner. On July 30, 1896, there had been recorded a deed dated March 23, 1890, whereby Mary L. Barclay (a sister of Anna G. Barclay) purported to convey to Anna G. Barclay the west 156 feet of the north half of said lot 38. At that time the title thereof apparently was vested in Mary M. Barclay, their mother. Later, however, by mesne conveyances, the title of Mary M. Barclay to said west 156 feet passed to Mary L. Barclay, and that title inured to the benefit of her previous grantee, Anna G. Barclay. The apparent title of Oscar Doolittle having passed by successive conveyances to Alice Huse, and from her to the plaintiff, Rowley, it follows that Rowley is entitled to recover herein as against the cross-complainant, unless it can be shown that the deed of Anna G. Barclay to Doolittle was in fact a mortgage, as alleged by the cross-complaint, and unless it can be shown, further, that Homer A. Hansen, in purchasing the property from Doolittle, and that Mrs. Huse in purchasing the same from Hansen, and Rowley in taking his deed from Mrs. Huse, had actual or constructive notice of the fact that the title really was not vested in Doolittle. The purchases by Hansen and by Mrs. Huse were for value, and the deed from Mrs. Huse to Rowley was made upon a valuable consideration, in this: that it was "in consideration of clearing the title." Rowley's testimony is that, after settlement of this controversy, he is to reconvey to Mrs. Huse the west 140 feet of the north half of lot 38.

[5] In the transaction by which Hansen obtained a quitclaim deed from Oscar Doolittle, he was acting at the request of George Huse, the husband of Alice Huse, who desired to obtain the property. Hansen, however, procured the deed in his own name, in February, 1907, and paid the consideration with his own money. Thereafter, and for a separate consideration, he conveyed to Mrs. Huse. Neither Hansen nor Mr. or Mrs. Huse or Rowley ever had actual knowledge of any mortgage transaction affecting the deed made by Anna G. Barclay to Oscar Doolittle. Hansen's testimony was that before he obtained his deed from Doolittle he procured from a title company a report "of all the instruments affecting the title of the property" from the time of the subdivision of the tract to the time of the search. A. L. Rhodes, vice president of the Title Abstract & Trust Company by which said report was made, testified that his company made an examination of all transactions and instruments of record in the county "affecting the title" of said lot 38 subsequent to the subdivision of the tract in 1887 to the time of search in November, 1906; that that report was furnished by the company to Dr. Hansen for his examination. The evidence shows, without conflict, that the deed to Doolittle was in fact intended as a mortgage, to secure a loan.

Cross-complainant offered in evidence the record of a document, signed, "Anna Gladys Hupp, formerly known as Annie G. Barclay, Annie Gladys Barclay, and Anna Gladys Barclay," with an annexed certificate of acknowledgment by a notary public, which document was recorded in the record of deeds of the county recorder's office of Los Angeles county on February 20, 1906. In this document Mrs. Hupp refers to certain recorded instruments previously executed by her to Oscar Doolittle, and declares that said instruments were mortgages to secure the payment of money, and were not intended to convey any title in or to said premises. The plaintiff objected to said instrument being received or considered in evidence, and the objection was sustained. Appellant claims that in that ruling the court was in error, and that thereby he was prevented from establishing a fact which, together with the other evidence, necessarily would sustain his title. In support of this contention, he further claims that Hansen and Huse by reason of the document in question had actual as well as constructive notice that the Hupp-Doolittle deed was in fact only a mortgage. Here we must take note that the said recorded declaration made by Mrs. Hupp does not contain any description of the premises in controversy. It refers to a recorded instrument purporting to convey to Doolittle described portions of lot 39 of the Monte Vista tract, and then refers also to "that certain instrument in writing, in form a deed, bearing date March 6, 1899, made by Anna Gladys Barclay to Oscar Doolittle, and being the same deed last above mentioned, and recorded July 3, 1900, in said county recorder's office, recorded in Book 1374, page 154, of Deeds, Los Angeles County Records, after certain alleged corrections were purported to be made in said deed." Thus we see that the declaration nowhere defines any instrument affecting the title to any portion of lot 38. On these facts the declaration could not in any event impart actual notice of an interest claimed in lot 38, even if it had been read by a person purchasing from Doolittle.

[6] We are further of the opinion that the recorded declaration of the grantor, made as above stated, even if the "alleged corrections" referred to the land in controversy, did not impart the notice imputed by law, usually called constructive notice. Section 2950 of the Civil Code reads as follows:

> "When a grant of real property purports to be an absolute conveyance, but is intended to be defeasible on the performance of certain conditions, such grant is not defeated or affected as against any person other than the grantee or his heirs or devisees, or persons having actual notice, unless an instrument of defeasance, duly executed and acknowledged, shall have been recorded in the office of the county recorder of the county where the property is situated."

As we view the evidence, neither Hansen nor Mrs. Huse nor the plaintiff comes within any of the classes specified in the foregoing section. They are neither heirs nor devisees, nor persons having actual notice of the alleged conditions affecting the deed made to Doolittle. As to them, that deed must be regarded as being what in its terms it purported to be, namely, a conveyance of land. Payne v. Morey, 144 Cal. 130, 77 Pac. 831. Appellant admits that the alleged declaration did not have the effect of a defeasance, and only seeks to use it as a means of charging Hansen and Huse with actual notice of its contents. Since there was no defeasance, and since the recorded deed showed that the grantor, Anna G. Barclay, had parted with her title, she was without power to destroy the effect of her deed by merely recording a declaration repudiating the instrument as a transfer of title. Subsequent purchasers from her grantee were not bound to search the records to ascertain whether some such declaration had been made. On the facts shown herein appellant gains no advantage from the rule stated in section 19 of the Civil Code that:

> "Every person who has had actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact."

There is no evidence that the Hupp declaration ever was known to Hansen, or to Mr. Huse, or Mrs. Huse, or to Rowley, prior to the time of receiving their conveyances. The testimony on this point is limited to the statements, above noted, that the abstract company's report included all instruments "affecting the title" of the property. The Hupp declaration was not an instrument affecting the title, and it may not be presumed that it was in the abstract company's report. The ruling of the court below, excluding the record of that declaration, was without error.

[7] Appellant claims that Hansen, Huse, and Rowley were likewise charged with notice of title vested in Anna G. Hupp at the time of the levy and sale by the sheriff under the execution issued on a judgment against Mrs. Hupp. The levy was made in August, 1906. The sheriff's sale to appellant Davis was made on September 5, 1906, and recorded October 11, 1906, which was prior to the deed of Doolittle to Hansen. The levy was upon "the interest of the defendants in the west 3 acres of the north half of lot 38," etc., "standing of record in the name of Oscar Doolittle." The sale, as recited in the sheriff's certificate of sale, was of the same west 3 acres, "standing of record in the name of Oscar Doolittle." The sheriff's deed to Davis bears date September 10, 1907, which was subsequent to the deed of Doolittle to Hansen, and prior to Hansen's deed to Mrs. Huse. Appellant claims that by virtue of the facts stated Hansen and Huse and the plaintiff were charged with notice that the purported deed to Doolittle was in fact a mortgage. We find no merit in this contention. The recording laws are intended as a protection, and not as a menace, to existing titles. It is against the policy of the law to permit the use of the public records as a means by which strangers to existing titles may cloud those titles and impair the values thereof to their owners. Thus it is held that an attaching creditor takes only whatever interest the debtor has. "The creditor is entitled to the same rights as the debtor had, and to no more." Bank of Ukiah v. Petaluma Savings Bank, 100 Cal. 590, 35 Pac. 170. So here the act of the sheriff, who, at the instance of the judgment creditor of Mrs. Hupp, made sale of her "interest" in the described land, did not constitute any assertion of rights against her grantee, Doolittle, who had apparent title under a deed of the kind referred to in section 2952 of the Civil Code. After the sheriff's sale to appellant, as well as before that transaction (in the absence of some appropriate proceeding to assert the rights of the mortgagor or of cross-complainant Davis, or to enforce the mortgage, accompanied by notice as required by law), an innocent purchaser for value might accept a conveyance from Doolittle as safely as if the deed made had been in fact a grant and not a mortgage.

The judgment and order are affirmed.

We concur: JAMES, J.; WORKS, Judge pro tem.

(34 Cal. App. 226)

THOITS et al. v. BYXBEE, City Superintendent of Streets. (Civ. 1961.)

(District Court of Appeal, First District, California. July 2, 1917. Rehearing Denied Aug. 1, 1917.)

1. MANDAMUS ⚷92 — SUPERINTENDENT OF CITY STREETS—REFUSAL TO MAKE CONTRACT.

Mandamus will lie to compel a city superintendent of streets to enter into a contract with the successful bidder for street work to be done under Vrooman Act (St. 1885, p. 160), as amended by St. 1913, p. 402.

2. MUNICIPAL CORPORATIONS ⚷293(1) — STREET IMPROVEMENTS—RESOLUTIONS—VALIDITY.

In proceedings for street improvements under Vrooman Act, as amended by St. 1913, p. 402, providing that the city council may make the expenses of work or improvement chargeable upon the district and that the resolution of intention shall in general terms describe said district and refer to a plat or map approved by the city council, which shall indicate the extent of territory to be included, and Improvement Bond Act 1915 (St. 1915, p. 1441) § 4, providing that the city council shall declare in its resolution of intention the exterior boundaries of the district the property to be assessed to pay the costs and expenses of the work, a resolution of intention of the city council was not insufficient because a legend on the map to which it referred states that the property colored in red is the property affected; such statement not being a declaration that other property included within its boundaries was not benefited and would not be assessed.

3. EVIDENCE ⚷10(1) — JUDICIAL NOTICE — ELEVATIONS.

It is a matter of common knowledge that in Palo Alto elevations are above sea level and are indicated in feet.

4. MUNICIPAL CORPORATIONS ⚷290 — IMPROVEMENTS — CHARTER — CONSTRUCTION — INCORPORATION OF STATE LAWS—"EXISTING LAWS."

Under Palo Alto Charter, § 10, as amended in 1911, providing that in the erection, improvement, and repair of all public buildings and works, in all street and sewer work done under and by authority of the laws of the state, or done under and by authority of any of the street laws of the state, which laws are hereby made a part of this charter, the council shall have power to adopt ordinances for the purpose of carrying out these provisions, and such ordinances shall be supplemental to the "existing laws" of the state, the adoption of the general street laws of the state is not confined to laws existing at the date thereof, and proceedings for street improvements were not invalid, because not taken under the general laws of the state as they existed in 1911; the word "existing" not confining the operation of the charter to existing state laws.

[Ed. Note.—For other definitions, see Words and Phrases, Existing Laws.]

5. Municipal Corporations 🔑304(5) — Street Improvements — Proceedings — Specifications.

Proceedings in a street improvement project pursuant to Vrooman Act, as amended by St. 1913, p. 402, and the Improvement Bond Act of 1915, were not invalid because the specifications with reference to the concrete to be used authorized the superintendent to change the proportions of sand and rock and determine the number of revolutions of the drum for mixing each batch of concrete.

6. Municipal Corporations 🔑336(5) — Street Improvements — Bids — Finding of Council—Result.

A finding of the council that a certain bidder for street improvement work was the lowest responsible bidder is conclusive, in the absence of fraud or collusion.

7. Mandamus 🔑14(1) — Conditions Precedent—Demand.

The duty of the superintendent of streets to execute a contract for street improvement work was a public duty, and a demand by property owners was not a condition precedent to their right to a writ of mandamus compelling him to execute the contract.

8. Mandamus 🔑23(2)—Parties Beneficially Interested.

The owners of lots that are to be improved may petition for a writ of mandamus to compel the superintendent of streets to execute a contract for street improvements; they being beneficially interested, within Code Civ. Proc. § 1086, providing that the writ of mandate shall issue only on petition of the party beneficially interested.

Application for a writ of mandamus by W. C. Thoits and another against J. F. Byxbee, Jr., Superintendent of Streets of the City of Palo Alto. Writ granted.

Norman E. Malcolm and Kirkbride & Gordon, of San Mateo, for petitioners. Raymond Benjamin, of San Francisco, and Frederick Schneider, for interveners. Earl D. White, of Oakland, for respondent.

PER CURIAM. This is a proceeding in mandamus, brought by petitioners, owners of certain lots in the city of Palo Alto, included, among others, within a project of street improvement, against the superintendent of streets of said city, to compel him to enter into a contract with the successful bidder for said work. Other property owners intervened in the suit and joined with the respondent in resisting the demand of the petitioners that said respondent be compelled to enter into such contract. Issues of fact being raised by the pleadings, the matter was by this court referred for the taking of testimony and the making of findings thereon. The referee has made his report, and the same is hereby adopted.

[1] The respondent and interveners raise various points which they urge as grounds for denying the relief sought, the first of which is, stated in the language of one of the interveners, that "the present mandamus proceedings cannot be used to test the validity of the proposed contract or the validity of the street work proceedings already had," for the alleged reason that the respondent, as superintendent of streets, acts purely in a ministerial capacity in executing a contract with the successful bidder for street work to be done under the provisions of the so-called Vrooman Act, and that if he refuses to perform such duty there is a direct remedy at hand by his removal from office and the appointment of another person, who will not refuse to do his duty. In support of this contention the cases of City of Los Angeles v. Lelande, 157 Cal. 30, 106 Pac. 218, and Marin Municipal Water District v. Dolge, 172 Cal. 724, 158 Pac. 187, are cited. In those cases, however, the officer whose action was sought to be compelled was under the direct authority of the board or corporation asking for the writ of mandamus; and it appearing to the court in those cases that the object of the proceedings was simply to get the opinion of the court upon the validity of proceedings in which the particular sought to be compelled was an incident, and that there was no real controversy between the parties to the proceeding, it denied the relief sought. We think those cases have no application here. The petitioners in this case have no authority over the respondent, nor have the interveners; and the controversy, to judge by the earnestness of opposing counsel in urging their contentions upon this court, is a very real one. Moreover, it cannot be said that the duty of the respondent to enter into the contract here involved is purely ministerial.

[2] The next contention in opposition to the issuance of the writ is that the proceedings taken thus far in the matter of the street improvement are invalid, because not based on any valid resolution of intention. It is alleged that the resolution of intention is ambiguous and fails to show the district to be assessed for the cost of the work. These proceedings are taken under the Vrooman Act and the Improvement Bond Act of 1915 (St. 1915, p. 1441). Section 3 of the former act, as amended by Stats. 1913, p. 402, § 2, declares that:

> The "city council may make the expense of such work or improvement chargeable upon a district, which said city council shall in its resolution of intention, declare to be assessed to pay the * * * expenses thereof. Said resolution of intention shall in general terms describe said district, and refer to a plat or map, approved by the city council, which shall indicate by a boundary line the extent of the territory to be included in said assessment dis-

trict, which plat or map * * * shall govern for all details as to the extent of the said assessment district."

Section 4 of the Improvement Bond Act of 1915 provides:

> "The city council shall also declare in said resolution of intention the exterior boundaries of the district, the property within which is to be assessed to pay the cost and expenses of said work."

In the resolution of intention adopted by the council it is declared:

> "That said proposed work and improvements are of more than local or ordinary public benefit, and affect and benefit the lands and district hereinafter described, which said district is hereby declared to be the district benefited by said work and improvements, and to have the exterior boundaries hereinafter described as the boundary thereof. That therefore the entire cost and expenses of said work and improvement shall be and are hereby made chargeable against and shall be assessed upon said lands and district, which district is within the city of Palo Alto, county of Santa Clara, state of California, and is particularly bounded and described as follows."

Then follows a description of the exterior boundary of said district. In said resolution of intention the council also referred to the plan and diagram of the district made by the city engineer, which showed the extent and boundaries of said district, and which by said resolution it adopted.

The point of attack on this resolution of intention is that it creates an assessment district, describes its boundaries, refers to a map thereof, and that said map shows that it includes therein property that is not to be assessed. From an examination of the map, however, we think no such conclusion can be drawn from it. In addition to the boundary line of the district, the map shows in detail the streets to be improved colored in yellow, the property abutting on those streets colored in pink, and other streets already improved and upon which no work is to be done under this resolution. A legend on the map states that the property colored in red is the property "affected," and from this the interveners argue that the map thus shows that only the property so colored in red is to be assessed. But the statement in the legend on the map that the property colored in red is the property affected is by no means a declaration that the remaining property is not benefited and not to be assessed; and the plain declaration in the resolution of intention itself is that all the property included within the district will be subject to assessment. As the assessment must be according to benefits, it is evident that the property which is stated in the map to be "affected" will bear a higher assessment than the property not so colored. We think it clear that the word "affected," as used in the legend on the map, merely means that such property is directly adjacent to the proposed work. The resolution of intention, therefore, is not invalid for the reason urged.

The next point of invalidity alleged is that no official grade has been established in Palo Alto. On this point the finding of the referee is:

> "That at all of the dates and times mentioned in the petition, all these portions of those certain streets in the city of Palo Alto described and mentioned in the resolution of intention hereafter referred to were open and located streets in the said city of Palo Alto, dedicated to public use, with established grades and width, and that the official grades thereof were established by the board of trustees of the town, not the city, of Palo Alto by resolution of the board of trustees of said town adopted July 7, 1900, wherein said board of trustees resolved: 'That the grades of the town of Palo Alto be and they are hereby established as shown on the map entitled "Map Showing the Established Grades for the Town of Palo Alto," prepared by C. E. Moore, and that all sidewalks and street improvements conform thereto.'"

The referee further found that the board of town trustees of Palo Alto adopted a map prepared by the town engineer showing bench marks and monuments, which map was introduced in evidence. The grade map shows that there are certain elevations marked upon every street intersection upon the map, and that C. E. Moore, the civil engineer who prepared the map, placed corresponding marks and figures for elevations upon hydrants and manholes in various parts of the city, and notably upon a rail in the circle of Palo Alto, so that any engineer could take this grade map, together with the monuments established at various places in the city, and determine the exact grade of streets at any given point.

[3] The objection that the figures do not specify inches, feet, or miles, or whether above or below sea level, is not serious. It is matter of common knowledge that in this part of the state elevations are above sea level (Federal Construction Co. v. Wold, 30 Cal. App. 363, 158 Pac. 340), and are indicated in feet.

[4] It is next contended that the street proceedings taken in this case are invalid, because not authorized by the charter of Palo Alto. It is argued that the proceedings should have been taken under the general laws of the state as they existed in 1911, because in section 10 of the charter of Palo Alto as amended in 1911 it is provided that:

> "In the erection, improvement and repair of all public buildings and works, in all street and sewer work, done under and by authority of the laws of the state of California creating a bonded indebtedness of the municipality, or done under and by authority of any of the street laws of the state of California, which laws are hereby made a part of this charter, the work shall be let to the lowest bidder. The council shall have power to adopt ordinances for the purpose of carrying out these provisions, and such ordinances shall be supplemental to the existing laws of the state. * * *"

By this section the general street laws of the state are adopted as a part of the charter of Palo Alto. Such adoption is not to be confined to the particular laws existing at the date thereof. The rule of statutory construction with regard to the adoption of statutes by reference is thus stated in 2 Sutherland on Statutory Construction (2d Ed.) p. 787:

> "Where one statute adopts the particular provisions of another by specific and descriptive reference to the statute or provision adopted, the effect is the same as though the statute or provision adopted had been incorporated bodily into the adopting statute. When so adopted only such portion is in force as relates to the particular subject of the adopting act and as is applicable and appropriate thereto. Such adoption takes the statute as it exists, and does not include subsequent additions or modifications of the statute so taken unless it does by express intent. When, however, the adopting statute makes no reference to any particular act by its title or otherwise, but refers to the general law relating to the subject in hand, the reference will be regarded as including not only the law in force at the date of adopting the act, but also the laws in force when action is taken or proceedings are resorted to."

Nor can the word "existing," found in the last clause of the section quoted, have the effect of taking this case from the general rule. The word is used in connection with the power given to the council to enact ordinances relating to street matters, and declares that such ordinances when enacted shall be supplemental to existing laws, that is, supplemental to the laws existing when such ordinances shall be enacted. We can discover no intention from the use of this language to confine the adoption of the general laws of the state relating to street improvement to the particular laws existing at the time of the enactment of this section; and the reason for making such an adoption is equally applicable to general laws later enacted which come within the description employed.

[5] The next objection to these proceedings is that they are invalid "because the specifications do not definitely inform the owners of the work to be done, and vest in the superintendent of streets an illegal discretion to favor or injure the contractor." This objection is aimed at the following specifications (speaking of the concrete to be used in the work):

> "It shall be composed of Portland cement, sand, and broken rock, mixed ordinarily in the proportions of one cubic foot cement to two cubic feet of sand and four cubic feet of broken rock. A change may be made in the proportions of sand and rock in the concrete aggregate as the street superintendent may direct, when in his opinion the voids in the material used are not satisfactory for mixing in the above proportions."
>
> "The number of revolutions of the drum for mixing each batch of concrete shall be as determined by the street superintendent."

As against the validity of the first of these provisions of the specifications, it is urged that the superintendent of streets is given such wide power to change the proportions of sand and rock in the concrete aggregate that the cost of the work could be materially increased or decreased by the superintendent, thus rendering favoritism or oppression on the part of the superintendent possible, and introducing such uncertainty into the specifications as to compel bidders for the work to name a higher price than they otherwise would, to the detriment of the property owner paying for the work.

The evidence taken in this case shows that, by employing the sand and rock ordinarily used in the vicinity of Palo Alto for the character of work to be done under these proceedings, the prescribed mixture of one cubic foot of cement to two cubic feet of sand and four cubic feet of broken rock will make a concrete of proper density, and that the faculty given to the street superintendent of changing the proportions of sand and rock in the concrete aggregate is for the purpose of preserving this density of character. It also appears that the cost of sand and broken rock around Palo Alto is practically the same, so that a change in the proportions of those elements would not affect the cost of the work so far as those ingredients are concerned, but might affect it by increasing or decreasing the quantity of cement required in the making of the concrete. Thus, if the rock furnished should show a materially larger percentage of voids than the average, that condition could be corrected by increasing the proportion of sand, with a resultant increase in the area covered by the mixture thus produced; the amount of cement added to the newly determined proportions of sand and rock not being changed, less cement would be required for the entire work, which might result in a considerable saving to the contractor. On the other hand, if the rock furnished should show a materially smaller percentage of voids than the average, that condition could be corrected by decreasing the proportion of sand, with a resultant decrease in the spread furnished by such mixture, and a consequent increase in the quantity of cement used, entailing a greater outlay on the part of the contractor.

It is argued that, in the presence of such possibilities under the specifications upon which the bids were to be made, the contractor, in order to guard himself from loss, would necessarily name a higher price. As against this view it was shown that if the contractor furnished uniformly graded rock, as required by another of the specifications for this work, the variation in the voids would be negligible, so that it would be unnecessary for the street superintendent to exercise the power in question. Witnesses testified that if this power were not given to the superintendent he would be compelled, in order to preserve the required quality of density in the concrete, to insist upon a rigid adherence to the requirement of uniform grading in the rock—a condition much more onerous upon a contractor than compliance with the superintendent's directions to change the proportions of sand and rock for the purpose of filling voids, and that this discretion allowed to the superintendent was a positive advantage to the contractor. It was also testified that a contractor, in preparing his bid upon such a specification, either would not give it any consideration, or would regard it as a desirable element, and would not increase his bid on account of its presence. One of the witnesses produced in opposition to the specification testified that he himself prepared the figures of one of the competitors for this work, and that he did not take this provision of the specification attacked into consideration.

Expert evidence as to the construction of this specification in the shape of testimony of engineers was also introduced. The preponderance of this testimony showed that the correct construction thereof is that, since only a change in the proportions of sand and rock is permitted, the proportion of cement to the whole must be maintained, and it is found by the referee that this result can be readily effected; that if it should be desirable to increase the proportion of sand to rock, and at the same time maintain the constant of one part of cement to six parts of concrete aggregate in the mixture, it could readily be done by making the change, not in one only of those ingredients, but in both—i. e., increasing the sand and decreasing the rock. We think, moreover, that this last method is the one required by a natural construction of the language of the specification. Bearing in mind that a mixture of one part of cement to two parts of sand and four parts of rock has been prescribed, and that a change is permitted in the proportions of only two of those ingredients, we think it follows that the change must be made, if possible, without affecting the third proposition. We have seen that this is not only possible, but very easily accomplished, by varying the quantity of both the sand and the rock, instead of confining the change to one of those ingredients.

Even if this construction be not the correct one, it is still apparent that the discretion given to the street superintendent under this specification is for one purpose only, viz., for filling voids in the concrete aggregate, and that the occasion for the exercise of this limited discretion is in the hands of the contractor, who can practically obviate its exercise by supplying rock uniformly graded as required by the specification. For these reasons we think that this alleged ground of invalidity must be rejected.

As to the discretion given to the superintendent to prescribe the number of revolutions of the drum of the mechanical mixer, the evidence showed that the presence of this provision in the specification would not introduce any material uncertainty in the cost of the work. The number of revolutions of the drum bears principally upon the question of time employed in the work. The testimony showed that there is an average number of revolutions which is practically standard, and that if this number should be somewhat increased the drum could be speeded up, and thus no difference in time result. Moreover, this discretion is not greater than that conferred upon the superintendent expressly by the Vrooman Act itself, wherein, in section 2 thereof, it is provided that the work must be done under the direction and to the satisfaction of the superintendent of streets. We think this clause clearly broad enough to vest in him the authority to prescribe the number of revolutions of the drum when exercised within the other requirement of this specification that the concrete mixture shall have a uniform consistency and color.

[6] It is next urged, as going to the invalidity of the proceedings attacked, that the award of the contract is invalid "because the lowest bidder was given no notice that his responsibility was in issue, nor was he accorded a hearing upon that point." The evidence shows that one F. R. Ritchie was the lowest bidder, and that he was present at the meeting of the council when it publicly opened, examined, and declared the bids, and was present at the meeting at which the contract was awarded; that members of the council and other officers of the municipality made an investigation concerning the financial responsibility of Ritchie, and reported to the council that the Ritchie Company had failed to perform a contract for the construction of a portion of the state highway of the state of California, and that the bondsmen of said concern had been compelled to complete the same; that Ritchie was in fact the Ritchie Company; that he was given a hearing by the council at the meeting at which the contract was awarded, at which time he refused to answer questions asked by members of the council, and declared that he would refuse to answer any and all questions asked him by members of the council until he could be represented by an attorney. After considering the reports and acting upon advice, the council found that F. R. Ritchie was not the lowest responsible bidder, and awarded the contract to the lowest regular responsible bidder—Paul & Caldwell. The finding of the council, in the absence of fraud and collusion (neither of which was alleged nor claimed in this proceeding) is conclusive. Butler v. Printing Com'rs, 68 W. Va. 493, 70 S. E. 119, 38 L. R. A. (N. S.) 653; 3 McQuillin on Municipal Corporations, § 1228.

[7] It is next claimed that the petitioners are not entitled to the writ of mandamus "because there was not a demand and refusal." In this case the contract executed by the firm to which it was awarded is in evidence, together with a proper bond. Demand was made upon the respondent to execute the contract by said firm, and was refused. So far as the petitioners are concerned, the duty of the respondent to execute the contract was not one owing specifically to them, but was a public duty. Under such circumstances we think a demand from the petitioners was unnecessary. Wilson v. Board, 138 Cal. 67, 70 Pac. 1059.

[8] It is finally urged as a reason why the writ should be denied that the petitioners

are not beneficially interested in the contract the execution of which is sought to be compelled. Section 1086 of the Code of Civil Procedure provides that the writ of mandate shall issue only on the petition of the party beneficially interested. While it may be true that the successful bidders have a greater interest in the signing of this contract by the respondent than have the petitioners, yet the beneficial interest of the latter is undeniable, since they are the owners of lots that are to be improved under the contract. We think the interest of the petitioners here is just as certain and direct as that of the petitioner in the case of Eby v. School Trustees, 87 Cal. 166, 25 Pac. 240. That was a proceeding to compel the school trustees to proceed to reconstruct a schoolhouse on an old site, and the interest of the petitioner was that of a resident elector having a family of minor children.

This disposes of the questions raised in opposition to the issuance of the writ. It is ordered that said respondent, J. F. Byxbee, Jr., as superintendent of streets of the city of Palo Alto, forthwith sign and execute the contract with Paul & Caldwell referred to in the petition herein, and fix a date for the commencement of the work to be done under said contract, and that the petitioners recover their costs.

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34 Cal. App. 210

STEPHENS et al. v. WEYL-ZUCKERMAN & CO. (Civ. 1560.)

(District Court of Appeal, Third District, California. June 28, 1917.)

1. Appeal and Error 🔑185(1)—Objections Not Made Below—Jurisdiction.

Jurisdiction of the trial court may be questioned for the first time on appeal.

2. Courts 🔑120—Superior Court—Jurisdiction.

The superior court is, under Const. art. 6, § 5, without jurisdiction; the money demand being for less than $300, and it being without jurisdiction to enforce the lien invoked.

3. Maritime Liens 🔑71 — Enforcement — Nature of Proceeding.

The proceeding to enforce the lien given by Code Civ. Proc. § 813, declaring vessels liable for their repair, and declaring the demand therefor liens on them, is one in rem, or quasi in rem, though it is eo nomine against the owner only, the remedies of attachment and execution not being invoked.

4. Maritime Liens 🔑74—Enforcement—Jurisdiction.

Act Cong. June 23, 1910, c. 373, 36 Stat. 604 (U. S. Comp. St. 1916, §§ 7783–7787) giving for repairs of a vessel a maritime lien thereon enforceable by a proceeding in rem, and providing that the act shall supersede all state statutes conferring liens on vessels in so far as they purport to create rights of action to be enforced by proceedings in rem against vessels for repairs, takes from the state courts all jurisdiction of such proceedings, as to repairs of a vessel already in maritime use.

Appeal from Superior Court, San Joaquin County; C. W. Norton, Judge.

Action by Theodore J. Stephens and another, partners as Stephens Bros., against Weyl-Zuckerman & Co., a corporation. Judgment for plaintiffs, and defendant appeals. Reversed.

Campbell, Weaver, Shelton & Levy, of San Francisco, and Arthur L. Levinsky, of Stockton, for appellant. D. V. Marceau, of Stockton, for respondents.

HART, J. The complaint is in three counts; it being alleged in each that the defendant requested the plaintiffs to furnish certain materials and perform certain work upon a certain gasoline launch belonging to the defendant, and "plying the waters of the San Joaquin river and the tributaries thereof." It is alleged that the plaintiffs furnished the materials for and performed the work upon said launch as so requested, that the aggregate value of the same is the sum of $296.94, and that, although often requested to do so, the defendant has failed and refused, and still fails and refuses, to pay the plaintiffs the said sum of money. A lien, purporting to be that authorized by section 813 of the Code of Civil Procedure, is expressly claimed; the prayer of the complaint being in accordance with the allegation asserting the right of lien, and is as follows:

> "Wherefore plaintiffs pray that judgment be given in their favor, against said defendant, for the sum of two hundred ninety-six and $^{94}/_{100}$ dollars ($296.94), together with costs of suit incurred herein, and that in due course plaintiffs may have said launch, 'Weyl-Zuckerman Co.,' commonly known as 'Old Boat,' together with its tackle, apparel, and furniture, attached, to satisfy said demand; that said sums and costs be adjudged a first lien upon said launch; and for such other relief as may be meet and proper in the premises."

The answer denied generally the allegations of the complaint, and for a separate defense, and by way of cross-complaint, alleged that the labor and materials set forth in the second count of the complaint were performed and furnished, if at all, upon a boat theretofore constructed by plaintiffs for defendant under a written guaranty for one year; that within a year said boat developed faults, due to plaintiffs' defective materials and workmanship; and that said materials and labor were furnished and performed without agreement or expectation of further compensation. There is also a separate defense to the third alleged cause of action, to the effect that the labor and materials therein mentioned were defective, and that, to remedy such defects, defendant was compelled to pay the sum of $15.40. The court found in favor of plaintiff on each cause of action set up in the complaint, and found in favor of defendant in the sum of $15.40 on its cross-complaint. It was decreed that plaintiffs have a lien upon the launch in question, and that the sheriff sell the same and apply the proceeds to the payment of plaintiffs' judgment, entered for $202.84. The appeal is by defendant from said judgment.

As grounds for reversal appellant contends: (1) There is no evidence to justify the finding of the court in so far as are concerned the first and second counts of the complaint. (2) The court had no jurisdiction of the subject-matter of the action, and the judgment and proceedings upon which it is based are void.

[1] The jurisdiction of the court is for the first time challenged on this appeal, and it is now objected that the right to raise that question was waived by failure to raise it in the court below. The specific contention of the defendant upon the question of jurisdiction is that the lien claimed by the plaintiff is maritime in its nature, and therefore one of which the federal courts, sitting in admiralty, have sole and exclusive jurisdiction by virtue of the provisions of an act of Congress, approved by the President on June 23, 1910 (Act Cong. June 23, 1910, c. 373, 36 Stat. 604 [Comp. St. 1916, §§ 7783–7787]), and entitled "An act relating to liens on vessels for repairs, supplies, or other necessaries," providing, among other things, that:

> "This act shall supersede the provisions of all state statutes conferring liens on vessels in so far as the same purport to create rights of action to be enforced by proceedings in rem against vessels for repairs, supplies, and other necessaries."

Of course, if this contention be sound, the mere failure to object in the court below to its jurisdiction in this action could not have the effect of conferring jurisdiction of the action upon that court. Jurisdiction, definitely prescribed to certain courts to the exclusion of all other courts, cannot be conferred upon the latter by the consent or agreement of the parties, and in such case, manifestly, an estoppel cannot be set up as against the right of the defendant to raise that question at any time.

[2] It is, of course, an obvious proposition that, unless a party is entitled to invoke some equitable or other permissible remedy for the judicial enforcement of a money demand, arising on contract, under the sum of $300, the superior court is wholly without jurisdiction to entertain an action for recovery upon such demand. Const. art. 6, § 5. In the present case, therefore, the plaintiffs have plainly sued in the wrong forum, unless, for the enforcement of their demand, they are entitled to invoke the lien provided by section 813 of the Code of Civil Procedure. So much of said section 813 as is pertinent to the inquiry here reads as follows:

> "All steamers, vessels, and boats are liable: * * * (3) For work done or materials furnished in this state for their construction, repair or equipment."

It is the contention of the defendant, as we have shown, that the effect of the act of Congress above referred to was to take from the state courts and exclusively vest in the United States courts jurisdiction to enforce liens for the satisfaction of demands growing out of contracts for the performance of labor and the furnishing of materials in the repair of steamers, vessels, and boats plying navigable waters. The text of said act of Congress is as follows:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that any person furnishing repairs, supplies, or other necessaries, including the use of dry dock or marine railway, to a vessel, whether foreign or domestic, upon the order of the owner or owners of such vessel, or of a person by him or them authorized, shall have a maritime lien on the vessel which may be enforced by a proceeding in rem, and it shall not be necessary to allege or prove that credit was given to the vessel.
>
> "Sec. 2. That the following persons shall be presumed to have authority from the owner or owners to procure repairs, supplies, and other necessaries for the vessel: The managing owner, ship's husband, master, or any person to whom the management of the vessel at the port of supply is intrusted. No person tortiously or unlawfully in possession or charge of a vessel shall have authority to bind the vessel.
>
> "Sec. 3. That the officers and agents of a vessel specified in section two shall be taken to include such officers and agents when appointed by a charterer, or by an owner pro hac vice, or by an agreed purchaser in possession of the vessel, but nothing in this act shall be construed to confer a lien when the furnisher knew, or by the exercise of reasonable diligence could have ascertained, that because of the terms of a charter party, agreement for sale of the vessel, or for any other reason, the person ordering the repairs, supplies, or other necessaries was without authority to bind the vessel therefor.
>
> "Sec. 4. That nothing in this act shall be construed to prevent a furnisher of repairs, supplies, or other necessaries from waiving his right to a lien at any time, by agreement or otherwise, and this act shall not be construed to affect the rules of law now existing, either in regard to the right to proceed against a vessel for advances, or in regard to laches in the enforcement of liens on vessels, or in regard to the priority or rank of liens, or in regard to the right to proceed in personam.
>
> "Sec. 5. That this act shall supersede the provisions of all state statutes conferring liens on vessels in so far as the same purport to create rights of action to be enforced by proceedings in rem against vessels for repairs, supplies, and other necessaries."

It is needless to suggest that, while the intention in the enactment of the above act was to vest in the federal courts, in the exercise of their admiralty powers, exclusive jurisdiction of maritime liens, enforceable by proceedings in rem, it was not thereby intended as an obstacle to the maintenance of suits in state courts against the owners of vessels for repairs thereof and the attachment of such vessels as a means of enforcing judgments obtained in such suits.

[3] The important question, then, which arises in this case, is whether a proceeding for the enforcement of the lien provided by section 813 of the Code of Civil Procedure is one in rem or against the vessel itself. To our minds, it is very clear that the proceeding authorized by section 813 is strictly one in rem. In legal effect, it is analogous to a libel in admiralty, and its object and purpose precisely the same. It necessarily involves an action against the rem or property itself, and the selling of that rem to satisfy the debt sued for. The property itself is, in other words, made liable for the debt.

It is claimed by the plaintiffs, however, that the action here is strictly in personam, since it is the owner of the launch, and not the launch itself, who is proceeded against, and that the effect of the lien claimed is nothing more than that of an attachment or an execution upon the judgment. It is true that the action is, eo nomine, directly against the owner only, and is not so against the launch itself. But the plaintiffs have not invoked the ancillary law remedies of attachment and execution to enforce their judgment. As shown, they claim the right to have their demand satisfied through a lien attaching to the vessel by operation of law—that is, the lien purporting to be created by the provisions of the Code section above named, and in doing so they necessarily proceed against the vessel itself, and thus, as suggested, the questions arise: Is not the action one in rem, as well as one in personam, or, as some of the adjudicated cases characterize such a proceeding, is it not quasi in rem? And (2) if so, in view of the provisions of the above act of Congress, is it within the jurisdiction of the state courts, in a case for recovery upon a demand for labor performed and materials furnished in the repair of a vessel or steamer or boat, to enforce satisfaction of such demand through a remedy necessarily the product of a proceeding in rem against the vessel? In other words, have the state courts the jurisdiction to enforce the lien invoked in this case, or has the jurisdiction thus attempted to be conferred upon those tribunals been divested by the act of Congress in question and by said act vested exclusively in the United States courts sitting in admiralty?

[4] The language of the fifth section of said act would seem to lend support to no other conclusion than that the intention of the Congress was, by that act, to establish a general system, to operate uniformly throughout the nation, for the enforcement of liens by proceedings in rem against vessels for "repairs, supplies and necessaries," and that under the system so established the federal courts, in the exercise of their powers in admiralty, were to be and are thus clothed with sole and exclusive jurisdiction of such proceedings. And that this is the correct view of the act, and that its effect is to take from the state courts all jurisdiction of such proceedings, is abundantly established by the cases. See the Ha-Ha (D. C.) 195 Fed. 1013; The Edna (D. C.) 185 Fed. 206, 207, 209; The Saratoga, 204 Fed. 952, 123 C. C. A. 274; New York Co. v. Bermuda-Atlantic Co. (D. C.) 211 Fed. 989, 997; The Towanda (D. C.) 215 Fed. 232, 234; The Edith (D. C.) 217 Fed. 300, 301; The Geisha (D. C.) 200 Fed. 865; The Easby (D. C.) 201 Fed. 585.

In an elaborate and able review of said act, in which, among other things, he construes the effect thereof upon state statutes giving liens for labor and materials performed and furnished in the repair of vessels, Fitz-Henry Smith, Jr., in 24 Harvard Law Review, 182, 187, 188, has this to say:

> "It will at once be observed that, generally speaking, the act does three things: (1) It does away with the artificial distinction between foreign and domestic vessels in the matter of liens for necessaries; (2) removes the presumption of credit to the owner; and (3) supersedes the state statutes in so far as they confer liens for supplies, repairs, and other necessaries."

The cases above cited likewise construe the act. It hence follows that the state superior court is wholly without jurisdiction to enforce the lien purporting to be authorized in a case of this character by section 813 of the Code of Civil Procedure.

In this case, although the action, so far as its title is concerned, is directly against the owner of the launch only, yet the plaintiffs have in their complaint gone farther, and proceeded in rem, or against the res or launch itself, as effectually as though they had done so directly, or eo nomine, by alleging their right to the lien provided by section 813 of the Code of Civil Procedure, and praying for the sale of the launch under the foreclosure of the lien for the satisfaction of the debt sued for. Call the action what we may—quasi in rem, if that be the proper designation of an action in which both the person and the rem itself are proceeded against—it cannot be denied that, since by such action it is sought to make the property or thing itself liable for the debt growing out of a contract for the repair thereof, the action involves a proceeding in rem in the sense and to the extent that jurisdiction to enforce the lien is, under the terms of the federal statute in question, entirely and solely in the federal courts of admiralty.

The cases relied upon by the plaintiffs in support of their asserted right to the benefit of a lien under the section of the Code named, viz., Olsen v. Birch, 133 Cal. 483, 65 Pac. 1032, 85 Am. St. Rep. 215, and Jensen v. Dorr, 23 Cal. App. 702, 139 Pac. 659, are not pertinent to the situation presented by this appeal. Both those cases were where the liens were claimed for labor and materials performed and furnished in the construction of vessels and before the latter had been put in commission or to a maritime use. An obvious distinction exists between those cases where liens are sought to be enforced for the satisfaction of debts arising from the construction of vessels and prior to the launching of and putting them to use for navigation purposes and those cases in which the debts are created for repairs of vessels already in maritime use. To the former class the act of Congress in question does not apply, for the reason that, as the above statement of the distinction implies, the labor and materials used in the construction of a vessel are performed and furnished before the vessel becomes impressed with a maritime character. See Perkins v. The Golden Girl, 185 Mich. 200, 151 N. W. 660; Olsen v. Birch, 133 Cal. 479, 65 Pac. 1032, 85 Am. St.

Rep. 215; Jensen v. Dorr, 23 Cal. App. 701, 139 Pac. 659.

But the plaintiffs further argue:

> "If, as is claimed by appellant, the act of Congress 'supersedes the provisions of all state statutes conferring liens on vessels, in so far as the same purport to create a right of action to be enforced by proceedings in rem against vessels for repairs, supplies and other necessaries,' it would at most only deprive plaintiffs of their right to have the vessel sold in satisfaction of said judgment, and would in no wise affect the personal judgment against defendant, or the right of plaintiffs to satisfy the judgment out of other property belonging to defendant."

But the obvious reply to this proposition is that, the demand sued for being less than that for which the superior court has jurisdiction, the judgment of said court in favor of the plaintiffs for the amount of said demand is coram non judice and void, unless the plaintiffs, to secure satisfaction of their demand, may legally claim and invoke the lien purporting to be authorized by section 813 of the Code of Civil Procedure.

Since it is our conclusion that the superior court is without jurisdiction to entertain this action, it is obviously unnecessary to consider the question whether the evidence supports the findings.

The judgment is reversed.

We concur: CHIPMAN, P. J.; BURNETT, J.

34 Cal. App. 200

SAXON v. BUCKEYE MFG. CO. (Civ. 1919.)

(District Court of Appeal, Second District, California. June 26, 1917.)

1. Contracts ⟹280(1)—Agreement to Loan—Failure to Deliver Proper Mortgage—Recovery of Money.

Defendant, desiring to sell a truck to C., agreed with plaintiff that if she would advance $500 to C. to enable him to make the purchase, plaintiff should be protected by a first chattel mortgage on the truck, and the receipt issued to plaintiff when she delivered her check for $500 to defendant, provided that the money should be returned to her if the loan was not made. The sale was made, and defendant got full payment, but the mortgage on the truck forwarded by defendant to plaintiff was executed informally and was unacknowledged, C. having failed to sign in the usual place, though the mortgage as between the parties could be enforced by action. *Held*, that plaintiff was justified in refusing to accept it, having a right to insist on the correction of its execution, and, this not having been done, she could recover her $500 from defendant.

2. Contracts ⟹322(2)—Evidence—Materiality.

In plaintiff's action, the court properly admitted the correspondence which passed between her attorney and the automobile company, touching the matter of the execution of the mortgage, it being competent, material, and pertinent to show the continued objection made by plaintiff to the mortgage tendered her, and that she did not, by acquiescence, accept it as sufficient, while the reply correspondence from defendant was competent to make a complete statement of the matters discussed, etc.

3. Trial ⟹395(1)—Necessity for Findings.

Where the court by its findings determined that the contract in suit was as plaintiff had alleged it to be, it was unnecessary to make particular findings as to matters touching the same issue which were set forth in defendant's answer.

Appeal from Superior Court, Los Angeles County; Sidney N. Reeve, Judge.

Action by Cora Saxon against the Buckeye Manufacturing Company, a corporation. From a judgment for plaintiff, and an order denying new trial, defendant appeals. Judgment and order affirmed.

Edward M. Selby, of Los Angeles, for appellant. Leaf & Pugh and James E. Shelton, all of Los Angeles, for respondent.

JAMES, J. Appeal by the defendant from a judgment entered in accordance with the prayer of plaintiff's complaint, and from an order made on the trial court denying to the defendant a new trial. The judgment roll is included in the transcript, and the evidence heard at the trial is presented by bill of exceptions.

Plaintiff by this suit sought to recover the sum of $500, with interest, alleged to have been deposited with the defendant under the terms of a certain agreement. The cause of action is in the main stated in paragraph 2 of plaintiff's complaint, which paragraph reads as follows:

> "That on the 26th day of July, 1912, in the city of Los Angeles, county of Los Angeles, state of California, plaintiff deposited in the hands of defendant the sum of $500, and authorized defendant to lend said $500 to one Ray S. Carrothers, upon the defendant procuring and delivering to plaintiff the promissory note of said Ray S. Carrothers, executed to plaintiff, for $500, payable six months from the date of the execution thereof, and secured by a chattel mortgage on a certain automobile truck that defendant informed plaintiff was to be purchased by said Ray S. Carrothers from defendant; and defendant agreed to make said loan in the manner above stated, and not otherwise, and agreed to return said sum of $500 to plaintiff within a reasonable time after July 26, 1912, if said loan was not made in the manner above stated."

It is claimed in the first place that the evidence is insufficient to support the findings made by the trial judge. The evidence showed that in 1912 the plaintiff, having theretofore entered into a contract with the defendant by which the plaintiff acquired the right to market automobiles manufactured by defendant within certain territory in the state of California, desired to bring to an end her business relations with defendant. The full time fixed by the agreement between the parties had not then expired, and defendant sent to California its agent for the purpose of endeavoring to adjust matters with the plaintiff so that her desire to be released from her contract might be accomplished. This agent, dealing mainly with the attorney for the plaintiff, arrived at an agreement, which was reduced to writing. This agreement embodied a number of provisions which related to the disposition to be made of automobiles and trucks theretofore ordered from the defendant by the plaintiff. The cause of action here sued upon arose by reason of the claim of the plaintiff that the defendant had failed to comply with certain conditions made respecting the matter set forth in paragraph 7 of the settlement agreement. We quote that paragraph:

"(7) Inasmuch as said Buckeye Manufacturing Company is disposing of or is intending to dispose of the truck included in said carload above mentioned, Mrs. Saxon agrees to make a loan to the purchaser of said truck, Mr. Ray S. Carrothers, in the sum of $500, so that said Carrothers can pay to said Buckeye Manufacturing Company the balance of the purchase price of said truck in full, said loan to be represented by a promissory note made by said Carrothers, due six months after its date, bearing interest at 7 per cent. per annum from its date, which promissory note shall be secured by chattel mortgage on said truck, executed by said Carrothers in the form already agreed upon and already executed by said Carrothers."

The evidence showed that as to the particular truck mentioned in the foregoing the defendant company desired to complete the sale thereof to Carrothers, but were not prepared to do so until $1,100, in addition to the $500 to be advanced by the plaintiff, was paid on account of the purchase price. On July 26, 1912, the plaintiff delivered her check for $500 to the defendant, and the following receipt was issued to her:

"Received from Mrs. Cora Saxon check to the order of Buckeye Mfg. Company for five hundred dollars, being the amount agreed to be loaned by Mrs. Saxon to Ray S. Carrothers, for six (6) months at 7 per cent. interest, on note to be secured by chattel mortgage on Lambert truck, in accordance with agreement dated July 24, 1912. In case said loan is not made to Carrothers, said check for $500.00 shall be returned to Mrs. Saxon.

"[Signed] The Buckeye Mfg. Co.,
"J. E. Burke."

At the time this receipt was issued the defendant had not completed the deal with Carrothers, in that Carrothers had not yet secured the $1,100 which he was to pay in cash, and which he was arranging to borrow on the security of some real estate. Meanwhile plaintiff's attorney, being consulted by the agent of defendant, had furnished to the defendant's agent a form of chattel mortgage to be executed by Carrothers. The testimony of the attorney for the plaintiff who acted in the negotiations with defendant's agent, was to the effect that he did not superintend the further making of the chattel mortgage in any way; that he prepared the form and delivered it to defendant's agent that the latter might have it executed in such a way as to furnish to the plaintiff the security for $500 in accordance with the agreement hereinbefore referred to. There was some conflict in the testimony upon this point, the defendant's agent claiming that the attorney did supervise and direct the further attaching of the signature of Carrothers to the document; but in view of the conflict we must assume the correctness of the testimony introduced by the plaintiff on all points. It does appear that after the plaintiff had delivered her check for $500 to the defendant and the form of chattel mortgage had been placed in defendant's hands for execution by Carrothers, the latter document was not delivered to the plaintiff or her attorney until September of the same year. At that time defendant wrote to the plaintiff:

"We are inclosing you herewith the Ray S. Carrothers mortgage notes, Mr. Carrothers having just sent in the remainder of his settlement on the truck. We are sending you this in care of Mr. Bacheler and presume it will be necessary for you to have the same recorded at once. Yours very truly, The Buckeye Mfg. Company, J. E. Burke."

Upon examining the documents forwarded by defendant with the letter above quoted, the attorney found that Carrothers had signed on the face of the mortgage the note set out therein, that he had not attached his signature in the usual place at the foot of the mortgage at all, and that the only other place where his signature appeared was as attached to the affidavit at the foot of the mortgage, made in accordance with the provisions of section 2957, Civil Code. While that matter has not been specially adverted to in the briefs, we also note that the document did not have attached at that time any acknowledgment by the mortgagor which would entitle it to be recorded. Immediately upon receiving the letter and the inclosures from the defendant, plaintiff's attorney wrote to defendant, calling attention to the fact that the note of Carrothers should have been executed in separate form from the mortgage, and that Carrothers, in order to properly attest the mortgage, should have signed it in the usual place. He further called attention to the fact that the mortgagee had not joined in the affidavit required. The plaintiff at that time not being a resident of California, her attorney gave in this letter her address, which was at a place in Colorado. In this letter, which was dated September 10th, the attorney stated to defendant:

"I do not think you are authorized to use Mrs. Saxon's money until a duly executed mortgage has been recorded here and the note referred to in the mortgage delivered to Mrs. Saxon."

The mortgage was returned to the defendant, and the defendant forwarded it to Mrs. Saxon in Colorado and she signed the affidavit, which had previously been signed by Carrothers. The mortgage was still without the signature of Carrothers affixed in the usual place; and there was no separate note aside from that appearing in the mortgage itself. On September 16th defendant wrote to plaintiff's attorney in Los Angeles:

"Replying to yours, we have to-day sent the mortgage to Mrs. Saxon at Colorado Springs, and requested her to follow instructions in your letter which accompanies same and return it to you promptly. Mr. Carrothers' address is Surrey, Cal., and as soon as you receive the mortgage back from Mrs. Saxon will you kindly address a letter to Carrothers requesting him to come in and sign same and at the same time a note in conformity with the note in the mortgage and turn same over to Mrs. Saxon."

The reply, made early in October, to this letter by plaintiff's attorney was that he had written to Carrothers, but that Carrothers had not appeared. He added:

> "Of course, we are holding the Buckeye Manufacturing Company until the note and also the chattel mortgage are fully completed."

Considerable correspondence followed between defendant and the plaintiff. Carrothers never did appear and sign the documents. Plaintiff's attorney at all times insisted in his letters to the defendant that he would refuse to accept the mortgage in the condition it was, but would insist upon the $500 being returned to the plaintiff. Defendant finally insisted on its part that it had fully complied with its agreement, whereupon this action was commenced. We have already indicated that there was some conflict between the testimony given by defendant's agent Burke and that given by the attorney for the plaintiff as to the circumstances relating to the matter of the execution of the chattel mortgage at the time the form was prepared by the attorney. The letters written by the defendant during the time that the matter was in the stage of active dispute indicated that it had not considered its duty at an end when it offered to the plaintiff the mortgage of Carrothers in its imperfect condition.

[1] However, we agree wholly with the contention of respondent as to the obligations assumed by the defendant under its agreement with the plaintiff. At the time the agreement was entered into respecting the loan of $500 to be made by the plaintiff to Carrothers, the defendant had the truck in its possession, it had not completed the sale to Carrothers, and was wholly in a position to protect itself from loss. It assumed the duty voluntarily, in consideration that the plaintiff would make the $500 loan, of seeing to it that the plaintiff was protected by security in the form of a first chattel mortgage against the truck. The making of the mortgage was in the hands of the defendant, and, according to the testimony offered for the plaintiff, the only thing the latter's attorney did was to indicate a form of mortgage which would be satisfactory to his client. The receipt issued to the plaintiff when she delivered her check for $500 provided that the money should be returned to her in the event the loan was not made, and this condition was one which was clearly impressed upon the whole transaction, as shown by other evidence. There was no material dispute, but that under the agreement as made the $500 of Mrs. Saxon was not to be applied on account of the purchase by Carrothers of the truck from the defendant, unless Carrothers secured more cash to put with that money. If he had not secured the additional cash, there would have been no sale of the truck, and consequently there would be no transaction upon which the $500 of the plaintiff could properly be applied. Necessarily in that contingency it was understood that Mrs. Saxon should have her check returned. As it developed, however, Carrothers did raise the additional $1,100, and the defendant got full payment for the truck. Did it on its behalf properly secure the plaintiff for her advancement in the way it agreed to do? Counsel for appellant argues that the mortgage as made by Carrothers was good in law and could be enforced. Assuming the correctness of this position, we do not think that the plaintiff was obliged to accept a mortgage executed in such an informal way as this one was, particularly as to the failure of Carrothers to sign the mortgage in the ordinary and usual place. There is no doubt that the note, being signed in the body of the mortgage, was a good note and enforceable, and yet in the ordinary and usual completion of such a mortgage transaction the mortgagee is given the original note separately and a copy thereof is embodied in the mortgage. We have said, and we repeat, that we think that, even though it be admitted that the mortgage as between the parties could be enforced by action (and counsel for appellant has some substantial authority sustaining such a position), the mortgagee was wholly justified in refusing to accept an instrument executed in a way so divergent from the common and ordinary method. She had a right to insist, as she did, upon the correction of the document, and the burden rested upon the defendant under its agreement to see that her request was complied with. We have called attention to the fact that the chattel mortgage was not acknowledged by the mortgagor. This, under the provisions of section 2957, Civil Code, would have prevented its recordation, and so deprived the plaintiff of the protection given her by the notice which such recordation would afford as against further incumbrancers or purchasers from Carrothers. The property involved was property peculiarly susceptible of being transferred from one place to another, and which could easily be disposed of or further incumbered.

[2, 3] Counsel for appellant insists that the court committed error in admitting the correspondence which passed between plaintiff's attorney and the defendant touching the matter of the execution of the mortgage. That correspondence was competent, material, and very pertinent to show the continued objection made by the plaintiff to the mortgage tendered her, and that she did not, by any form of acquiescence, accept the same as sufficient. The correspondence from the defendant in reply was competent to make a complete statement of the matters discussed and to show, by inference at least, that the defendant did not, until very late in the course of the correspondence, contend but that a duty still rested upon it to see that the mortgage was executed in form as required by the plaintiff. The court by its findings determined that the contract as made was as plaintiff had alleged it to be. Necessarily

this conclusion excludes all notion or idea that the contract was of any other kind, or that the breach alleged to have been committed by the defendant was of any different kind than the affirmative findings showed it to be. It was therefore unnecessary to make particular findings as to certain matters touching the same issue, and which were set forth in the answer made by the defendant.

We have examined all of the points presented by appellant from which it is argued that a reversal should be ordered, and we cannot concede that they possess the merit claimed for them.

The judgment and order are affirmed.

We concur: CONREY, P. J.; WORKS, Judge pro tem.

34 Cal. App. 164

HOWARD v. ANGLO-CALIFORNIA TRUST CO. et al. (Civ. 2039.)

(District Court of Appeal, First District, California. June 21, 1917. Rehearing Denied by Supreme Court Aug. 20, 1917.)

1. TRUSTS ⇨140(1)—WAIVER OF RIGHTS BY BENEFICIARY.

Decedent transferred to a trust company for trust purposes his shares in the investment company he had formed to manage his properties, requiring that out of net dividends the trustee should pay after decedent's death $250 a month to plaintiff, and providing that such payments should constitute, when received, a waiver of all compensation for all services plaintiff might render to the investment company. The trustee made one payment of $250 to plaintiff, but litigation arose, and no further dividends were paid. Later the investment company adopted a resolution that since plaintiff, its president, had been devoting his time to it, he should be paid a salary of $250 per month, that the trustee should be notified that plaintiff was receiving such salary, and that from such date any dividends due plaintiff under the trust agreement should be retained in accordance with the provision of the agreement whereby, should plaintiff receive a salary, it should be in lieu of dividends. *Held*, that plaintiff, having accepted $16,750 as salary from the investment company under the resolution, waived his right to recover of the trustee the aggregate amount otherwise payable to him by the trustee under the trust.

2. CONTRACTS ⇨187(1)—CONTRACT FOR BENEFIT OF THIRD PERSON—STATUTE.

Under Civ. Code, § 1559, providing that a contract made expressly for the benefit of a third person may be enforced by him at any time before the parties rescind it, the contract between an investment company and its president, embraced in a resolution of the company, providing that a specified salary to the president should be in lieu of his rights under a trust instrument of which shares in the investment company were the subject-matter, was a contract which the trustee and the other beneficiaries could enforce, and successfully assert the benefits of in the president's action against the trustee to recover his beneficial interest, despite his having received salary.

Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by Frederick Paxson Howard against the Anglo-California Trust Company, a corporation, and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Aldrich & Gentry, of Oakland, and A. E. Shaw, of San Francisco, for appellant. F. A. Denicke and H. S. Young, both of San Francisco, for respondent Anglo-California Trust Co. C. W. Slack, of San Francisco, for respondents Whitney and others.

RICHARDS, J. This is an appeal from a judgment in favor of the defendants. Charles Webb Howard, in the course of the management of his accumulated properties, caused to be created, prior to the year 1903, a corporation known as the Howard Investment Company, with a capital stock of 5,000 shares, of which he retained the ownership of 4,995. In the month of October, 1903, the said Charles Webb Howard caused to be transferred to Central Trust Company of San Francisco his said 4,995 shares of the capital stock of the Howard Investment Company for certain trust purposes, among which was the requirement that out of the net dividends declared upon such shares of stock and collected by said trustee the latter was to pay, after the death of said Charles Webb Howard, certain sums of money to certain designated beneficiaries, among whom was the plaintiff in this action, who was to receive the sum of $250 per month from such source. The trust direction as to said plaintiff contained the following proviso:

> "Provided that such payments to said Frederick Paxson Howard personally and while living shall be and constitute, when received by him, a waiver of all compensation for any and all services which, as an officer or otherwise, he personally may, from time to time, render to said Howard Investment Company."

It was further provided by said trust that upon the termination of the trust the said shares of stock which were its subject, together with the balance of the income therefrom remaining in the hands of the trustee, were to go in certain specified proportions to the plaintiff and to three of the individual defendants, who were subsequently made parties to this action by order of the court. Charles Webb Howard died in 1908. Shortly thereafter a dividend was declared upon said stock, out of which the trustee was enabled to make one payment of $250 to the plaintiff; but, litigation immediately arising over the validity and subject of the trust, no further dividends were declared or paid to plaintiff. In the month of October, 1908, the Howard Investment Company adopted the following resolution:

> "Whereas, F. P. Howard, the president of this company, has been devoting his time to the affairs of the company, and for such time and attention no compensation has been paid him: Now, therefore, be it resolved that the said F. P. Howard, as president of this company, be paid a salary of $250 per month, commencing the 1st day of October, 1908; and be it further resolved that the Central Trust Company of California be notified that the said F. P. Howard

is receiving a salary of $250 per month for services rendered to the company, and that from and after October 1, 1908, any dividends which may be due him under that certain trust agreement made and executed by the late Charles Webb Howard be retained in accordance with the provisions made therein by which, should said F. P. Howard receive a salary for services rendered, said salary should be in lieu of dividends that he might receive from the said Central Trust Company under the aforesaid trust agreement."

At the time of the adoption of this resolution the plaintiff was president of the Howard Investment Company, and prior to its passage was made familiar with its terms. The evident, if not expressed, purpose of the resolution was to provide the plaintiff with an income of $250 during the time, at least, that the shares of the Howard Investment Company were so tied up in litigation that no dividends were being declared or paid to the trustee which could in turn by it be paid over to the plaintiff under the terms of the trust. The plaintiff accepted and acted upon the terms of the foregoing resolution, continuing to perform the duties of president of the Howard Investment Company and regularly receiving the monthly salary named therein until he had received the sum of $16,750 on account of his salary as provided in said resolution. In the month of May, 1914, the plaintiff instituted this action against the Anglo-California Trust Company, which had been substituted for the original trustee, to recover the sum of $17,750, alleged to be due him as the accumulated monthly payments under the terms of said trust. Said trustee caused the other beneficiaries of the trust, including the individual respondents herein, to be interpleaded for the purpose of defending against the plaintiff's claim, which, if allowed, would have depleted their respective shares of the properties and funds in the hands of said trustee. The trial of the cause resulted in a judgment in favor of the respondents, and from such judgment plaintiff prosecutes this appeal.

The sole question presented upon this appeal is as to whether the plaintiff, having accepted the salary as president of the Howard Investment Company under the terms and conditions specified in the resolution providing for the payment of such salary, must be held to have thereby waived his right to receive and recover the aggregate amount which would otherwise have been payable to him by the trustee under the terms of the trust.

[1, 2] We are of the opinion that the trial court rightly resolved this question in favor of the respondents. It is true that under the peculiar wording of the proviso in the trust instrument above set forth the plaintiff cannot be held to have waived any right which he might otherwise have to receive compensation for his services as an officer of the Howard Investment Company until such time as he had actually received the payments coming to him as a beneficiary of said trust; and had the Howard Investment Company voted to pay and paid the plaintiff said salary during the period when he was not receiving the monthly payments due him as such beneficiary, without the limitations attending the allowance and receipt of such salary in the foregoing resolution, the plaintiff's right of recovery in this action would have been unassailable. But such was not the case; and while it is true that the original trustee and the individual respondents herein were not parties to the contract contained in the resolution providing for the payment of a salary to plaintiff as president of the Howard Investment Company, yet the interrelation of the parties was such that said resolution cannot be otherwise construed than as intended to substitute the monthly salary which the plaintiff was to receive thereunder for the monthly sum he was otherwise entitled to receive, but was not as yet receiving, from the trustee, and that, when plaintiff undertook to perform the duties of president of the Howard Investment Company for the monthly salary to be allowed him under the limited terms of said resolution, he must be understood to have agreed to waive his right to receive his monthly stipend from the trustee while such salary was being paid, and, in view of the interrelation of the parties, it must also be held that this was a waiver made expressly for the direct benefit of the trustee and of the other ultimate beneficiaries of the funds and properties of the trust. This being so, the contract embraced in said resolution was one the terms and limitations of which the said trustee and the other beneficiaries of the trust would be entitled to enforce, and successfully assert the benefits of in this action. Section 1559, Civ. Code; Bacon v. Davis, 9 Cal. App. 83, 98 Pac. 71; Washer v. Independent M. & D. Co., 142 Cal. 702, 76 Pac. 654; Goff v. Ladd, 161 Cal. 257, 118 Pac. 792.

For the foregoing reasons, the judgment is affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

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34 Cal. App. 239

CAPUCHINO LAND CO. v. BOARD OF TRUSTEES OF CITY OF SAN BRUNO et al. (Civ. 1984.)

(District Court of Appeal, First District, California. July 5, 1917. Rehearing Denied by Supreme Court Sept. 1, 1917.)

1. MUNICIPAL CORPORATIONS 🔑33(8)—ANNEXATION PROCEEDINGS—WRIT OF REVIEW.

Under St. 1889, p. 358, with reference to inclusion of inhabited territory within corporate limits, the actions of the board of trustees of a city in determining whether a petition for annexation is sufficient are judicial, and may be reviewed by a writ of review.

2. MUNICIPAL CORPORATIONS 🔑33(8)—ANNEXATION PROCEEDINGS—WRIT OF REVIEW.
Whether territory sought to be brought within the boundaries of the city by an annexation election is inhabited territory within St. 1889, p. 358, is a question which the electors ought rightly be left to decide, but when a case is presented in which the tract sought to be included has not a house upon it, and consists of grazing or marsh land and falls clearly without the statute, the determination of the governing officers of the adjacent municipality bringing such an area within its boundaries should be a subject of inquiry through a writ of review.

3. MUNICIPAL CORPORATIONS 🔑29(4)—ANNEXATION—"INHABITED TERRITORY."
A compact, uninhabited, rectangular body of land embracing 1,890 acres, consisting entirely of grazing, marsh, and tide lands, separated from inhabited parts of the city by railroads, and not subdivided or intersected by streets, is not "inhabited territory" within the meaning of St. 1889, p. 358, providing for the annexation of inhabited territory.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Inhabited Territory.]

Appeal from Superior Court, San Mateo County; John L. Hudner, Judge.

Writ of review by the Capuchino Land Company against the Board of Trustees of the City of San Bruno and others. Judgment for petitioner, and defendants appeal. Affirmed.

Mason & Locke, of San Francisco, and Kirbride & Gordon, of San Mateo, for appellants. Arthur H. Redington, of San Francisco, for respondent.

RICHARDS, J. This is an appeal from the judgment in petitioner's favor upon a hearing of its application for a writ of review, wherein the petitioner sought to have reviewed and annulled the action of the board of trustees of the city of San Bruno in calling and holding an election for the proposed annexation of certain territory to and its inclusion within the corporate boundaries of said municipality.

The election was called and held under the provisions of the act of 1889 (Stats. 1889, p. 358) providing a method for the inclusion of outside inhabited territory within the corporate limits of municipalities. The lands of the petitioner sought to be made the subject of such inclusion within the corporate limits of the city of San Bruno consisted of a tract of land lying adjacent to the eastern boundary of its present corporate limits, comprising 1,890 acres in one rectangular piece, and extending thence eastward to and some distance into the tidewaters of the bay of San Francisco. This particular tract is entirely uninhabited, but adjacent to it, lying across the railroad tracks which run along a portion of its western line, is another and separate tract of land comprising 62 acres and known as Lomita Park, which has been subdivided and sold in small lots, and which is inhabited by a population of 190 persons. The city of San Bruno was incorporated as a city of the sixth class in December, 1914. In the month of June, 1915, the board of trustees of the said city received a petition containing 111 signatures of persons asserting themselves to be and constitute the necessary one-fifth of the qualified electors of the municipality required by the statute, which petition described the territory sought to be included within the limits of the municipality through the holding of an annexation election, and which description embraced the lands of the petitioner. The board of trustees of said city entertained said petition, decided that it was sufficient in point of signatures and description to require the calling of such election, and then proceeded in accordance with the directions of the statute to call and hold the same. The jurisdiction of said board so to do was the subject of successful assault in this proceeding before the trial court, and from its judgment annulling the proceedings for the calling and holding of such election the present appeal has been taken.

The chief and vital point urged by the petitioner before the trial court and insisted upon on this appeal is that the face of the record discloses and the fact is that the said lands of the petitioner constitute a segregated uninhabited territory which is of such comparative area and so situated as not to be susceptible of being brought within the intent and meaning of the term "uninhabited territory" as employed in the statute of 1889, and hence that its annexation either by itself, or by the attempted inclusion within the same description with itself of another and separate inhabited area, was beyond the jurisdiction of said board of trustees of the city of San Bruno.

The answer which the appellants make to this contention is twofold; the first being that the action of the said board of trustees in the matter of the calling and holding of the election in question is not judicial in its character but is purely administrative, and hence not the subject of review of this proceeding, and this for the reason that the statute under which the election was called and held gives to the governing bodies of municipalities no discretion in the matter of calling and holding an annexation election upon the presentation of a proper petition therefor, signed by the requisite quota of electors, and containing the proper description of the territory to be embraced within the boundaries of the city, and it is therefore argued that the writ of quo warranto would be the proper and only remedy for the acts of the appellants of which the petitioner herein complains.

[1] As to this contention we are clearly of the opinion that, while it is true that the statute in question reposes no discretion in

the board of trustees as to the matter of issuing its call for an annexation election upon the presentation of a properly signed and worded petition therefor, and that its acts in the premises from that time forth would be administrative, and hence not the proper subject of review in this proceeding, yet the initial action of the board of trustees in determining whether a petition in all respects sufficient to set in motion the compulsions of the statute in the matter of calling and holding such election had been presented before it was essentially judicial in its nature, and hence was and is the proper subject of review in this proceeding. The controlling authorities sustaining this view are Stumpf v. Bd. of Supervisors, 131 Cal. 364, 63 Pac. 663, 82 Am. St. Rep. 350; Great Western Power Co. v. Pillsbury, 170 Cal. 180, 149 Pac. 35; People v. Oakland, 123 Cal. 598, 56 Pac. 445; Levee District v. Farmer, 101 Cal. 178, 35 Pac. 569, 23 L. R. A. 388; People v. Ontario, 148 Cal. 625, 84 Pac. 205.

The case of Frederick v. City of San Luis Obispo, 118 Cal. 392, 50 Pac. 661, cited in the closing brief of appellants, is not in conflict with the rule adhered to in the foregoing cases, for that was a proceeding in mandamus to compel the holding of an election after the presentation of a proper petition therefor; and the question of the nature of the action of the city officials in passing upon the sufficiency of the petition itself was not the subject of inquiry or decision in that case.

[2] The second and final contention of the appellants is that the question as to whether or not the territory sought to be brought within the boundaries of the city by the annexation election is inhabited territory within the meaning and intent of the statute of 1889 is a purely political question, to be determined in the first instance by the electors presenting the petition, by the board of trustees in their adoption of the proposed boundaries of the enlarged city, and finally by the voters themselves within the prescribed territory sought to be annexed, and that as to such determination the courts have no right to interfere.

While it is true that the question as to whether certain territory lying adjacent to a municipality and sought to be embraced within its boundaries is or is not inhabited territory within the intent and meaning of the statute of 1889 would, in many cases, be a difficult question to determine, owing to the fact that the suburbs of cities frequently embrace areas more or less thinly populated, with considerable stretches sometimes of vacant lots or lands, and that in such cases the determination of the question as to whether the areas sought to be embraced within the city are sufficiently inhabited so as to be properly included within it, is one which the electors occupying said areas should rightly be left to decide, still, when a case is presented in which the particular tract of land sought to be included is of such size, area, location, isolation, and state of uninhabitancy as to render it perfectly apparent that it falls clearly without and beyond the scope and intent of the statute of 1889 permitting only inhabited areas to be embraced within its provisions for the holding of annexation elections, in such a case we are satisfied that the determination of the governing officials of the adjacent municipality to bring such an area within its civic boundaries should be the subject of inquiry through the writ of review.

[3] The record seems to us to show that this is one of those cases. The tract of land sought to be included within the expanded boundaries of the city of San Bruno is a compact rectangular body of land embracing 1,890 acres, which has apparently never been subdivided or intersected with streets, has not a house upon it, and consists entirely of grazing, marsh, and tide lands. It is separated from the Lomita Park tract by the tracks of the Southern Pacific Railroad and of the San Francisco & San Jose Railroad, so that the inhabitants of the Lomita Park tract cannot by any stretch of reasoning be said to be inhabitants of the larger area adjacent. In no reasonable sense can it be said that this tract of land, which from the map appears to be almost if not quite as large as the present city of San Bruno, when regarded as a unit, be said to be inhabited, nor to have any electors within its boundaries to whom the question of its annexation to the city of San Bruno could have been submitted under the terms of the statute of 1889. This being so, there is no room for the application of the principles enunciated in the case of the People v. City of Los Angeles, 154 Cal. 220, 97 Pac. 311, to the facts of the case at bar. On the other hand, the language of the Supreme Court in the very recent case of People v. Van Nuys Lighting District, 173 Cal. 792, 162 Pac. 97, has a very apt and direct bearing on the facts of the instant case:

> "The only fair and reasonable construction of the act is that districts for which it provides are intended to be limited territorially to the town or village whose residents and taxpayers petitioned therefor. Doubtless the board of supervisors would have much discretion upon the question whether or not any particular parcel of land could reasonably be included as part of such town or village. The courts should be loth to set aside the proceeding for error in this particular, and would not do so unless the unwarranted inclusion is clear. Here there can be no doubt. The area included without authority is so vast that it can only be regarded as a plain disregard of the statute."

The foregoing views gain an added force from consideration of the fact that the state Legislature has provided two distinct methods for the incorporation of additional territory within the boundaries of municipalities. One of these is embraced in the statute of 1889 under which the city of San Bruno attempted to act in the proceeding under review. That statute, as we have seen, is confined in its application to territory which, taken as a whole, may be fairly said to be inhabited. The other method is to be found embraced within the terms of the act of 1899 (Stats. 1899, p. 37), which has application to the annexation of uninhabited lands to municipalities, and which provides for a proceeding before the board of supervisors of the county wherein such lands are located, in which proceeding the owner or owners of the acreage proposed to be included may be heard to protest effectively, if they so desire, against the inclusion of such lands. It seems to us clear that the lands of the petitioner in this proceeding are of such a character as to the state or want of their inhabitancy as to be only the subject of inclusion within the corporate boundaries of the city of San Bruno through the operation of this latter act, and that the attempt of the board of trustees of said city to bring them within the scope of the operation of the statute of 1889 was beyond the jurisdiction of said board, and that it was within the proper scope and power of the court to annul their proceedings taken in that behalf through the medium of a writ of review.

This conclusion renders unnecessary a consideration of the other points relied upon by the respondents herein.

Judgment affirmed.

We concur: KERRIGAN, J.; BEASLY, Judge pro tem.

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34 Cal. App. 269

PEOPLE v. CALIFORNIA SAFE DEPOSIT & TRUST CO. et al. (Civ. 2066.)

(District Court of Appeal, First District, California. July 7, 1917.)

1. Corporations 🔑566(1) — Liens 🔑4 — Claims—Preferences.

By agreement a lease was canceled and a new lease issued to a corporation which agreed in writing to pay the former lessee an agreed amount per month. The corporation became insolvent and the lessor compromised her claim against the corporation and secured a cash payment. *Held*, that the former lessee's claim to the monthly installments was not a preferred claim, nor could a lien be imposed therefor on the lessor's property.

2. Corporations 🔑568 — Insolvency — Claims—Interest.

Where the assets of the insolvent corporation will pay its obligations in full, a creditor should be allowed interest upon his claim on a written contract, from the date of the respective sums, in view of Civ. Code, § 1917, providing for interest upon all moneys which have become due upon any instrument in writing.

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by the People, etc., against the California Safe Deposit & Trust Company, a corporation, and others, in which George S. Smith intervened. From the judgment the intervener appeals. Modified, and cause remanded.

Arthur Crane, of San Francisco, for appellant. De Laveaga & Magee, of San Francisco, for respondents.

RICHARDS, J. In this action, originally instituted for the purpose of having the defendant California Safe Deposit & Trust Company declared an insolvent corporation and for the administration of its assets, the appellant herein intervened, setting up certain facts upon which he claimed to be entitled to recover judgment for the sum of $2,000 and interest, and to have certain other and further relief.

The facts out of which his claim arose are substantially undisputed, and are as follows: During the month of July, 1906, the appellant was a lessee for a term of years of one Leonide G. Auzerais of certain premises described in his petition. The California Safe Deposit & Trust Company desired to secure a lease of said premises for its own uses. Accordingly Mrs. Auzerais, the appellant, and the representatives of said corporation came together in an understanding whereby the appellant's lease was canceled and a new lease was made by Mrs. Auzerais to the corporation for a term of five years with certain privileges of renewal. As the consideration for the cancellation of the appellant's lease the said corporation entered into an agreement with him, whereby it agreed to pay him $200 per month for the period of the five-year term of its lease, and in the event of its renewal to pay him said sum of $200 per month during the further period of five years. There were certain other agreements not material to this controversy in view of later developments. In the latter part of the year 1907, the said corporation became insolvent, and this action was instituted by the state of California for the administration of its affairs. Not long thereafter Mrs. Auzerais applied to the court in which said proceeding was pending for leave to bring an action in ejectment against said insolvent, alleging the termination of its lease through the insolvent's failure to comply with its terms. The court denied her petition, but permitted the receiver to compromise the matter with her by a surrender of the premises and a cash payment of $4,000. Thereafter the appellant filed his petition in said court, asking for certain relief under the terms of his foregoing agreement. His first prayer was for the payment to him of a sum of $2,000, with interest at the rate of 7 per cent. per annum from the dates of the respective monthly payments aggregating said sum fell due; and for an accounting as to such further amounts as might be found due under his agreement with the insolvent corporation; that such sums should constitute and be a preferred claim against said insolvent, and should also be decreed to be a lien on the said property of Mrs. Auzerais. The trial court found that there was due to the appellant the principal sum of $1,535 upon his agreement with said corporation, and gave judgment for said amount as a common claim, to be paid in the same manner as other common claims in due course of the liquidation of the affairs of the corporation; but the trial court refused to allow the appellant any interest on the sums of monthly accruing payments aggregating the said sum for which it gave its judgment in appellant's favor, and also denied the prayer of the appellant to have the said claim made a preferred claim or to have the same imposed as a lien upon the property of Mrs. Auzerais.

[1] We are entirely satisfied that in so far as the judgment of the trial court refused to give preference to the appellant's claim, and declined to impose it as a lien upon Mrs. Auzerais' property, its judgment was correct, and hence will not be disturbed upon this appeal; and in so far as its said judgment awarded to the appellant the sum of $1,535 and no more as the principal sum due him upon his agreement with the corporation, its conclusions are also correct; but as to the right of the appellant to have interest allowed upon his claim we think the trial court was in error.

[2] The appellant's right to interest is based upon section 1917 of the Civil Code, by which interest at the legal rate of 7 per cent. is payable upon all moneys that have become due upon any instrument in writing. This right of the appellant is as substantial as his right to receive the principal sum due him upon such written agreement. The Bank Act of California is silent upon the subject of the power of the court in the matter of the allowance of interest upon claims against an insolvent corporation. The cases to which we are referred by the respondent are cases arising either under statutes expressly providing that no interest shall be allowed upon such claims, or dealing with instances where the assets of the insolvent are shown to be insufficient to meet its obligations in full, including interest. In the case before us the record nowhere discloses that the assets of the insolvent corporation will not, under prudent management, pay its obligations in full; and, this being so, we think the better rule is that adhered to in the case of American Iron & Steel Co. v. Seaboard Railroad Co., 233 U. S. 261, 34 Sup. Ct. 502, 58 L. Ed. 949, that interest should be allowed on all claims during receivership, and that if, as a result of good fortune or good management, the estate shall finally prove sufficient, both interest and principal should be and would be paid in full.

In the case before us the judgment merely establishes the status and amount of the claim, leaving its settlement to await the ultimate distribution of the assets of the corporation. We are therefore of the opinion that the judgment should be so modified as to provide for the allowance of interest upon the appellant's claim from the date the respective sums making up its aggregate became due and payable, and that the cause be remanded to the trial court for the purpose of making such modification, and that otherwise the judgment should be affirmed. It is so ordered.

We concur: KERRIGAN, J.; BEASLY, Judge pro tem.

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34 Cal. App. 168

McGAVIN v. SAN FRANCISCO PROTESTANT ORPHAN ASYLUM SOC. et al. (Civ. 2041.)

(District Court of Appeal, First District, California. June 22, 1917. Rehearing Denied by Supreme Court Aug. 20, 1917.)

1. EXECUTORS AND ADMINISTRATORS 🔑315(4)—DECREE OF DISTRIBUTION—SETTING ASIDE—MISTAKE.

A decree of distribution of an estate will not be set aside unless the fraud or mistake on account of which the relief is prayed is extrinsic or collateral to matter which was tried by court.

2. EXECUTORS AND ADMINISTRATORS 🔑315(4)—DECREE OF DISTRIBUTION—SETTING ASIDE—MISTAKE AS TO EXTRINSIC MATTER.

Where, owing to negligent failure of attorney for executors to apprehend effect of Civ. Code, § 1313, making charitable bequest void because testator died within 30 days of making will, and negligence of executors who knew of that effect, but signed petition for distribution without reading it, estate was distributed according to will, decree of distribution will not be set aside at suit of heir, where she knew that provisions were void, but did not object, relying on executors and their attorney to procure proper distribution, since her inattention does not constitute excusable neglect from consequence of which court will grant relief.

3. EXECUTORS AND ADMINISTRATORS 🔑315(6)—DECREE OF DISTRIBUTION—CONCLUSIVENESS.

Decree of distribution of an estate is a judgment in rem, and, though erroneous, is as conclusive against one who fails to appear, having opportunity to do so, as it is against party whose fault produced the error.

Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Action by Kate McGavin against the San Francisco Protestant Orphan Asylum Society and others. From judgment for plaintiff, defendants appeal. Reversed.

Charles W. Slack and Chauncey S. Goodrich, both of San Francisco, for appellant San Francisco Protestant Orphan Asylum Soc. Aaron L. Sapiro, of San Francisco, for appellant Pacific Hebrew Orphan Asylum & Home Soc. W. H. Barrows, of San Francisco, for appellant Roman Catholic Orphan Asylum of San Francisco. Gibson & Woolner, of Oakland, for respondent. Fitzgerald, Abbott & Beardsley, of Oakland, for defendants Fitzsimmons and Barry.

KERRIGAN, J. This is an appeal from a judgment setting aside a decree of distribution, and from an order denying a motion for a new trial. On March 6, 1909, Charles Louis Scrimger died, leaving surviving him as his only heirs Nancy Scrimger, his mother, and Kate McGavin, his sister, the plaintiff. On February 20th of the same year—less than 30 days prior to his death—he executed his will, by the terms of which he bequeathed the bulk of his estate to his executors as trustees under a trust created thereby. The trust thus created was to terminate upon the death of either the mother or sister, when two-thirds of the trust estate was to be distributed to the survivor of them, and the remaining third to certain charitable institutions, three of which are the appellants herein. Admittedly these charitable bequests failed by reason of the testator dying within a period of 30 days of the making of his will, but nevertheless the probate court, on January 5, 1911, distributed the estate of Charles Louis Scrimger in accordance with the terms of his will, including those rendered void by reason of the provisions of section 1313 of the Civil Code. From this decree no appeal was taken. On March 20, 1912, Nancy Scrimger died. Thereafter demand was made by Kate Scrimger, the survivor under the terms of the trust, that the whole of the estate be given to her by the trustee. This demand was refused, and this suit was brought by her, praying for a decree declaring void the provision of the decree of distribution theretofore made and entered, by which one-third of the estate was decreed to go to said charitable institutions, and that the trustees be declared to hold such interest in trust for plaintiff. The trustees answered, admitting the allegations of the complaint, and prayed for such a decree as might be proper in the premises; but the charitable institutions by their answer denied plaintiff's right to any relief, and claimed ownership of said one-third of said estate. Judgment was rendered for the plaintiff, by which it was declared that the decree of distribution in the estate of Charles Louis Scrimger, in so far as it purported to distribute one-third of such estate to charitable institutions, was void. From such judgment and the order denying a new trial this appeal is taken by the three institutions above named.

The respondent's claim to the equitable relief thus granted is based upon allegations to the effect that she and her mother, in the latter's lifetime, believed that the probate court, the executors and their attorney would secure a proper distribution in accordance with law, and not as the testator had attempted to provide in his void bequest, and upon the contention that their neglect in failing to make an examination to see if this had been done is excusable. The evidence shows that the plaintiff and her mother were represented by attorneys in the probate of the Scrimger estate for a year and a half after the probate proceedings were instituted; and the trial court in its findings declared that the attorney for the executors at all times knew that the testator died within 30 days after the making of his will, but did not realize the effect of this fact on the bequest until after the death of Nancy Scrimger. The findings disclose further that at the date of the probate of the will it was known to the executors, to Nancy Scrimger and the plaintiff herein, as also to the attorneys of these ladies, that the will contained a void provision. It thus affirmatively appears that all of the interested parties, except the attorney for the executors, knew both the fact and the legal effect thereof. Notwithstanding this, the attorney for the executors, unaware of or not realizing the invalidity of the bequest, prepared and presented a petition for final distribution conforming to the provisions of the will, which petition was signed by the executors without having been first read by them. No fraud is charged or found in the procurement of the decree, the judgment of the trial court herein being based solely on the mistake of the attorney for the executors as above narrated.

[1] It is the contention of the appellants that equity will not relieve against an erroneous judgment or decree on the ground that it is erroneous unless it appears that the parties seeking such relief could not avail themselves of their defense in an action at law, or that they were prevented from doing so by fraud, accident, or mistake without fraud or negligence on their part. Under what circumstances a decree of distribution is subject to review in equity is elaborately pointed out by Mr. Justice Shaw in Bacon v. Bacon, 150 Cal. 477, 89 Pac. 317, where the cases in this and other jurisdictions are carefully reviewed and considered. Plaintiff's attorneys have cited us to that case as authority in support of the judgment. We cannot subscribe to their interpretation of that authority. As we read the decision the conclusion reached by the learned justices is to the effect that, while a distributee under an erroneous judgment may, in a proper case, be held as an involuntary trustee, the fraud or mistake forming the basis of that relation and warranting the granting of equitable relief by setting aside a decree must be extrinsic or collateral to the matter which was tried and determined by the court, and not intrinsic. It is true that the relief prayed for here was granted in that case, but upon the sole ground that the mistake was a common one shared in by all the parties, and not caused as here by negligence of a rather pronounced character. The California decisions, as pointed out in the Bacon Case, are uniform upon the subject. Pico v. Cohn, 91 Cal. 135, 25 Pac. 970, 27 Pac. 537, 13 L. R. A. 336, 25 Am. St. Rep. 159. See, also,

Rountree v. Montague, 30 Cal. App. 170, 181, 157 Pac. 623. The rule is the same in the case of either fraud or mistake. Bacon v. Bacon, supra.

[2] As instancing what extrinsic fraud or mistake may consist of, our Supreme Court has said that it may result from: (1) Keeping the unsuccessful party away from the court by a false promise of a compromise; (2) purposely keeping him in ignorance of the suit; (3) where an attorney fraudulently pretends to represent a party and connives at his defeat; (4) being regularly employed, corruptly sells out his client's interests. Pico v. Cohn, supra; Rountree v. Montague, supra. No such situation is presented here. The mistake complained of was one made by the attorney for the executors, and was due solely to his failure to apprehend the effect of a provision of our Civil Code when applied to the facts within his knowledge, which failure must be held to constitute negligence. Plaintiff was not induced by said attorney or any one else to refrain from appearing in the proceeding. It is admitted that both she and her mother at all times knew of their rights, and they had both been represented by an attorney, who correctly advised them as to the invalidity of the provision of the will in question, yet they both failed to follow the proceedings in the estate, and at the distribution thereof neglected to object, either in person or by attorney. This cannot be said to constitute a mistake which may be corrected by this proceeding. The one explanation given by the plaintiff as an excuse for not so appearing is that she had a right to believe that the executors and their attorney would procure a proper and legal distribution of the estate. In this connection we are reminded by the respondent that the executors exercised a trust relation towards the legatees, and were bound to the utmost good faith in their transactions with the beneficiaries. While this is true, it is sufficient to say in answer thereto that it is not claimed that they were, at any time, guilty of fraud, or that they misrepresented any fact to the respondent, or that she was prevented from availing herself of the invalidity of the bequest. She was in possession of all of the facts, and gross inattention and negligence contributed to the situation of which she complains. Such conduct cannot be said to constitute excusable neglect from the consequence of which a court of equity will grant the relief here sought.

[3] It must be remembered that a decree of distribution is a judgment in rem, and, although erroneous, is as conclusive against one who fails to appear, having the opportunity so to do, as it is against a party whose fault produced the error. Smith v. Vandepeer, 3 Cal. App. 300, 85 Pac. 136; Lynch v. Rooney, 112 Cal. 279, 44 Pac. 565.

In conclusion it may be said that, in the absence of the explanation given by the plaintiff, the conduct of the parties is inexplicable, except upon the theory that the mother and sister of the deceased had originally concluded that the orphanages designated in the invalid provision of the will should receive the benefit of the bounty of their relative, regardless of its vulnerability to attack, and that the present suit, instituted after the death of the mother, is the result of an afterthought and a changed attitude on the part of the plaintiff. However this may be, for the reasons heretofore given we are of the opinion that the plaintiff under the facts presented is not entitled to the relief granted by the judgment of the court below.

In view of the conclusion reached, it becomes unnecessary to determine the question of procedure raised by the appellants.

The judgment and order are reversed.

We concur: LENNON, P. J.; RICHARDS, J.

34 Cal. App. 290

Ex parte HOLT. (Cr. 554.)

(District Court of Appeals, Second District, California. July 10, 1917.)

HABEAS CORPUS ⚿120—CUSTODY OF CHILDREN—RES ADJUDICATA.

A judgment of the superior court denying a writ of habeas corpus to obtain the custody of petitioner's minor children and remanding them to the custody of the respondents was res adjudicata in a subsequent habeas corpus petition in the appellate district court to obtain their custody on the same grounds and the same facts, as the proceeding is in its nature civil and not criminal.

Petition for habeas corpus by David F. Holt on behalf of Joseph Holt and others, minors. Writ discharged, and the minors remanded to the custody of respondents.

N. C. Peters, of San Bernardino, and W. E. Ginder, of San Diego (F. Louis Zimmerman, of Phœnix, Ariz., of counsel), for petitioner. W. J. Bailey, of Needles, and Allison & Dickson, of San Bernardino, for respondents.

JAMES, J. David F. Holt presented the petition herein seeking a writ under which to have restored to him the custody of his three children, Joseph, Marie, and Catherine, aged respectively 10, 9, and 6 years. It was set forth in the petition that the minors were in the custody of Kit Carson and Lou C. Carson, his wife, the latter being a sister of the deceased wife of petitioner. It was further set forth that petitioner's wife died about 4½ years ago, and that the minor children were left in the custody of the Carsons at and during the pleasure of petitioner, and for such period of time as might be required by him to establish a suitable home within which he might place and care for them; that petitioner had to the best of his ability supported the children during the time they had remained with the Carsons, and had expended as much as $500 in that behalf; that petitioner had remarried and had established a home and had ample means with which to support his minor children; that the said children were not being properly educated and instructed; and that they were kept at a place remote from churches and schools and were living in tents. Further alleged facts were set forth tending to show that Kit Carson was not a suitable person to have part in the raising of the children. Petitioner alleged that the Carsons, upon his demand, refused to relinquish the children into his care and custody. It further appeared by the petition that a proceeding of this same kind was heretofore instituted in the superior court of the county of San Bernardino for the same cause and upon the same alleged facts, and that the court denied the application and remanded the children to the custody of the Carsons. Upon the filing of the petition here the writ was issued and the children were brought into court with the return as made by their custodians. The respondents preliminarily presented to the court for consideration and in an appropriate way the objection that, as the matters presented by the petition had heretofore been considered in a habeas corpus proceeding before the superior court in San Bernardino county, the writ could not be maintained here, for the reason that the order as made by the superior court had become res adjudicata. Authorities were cited sustaining that position. It was admitted by respondents' counsel that in the ordinary case where a person is actually imprisoned under criminal process, a decision on habeas corpus rendered in one court is not a bar to the prosecution of a proceeding of the same kind in another court having original jurisdiction to issue the writ. It was argued, however, that in the matter of the custody of children, where the writ is sought to determine primarily the right to their custody, the question involved is in its nature civil, and that a different rule is then to be recognized. The authorities cited sustain this position, and our attention has been called to none which raise a serious dispute with that holding. In State v. Bechdel, 37 Minn. 360, 34 N. W. 334, 5 Am. St. Rep. 854, the court was considering the same question. In that decision it is said:

> "It is true that the charge is, that the child is unlawfully restrained, etc.; but the gist of this charge is not that the child is unlawfully deprived of its liberty, but that such restraint is in prejudice of the right of the relators to its custody. The case is really one of private parties contesting private rights, under the form of proceedings on habeas corpus. In our judgment, in such cases, both principle and considerations of public policy require the application of the doctrine of estoppel to judicial proceedings. We therefore hold that a former adjudication on the question of the right to the custody of an infant child, brought up on habeas corpus, may be pleaded as res judicata, and is conclusive upon the same parties, upon the same state of facts."

The decision cites as sustaining the text, Freeman on Judgments, § 324; Church on Habeas Corpus, § 387. The question was also considered in Re Harriet King, 66 Kan. 695, 72 Pac. 263, 67 L. R. A. 783, 97 Am. St. Rep. 399, under which case may be found an extensive note collecting a number of authorities. Also in the case of Cormack v. Marshall, 211 Ill. 519, 71 N. E. 1077, 67 L. R. A. at page 787, 1 Ann. Cas. 256. No facts different from those which were presented to the superior court are brought before us by the petition; in fact, the petition negatives any such suggestion. The question involved in the hearing before the superior court was as to the right of the parent to the custody of his children, and in deciding that question it was necessary for the court to determine as to what the best interests of the children required in the circumstances of the case.

Our conclusion is that the petitioner is not entitled to have retried here the matters upon which decision was asked and made in the superior court. We do not wish to be understood as declaring that petitioner might not, in a proper court, in a different proceeding, as by petition for guardianship, have such questions as would be material to his application tried and determined.

The writ is discharged, and the minors remanded to the custody of respondents until it is otherwise legally adjudged.

We concur: CONREY, P. J.; WORKS, Judge pro tem.

34 Cal. App. 180

BEATTY et al. v. RIANDA et al. (Civ. 2053.)

(District Court of Appeal, First District, California. June 25, 1917.)

CORPORATIONS 🔑298(3) — SPECIAL MEETING OF DIRECTORS—NOTICE—SUFFICIENCY.

Under by-laws of a corporation, providing that special meetings of the board may be called at the option of the president or two directors upon notice in writing at least three days prior to the meeting, or upon two day's personal notice to each director, and that such service of notice shall be entered on the minutes, a special meeting called by four directors was illegal, where no notice, either written or oral, was served by the secretary upon the directors calling the meeting, and an assessment levied pursuant to such meeting was void.

Appeal from Superior Court, Monterey County; B. V. Sargent, Judge.

Action by Margaret Jane Beatty and husband against Andrea Rianda and another. Judgment for plaintiffs, and defendants appeal. Affirmed.

Daugherty & Lacey, of Salinas, for appellants. Wyckoff & Gardner, of Watsonville, for respondents.

KERRIGAN, J. The plaintiff Margaret Jane Beatty, joining with her husband, brought suit to have declared null and void the sale by defendant Clark Colony Water Company of stock owned by her in said corporation made by reason of the nonpayment of an assessment levied by the corporation upon the stock. Andrea Rianda, the codefendant, was the purchaser at such sale. Judgment was rendered in favor of plaintiffs annulling said sale and reinstating Margaret Jane Beatty as a stockholder of the corporation, from which the defendants have appealed.

The principal ground of attack upon said delinquent sale is that the special meeting at which the assessment was levied was not regularly called in accordance with the by-laws of the corporation. In that behalf one of said by-laws provides:

> "Article XIII. * * * Special meetings of the board may be called at the option of the president or two directors, upon notice in writing being mailed at Greenfield at least three days prior to the day of meeting, or upon two days personal notice to each director. Such service of notice shall be entered upon the minutes of the corporation, and the said minutes upon being read and approved at a subsequent meeting of the board shall be conclusive upon the question of service."

The facts as to the call of the special meeting as found by the court are: A regular meeting of the board of directors of the corporation was held on October 8, 1912. After the adjournment of the meeting the four directors present decided to call a special meeting for October 11, 1912. The secretary thereupon sent a written notice to one Whiting, a director of the corporation, who was not present at said regular meeting, but served no notice whatever upon any of the other four directors, under the impression, apparently, that as they had ordered the calling of the special meeting it would be superfluous to serve upon them any notice thereof. One of these four who received no notice, Director Franscioni, was not present at the special meeting, nor was Director Whiting. The remaining three directors attended and levied the assessment under attack.

The holding of special meetings of directors or stockholders of corporations is of such importance in the conduct of corporate business that it has been made the subject of express statutory regulation. Section 320 of the Civil Code provides:

> "When no provision is made in the by-laws for regular meetings of the directors and the mode of calling special meetings, all meetings must be called by special notice in writing, to be given to each director by the secretary, on the order of the president, or if there be none, on the order of two directors."

It will thus be seen that a duty is laid upon a particular officer of the corporation to issue the notices of special meetings of the board of directors, and that, in the absence of a by-law provision to the contrary, such notices must be in writing and must be personally served on each director. The obvious reason for this particularity lies in the fact that each director of a corporation is the personal trustee of those of its stockholders whose cumulative votes have selected him for that office, and as such he is entitled to be present at every special meeting of the board, and to have the precise formula of the statute or by-laws followed in giving him notice thereof. The above-quoted section of the Civil Code is specific in its requirement that, unless otherwise provided in the by-laws, all special meetings shall be called by special notice in writing given to each director by the secretary; and the following section, 320a, emphasizes this particularity by providing that the written consent of the directors shall be entered on the record of the meeting if requirements of the statute or of the by-laws have not been followed in the method of calling or giving notice of it. It is true that section 320 of said Code does permit a departure from its precise requirements to be made by a provision in the by-laws defining the mode of calling special meetings; but it is our view that such provisions should be strictly construed with a view to preserving the reasons for strictitude in the method of calling special meetings of the directors of corporations. Had there been no provision in the by-laws of this corporation, it could not be concluded that, notwithstanding the fact that four directors of the corporation, including the secretary thereof, at the conclusion of a regular meeting had decided upon the calling of a special meeting for a later date, such meeting would have been legal without "a special notice in writing," given by the secretary to each of said directors. Their fullest knowledge of the time and place and fact of such meeting would not have sufficed to do away with this statutory requirement. The provision in the by-law under review preserves the statutory requirement that the secretary must give notice to each director of the time, place, and fact of all special meetings of the board. The utmost that can be claimed for it is that it dispenses with the requirement that the notice which the secretary is required to give to the directors when given personally shall be in writing; but this does not permit that the knowledge which the said directors have as to the time and place and fact of such meeting derived from their order calling it shall suffice to take the place of the notice, written or oral, which both the statute and the by-law require the secretary to give of such meeting. This is made doubly plain by the fact that the secretary is expressly required by such by-law to make an entry of the fact of such service, whether written or oral, in his minutes. In the case at bar no such entry could have been truthfully made by the secretary for the simple reason that no such notice as the by-law requires was given by him to the four directors who called the meeting; and even if it be conceded that the by-law dispenses with the statutory requirement that the notice of the special meeting shall, when given personally, be in writing, the fact remains that the secretary did not comply with the by-law in respect to his service of notice of the meeting, and that he could not therefore comply with the by-law in certifying to such service of notice in his minutes of such meeting.

But beyond this it is not to be conceded that the by-law dispenses with the statutory requirement of written notice of all special meetings of the board whether served by mail or served personally upon each director. The by-law does not expressly so declare. Its meaning and intent are uncertain. The use of the word "written" in regard to the notice when served by mail might lead to the inference that the notice when personally served on the directors need not be written; but the requirement that the notice, whether written or oral, must be "served" and so certified by the secretary in his minutes would seem to negative this inference. In view of these uncertainties in construing this particular by-law we deem it better to give it a construction in harmony with the plain and wise intendment of the statute requiring notices of special meetings of the board of directors to be in writing, and to interpret whatever change this by-law makes in the statutory requirement to have reference to the method of giving the notice itself. To do otherwise might lead to the introduction of a dangerous laxity in the calling and holding of special meetings of the directors of corporations.

We are of the opinion therefore that the conclusion of the trial court that the assessment levied upon the stock of said plaintiff was invalid by reason of the informality in the calling of the special meeting at which the levy was made was correct.

This view renders unnecessary a discussion of the other points urged by respondent.

The judgment is affirmed.

We concur: RICHARDS, J.; BEASLY, Judge pro tem.

34 Cal. App. 208

O'DONNELL v. SUPERIOR COURT OF CALIFORNIA IN AND FOR LOS ANGELES COUNTY et al.

(Civ. 2380.)

(District Court of Appeal, Second District, California. June 26, 1917. Rehearing Denied by Supreme Court Aug. 23, 1917.)

JUSTICES OF THE PEACE 🔑159(6)—APPEAL—BOND—EXCEPTION—TIME TO JUSTIFY.

Where the sureties on an appeal bond, on the sixth day after notice of exception to the sufficiency of the bond was mailed to appellant, appeared before the justice who found them insufficient, the justice had no power to continue the matter of justification to the next day which was beyond the time specified by Code Civ. Proc. § 978a, for justification after notice of exception.

Petition for writ of prohibition by F. J. O'Donnell against the Superior Court of the State of California in and for the County of Los Angeles and the Honorable Grant Jackson, Judge thereof. Peremptory writ ordered to issue.

John N. Swenson, for petitioner. H. E. Gleason, of Los Angeles, for respondents.

JAMES, J. In this proceeding a writ of prohibition is sought requiring the superior court to desist from proceeding further in a certain cause which was attempted to be brought into said superior court by appeal from the judgment of a justice of the peace. The petition sets forth that after judgment had been entered in the justice's court in favor of this petitioner as plaintiff, the defendant in that action, the Molander Power Company, a corporation on the 5th day of April, 1917, served and filed notice of appeal, and on the same day filed an undertaking on appeal; that on the same day the plaintiff, this petitioner, served on the attorney for the defendant there a notice in writing, excepting to the sufficiency of the sureties; that the attorney for that defendant resided in the city of Long Beach, which was a distance of about 20 miles from the city of Los Angeles, and that the notice of exception to sureties was served by being deposited in the United States post office in the city of Los Angeles, properly addressed and the postage prepaid; that thereafter, on the 11th day of April, 1917, being the sixth day after the mailing as aforesaid of the notice of exception, the sureties on the undertaking appeared in the justice's court and were examined as to their property, and were found to be insufficient; that no other sureties were offered at that time by the defendant, and that the undertaking was rejected by the justice, and that the justice thereupon made an order continuing the matter, for the purpose of allowing a new undertaking to be filed, to April 12, 1917; that on the last-named date the defendant there, in lieu of undertaking, deposited a sum of money, which was accepted by the justice and transmitted to the superior court; that thereafter a motion was made in the superior court to dismiss the appeal on the ground that no sufficient undertaking had been given to support the appeal; that thereafter this motion was heard, and by the superior court denied. In the petition here presented it is alleged that the superior court threatens to and will, unless prohibited from so doing, proceed to try the action anew, treating the appeal as having been properly perfected. Alternative writ was issued herein, and by way of answer a demurrer has been filed, raising only the issue of law as to the sufficiency of the facts stated in the petition to warrant the relief demanded. We think that the motion to dismiss the appeal should have been granted. If we assume, as is contended by respondent, that the sureties appeared within time after service of notice of exception to their sufficiency (it being claimed that the fact that service was made by mail to a point 20 miles from the city of Los Angeles entitled the appealing party to one day more than the five specified in section 978a, Code of Civil Procedure), still there was no justification of sufficient sureties made even within six days. It is shown that when the sureties did appear on the 11th day of April they failed to justify, and the undertaking was found by the justice to be wholly insufficient and no other sureties or any form of undertaking was presented on that day in lieu of the one first offered. We think that the justice's court was without power to make the pretended order continuing the matter of justification until April 12th. We doubt the power of the justice to make such an order of continuance where the sureties have been fully examined and found to be insufficient, even though the date fixed in the order of continuance would still fall within the five days allowed by the statute within which the appealing party was required to furnish a good undertaking. However, the justice here attempted to continue the matter to April 12th, which would be the seventh day after notice of exception, according to the computation of the petitioner, and the sixth day according to the computation of respondent. In either case the time fell without the limit fixed by law, and there was no authority left in the justice's court to receive an undertaking or cash in lieu thereof for the purpose of security on the appeal.

Peremptory writ is ordered to be issued; petitioner to have his costs.

We concur: CONREY, P. J.; WORKS, Judge pro tem.

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34 Cal. App. 174

FARMERS' WAREHOUSE CO. v. PIERCE-INGRAM-ABBOTT CO. (Civ. 1931.)

(District Court of Appeal, Second District, California. June 22, 1917.)

SALES 🔑71(1)—CONSTRUCTION OF CONTRACT—ADMISSION AS TO CONDITION.

Contract for sale of hay, providing that it shall be of same lot as that inspected by officer of purchaser, serves merely to identify hay, and is not admission that purchaser had inspected all the hay sold, so as to estop it from raising any question as to its quality.

Appeal from Superior Court, Los Angeles County; Sidney N. Reeve, Judge.

Action by the Farmers' Warehouse Company against the Pierce-Ingram-Abbott Company. From judgment for plaintiff, defendant appeals. Reversed.

Hanson, Hackler & Heath, of Los Angeles, for appellant. Loeb, Walker & Loeb, of Los Angeles, for respondent.

JAMES, J. Plaintiff sued to recover upon a written contract for the sale of a lot of baled hay. Judgment was in its favor, from which judgment this appeal is taken.

On October 31, 1913, the following agreement was made between the parties hereto:

> "This agreement, made this 31 day of Oct., 1913, by and between Pierce-Ingram-Abbott Co., a corporation of the city of Los Angeles, party of the first part, and the Farmers Warehouse Co., party of the second part, witnesseth: That the party of the first part agrees to buy, and the part ...... of the second part agree ...... to sell approximately 50 tons of first-class oat hay, at $17.50 per ton, and ...... tons of first class ...... hay at $...... per ton, all f. o. b. cars in the field at Santa Barbara and Western Aves. station, payment to be made for said hay by said party of the first part as follows: $250.00 cash, receipt of which is hereby acknowledged by said party of the second part, and the balance Nov. 10, 1913, days after hay has been shipped. Settlement to be made according to Trans. Con. Trf Bu on Hardestys scales weights at Los Angeles.
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> "All cars to be loaded to capacity required by railroad company. Said hay shall be well baled, sound and of good merchantable quality, and of the same lot as that inspected Mr. Pierce and now located at Santa Barbara Western Ave. and is at risk of said party of the second part as to damage by fire or water until hay is delivered f. o. b. cars for said party of the first part.
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> "Said hay shall be shipped discretion of party of first part and if not shipped as herein stated first party shall have the right to cancel this agreement. If hay shipped is not first-class quality, first party shall report same to second party as soon as possible, and unless otherwise ordered may sell said hay for the account of said second party."

The evidence showed that at the time in question plaintiff was the owner of a stack of baled hay located in a field. Plaintiff by one of its agents made inquiry of defendant as to whether defendant would purchase the hay, and after some negotiation a price was agreed upon and the writing above set forth executed. In the afternoon of the same day, after inspecting the stack of hay, the defendant stopped payment on the check for $250 delivered by it at the time of the signing of the contract, and refused to accept the hay for the alleged reason that it was third-class hay and not such hay as the contract provided should be delivered to it. Plaintiff insisted that the sale had been completed, and brought this suit to recover the purchase price. It will be noted that the contract recited: First, that the hay subject to the sale was "first-class oat hay"; again, that "said hay shall be well baled, sound and of good merchantable quality, and of the same lot as that inspected Mr. Pierce. * * *" It appeared first in evidence that prior to entering into the written contract or agreement for sale, and prior to any negotiations being had with the plaintiff, two of the officers of the defendant had inspected a single bale of hay located at some distance from the main stack. This bale was said by one of these witnesses to be "second quality hay." A witness for the plaintiff testified that when the negotiations with defendant were taken up looking to sale being made of the hay in question, defendant's officer was asked if he had seen the hay, and he replied "Yes." Testimony was offered by competent witnesses to show that the hay was found to be "third class," and to establish the value of it at the date of making the contract. All of this evidence was refused by the trial judge, who stated that the contract itself showed that the hay had been inspected, and therefore the defendant was estopped from raising any question thereafter as to its quality. One of defendant's officers testified that when he negotiated for the hay it was understood that he was to visit the stack, which he had not theretofore examined, in the afternoon of the same day upon which the contract was signed, and that if the hay was of satisfactory quality, the deal would be completed; otherwise not. This preliminary showing of the situation as to the hay and the conditions under which the contract was made was competent, although we agree, as the trial judge concluded, that the obligations of the parties in the main was governed by the terms of the writing which was entered into deliberately at the end of the negotiations. We cannot agree, however, with the conclusion of the lower court that the writing showed that *all* of the hay had been inspected at the time the writing was made. As to the matter of inspection, the contract only recited that the hay should be "of the same lot as that inspected by Mr. Pierce," which serves no more than to identify the hay, and does not amount to an admission that defendant had inspected *all* of the hay. Under the terms of the contract the hay was required at least to be "sound and of good merchantable quality." The evidence tendered by the defendant would have been material as showing whether or not this condition of the agreement was satisfied. If the parties were making a sale of hay already examined by the defendant, then it must have been that the defendant knew fully the character of the hay bargained for, and there would have been no purpose at all of inserting the terms declaring what the condition of the hay should be and defining its quality. For error in refusing to receive the testimony offered by the defendant for the purpose of proving the quality of the hay, we think a new trial should be had.

The judgment is reversed.

We concur: CONREY, P. J.; WORKS, Judge pro tem.

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34 Cal. App. 223

STEINBACH v. SMITH et al. (Civ. 1972.)

(District Court of Appeal, First District, California. June 30, 1917. Rehearing Denied by Supreme Court Aug. 29, 1917.)

1. PARTNERSHIP 🔑285—AUTHORITY OF PARTNER AFTER DISSOLUTION—STATUTE.

Civ. Code, § 2462, providing that a copartner authorized to act in liquidation cannot create new obligations in the name of the partnership, expresses the general rule that a partner has no implied authority to bind his partners to new obligations after dissolution.

2. PARTNERSHIP 🔑286—AUTHORITY OF LIQUIDATING PARTNER—SIGNING NOTES.

A liquidating partner has no authority after dissolution to sign notes in the name of the copartnership, even for money borrowed to pay partnership debts.

3. PARTNERSHIP 🔑285—LIABILITY OF PARTNER AFTER DISSOLUTION—BORROWING MONEY—"OBLIGATION."

In view of Civ. Code, § 1427, providing that an obligation is a legal duty by which a person is bound to do or not to do a certain thing, where, after dissolution of a partnership, the liquidating partner borrowed money with which he paid debts of the firm contracted before dissolution, the partner who had left the firm was liable for the money borrowed, though he was not liable on the notes given therefor, since no change had been made in the partnership obligation, but merely in the person to whom it was owing.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Obligation.]

Appeal from Superior Court, City and County of San Francisco; W. R. Guy, Judge.

Action by Henry Steinbach against F. C. Smith and another. From a judgment against both defendants, Smith appeals. Affirmed.

W. H. Morrissey, of San Francisco, for appellant. Sidney Schlesinger, of San Francisco, for respondent.

BEASLY, Judge pro tem. During the period between the 15th day of March, 1914, and the 15th day of April, 1914, the defendants, F. C. Smith and George W. Metlar were copartners owning and operating a ranch in Stanislaus county. The partnership was dissolved on the last named day. The business was conducted at all times in the name of George W. Metlar alone. After the dissolution Metlar, without the knowledge or consent of Smith—unless Smith's consent must be implied—borrowed from his father, Edwin F. Metlar, three sums of money, aggregating $497.75, giving notes for these sums signed by himself alone. The trial court found that these sums were loaned to the defendants as copartners, but at the request of George W. Metlar, and that the funds were used in payment of indebtedness of the firm incurred before the dissolution of the copartnership. Edwin F. Metlar died before the trial. The claim against the partnership was assigned by Metlar to the plaintiff, who brings this action against both the defendants. The action was not brought upon the notes, but directly for the money loaned to the defendants. Judgment went against both defendants, and Smith appeals.

[1, 2] Upon these facts the appellant contends that George W. Metlar was in no way authorized to borrow this money, and in support of this contention relies upon section 2462 of the Civil Code, which provides that a copartner authorized to act in liquidation cannot create new obligations in the name of the partnership. This section of the Code is an expression of a general rule that a partner has no implied authority to bind his copartners to new obligations after dissolution. In the application of this rule the courts have almost universally held that a liquidating partner has no authority after dissolution to sign notes in the name of the copartnership, even for money borrowed to pay partnership debts. But this is the full extent to which this doctrine has been carried so far as any case cited to us indicates. The case of Curry v. White, 51 Cal. 530, goes no further than this.

[3] The evidence in this case shows that the only change made in the liability of this partnership by the borrowing of this money for the purpose of paying its pre-existing debts was a change in the person to whom the amount of the debts was to be paid. The court found—and the evidence sustains the finding—that the money borrowed from Edwin F. Metlar was used to pay debts contracted by the copartnership before its dissolution. In fact this finding is not challenged. An obligation is thus defined in section 1427 of the Civil Code: "An obligation is a legal duty by which a person is bound to do or not to do a certain thing." Under this definition the identity of the person to whom the duty is owing may be changed without changing the obligation itself or creating a new obligation. In this case no change whatever was made in the obligation itself, that is, in what the partnership was in duty bound to do, for the debts were certain in amount, and were due when the money was borrowed to pay them. The only change was that of the person to whom the obligation was owing. The court gave judgment for the money actually loaned by Edwin F. Metlar to the partnership, without interest, and for nothing more. The notes which George F. Metlar attempted to give were not valid, because he had no authority to make them. These notes purported to change the obligation by providing that interest should be paid thereon, and in one instance at least that an attorney's fee should be payable if an action should be begun on the note. Under a long line of authorities this, as has been said, the liquidating partner had no authority to do; but by the borrowing of the money and payment therewith of these partnership debts—as was said of a somewhat similar transaction in Estate of Davis & Desaugue, 5 Whart. (Pa.) 531, 34 Am. Dec. 574—"there is no new debt or obligation created; the responsibility of the firm is precisely the same; and the only alteration is as to the person of the creditor." And it may be added that if Edwin F. Metlar had purchased these claims from the creditors of the copartnership and taken assignments thereof to himself no question could have been raised as to his right to enforce the obligations against the copartners, although the result so far as partnership liability is concerned would have been precisely the same.

For the foregoing reasons, the judgment must be affirmed; and it is so ordered.

We concur: KERRIGAN, J.; RICHARDS, J.

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34 Cal. App. 284

PEOPLE v. EVANS et al. (Cr. 369.)

(District Court of Appeal, Third District, California. July 9, 1917.)

1. Criminal Law 🔑1104(7)—Appeal—Further Transcript of Testimony.

An application under Pen. Code, § 1247c, for a "further transcription of the testimony" will be denied where it appears from the affidavit in support thereof that the testimony sought to be transcribed was not introduced at the trial nor on motion for new trial.

2. Criminal Law 🔑1134(2)—Appeal—Testimony Not Relied on Below.

Testimony not introduced in the prosecution against appellant and not made a part of the affidavit in support of a new trial cannot be considered for any purpose in disposing of the appeal.

3. Criminal Law 🔑939(1), 958(4) — New Trial—Newly Discovered Evidence.

Where counsel filed no affidavits of the witnesses disclosing the nature of their testimony as required by Pen. Code, § 1186, and admitted that he knew of the witnesses before the trial had closed, but misunderstood his client as to what they could testify to, the motion for a new trial for newly discovered evidence was properly denied.

4. Burglary 🔑41(1) — Evidence — Sufficiency.

In a prosecution for burglary, evidence, regardless of the testimony of an alleged accomplice, *held* sufficient to support a verdict of guilty.

5. Criminal Law 🔑507(5)—Evidence—"Accomplice."

One who had no part in the burglary, but received the property, would not be an "accomplice" within St. 1915, p. 760, providing: "An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in which the testimony of the accomplice is given."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Accomplice.]

Appeal from Superior Court, Stanislaus County; W. H. Langdon, Judge.

Charles Evans was convicted of burglary, and appeals from the judgment and from an order denying him a new trial. Affirmed.

A. L. Johnson, of Modesto, for appellant. U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

HART, J. The defendant Charles Evans, a colored man, jointly with three other persons, to wit, John Mackie, Toney Paresi, and Parthenia Hughson, a colored woman, was informed against by the district attorney of Stanislaus county for the crime of burglary. Evans was given a separate trial, which resulted in his conviction of the crime as so charged, and he prosecutes this appeal from the judgment and the order denying him a new trial.

[1] A proposition which should first be disposed of is involved in the application of the defendant for a "further transcription of the testimony"; said application being made under section 1247c of the Penal Code, and supported by the affidavit of the attorney for the accused.

Said affidavit reads in part:

> "The defendant requests that all the phonographic reporter's notes be transcribed in the case against Charles Evans, and also the testimony of the codefendants, Paresi, Mackie, and Stella Huston, in the trials of Toney Paresi and John Mackie; that the phonographic reporter of said court, N. E. Leak, Esq., failed and neglected to transcribe 'the testimony of the codefendants, Paresi, Mackie, and Stella Huston, in the trials of Toney Paresi and John Mackie,' although asked for in said application and not excepted to by the district attorney; that the final work of transcribing said notes and typewriting the same was performed by Mr. Leak's assistant at a time when said Leak was in the Sierra Nevada Mountains on a vacation trip, and incapable of being reached by any form of communication before the statutory time had elapsed for filing said transcription with your honorable court; that therefore this deponent, relying upon section 1247c of the Penal Code of the state of California, hereby makes this application for a further transcription of the testimony in said case, namely, the testimony of John Mackie, Toney Paresi, and Stella Huston, and this deponent further states that in his belief such testimony is expedient and necessary for the prosecution of the appeal in the above-entitled action, and further that the omission of the testimony of these three witnesses, upon which new evidence Toney Paresi and John Mackie, codefendants of this defendant, were acquitted, is absolutely necessary to properly present defendant's case to this court."

Thus it will be noticed that the testimony which the defendant asks be transcribed and certified to this court is testimony which was not introduced into this case, either by way of impeachment of the persons whose testimony is desired, in which case it would have been necessary that they should have testified in this case, or otherwise. The only other way we can conceive of in which said testimony might have properly been brought to our notice would have been by incorporating it into or making it a part of an affidavit filed and used in support of the motion for a new trial on the ground of newly discovered evidence. This course was not adopted, however.

[2] It would seem to be unnecessary to suggest that said testimony, even if the application for its transcription and certification to this court were allowed, could not be considered for any purpose in disposing of these appeals. The application must be denied, and it is so ordered.

[3] There is, however, another point in connection with the order denying a new trial which may now be appropriately considered. In presenting his motion for a new trial, counsel for the defendant stated to the court that he had learned of some other witnesses than those who had testified in the case whose testimony would tend to establish an alibi for the accused, and he admitted that information concerning said witnesses had been conveyed to him during the progress of the trial and before it had closed, although, he declared, he understood then that those witnesses would merely testify to the good character of the defendant rather than to facts which would go toward showing that his client was in no position or situation at the time the crime was committed to have taken any part in the commission thereof. But counsel filed no affidavits, made by said witnesses disclosing the nature of the testimony they would give and so showing, if thus he could, that such testimony would be material to the defendant's case, and that he could not, with reasonable diligence, have discovered and produced such evidence at the trial. Pen. Code, § 1181, subd. 7. Besides, it is quite probable that the defendant would have experienced much difficulty on the question of diligence, for it is evident, as the learned trial court suggested, in disposing of the motion, that the defendant must have known, or at least, by the exercise of reasonable diligence, could have known, of the evidence referred to. In fact, as before shown, his learned counsel admitted before the court, when pressing his motion for a trial de novo, that the defendant told him of the said evidence, but that he (counsel) misunderstood his client as to the nature of the evidence to which the accused referred, and so obtained the erroneous impression that it involved character testimony rather than proof of a more substantial nature in its bearing upon the case.

Upon the alleged ground of newly discovered evidence the motion for a new trial was properly denied.

[4] It is contended, however, that the evidence does not justify the verdict, and that upon this ground a new trial should have been granted, and that the refusal to grant said motion calls for a reversal.

The facts which the evidence appears to have justified the jury in finding may thus be stated: The hardware store of the firm of Lewis & Byrd, at the town of Newman, in Stanislaus county, was entered at some time between the hours of half past 8 of the Saturday evening of June 24, 1916, and half past 8 o'clock the following morning, Sunday, the 25th of June, and a large number of articles, including shotguns, pocketknives, razors, and other small articles of hardware, was taken therefrom. Lewis, one of the members of the firm, having been the first person to go to the store on Sunday morning, was the first to discover that the store had been burglarized. On investigation he found that a window in the rear of the store had been pried open, and that evidently entrance into the building had been made through said window.

The local officers were immediately upon the discovery of the crime informed of the commission thereof, and at once proceeded upon a search for the perpetrators and kept up the search until Monday, the 26th day of June, when they overtook the defendants at a point two or three miles south of the village of Dos Palos in said county, and a considerable distance from Newman. The four defendants were traveling together in a spring wagon, drawn by a pair of horses. The officers placed the quartet under arrest, and on investigation found the stolen articles in the possession of the defendants. Some of these articles were in an old suit case belonging to Evans and the woman. Each of the male defendants had on his person, in the pockets of his pantaloons, from two to four of the pocketknives stolen from the store. The woman had in her possession two of the stolen pocketknives and a cheap watch, which she claimed were given her by Paresi. The guns, which were also identified as having been taken from the store, were in the wagon, covered over with a quantity of old sacks.

It was shown that on the morning of the 24th of June the defendant and his codefendant Paresi, an Italian, were in the hardware store and there purchased some fishhooks.

It was further shown that at about the hour of 11 o'clock on the night of June 24th a citizen of Newman saw a colored and a white man coming out of an alley near which the hardware store is situated.

For the purpose of using the colored woman as a witness for the people against the other defendants, the district attorney moved to dismiss the charge against her, and the motion was granted. From her testimony it appears that she and Evans were living together, and that she was known as "Mrs. Evans"; that late in the month of May, 1916, she and Evans started out for a fishing trip near Firebaugh, Stanislaus county; that Evans was engaged in gathering and selling old junk, and that in their meanderings they came across Mackie and Paresi, who joined them in their travels and went with them to Newman. She further testified that, when they camped for the night, she and Evans slept in the wagon, and that on the night of the burglary, at about 9 o'clock, after Evans had retired, Paresi and Mackie came to the wagon and called for Evans; the latter arose and stepped to the ground from the wagon, and the three men for a few moments held a conversation, the purport of which she did not hear; that the three men then left the "camp" together, and returned thereto several hours thereafter. The next morning at an early hour they broke up camp and proceeded on their way. When they reached the suburbs of Los Banos, a small town in Stanislaus county, they stopped, and it was at this place where for the first time the woman saw the articles referred to and where the goods were divided between the parties. She testified that Paresi superintended the matter of division. Among the articles displayed on the ground pending the division were several empty razor boxes. The woman asked how it was that so many empty boxes were there, to which Paresi in effect replied that it was so dark in the store when they were taking the goods that they could not tell precisely what they were getting away with.

The defendant testified in his own behalf, but introduced no other testimony. He declared that on Saturday, the 24th of June, he went to bed in the wagon near the hour of 8 o'clock p. m., and that he did not leave his bed until aroused from his slumbers at an early hour Sunday morning by Mackie and Paresi, who had apparently just reached the camp, they having been absent during most of the night. This, he said, was the first he knew of the possession by Mackie and Paresi of the stolen goods. He said that he knew nothing of the fact of the entrance into the store by Mackie and Paresi until then, and that prior to the perpetration of the crime he did not know that they contemplated or intended committing the act.

The foregoing statement embraces a brief recital of all the facts brought out at the trial.

The defendant claims: (1) That the Hughson woman was an accomplice to the crime, and that there is no other evidence in the record which corroborates her testimony; (2) that, if the defendant is shown by the evidence to be guilty of any crime at all, it is that of receiving stolen property, with knowledge at the time of receiving it that it had been stolen, and not that of burglary.

[5] 1. There is no evidence in the record, except the mere circumstance that she was the traveling companion of the other defendants and the circumstance that she received a portion of the stolen property, that Mrs. Hughson had anything to do with the burglary or that she knew that it was to be committed or in any way aided and abetted in its commission. Her own testimony is to the effect that she knew nothing about the crime or of any intention to commit it until after it was committed. It is, though, quite manifest that, when she received the two pocketknives and some other articles from Paresi and the other two men, she knew that the articles received by her were stolen property, and, of course, in that case, if she was guilty of any crime, it was that of receiving stolen property, then knowing it to have been stolen. If this be true, then under the description of an accomplice as defined by the

Legislature of 1915, in an amendment to section 1111 of the Penal Code (Stats. 1915, p. 760), she is not an accomplice, assuming, of course, that the evidence sufficiently shows that Evans was a party to the crime of burglary. The amendment referred to reads:

> "An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given."

But, even if it were true that Mrs. Hughson was an accomplice of Evans, still there can be no doubt that there was other evidence than that of the testimony of the woman tending to connect the defendant with the commission of the offense charged and corroborative of Mrs. Hughson's testimony. Pen. Code, § 1111, supra. A brief repetition only of certain circumstances disclosed by the proofs will be sufficient to reaffirm conviction that the verdict is legally well fortified: He, with Paresi, was seen in the store which was entered on the morning of the day the crime was committed. A colored and a white man were seen coming out of an alley near the building entered at a late hour on the night of the burglary. The stolen articles were found in the possession of the defendant and his companions. These circumstances surely corroborate Mrs. Hughson's testimony. Indeed, in our judgment, they not only tend to connect the defendant with the commission of the crime, but are themselves or alone sufficient to support the verdict returned by the jury. With the testimony of Mrs. Hughson, they certainly satisfactorily establish the guilt of the defendant.

No other points are made.

The judgment and the order appealed from are affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

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34 Cal. App. 237

GILLE v. ANDERSON. (Civ. 1952.)

(District Court of Appeal, First District, California. July 3, 1917.)

1. Appeal and Error 🔑204(3)—Secondary Evidence—Failure to Object.

Where defendant did not object to the introduction of certain evidence at the trial, he cannot complain on appeal that such evidence was secondary.

2. Account Stated 🔑5—Evidence—Sufficiency.

In an action upon an open book account, a statement made by defendant to the effect that he was liable for "part of these bills" was insufficient to show an account stated.

3. Account 🔑22—Evidence—Sufficiency.

In an action on a book account, *held*, under the evidence, that finding that defendant was liable individually for the entire debt was justified.

Appeal from Superior Court, City and County of San Francisco; Bernard J. Flood, Judge.

Action by Henry G. Gille, doing business as the Gille Show Printing Company, against G. M. Anderson. Judgment for plaintiff, and defendant appeals. Affirmed.

Herbert Choynski and James R. Kelly, both of San Francisco, for appellant. Walter H. Robinson, of San Francisco, for respondent.

BEASLY, Judge pro tem. This is an action in which the plaintiff declared upon an open book account, and was given judgment for $1,211.50. The defendant appeals, and insists that "there is no evidence of an open book account."

[1] At the trial the accounts of the plaintiff were in court, and the plaintiff read the items from them in giving his testimony, or they were read to him by his attorney. No objection was made to this method of proving the plaintiff's claim. Having failed to object at the trial to this method of proof, the defendant cannot now be heard to complain of it; for it is well settled that, if a party permits his adversary to prove his case by secondary evidence, he cannot afterwards object that better evidence should have been produced. The secondary evidence is under the circumstances sufficient. Wright v. Roseberry, 81 Cal. 87, 22 Pac. 336; Williams v. Hawley, 144 Cal. 102, 77 Pac. 762.

[2] Defendant makes the further point that "the evidence shows that, if there was any account, the account was stated between the parties." To establish this he relies upon a statement made by himself at one time to the effect that he was liable for a part of these bills; but this statement was not made under circumstances which showed such a meeting of minds as to establish an account stated between the parties; at least, considering the other evidence, the court was justified in finding that the account was not stated.

[3] The appellant also claims that this was not his debt, but the debt of the G. M. Anderson Company. The items were charged to the defendant, either under his own name or under the name of the Gaiety Theater Company. Anderson personally ordered the opening of this account. The account was for printing done by the plaintiff for various shows produced at the Gaiety Theater. The defendant was the only person who opened the account or made any arrangements for this printing. He told the plaintiff that he was opening the Gaiety Theater, and would require a great deal of printing, and arranged with the plaintiff to furnish it. He also instructed the plaintiff to take orders from his managers. He paid some money on the account personally, and never suggested that he was not responsible individually for the bills so contracted. He now claims that, after giving two shows, he retired from the theater, and that the theater was thenceforth conducted by the G. M. Anderson Company.

However, there was evidence that he later admitted his liability for the account; and, from the evidence taken as a whole, the court was justified in finding that Anderson was personally liable for the entire indebtedness. No good purpose would be served by a lengthy analysis of this evidence. Defendant's methods of doing business may be said to have been loose; he apparently contracting bills in the name of the Gaiety Theater Company, the G. M. Anderson Company, and under his own name; and the court was amply justified in finding that all these accounts were chargeable to him personally.

There was no error as to any of the rulings of the court in the admission of evidence as to which the defendant complains.

The judgment is affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

34 Cal. App. 263

Ex parte KEENE. (Cr. 553.)

(District Court of Appeal, Second District, California. July 6, 1917.)

1. Arrest 🔑27—Affidavit—Statement of Facts.

The statement of facts in an information and belief affidavit, to authorize an order of arrest under Code Civ. Proc. § 481, must be positive and clear, and must be such evidence as would be competent and receivable upon the trial of an action to justify an ordinary judgment for money.

2. Arrest 🔑25—Affidavit—Statement of Facts.

The affidavit for an order of arrest in a civil action filed under Code Civ. Proc. § 481, need not state the evidentiary facts upon which the principal fact rests, if it follows the statutes and positively declares that such principal fact exists, though if the facts stated in the affidavit show that affiant is necessarily acting only on his information and belief, the evidentiary facts must be stated.

3. Arrest 🔑29—Affidavit—Sufficiency of Statement—Fraud in Contracting Debt.

Statements in affidavits, filed under Code Civ. Proc. § 481, to obtain order for arrest of defendant, which aside from possible conclusions of the affiant were substantial statement of facts apparently within the affiant's knowledge, to the effect that defendant represented himself to be a reputable business man when in fact he was not, and was doing business under an assumed name to defraud creditors, and that he had stopped payment on a check given in part payment, authorized an arrest under section 479 for fraud in contracting the debt on which the action was brought.

In the matter of the application of Maurice Keene whose true name is Maurice Chaney, for a writ of habeas corpus. Writ discharged, and petitioner remanded.

Willedd Andrews, of Los Angeles, for petitioner. W. J. Ford and Henry G. Bodkin, both of Los Angeles, for respondent.

CONREY, P. J. Habeas corpus. The petitioner is in custody of the sheriff of Los Angeles county pursuant to an order of arrest issued in accordance with certain provisions of the Code of Civil Procedure. Section 479 of that Code provides that the defendant may be arrested in certain cases, one of which is "when the defendant has been guilty of a fraud in contracting the debt or incurring the obligation for which the action is brought." Section 481 provides that an order for the arrest of the defendant may be made whenever it appears to the judge, by the affidavit of the plaintiff, or some other person, that a sufficient cause of action exists, and that the case is one of those mentioned in section 479. "The affidavit must be either positive or upon information and belief; and when upon information and belief, it must state the facts upon which the information and belief are founded."

The commitment presented with the sheriff's return shows that a judge of the superior court, in an action against the petitioner herein and one other person, ordered the arrest of the petitioner. In that order it was stated that it appeared to the judge from the verified complaint on file and from the affidavit submitted on the part of the plaintiff that a sufficient cause of action exists against the defendants, and that the case is one of those mentioned in section 479, Code of Civil Procedure, and that the defendants and each of them have been guilty of fraud in contracting the debt for which the action is brought. The petition for the writ contains copies of the affidavits. One of those affidavits states that a copy of the complaint is thereto annexed and made a part thereof. The petition does not negative the fact that a copy of the complaint was annexed to the original affidavit; therefore we presume that the complaint was before the judge when he made his order of arrest, and that it does state a cause of action. The affidavits also directly show that the defendants purchased from the plaintiff merchandise, to wit, certain quantities of butter, of a value exceeding $3,000, which was delivered to the defendants, that the defendants have not paid the purchase price or any part thereof, and that the same is due, owing and unpaid. The affidavit of Axel Whitefield, a recent employê of the defendants, states that the defendants Maurice Chaney and Albert Chaney have been doing business under the name of Keene Butter Company, and have represented themselves in all business transactions as Maurice Keene and Albert Keene, respectively; that Maurice Chaney was convicted of using the United States mails to defraud, in the district court of the United States in the city of San Francisco, Cal., in 1912, and sentenced for a term of four years, of which term he served three years and one month, and was released from the penitentiary at McNeil's Island on or about November 1, 1915; that the defendants have been guilty of fraud in contracting their indebtedness with the plaintiff, in that the defendants represented themselves to be reputable business men, whereas in fact the defendant Maurice Chaney was a man of bad repute and doing business under an assumed name, "and each of said defendants assumed said fictitious name in order that they might defraud plaintiff herein, and other creditors"; that defendants have fraudulently concealed, removed, and disposed of certain of said butter to prevent its being found or taken by the sheriff in any action commenced by the plaintiff herein, or any of the other creditors of said defendants; that defendants stated to affiant that they would not deposit any further money in the bank, for the reason that they were afraid that plaintiff herein would attach said money and that said defendants would keep their money in other places.

The affidavit of R. F. Bennett, the president of the plaintiff company, states that on or about the 7th day of June, 1917, the defendants ordered a consignment of butter to be shipped to them to the city of Los Angeles; that the defendants at that time represented to the plaintiff that in case said butter was shipped to them they would immediately forward check to plaintiff for the amount of money due to date and for said consignment; that relying upon such representations the plaintiff shipped said butter, of the value of $1,000 or thereabouts, to the defendants in accordance with such agreement; that the defendants thereupon mailed a check to the plaintiff for the sum of $1,000 or thereabouts; that thereafter, after the receipt of said butter by the defendants, they caused payment to be stopped on the check so received, and said check was dishonored by the bank upon which the check was drawn; that no money has been paid by the defendants, or either of them, to the plaintiff on account of said butter so furnished as aforesaid; that the plaintiff would not have furnished and delivered said butter, or any part thereof to the defendants or either of them if it were aware of the true name of defendants herein, and if it were not for the fact that said defendants had forwarded said check to the plaintiff. The check was annexed to the affidavit. It was drawn on June 7, 1917, for $1,061.87 in favor of the plaintiff, signed "The Keene Butter Co., by M. Keene." It bears the indorsement, "Payment stopped," and is marked, "Canceled June 13, 1917."

[1] Counsel for petitioner claims that the affidavits do not tend to show and furnish no foundation upon which the judge of the superior court was authorized to find that it appeared thereby that the petitioner had been guilty of a fraud in contracting the debt or incurring the obligation for which the action was brought. He claims that the only statements made pertinent to that charge are upon information and belief, and that the facts upon which such information and belief were founded are not stated. We agree that the statement of facts upon which an information and belief allegation is founded, to authorize an order of arrest, must be positive and clear, and must be such evidence as would be competent and receivable upon the trial of an action to justify an ordinary judgment for money. Ex parte Fkumoto, 120 Cal. 316, 52 Pac. 726; Fkumoto v. Marsh, 130 Cal. 66, 62 Pac. 303, 509, 80 Am. St. Rep. 73.

[2] It is also true that the affidavit upon which an order of arrest in a civil action is asked need not state the evidentiary facts upon which the principal fact rests, if instead thereof the affidavit follows the statute and declares in positive terms that such principal fact exists. Matter of Caples, 26 Cal. App. 786, 148 Pac. 795. This is subject, of course, to the qualification that if the facts stated in the affidavit show that necessarily affiant is acting only on information and belief other than actual knowledge, then the evidentiary facts must be stated.

[3] In the present instance those portions of the affidavits to which we have referred in the foregoing statement do not purport to have been made on information and belief. While some of the expressions therein contained may be construed as stating the conclusions of the affiant, there remain substantial statements of facts, apparently within the knowledge of Whitefield and of Bennett, which we think are legally sufficient to have authorized the order of arrest.

The writ is discharged and petitioner is remanded.

We concur: JAMES, J.; WORKS, Judge pro tem.

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34 Cal. App. 293

MILLER v. LANKTREE et al. (MURPHY, Intervener.) (Civ. 1908.)

(District Court of Appeal, First District, California. July 10, 1917. Rehearing Denied Aug. 9, 1917; Denied by Supreme Court Sept. 6, 1917.)

1. MORTGAGES 🔑606—REDEMPTION—TENDER—ACCEPTANCE.

Where one entitled to redeem in any capacity tendered the amount required by the statute to effect a redemption, the holder of the certificate of foreclosure sale was bound to accept the tender, and was not entitled to be informed as to the particular capacity in which the redemptioner was acting.

2. APPEAL AND ERROR 🔑1011(1)—FINDING ON CONFLICTING EVIDENCE—REVIEW.

The trial court's finding on conflicting evidence on the question of good faith in tendering the amount necessary to redeem from a mortgage foreclosure will not be reviewed on appeal.

Appeal from Superior Court, Alameda County; J. J. Trabucco, Judge.

Mandamus by William Miller against J. B. Lanktree and William M. Roberts; Ella M. Murphy, intervener. Judgment for defendants and intervener, and plaintiff appeals. Affirmed.

Daniel O'Connell, of San Francisco, for appellant. E. C. Harrison and M. E. Harrison, both of San Francisco, and Thomas C. Huxley, of Oakland, for respondents.

RICHARDS, J. This is an appeal by the plaintiff from the judgment of the trial court refusing to issue a writ of mandate upon the plaintiff's application therefor to compel the defendant J. B. Lanktree, as the commissioner upon a foreclosure sale, to issue a commissioner's deed to the plaintiff as the purchaser at said sale, upon the ground that no redemption of the property involved in such sale had been made within the time required by law. The defense to this application urged both by said commissioner and by the defendant W. M. Roberts and the intervener, Ella M. Murphy, was that a redemption of the property had been accomplished within the time provided by law.

The facts of the case essential to its decision are these: The original action for the foreclosure of a mortgage out of which this proceeding arose was begun by Berkeley Bank of Savings & Trust Company against Herman Murphy, Ella M. Murphy, his wife, and several other defendants. Prior to the judgment in said action the plaintiff herein was substituted for the plaintiff in that action, and thereupon judgment went in his favor against all of the defendants for the foreclosure of said mortgage and the sale of the property involved therein by J. B. Lanktree, who was appointed commissioner of the court for that purpose, and who, having duly qualified, proceeded to sell the same for the satisfaction of the judgment, amounting to the sum of $7,837.35. The plaintiff was the purchaser at said foreclosure sale, bidding therefor the sum of $6,500. The record shows that prior to the rendition of said judgment in the foreclosure proceeding the defendant Herman Murphy had conveyed the premises in question to his wife, Ella M. Murphy, by deed of gift; that Ella M. Murphy had thereafter conveyed the same to a corporation known as the Progressive Investment Company, which had later reconveyed the property to her. It further appears that William M. Roberts, named as a defendant in the present proceeding, was a judgment creditor of said Herman Murphy by virtue of assigned claims of several other judgment creditors having accrued liens upon the property subsequent and subject to the lien or liens of the plaintiff. Within the time required by law to effect a redemption of the property sold by the commissioner upon foreclosure sale Ella M. Murphy, one of the defendants in the original action and the intervener in the present proceeding, tendered in cash the sum of $7,416.19 to effect a redemption of the property. This sum covered the amount of the purchase price by the plaintiff at the foreclosure sale, with accrued interest and taxes, and was, it is conceded, sufficient in amount to have effected a redemption of the property by said Ella M. Murphy in her capacity as an original judgment creditor; but the plaintiff, in his capacity as purchaser at the foreclosure sale, refused to accept said tender, claiming at the time thereof, and still insisting, that he was entitled to require that the said Ella M. Murphy, the proposed redemptioner, should make a disclosure as to whether she was tendering said sum and offering to redeem the property in her capacity as an original judgment creditor, or as the successor in interest of her codefendant, Herman M. Murphy, the original owner and mortgagor of the property.

[1] We think there is no merit in this contention. If the defendant Ella M. Murphy in the former action was entitled to redeem in any capacity, and tendered to the purchaser at the foreclosure sale the amount required by the statute to effect such redemption, the holder of the certificate of sale was bound to accept such tender, and was not entitled to be informed in what particular capacity the redemptioner was acting. Pollard v. Harlow, 138 Cal. 390, 71 Pac. 454, 648.

[2] This practically disposes of the case. The appellant undertakes to argue at considerable length the evidence educed at the trial as to the facts and circumstances attending the making of the tender in question as tending to show a want of good faith in the proposed redemption in making the same; but as to this we are of the opinion that, at most, a conflict in the evidence was presented which it was the proper province of the trial court to resolve in favor of either of the parties to the proceeding, and his discretion in making his findings thereon in the defendants' and intervener's favor will not be reviewed upon this appeal.

The same rule applies to the attack made by the appellant upon the sufficiency of the proof of Ella M. Murphy's title as the asserted successor in interest of her husband, although, in view of what has heretofore been said, this is not a material issue in the case.

Neither do we regard the points made by the appellant touching the sufficiency of the alleged tender of William M. Roberts in his effort at a redemption of the property important to this decision, in view of our holding as to the sufficiency of the tender made by Ella M. Murphy, which had the effect of defeating the right of the plaintiff in the original action to have issued to him in his capacity of purchaser at the foreclosure sale a commissioner's deed, or to now compel in this proceeding the issuance of such deed to him.

Judgment affirmed.

We concur: BEASLY, Judge pro tem.; KERRIGAN, J.

34 Cal. App. 282

HARRIS v. ROBINETT. (Civ. 2105.)

(District Court of Appeal, First District, California. July 9, 1917. Rehearing Denied Aug. 8, 1917; Denied by Supreme Court Sept. 6, 1917.)

LIMITATION OF ACTIONS ⟹127(18)—AMENDMENT OF PLEADING—NEW CAUSE OF ACTION.

In an action on an assigned claim for goods sold and delivered, an amendment to the complaint by adding a count upon an account stated based on the same transaction was properly allowed over the objection that it stated a new cause of action against which the statute of limitations had run.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Matthew A. Harris, as special administrator, etc., substituted in place and stead of E. S. Chandler, deceased, against Thomas W. Robinett. Judgment for plaintiff, and defendant appeals. Affirmed.

W. C. Cavitt, of San Francisco, for appellant. Charles S. Peery and R. H. McGowan, both of San Francisco, for respondent.

RICHARDS, J. This is an appeal from a judgment in plaintiff's favor in an action brought to recover upon an assigned claim for merchandise sold and delivered. The original complaint was for the recovery of $1,035.38, claimed to be due the plaintiff's assignor as a balance upon an open book account. The plaintiff recovered judgment upon that complaint and the issues joined thereon; but upon appeal said judgment was reversed, and a new trial ordered. Chandler v. Robinett, 21 Cal. App. 334, 131 Pac. 891. Upon the retrial of the case the plaintiff, over the defendant's objection, was permitted to amend his complaint by adding a second count thereto alleging an account stated. The judgment was again in plaintiff's favor, and from it the defendant has again appealed.

The first contention urged by the appellant is that the court erred in permitting the plaintiff to amend his complaint by adding to it a cause of action on an account stated, upon the ground that this constituted a new cause of action, against which the statute of limitations had run.

We find no merit in this contention. It is admitted that both the original complaint and the amendment thereto refer to the same transaction, and that each is for the recovery of the same indebtedness arising out of said transaction. This being conceded, no new cause of action is stated by the amendment to the original complaint. Union Lumber Co. v. Schouten & Co., 25 Cal. App. 80, 142 Pac. 910; Born v. Castle, 22 Cal. App. 282, 134 Pac. 347; Bogart v. Crosby, 91 Cal. 278, 27 Pac. 603; Smullen v. Phillips, 92 Cal. 408, 28 Pac. 442.

The next contention of the appellant is that the evidence is insufficient to sustain the findings and judgment. In support of this contention the appellant devotes much space to a discussion of the evidence in the case; but, after a careful reference to the portions of the record to which his various strictures are directed, we are satisfied that there is in each instance sufficient evidence to support the findings and judgment of the trial court, and that the numerous objections made during the trial to the introduction of such evidence were not well taken. Without reviewing in detail these alleged deficiencies and errors, it will be sufficient to say that, in our opinion, upon the second trial of the cause the court avoided or corrected the errors which led to a reversal of this case upon the former appeal.

Judgment affirmed.

We concur: BEASLY, Judge pro tem.; KERRIGAN, J.

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34 Cal. App. 317

HALLER v. YOLO WATER & POWER CO. et al. (Civ. 1653.)

(District Court of Appeal, Third District, California. July 13, 1917. Rehearing Denied by Supreme Court Sept. 11, 1917.)

1. TRIAL ⟹404(1)—FINDINGS — CONSTRUCTION.

The trial court's findings are to receive such a construction as will uphold rather than defeat its judgment.

2. TRIAL ⟹396(1)—FINDINGS—FORM.

It is not necessary that findings should be in the exact language of the pleadings.

3. TRIAL ⟹395(6)—FINDINGS — REFERENCE TO COMPLAINT.

If a complaint is sufficient, a finding by reference to it will be sufficient.

4. TRIAL ⟹404(2)—FINDINGS — CONSTRUCTION.

In an action against a company and an individual for the loss of crops from their negligent flooding of plaintiff's land, a finding that the facts alleged in the complaint, as amended at the trial, were true as against the company, and were untrue as against the individual defendant, will be construed to mean that the company did, and that the individual defendant did not, "negligently and carelessly turn into lateral ditch large and unusual quantities of water," etc., as alleged in the complaint.

5. JUDGMENT ⟹237(1)—JUDGMENT AGAINST ONE OR MORE PARTIES.

Code Civ. Proc. § 578, providing that judgment may be given for or against one or more of several defendants, etc., modifies the common-law rule that, where an entire judgment against several joint tort-feasors must be reversed as to one, it must be reversed as to all, so that a judgment against defendant company sued with an individual defendant for crops lost by the negligent flooding of plaintiff's land would be upheld.

Appeal from Superior Court, Yolo County; W. A. Anderson, Judge.

Action by Fred Haller against the Yolo Water & Power Company and Gottlob Plocher. Judgment for plaintiff against the defendant company and judgment that he take nothing against defendant Plocher, and the defendant company appeals on the judgment roll. Affirmed.

Arthur C. Huston, of Woodland, for appellant. E. E. Gaddis, of Woodland, for respondent Haller. C. W. Thomas and C. W. Thomas, Jr., both of Sacramento, for respondent Plocher.

HART, J. Plaintiff brought the action against the defendants to recover damages suffered by him in the loss of certain crops, alleged to have been caused by the negligent flooding by defendants of plaintiff's land.

The court made the following finding and conclusion of law:

"(1) That as against the defendant Yolo Water & Power Company, a corporation, all of the facts set forth in plaintiff's complaint, as amended in court at the trial of this action, are true, and the same are now found to be true, and that as against the defendant Gottlob Plocher the facts set forth in plaintiff's complaint, as amended in court during the trial of this action, are untrue, and the same are by the court found to be untrue.

"Conclusion of Law.

"As a conclusion of law from the foregoing facts, the court finds that plaintiff is entitled to judgment against the defendant Yolo Water & Power Company, a corporation, for the sum of $299 in United States gold coin and for costs of suit, and it is ordered that judgment be entered accordingly, and that as against the defendant Gottlob Plocher, the plaintiff in this action take nothing."

Judgment was accordingly entered in favor of plaintiff against the defendant corporation, and the appeal is by the latter on the judgment roll.

1. Appellant makes the point that:

"The court has not made any finding whatever on the issues raised by the pleadings; also the findings are contradictory, inconsistent, and irreconcilable because it is manifestly impossible that the allegations of the complaint are true as against the defendant Yolo Water & Power Company and untrue as against the defendant Plocher."

While prolixity in the drafting of pleadings or other papers necessary in an action or proceeding may not be in conformity with the well-nigh universal utilization, in almost every activity, of time and labor-saving expedients, the compression of essential statements into so few words that the ascertainment of their meaning is rendered extremely difficult is not to be commended. We may well say of the finding before us, as was said by our Supreme Court, in Ladd v. Tully, 51 Cal. 277, that it tends to "lead to most serious perplexities." The use of but very few additional or different words would have dissolved the obscurity complained of by the appellant.

[1, 2] But, bearing in mind that the findings of the trial court are to receive such a construction as will uphold rather than defeat its judgment (Breeze v. Brooks, 97 Cal. 72, 31 Pac. 742, 22 L. R. A. 257; Warren v. Hopkins, 110 Cal. 506, 42 Pac. 986; Gould v. Eaton, 111 Cal. 639, 44 Pac. 319, 52 Am. St. Rep. 201), and that it is not necessary that findings should be in the exact language of the pleadings (Millard v. Legion of Honor, 81 Cal. 340, 22 Pac. 864; Mott v. Ewing, 90 Cal. 231, 27 Pac. 194; Clary v. Hazlitt, 67 Cal. 286, 7 Pac. 701), we think the intended meaning of the findings can be arrived at.

[3] If a complaint be sufficient, a finding by reference to it will be sufficient. Gwinn v. Hamilton, 75 Cal. 265, 17 Pac. 212.

[4] It is alleged in the complaint that adjoining plaintiff's land the defendant corporation maintained and operated a ditch for the purpose of conveying, selling, and delivering to its patrons water for irrigation; that, on the west boundary of plaintiff's lands the defendant Plocher owned a right of way for ditch purposes, which connected with the ditch of the defendant corporation. The fifth allegation of the complaint is:

"That on or about the 7th day of September, 1915, the said defendants negligently and carelessly turned into said lateral or tributary ditch large, unusual, and inordinate quantities of water, and more water than said lateral or tributary ditch would accommodate and hold, in consequence of which large, unusual and inordinate quantities of water flowed onto plaintiff's lands, causing the same to become inundated and submerged."

We think the finding must be held to mean that appellant did and that defendant Plocher did not "negligently and carelessly turn into said lateral or tributary ditch large, unusual, and inordinate quantities of water," etc., and, as thus construed, the finding supports the judgment.

[5] 2. Appellant makes the further point that, as the action was instituted against two joint tort-feasors upon a joint tort, and the judgment is against one of them on a several tort, the judgment cannot be upheld.

Section 578 of the Code of Civil Procedure reads:

"Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side, as between themselves."

In Zibbell v. S. P. Co., 160 Cal. 237, 116 Pac. 513, it is said:

"But the contention of appellant that from this the whole judgment must be reversed, under the common-law rule that, where an entire judgment against several joint tort-feasors must be reversed as to one, it must be reversed as to all, is not sound. The early rule has been relaxed by judicial decision and modified by statute. And in this state it does not exist."

Appellant claims that "the court did not find that a joint tort had been committed and render judgment against appellant as one of the joint tort-feasors," but "that appellant alone, and not acting either in concert or otherwise with Plocher, committed the wrong," and the case of Miller v. Highland Ditch Co., 87 Cal. 431, 25 Pac. 550, 22 Am. St. Rep. 254, is relied upon. Therein it was held, as stated in the syllabus, that:

> "Several tort-feasors, not acting in consent or by unity of design, are not liable to a joint action for damages, although the consequences of the several torts have united to produce an injury to the plaintiff."

The distinction between that case and the one at bar is obvious. In the former there were independent torts committed by different defendants, while here but one tort was committed, and, as the court found, by one defendant only.

In Dow v. City of Oroville, 22 Cal. App. 215, 134 Pac. 197, we said:

> "It is * * * well settled in this state that, in actions upon tort, where two or more persons have been concerned in the commission of the tort, the plaintiff may proceed either jointly or severally against such joint tort-feasors, who are both jointly and severally liable, and, although the complaint may allege a joint act of negligence on the part of the joint tort-feasors, it would nevertheless state a complete and separate individual liability against each party so sued on account of the single act complained of."

In that case the city and a construction company were jointly sued, a demurrer to the complaint as to the city was sustained, and judgment was rendered against the construction company. We held:

> "Assuming that the court's order sustaining the demurrer as to the city was correct, still the entire complaint stands so far as the company is concerned, and if, therefore, the act or omission charged against both defendants is sufficient to make a case of negligence against the company alone, the order overruling the demurrer as to the latter must be sustained."

It should be explained, in view of the fact that, according to the ad damnum clause of the complaint, the jurisdiction of the above-entitled case is in the justice's, and not in the superior, court, that we learn de hors the record that the title to the land alleged to have been damaged was brought in question at the trial in the justice's court, in which the action was originally instituted, and that thus the superior court acquired jurisdiction of the action. Section 838, Code Civ. Proc. The appeal here, as shown by the above opinion, is from the judgment on the judgment roll alone, and the record does not show the certification of the pleadings to the superior court, pursuant to said section 838, in such cases. But no objection was raised to the hearing of the appeal by this court.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

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32 Cal. App. 184

MONO COUNTY IRR. CO. v. STATE et al.
(Civ. 1460, 1461, 1462.)

(District Court of Appeal, Third District, California. Nov. 24, 1916.)

APPEAL AND ERROR 🔑781(1)—RIGHT TO APPEAL—PARTIES.

An appeal by the state from a judgment in condemnation proceedings to which it was made a party defendant with certain fictitious parties will be dismissed where the state disclaims on appeal any interest in the property or the judgment, although the trial court found against such claim and awarded the state compensation, as to review such proceedings would be to consider a mere abstract proposition of law, the determination of which would be in no measure an adjudication of the rights of the real parties in interest.

Appeal from Superior Court, Mono County; W. S. Wells, Judge.

Several condemnation proceedings by the Mono County Irrigation Company against the State of California and others. From the judgments entered, the State appeals. Appeals dismissed.

See, also, 31 Cal. App. 719, 162 Pac. 641.

U. S. Webb, Atty. Gen., and John T. Nourse, Deputy Atty. Gen., for appellant. W. O. Parker, of Bridgeport, and J. D. Murphy, of Berkeley, for respondent.

BURNETT, J. These cases involve the same principle, and may therefore be considered together. Each was an action brought in the superior court of Mono county for the purpose of condemning certain lands for reservoir purposes, and alleged to be owned by the state of California and situated within the boundaries of a United States forest reserve, to wit, the Mono forest reserve, in said Mono county. The lands were reserved and set apart as reserved forest lands by the act of Congress approved October 1, 1890 (26 Stats. at Large, p. 650, c. 1263 [U. S. Comp. St. 1916, §§ 5209–5211]). The United States township plat of the survey of said section was approved by the United States surveyor general on May 29, 1895.

In its brief appellant states:

> "These lands were therefore unsurveyed lands at the time they were included within the reservation. They were thus lost to the state of California 'and the state had received indemnity in lieu of its loss.' * * * The lands sought to be condemned in this action being unsurveyed lands at the time of the creation of the forest reserve in 1890, the state of California at that time lost all interest in these lands."

In view of the foregoing affirmation, the inquiry naturally arises: Why is the state of California complaining of the judgment? Why should it be concerned over the condemnation of land to which admittedly it had and has no title, legal or equitable?

That there may be no mistake as to the attitude of appellant, we quote further from its brief:

> "Since October 1, 1890, the state of California has not had the title, possession, or right to possession of the lands sought to be condemned, but ever since said time the title to said lands has been vested in the United States of America, and the United States has also since said date had the possession and control of the lands sought to be condemned. * * * If the state has no title to the lands, it should not accept the money awarded."

And in the closing brief the final declaration is as follows:

"The result is therefore that the state of California did not acquire any legal or equitable title in this section of land and was not a proper party to this action, but that the complete legal and equitable title is now and at all times has been in the United States. Such being the case, the federal officers are fully authorized under the provisions of sections 2275 and 2276 of the Revised Statutes of the United States [U. S. Comp. St. 1916, §§ 4860, 4861] to exchange this section for other lands outside of the forest reserves."

Moreover, in the answer to the complaint, it is alleged:

"That, by reason of the facts hereinbefore set forth, the state of California is improperly joined as a party in said action, and that the whole fee, estate, and interest in the land described in paragraph IV of said complaint is in the United States of America, and not in the state of California."

Under this allegation the court below could, no doubt, have dismissed the action as to appellant, but the cause proceeded to trial without objection. It is true, however, that while the trial was in progress appellant stated its position, concluding with the declaration:

"The state has absolutely no title to the land whatever."

The court then said:

"What is the state's interest in it, then, supposing it is condemned? It is only the interest in the state; you have no right to complain if it is in the United States; the condemnation would not be good for anything, to go and sell it if somebody else owned the property."

The court, however, found that the state did own an interest in the land, and decreed its condemnation, awarding the state therefor the sum of $1,200. It was in view of this finding and the fact that the briefs on the merits had not been filed that a former motion to dismiss the appeal was denied. But how can there be any question now as to the proper course to pursue? Appellant continues to disclaim any interest in the property and any interest in the judgment. Its rights cannot possibly be affected prejudicially by a judgment affecting the title to property in which appellant has no interest whatever. And it must be remembered that we must consider this appeal now upon the basis of appellant's claim and admission, and not upon the basis of the court's finding. In other words, where a party appeals from a judgment which apparently may affect him injuriously, and upon the hearing of the appeal he openly and emphatically declares that he is not interested in the subject-matter of the action, he assumes an attitude from which we must conclude that he is not and cannot be aggrieved by the judgment, and his contention thus set forth must be the guide for the appellate court's action as to the disposition of the appeal.

Apparently the only pretense for justification in prosecuting the appeal is for the protection of the interest of the United States. But, no doubt that august power is fully able to protect its own interests in the matter and there is nothing to show that the state of California, as trustee, guardian, or otherwise, is in a position to press the litigation on behalf of the United States.

Besides, what is manifestly true may be said, that the United States, not being a party to the proceeding, is in no wise bound by the action nor is its interest in the land at all affected by the judgment. This was clearly seen by the learned trial judge, and while there is no statement made as to the ground upon which he based his judgment as to the state, it certainly seems very plain that appellant cannot claim that it is aggrieved by said judgment.

It is fair to assume that, since appellant has no interest in the judgment, it will not accept the $1,200 that was awarded it. When plaintiff finds, indeed, that it would be virtually getting nothing for the money, it will hardly insist upon making the payment.

That our position may not appear arbitrary, we quote from certain cases involving a similar question.

In People v. Wilson, 26 Cal. 128, it was said that:

The appellant "is entitled to assign for error only such proceedings in the court below as injuriously affect him, without regard to errors of which others might complain."

In Palmer v. Merrill, 70 Iowa, 227, 30 N. W. 494, it was held:

"Where, in an action to foreclose a mechanic's lien, the complaint alleges a claim in one who is not the owner, and who is made a codefendant with the owner, and the owner makes default, while the codefendant makes a general denial, without alleging any interest in himself, the default of the owner establishes plaintiffs' right to recover, as against him; and the codefendant's general denial, denying the allegation in the complaint of his ownership, establishes his want of interest, and incapacity to appeal."

In Myers v. Mahoney, 43 Neb. 208, 61 N. W. 580, it was held that in an action to foreclose a mortgage persons who were made defendants cannot be heard to complain of the judgment affecting merely the land when by their pleadings they have disclaimed all interest therein.

In Hinton v. Winsor, 2 Wyo. 206, the appellant, having filed in the court below a disclaimer, was held to be estopped from asserting any interest in the Supreme Court and to have no standing therein to complain of the decree below.

In Page v. Havens, 9 Kan. App. 888, 60 Pac. 1096, it was held that:

"Where, on foreclosure, the defendant disclaims any interest in the mortgaged premises, he has no ground to complain of the judgment."

In Brigham City v. Toltec Ranch Co., 101 Fed. 85, 41 C. C. A. 222, the conclusion was reached that:

"A defendant in an action in ejectment cannot maintain a writ of error to review a judgment therein awarding possession to the plaintiff, on the ground that the title is in a third person, where, by his answer, he disclaimed any interest in the property affected by such judgment, and has therefore no legal interest in the question he seeks to have reviewed."

Therein are cited two cases from the United States Supreme Court, wherein the principle is lucidly set forth.

Thus upon the admissions of appellant for us to review the questions attempted to be presented by this appeal would be merely to consider a mere abstract proposition of law, the determination of which would be in no measure an adjudication of the rights of the real parties in interest. We may say, though, that the finding of the court as to the ownership of the state probably had its origin in the failure to observe the distinction between surveyed and unsurveyed school lands included within the exterior boundaries of a federal reservation. The difference is pointed out in Hibberd v. Slack (C. C.) 84 Fed. 574. However, that is beside the question here, as the situation is confessedly this: The United States is not affected by the judgment, since it was not a party to the action. The state has no authority to represent it in the proceeding or to urge on appeal questions which affect only the rights or interest of the said United States. There is no personal judgment against the state, and since it confessedly owns no interest in the land, it is not an aggrieved party, and therefore it is not entitled to an appeal.

The appeal in each of the said causes is dismissed.

We concur: CHIPMAN, P. J.; HART, J.

176 Cal. 353

WIEZOREK v. FERRIS. (L. A. 3815.)

(Supreme Court of California. Oct. 19, 1917.)

1. Appeal and Error 🔑1002 — Review — Conflicting Evidence.

Where the evidence substantially supported the verdict, the Supreme Court could not disturb it because of contradictions in the testimony.

2. Appeal and Error 🔑882(12)—Review—Invited Error.

Where, in an action for the death of a person struck by an automobile, though the answer limited the affirmative defense to the plea that the accident was caused exclusively by the negligence of deceased, this position was abandoned and the case tried on the theory that contributory negligence was in issue and defendant invoked instructions on this issue, he could not complain that the court charged thereon.

3. Municipal Corporations 🔑706(8) — Injuries on Streets—Instructions.

In an action for the death of a child struck by an automobile, it was not error to charge that defendant's claim of contributory negligence on the part of the deceased child presupposed the existence of negligence on the part of defendant, especially where from the charge as a whole the jury must have understood its import and purpose.

4. Municipal Corporations 🔑705(10)—Injuries on Streets—Contributory Negligence.

A pedestrian crossing a street has a right to assume, until the contrary reasonably appears, that drivers of automobiles will keep a reasonable lookout ahead and exercise ordinary care to avoid causing him injury, but is bound generally to look after his own safety, and when crossing a highway where vehicles are to be looked for must use due care and caution to see that he is not in danger.

5. Death 🔑58(2) — Burden of Proof — Amount of Loss.

In an action for the death of a child 6½ years old, proof of the cost of his care, maintenance, and schooling, his probable future earnings and the pecuniary advantages which the parents might have enjoyed, was not necessary to support a recovery, as such proof is in its nature impossible in the case of a child of tender years.

6. Appeal and Error 🔑1004(1)—Review—Excessiveness of Damages.

While the power of the Supreme Court over excessive damages exists only when the facts are such that the excess appears as a matter of law, or is such as to suggest at first blush passion, prejudice, or corruption, if the amount of damages is obviously so disproportionate to the injury proved as to justify the conclusion that the verdict is not the result of the cool and dispassionate discretion of the jury, the verdict must be held excessive.

7. DEATH 🔑99(3) — EXCESSIVE DAMAGES — DEATH OF CHILD.

A verdict of $10,000 for the death of a child 6½ years old was excessive where there was no showing of special damage or anything to show that the pecuniary value of the child to his parents would have been any greater than that of the ordinary boy of his age.

Department 1. Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by Martin Wiezorek against Ralph Ferris. From a judgment for plaintiff, defendant appeals. Reversed.

Paul W. Schenck, Joseph Citron, and Richard Kittrelle, all of Los Angeles, for appellant. Morton, Hollzer & Morton, of Los Angeles, for respondent.

LAWLOR, J. Plaintiff brought this action under section 376 of the Code of Civil Procedure to recover damages for the death of Mieczyslaw Wiezorek, his only child, a boy of 6½ years of age, who was run down and killed by the defendant's automobile. The judgment entered upon the verdict was for $10,000. A witness, who had been driving an automobile ahead of appellant's on the occasion of the accident, saw deceased, as he started to cross Ninth street in the city of Los Angeles, pause in front of a truck standing alongside of the curb to let the witness drive by. Immediately afterwards the truck commenced to move, and deceased was seen to run forward into the street where he was struck by appellant's automobile, which, as several witnesses testified, was traveling at a high rate of speed close behind that of the first machine.

The defense was in part based upon the theory that the damage to plaintiff was the result of an unavoidable accident. Much of the evidence of the defense was to this effect. Appellant himself testified that he was traveling "at not more than 15 miles an hour" at the time of the collision, and that when "the little boy came running from in front of the truck * * * there wasn't a possible chance to get away from striking him." But the evidence tending to establish defendant's negligence is sufficiently convincing to support the verdict. It shows that appellant was actually traveling very fast; that as he neared the truck he swerved to the left to pass it by; that thereupon seeing the boy in a position of danger he suddenly made some effort to dodge him, but notwithstanding the immediate application of the brakes dragged him about 36 feet beyond the point of collision. Indeed, there is testimony that defendant and the driver of the automobile which had first passed the boy were racing along Ninth street at about 35 miles an hour, concededly a dangerous and excessive rate of speed. As is admitted by the pleadings, the maximum speed permitted by the city ordinance was only 20 miles per hour.

[1] Witnesses for defendant testified that deceased was a boy of a reckless and venturesome disposition, who was allowed to play ball and jackstones on the streets, and to climb on the back of passing wagons. That his parents were very poor people who worked by the day, the father as a cabinet maker and the mother as a laundress, and that the child was left in the charge of a Mrs. Anna Whypyhowski, one of their neighbors, who was ordinarily not very diligent in looking after her charge, is quite clear. But it does not appear that the accident was proximately caused by any neglect of Mrs. Whypyhowski, or by the negligence or carelessness of the deceased child, at the particular time of the collision. The evidence, as submitted, is sufficient to support the verdict of the jury that on that occasion he was exercising such reasonable care of his own safety as a child of his age and capacity under similar circumstances would ordinarily exercise. He was not then playing on the street, but having just completed an errand for Mrs. Whypyhowski, was crossing the street to join some of his boy friends at play in a vacant lot. As in most instances where certain witnesses of the transaction attempt to describe it, the testimony regarding the accident contains many contradictions, but as the evidence substantially supports the verdict, we cannot disturb it on that ground.

[2, 3] Although appellant had introduced evidence to show negligence on the part of the deceased boy and had asked for a number of instructions upon the law of contributory negligence, which were given, he now contends that the court erred in instructing that "the defendant's claim of contributory negligence on the part of the deceased child presupposes the existence of negligence on the part of defendant. * * *" It is first claimed that the instruction had no proper place in the case for the reason that the pleadings raise no issue of contributory negligence. True, the answer, after specifically denying the allegations of the complaint concerning defendant's alleged negligence, limits the affirmative defense to the plea that the accident was caused exclusively by the negligence of the boy. This position, however, was abandoned by appellant, and the case tried upon the theory that contributory negligence was in issue. He cannot now be heard to complain that the court gave instructions on an issue which he had introduced into the trial, and upon which he invoked instructions. Under the issues as presented, therefore, the jury was entitled to find not only that the proximate cause of the death of deceased was either the defendant's negligence or the negligence of the deceased child, but

also the joint or coexisting negligence of both himself and defendant. That contributory negligence must as matter of law be predicated upon the existence of negligence on the part of defendant is freely conceded. In fact, an instruction containing identically the same language has received the approval of this court. Linforth v. S. F. Gas & Elec. Co., 156 Cal. 58, 66, 103 Pac. 320, 19 Ann. Cas. 1230. But appellant argues, in the light of the dissenting opinion in Mulholland v. Western Gas Constructing Co., 21 Cal. App. 44, 131 Pac. 110, 113, that such an instruction in effect informed the jury that he had directly admitted his own negligence, and that therefore the single remaining issue, notwithstanding he had interposed other defenses, was the question of deceased's contributory negligence. Regarding the instruction as simply pertaining to the issue of contributory negligence, we find no objection to it. And that the jury must so have understood its import and purpose seems clear from a study of the instructions as a whole. There is no merit to the point that the jury was erroneously instructed upon the rule of preponderance of evidence.

[4] The law is well settled that a pedestrian crossing a street has a right to assume, until the contrary reasonably appears, that drivers of automobiles will keep a reasonable lookout ahead and exercise ordinary care to avoid causing him injury. The pedestrian likewise is bound generally to look after his own safety, and in that behalf a duty is imposed upon him, when crossing a highway where vehicles are to be looked for, to use due care and caution to see that he is not in danger. Scott v. San Bernardino Valley, etc., Co., 152 Cal. 604, 93 Pac. 677. We find this general rule is fully covered by the instructions, and the criticism made in that behalf by appellant is without merit.

[5] The main ground urged for reversal is that the verdict is excessive. Our attention is called to the fact that the evidence at the most merely shows that the deceased was a healthy child, both physically and mentally, and of a loving and dutiful disposition towards his parents. No evidence was introduced regarding the cost of his care, maintenance, and schooling, his probable future earnings and the pecuniary advantage which the parents might have enjoyed had he been spared to them. But where, as here, the child is of tender years, such proof is in its nature impossible, and therefore not required. It was said in Houghkirk v. President, etc., D. & H. C. Co., 92 N. Y. 219, 44 Am. Rep. 370, an action for the death of a six year old girl, wherein the maximum sum fixed by statute was recovered:

> "The evidence showed that she was about six years old; an only child; bright, intelligent, and healthy, and the daughter of a market gardener. This, and the circumstances of her death, constituted the only proof bearing on the question of damages, and which served as a basis for the judgment of the jury in estimating the pecuniary loss suffered by the next of kin. * * * The age and sex, the general health and intelligence of the person killed, the situation and condition of the survivors and their relation to the deceased, these elements furnish some basis for judgment. That it is slender and inadequate is true; * * * but it is all that is possible, and while that should be given, * * * more cannot be required."

See, also, Whitmer v. El Paso & S. W. Co., 201 Fed. 193, 198, 119 C. C. A. 637; Little Rock, etc., Ry. Co. v. Barker, 39 Ark. 491, 511; City of Chicago v. Hesing, Adm'r, 83 Ill. 204, 25 Am. Rep. 378; A., T. & S. F. Ry. Co. v. Fajardo, 74 Kan. 314, 86 Pac. 301, 6 L. R. A. (N. S.) 681; Gorham v. N. Y. C. & H. R. R. Co., 23 Hun (N. Y.) 449.

The jury, upon being instructed that "such damages may be given as under all the circumstances of the case may be just" (Code Civ. Proc. § 377), were duly cautioned that the verdict "must be limited to such amount, if any, * * * as plaintiff has suffered financially by reason of the death of his child." Other instructions explained that among the circumstances to be considered was the loss, if any, of the comfort, society, and protection of the deceased child. Bond v. United Railroads, 159 Cal. 277, 113 Pac. 366, 48 L. R. A. (N. S.) 687, Ann. Cas. 1912C, 50; Bergen v. Tulare County Power Co., 173 Cal. 709, 719, 161 Pac. 269. See, also, Miller v. Southern Pacific Co., 266 Mo. 19, 178 S. W. 885, 891.

[6, 7] In every case of this character the soundness of the verdict must be determined by its own peculiar facts and circumstances. It is true, also, as said in Bond v. United Railroads, supra, that "our power over excessive damages exists only when the facts are such that the excess appears as a matter of law, or is such as to suggest at first blush, passion, prejudice, or corruption on the part of the jury [citing cases]. Practically, the trial court must bear the whole responsibility in every case." But if "the amount of the damages is obviously so disproportionate to the injury proved as to justify the conclusion that the verdict is not the result of the cool and dispassionate discretion of the jury" (Morgan v. Southern Pac. Co., 95 Cal. 510, 30 Pac. 603, 17 L. R. A. 71, 29 Am. St. Rep. 143), the verdict must be held excessive. We are of the opinion that the award of $10,000 in this case is excessive. There was no averment or proof of special damage, nor anything to show that the pecuniary value of the child to his parents would have been any greater than that of the ordinary boy of his age. For a number of years to come he would have been a source of expense to them; his pecuniary value to his parents after that could by no permissible rule of compensation have equaled the award made by the jury. Even conceding that the child would have been of help to his parents after minority,

which is only conjectural, the verdict is still excessive.

For this reason, the judgment must be reversed. So ordered.

We concur: SHAW, J.; SLOSS, J.

175 Cal. 743

SEGNO v. SEGNO. (No. 4026.)

(Supreme Court of California. Aug. 22, 1917.)

1. TENDER 🔑14(1) — STATUTE — EFFECT TO DISCHARGE LIABILITY—SUFFICIENCY.

A debt is not extinguished by offer of payment, under Civ. Code, § 1500, providing that an obligation to pay money is extinguished by due offer of payment if amount is deposited in bank in creditor's name, if the money is deposited in bank as agent of debtor to pay it to creditor on certain conditions.

2. BILLS AND NOTES 🔑440—PAYMENT.

Where defendant agreed with plaintiff, to whom she had executed a note and mortgage, that if plaintiff did not pay certain of his notes, she might do so and apply such payments on a certain note given by her to plaintiff, she cannot claim to hold notes so paid as purchaser and set off their amount in suit on other notes made by her.

Department 2. Appeal from Superior Court, Los Angeles County; George L. Jones, Judge.

Action by A. V. Segno, substituted for Arthur S. Hall, against Annie Dell Segno. From judgment for plaintiff, defendant appeals. Affirmed.

S. J. Parsons, of Los Angeles, for appellant. L. S. Arnold, of Los Angeles, for respondent.

LORIGAN, J. This action was originally brought by A. S. Hall as assignee of the substituted plaintiff, A. V. Segno, to recover on several promissory notes and for money loaned. The substituted plaintiff and defendant are husband and wife, and the notes were executed by her in his favor and the money loaned by him to her. The defendant did not deny the execution of the notes or their validity, or the making of the loan, but set up a variety of other defenses against recovery upon any of them. The court made findings in favor of the plaintiff on all the notes and the loan sued on and against defendant upon all her defenses. On this ap-

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

peal defendant questions only the validity of two of the findings in favor of plaintiff. The court found in his favor as to a loan of $800 alleged to have been made to defendant on September 22, 1913. It appears that when this loan was made and at the same time defendant made a bill of sale in favor of plaintiff of certain personal property consisting of office furniture, books and papers to secure its repayment, he agreeing to return or cancel the bill of sale on repayment of the money within 30 days. Defendant claims the evidence shows that within the 30 days she tendered to plaintiff the sum of $805 in full payment of the indebtedness and demanded from him a delivery of the bill of sale which he refused; that this constituted a tender or offer of payment extinguishing the $800 indebtedness, and the court should have so found and held.

[1] The contention of the defendant is based on section 1500 of the Civil Code, which provides that:

> "An obligation for the payment of money is extinguished by a due offer of payment, if the amount is immediately deposited in the name of the creditor with some bank of deposit within this state of good repute, and notice thereof is given to the creditor."

But the trouble with this claim of defendant is that the evidence does not bring her within the terms of this section. She does not allege in her answer, nor does the evidence show that she deposited in the name of plaintiff in some bank of deposit in this state the amount due in satisfaction of the obligation. Defendant did take some measures respecting the payment of the loan and the return of her bill of sale, and doubtless left money with the Hellman Bank in Los Angeles as she testified for that purpose. So, too, the bank by letter sent, notified plaintiff that it was holding "(a specified sum of money) to take up a certain bill of sale." etc., stating that said sum was being "held" and "was to be paid" on compliance with certain conditions specified in the letter which involved a surrender of the bill of sale. Plaintiff refused to call for the money or to comply with the conditions. It is not pretended that defendant did anything more than have the bank so notify plaintiff. She did not deposit the money in the Hellman Bank, or any other bank, in the name of the plaintiff at any time. It is not clear that it was deposited with the Hellman Bank for any purpose, or if it was, that the bank held it in any other custody than as agent for the defendant to pay it over to the plaintiff on certain conditions. To effect the extinguishment of an obligation under the section there must be a full compliance with the law. As there was no deposit of the money in the name of the plaintiff which the section requires there could be no extinguishment of the obligation, and the court properly so held. "The deposit contemplated by section 1500 of the Civil Code, the effect of which is an extinguishment of the obligation, is an unconditional deposit to the credit of the owner or holder of the obligation. * * * Money deposited under section 1500 of the Civil Code becomes at once the property of the person to whose credit it is placed." Righetti v. Righetti, 5 Cal. App. 249, 90 Pac. 50.

[2] Appellant complains because the court failed to give her credit as an offset for $2,459.74, the aggregate amount of 29 notes for small sums given by plaintiff to third persons and taken up by defendant as they became due. There is no doubt but that plaintiff executed the notes, failed to pay them when due, and that they were presented to defendant, who settled with the holders of them. But all this was provided to be done by the defendant in a written contract between the parties. Defendant had agreed to give plaintiff a note for $50,000, secured by mortgage, which she did. This note and mortgage represented the purchasing price of a publishing business sold by plaintiff to defendant and these outstanding 29 notes represented obligations of the plaintiff theretofore given by him to the owners of stock in said publishing company for the purchase price thereof. Contemporaneously with the giving of this note and mortgage a written contract relative to these outstanding notes was made by the parties whereby it was declared that the note and mortgage were given in part to secure payment of said outstanding notes of the plaintiff, the agreement providing that plaintiff should pay them and that if he did not then that defendant might pay them "which payments shall be considered to be and shall be payments upon the note heretofore given" by defendant to plaintiff "for said sum of $50,000." Plaintiff being out of the state defendant took up these notes as they became due and long prior to the commencement of this action. Her claim on the trial was that she had not in fact paid them, but had merely purchased them from the holders to assert as a set-off against plaintiff. There is nothing in this claim. While the defendant was not required to pay these notes at all unless she chose to do so she did pay them and did so in harmony with the terms of her contract and they constituted partial payments on her $50,000 note to plaintiff. The effort now to assert their set-off to the notes in suit here only occurred to the defendant after the bringing of the present action.

These are the only points made in the brief of appellant, and as they are entirely without merit, the judgment appealed from is affirmed.

We concur: MELVIN, J.; HENSHAW, J.

34 Cal. App. 302

WEIHE et al. v. RATHJEN MERCANTILE CO. (Civ. 2063.)

(District Court of Appeal, First District, California. July 11, 1917. Rehearing Denied by Supreme Court Sept. 6, 1917.)

1. Municipal Corporations 🔑706(7)—Use of Streets—Automobile Accident—Contributory Negligence — Question for Jury.

In an action for injuries when plaintiff was struck by an automobile as she stepped from the sidewalk in front of it to board a street car, question of contributory negligence *held* for the jury.

2. Trial 🔑296(4, 5) — Instructions — Construction Together.

Where the instructions, read together and construed as a whole, were consistent with each other, and not confusing, and fairly covered the issue of contributory negligence, such instructions were correct, though a single one predicated defendant's liability and made no reference to the defense of contributory negligence.

3. Municipal Corporations 🔑703(3) — Traffic Ordinance — Stopping Vehicle with Left Side to Curb.

Traffic Ordinance of City and County of San Francisco, § 3, providing that no person driving or in charge of any vehicle shall stop the same on any street with the left side of the vehicle toward or along the curb, prohibits the stopping as well as the driving of a vehicle with its left side toward the curb.

4. Municipal Corporations 🔑705(2) — Duty of Pedestrian and Automobile Driver—Ordinary Care.

The degree of care exacted from a pedestrian and from the driver of a motor vehicle is the same, being ordinary care, but the driver of the motor vehicle is charged with a greater amount of care than the pedestrian that he may be bound to the same standard of ordinary care; "ordinary care" and "negligence" being relative terms.

5. Municipal Corporations 🔑705(2) — Duty of Pedestrian.

It is the duty of a pedestrian, traveling in or crossing a street of a city, to use ordinary care, and to reasonably exercise for his personal safety his natural faculties for his protection, and, if injured by reason of failure to do so, he cannot recover.

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Julia Florence Weihe and others against the Rathjen Mercantile Company. From a judgment for plaintiff and an order denying its motion for new trial, defendant appeals. Judgment and order affirmed.

Gillett & Cutler, of San Francisco, for appellant. H. U. Brandenstein and Walter Perry Johnson, both of San Francisco, for respondents.

KERRIGAN, J. This is an appeal by defendant from an adverse judgment and from an order denying its motion for a new trial in an action for damages for personal injuries suffered by the plaintiff Julia Florence Weihe through being struck by an automobile of the defendant.

An employé of the defendant, in charge of and operating said automobile, in effecting a delivery of goods, drove it to the left (south) side of Sacramento street in San Francisco, and there stopped on that side a short distance from the east line of Fillmore street. The goods being delivered, the driver started the automobile and collided with the plaintiff just as she stepped from the sidewalk at the southeast corner of Sacramento and Fillmore streets in order to board a street car on Sacramento street, resulting in the injuries to the plaintiff set forth in the complaint.

In support of its appeal the defendant does not claim that the evidence is insufficient to warrant the jury in finding that the defendant was guilty of negligence; its contention in this respect being that the case should have been taken from the jury on the ground that the evidence showed the plaintiff to have been guilty of contributory negligence.

[1] There is no merit in this point. The question of whether or not the plaintiff was guilty of contributory negligence in stepping from the sidewalk in front of the automobile was, under the attending circumstances, clearly one for the determination of the jury.

The other grounds upon which defendant relies for a reversal of the judgment are confined to instructions to the jury given, modified, or refused.

[2] One of the several acts of negligence alleged in the complaint was the violation by defendant of a certain section of what is commonly termed the traffic ordinance of the city and county of San Francisco, which was read in evidence to the jury. Summarized, it required the driver of a car upon the public streets to drive in a careful manner, having in view the safety of pedestrians. Another section of this ordinance provides that such driver shall on all practical occasions travel on the right-hand side of the street and near the right-hand curb thereof. The trial court, after briefly referring to the ordinance, instructed the jury that, if the employé of the defendant in the course of his employment violated either or both of the provisions of the ordinance just referred to, the defendant was guilty of negligence, and that if in consequence of such negligence the plaintiff was injured she was entitled to recover damages. This instruction made no reference to the defense of contributory negligence on the part of plaintiff, which was an issue in the case, and was therefore not in itself a complete and correct statement of the law; but the court elsewhere in its charge fully instructed the jury on the subject of contributory negligence. When the instructions are read together and construed as a whole, they are consistent with each other and not confusing, and appear to fairly cover the point discussed. It cannot be said, therefore, that the jury was misled. Anderson v. Seropian, 147 Cal. 201, 217, 81 Pac. 521; Stephenson v. S. P. Co., 102 Cal. 143, 149, 34 Pac. 618, 36 Pac. 407.

[3] The defendant requested the court to

charge the jury that defendant had a lawful right to have its automobile at the place where the accident happened. The ordinance, in section 3 thereof, in express terms, unlike section 2931 of the Political Code, examined in Bauhofer v. Crawford, 16 Cal. App. 676, 117 Pac. 931, prohibits the stopping as well as the driving of a vehicle with its left side toward the curb. In part it reads:

> "No person * * * driving * * * or in charge of any vehicle shall stop the same upon any street with the left side of such vehicle toward or along the curb."

The court committed no error in refusing to give the requested instruction, in view of the language of the ordinance.

[4] Nor do we think the court misdirected the jury in reading to them from the case of Raymond v. Hill, 168 Cal. 473, 483, 143 Pac. 743, 747, as follows:

> "While both parties are charged with the same degree of care, * * * the amount of care exacted of the driver of a motor vehicle is far greater than the amount of care exacted of the foot passengers."

As said by counsel for the plaintiff, the degree of care exacted of both users of the highway is the same; the amount of care must of necessity vary in order that the degree may not. The driver of a motor vehicle—a dangerous instrumentality capable of inflicting fatal injuries—is charged with a greater amount of care than the pedestrian, in order that he may be bound to the same standard of ordinary care. "Ordinary care" and "negligence" are relative terms.

> "The care required must be in proportion to the danger to be avoided and the consequences that might reasonably be anticipated from the neglect. The greater the risk or danger the greater must be the care. What is ordinary care in a case of extraordinary danger would be extraordinary care in a case of ordinary danger." 29 Cyc. 428, 429.

The point is made in a case cited by appellant, Minor v. Stevens, 65 Wash. 423, 118 Pac. 313, 42 L. R. A. (N. S.) 1178, where it is said:

> "It is hardly possible to lay down a fixed rule in this class of cases; for, as has been said, negligence is a relative and comparative term, and each case must depend upon its own circumstances. * * * Nevertheless there is a duty on all parties to exercise reasonable care to prevent accidents and collisions. * * * Although a higher degree of care rests upon the driver of a vehicle, because of the dangerous instrumentality which he controls, yet it is universally held that the right to the street lies in both parties, and [that] their duty to exercise due care is reciprocal, whatever the character of the vehicle may be," etc.

[5] The court refused to give a certain instruction proffered by the defendant as to the duty of pedestrians using the public streets, but the true rule in that behalf was fully covered in the general charge, and notably by the following instruction:

> "I charge you that it is the duty of a pedestrian traveling in or crossing a public street of a city to use ordinary care, and to reasonably exercise for his personal safety the faculties with which he is endowed by nature for self-protection; and if he fails to do so and is injured by reason of such failure, he cannot recover on account of such injury."

The judgment and order are affirmed.

We concur: RICHARDS, J.; BEASLY, Judge pro tem.

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34 Cal. App. 321

EASTON v. INDUSTRIAL ACC. COMMISSION et al. (Civ. 1699.)

(District Court of Appeal, Third District, California. July 14, 1917. Rehearing Denied by Supreme Court Sept. 11, 1917.)

1. Master and Servant 🔑417(7)—Workmen's Compensation Act—Findings of Industrial Accident Commission—Review.

If there was evidence to justify the findings of the Industrial Accident Commission, the court is not at liberty to disturb the conclusion reached by the commission.

2. Master and Servant 🔑367—Workmen's Compensation Act—Employment as Basis of Award.

If applicant for compensation was not an employé or was an independent contractor, the Industrial Accident Commission had no authority to award him compensation for his injuries.

3. Master and Servant 🔑405(2) — Workmen's Compensation Act — Relationship Between Parties—Evidence.

The facts that a claimant for compensation under the Workmen's Compensation Act (St. 1913, p. 279) chose his own time to go out to and return from work, and was not directed by his employer where to go or to whom to sell, had some probative force, but was not conclusive of the relation which actually existed between them, whether or not of employer and employé.

4. Master and Servant 🔑405(2) — Workmen's Compensation Act — Payment of Commission.

The fact that an applicant for compensation under the Workmen's Compensation Act was to be paid by a per cent. of the retail price of the bread he sold was not conclusive of the relation which actually existed between him and his claimed employer; the circumstance not creating a distinct relationship in law other than that of employer and employé.

5. Master and Servant 🔑405(2) — Workmen's Compensation Act — Existence of Employment—Sufficiency of Evidence.

In proceedings under the Workmen's Compensation Act by a driver of a bakery wagon, evidence *held* to justify the findings of the commission, and to show that the relation existing between claimant and the proprietor of the bakery was that of employer and employé.

Petition for writ of review of an award in favor of A. C. Sohn by H. E. Easton, doing business as the Quality Bakery, against the Industrial Accident Commission of State of California and A. J. Pillsbury and others, as members of said Commission. Award affirmed.

R. W. Dodge, of Stockton, for petitioner. Christopher M. Bradley, of San Francisco, for respondents.

CHIPMAN, P. J. This is an action brought by petitioner for a review of an award made by the defendant in favor of one A. C. Sohn, as an employé of petitioner. In his application for adjustment of his claim said Sohn alleged that he received the injury complained of on December 1, 1916, while in the service of said petitioner, and while engaged in driving a wagon for the purpose of delivering bread on behalf of petitioner in the city of Stockton, Cal. It is alleged in the application that the accident from which the injury complained of arose occurred in front of petitioner's bakery shop while said applicant, Sohn, was engaged in unloading a bakery wagon; that, there being no step on the wagon, he was obliged to use the hub of the wheel in order to get on and off; that in thus using the wheel for a step his foot slipped and he received a broken kneecap. He was asked to explain how the injury happened, and if he had stepped up on the hub with the right foot, and he answered:

> "With the left foot, and when that slipped off, it threw the weight on my right one, and it simply bent the knee back and broke the kneecap. Q. Were you getting on the wagon or off the wagon? A. I was getting off the wagon."

It is contended that the following findings are not supported by the evidence:

> "(1) That J. Sohn, applicant herein, was injured on the 1st day of December, 1916, at Stockton, Cal., while in the employment of defendant, H. E. Easton, doing business under the name and style of Quality Bakery; (2) that the said employment of applicant was as a salesman and deliveryman, working upon a commission basis on the amount of goods sold by him, and that such occupation by applicant was not that of an independent contractor, but was that of an employé of defendant; (3) that said injury arose out of and happened in the course of said employment, was proximately caused thereby, and occurred while the injured employé was performing service growing out of and incidental thereto, in the following manner: While alighting from his wagon, applicant slipped and fell and fractured the patella or kneecap."

[1, 2] The sole question as to which there appears to be any controversy is whether or not the injured man was an employé of the petitioner or was an independent contractor. The nature of his employment appears from the testimony of the applicant, Sohn, and that of the petitioner, Easton. There is a very sharp conflict in the testimony of these two witnesses upon this question. The findings of the commission seem to have been based upon the testimony of the applicant, Sohn, and the circumstances surrounding his service, and if there was evidence sufficient to justify the findings, we are not at liberty, under the rule, to disturb the conclusion reached by the commission based upon such findings. Western Indemnity Co. v. Pillsbury, 172 Cal. 807, 159 Pac. 721. If applicant was not an employé of petitioner, or if he was an independent contractor, the commission had not authority to award compensation. Carstens v. Pillsbury, 172 Cal. 572, 158 Pac. 218.

Applicant, Sohn, testified:

> That he entered the employment of petitioner on the 10th day of October, 1916. "Q. What were the terms of the contract of hire between you? A. I was guaranteed $15 per week. Q. When you say that you were guaranteed $15 a week, if you sold bread on a commission basis in excess of that amount, did you receive the amount over and above the $15 per week? A. I returned him all that I had taken in on this commission and over $15 I give back to him at the end of the week. He kept track of this 20 per cent. commission, and at the end of the week if that commission overrun the amount of $15, I paid it back to him."

He testified that the horse and wagon used by him for the distribution of the bread and that he was driving was furnished by petitioner at his own cost, the arrangement being that he was to furnish the horse and wagon that applicant drove on his route; that this wagon had the name of "The Quality Bakery" painted on it by petitioner's direction and the phone number of his place of business. Witness was asked if $15 was the average weekly wage of men driving bakery wagons in Stockton, and he replied:

> That it was not the union wage and was not the average wage, which was $18 per week. "Q. Were you willing to work for $15? A. When I went to Mr. Easton, he told me that he could not afford to pay over $15 a week, and so I went to work for him because I was not making very much money when I was working on a commission. Q. I cannot see what the necessity was for a commission basis between you and Mr. Easton if you had a guaranteed salary of $15 a week and if you made over that on the commission basis you returned it to him. Can you explain how that occurs? A. When I took the bread out of the shop in the morning I was charged the full retail price for that bread, and when I came back in the evening, the bread which I had not sold was checked out again, back into the shop again, and then he give me 20 per cent. discount on that bread to cover my day's wages. Q. But I cannot see why there was any necessity of making any arrangement when you were guaranteed to be paid $15 a week and could not earn any more than $15 a week. A. Well, it seemed to come handy to pay me that way every day, because I had to stand everything that I put on the book. I had to trust people in town, and he did not stand anything. That is the only reason I know that he did that. Q. Then you say that you had to stand whatever you put on the book? Did you keep an account with your customers? A. I did. Q. And Mr. Easton had nothing to do with that account? A. No, sir. Everything he sold me at the time was, he said: 'If you trust anything out, you will have to stand that loss yourself.' Q. With that sort of an explanation, it would look like Mr. Easton simply guaranteed that your business would amount to $15 a week, if you were charged with the bread that you took out in the morning and given credit for what you returned at night. A. Yes, sir. Q. And you paid him for what bread you had sold during the day, and took the chance of collecting where you gave credit? A. I took that on my own shoulders to get that money. Q. Why should you take the chances of getting the money for bread delivered if you were not going to make anything by it? If you were paid $15 a week in wages, why should you extend credit and take the chances of collecting? A. Because I was working for his interest to get rid of his bread, and the more I sold it was that much better for him, because I got the money. I was acquainted with the people. Q. But it was distinctly understood between you and Mr. Easton that if you extended credit to any one that you took the chances of collecting? A. It was. Q. And each night you settled with Mr. Easton for the bread that you sold during the day? A. Yes; I did; less the 20 per cent. discount. Q. And when did you settle with him

then for this $15 per week? A. At the end of the week all that this discount overrun $15 I give back to him at the end of the week. The discount ran up something like $18 every week that I had collected at the end of the week, and I handed the balance back to him. I mean the percentage. Q. Did you have a lot of customers that you delivered bread to that had it charged to an account? A. There was a certain number. I don't know just how many there were. Q. About how much bread would you put out in the day that you did not get paid for? A. Perhaps $1, something like that; perhaps not that much. Q. Did you go around afterwards and collect that money? A. They paid me every week or two or three days; they would hand me some money on their account. Q. And you kept a record of that in a book that you provided for yourself? A. I have a book at home. Q. You have a book that you kept that in? A. I did; yes."

He testified that at the end of each week he had to repay more or less money to Mr. Easton over and above the $15. He testified also:

That before entering into Mr. Easton's service under this arrangement he had been distributing bread for another bakery, and also at the same time for Mr. Easton, and that at that time the arrangement was that he was to pay outright for the bread as he took it from the bakery. "Q. When you went to work for Mr. Easton, you say that you went to work for wages? A. That is what I took to be wages. Q. You are quite sure that the arrangement was not that your profits were to be at least $15 a week after you had paid for the bread that you took out? A. No, sir; it was a guaranty. That was just the words he said: 'I will guarantee you $15 a week.'"

He testified:

That at the time he was working for the two bakeries above referred to, buying and selling their bread, he had no guaranty whatever. He testified that he had regular customers to whom he furnished bread under the earlier arrangement, and when he went to work for Mr. Easton under the arrangement in question, he took the same route. "Q. You had certain regular customers? A. I did. Also I delivered to some of his wholesale trade—to three different stores. Also I took out bread to some of his retail trade on the north side of the town after I came in from my route. Q. That is delivering orders that came into the shop? A. I suppose so. They were in there to be taken out and I took them out. * * * Q. So, in addition to doing the work wherein you stated you got 20 per cent. for the goods sold by you, you also worked for him in delivering to the stores for him? A. I did. Q. Did you do it practically every morning? A. I would not swear to that, that I delivered it every morning, but I am almost sure I did, because after I started in I did. * * * Q. Did you receive any extra compensation over the 20 per cent? A. I did not. Q. When you delivered bread for him on his retail orders, did you receive any compensation? A. I did not."

Some slips were introduced in evidence on which are recorded in pencil roughly the amount of bread received daily by applicant and the amount returned for which credit was given, and showing the amount earned on that date, less 20 per cent., and as the entries are explained by the witness, they seem to corroborate his statement of the arrangement under which he was working. He testified:

That for the week, except on Saturday, his compensation, computed on the 20 per cent. basis, ran from $2.40 up to $3 daily; that Saturday was his best day, and on that day the balance was struck for the week. "Q. And the amount was never under 15? A. Not that I remember of. Q. And it usually exceeded by a few dollars $15? A. Yes, sir. Q. That amount you returned to your employer, Mr. Easton? A. I did."

Dr. L. R. Johnson, who was the attending physician while applicant was in the hospital, testified that petitioner visited the hospital several times to see applicant and to inquire after his condition. He testified:

"Q. Did he make any statement to you as to the manner of employment or compensation or regular wages paid to this man, Mr. Sohn? A. Yes; he told me that he worked on commission. [Objection was made to the question on the ground that it was a question of law, but it was claimed to be admissible as a statement made by the petitioner himself.] Mr. Dodge (attorney for petitioner): As far as it is a question of law, it is objected to. Referee: You will answer the question. A. He told me that he worked for him under a commission. I don't know as I can remember the exact conversation, but it seemed to be Mr. Easton's idea that it was a commission basis. It was something about his furnishing the horse and wagon, etc. Q. Did he speak to you about guaranteeing him a certain compensation per week? A. No; Mr. Sohn told me that. Q. Did he speak to you about having sent Mr. Sohn to the St. Joseph's Hospital? A. No; I don't think so. I think he said that, if he was responsible, he would pay the bills, and, if not, he would not. So he seemed very kindly disposed towards him, and he seemed inclined to help him, and he was solicitous about it. He did not offer to pay the bills unless he was held for it by the commission. That is the way I understood him."

On his cross-examination applicant testified that he started out in the morning whenever he got loaded up and went out on his old route, and Mr. Easton did not authorize him to go in any particular way; that he came back whenever he pleased after going over his route and sold bread to whomsoever he wished to, and Easton credited him with all bread returned.

Easton's testimony was, in effect, that Sohn came to him and said he wanted to purchase his (witness') goods and go out and sell them, and that the arrangement made was that Easton was to give Sohn "20 per cent. on the retail price and 5 per cent. on the wholesale stuff." He denied that he had guaranteed Sohn $15 per week while he was working; denied that he had ever said anything to Sohn about wages; that the arrangement "was strictly a buying or selling or a commission matter between" him and Sohn.

[3, 4] The fact that Sohn chose his own time to go out and return and was not directed by petitioner where to go or to whom to sell has some probative force, but is not conclusive of the relation which actually existed, nor is it inconsistent with the claim that the relation was that of employer and employé. The same may be said of the arrangement by which the applicant was to be compensated for his services. The circumstance that these services were to be measured by a per cent.

of the retail price of the bread sold did not "create a distinct relationship in law" (Cameron v. Pillsbury et al., 173 Cal. 83, 159 Pac. 149; Brown v. Industrial Accident Commission [Sup.] 163 Pac. 664); and while in the cases cited there were other circumstances tending to establish the relation, the principle was announced that the fact of compensation being fixed by the amount of the goods or lots sold did not in itself create the relationship of independent contractor.

As was said in Cameron v. Pillsbury, supra:

> "It is not an uncommon thing for retail merchants, for laundrymen, and the like to pay a commission to the drivers of their delivery wagons for all new business which they bring in. It has never been held that this circumstance creates a distinct relationship in law."

Paying for services by a commission is frequently but a means of admeasuring compensation. We must in the present case assume as the fact, for applicant so testified, that he was to receive and was guaranteed $15 per week for his services. It appeared by the testimony of applicant that he performed duties other than of selling the bread; that he, by direction of petitioner, delivered bread to the latter's wholesale customers and to some of his retail customers which, while part of the services rendered, were not compensated except by the payment of the $15 per week wage.

Applicant had previously performed for petitioner this same kind of service, and petitioner knew what he could do and applicant knew what was expected of him in order to earn the promised wage. It is fair to assume, and the evidence warrants the assumption that, while petitioner did not direct applicant in the performance of the service, it was mutually understood that applicant surrendered his entire time to the service being performed. It is not reasonable to suppose that petitioner would guarantee payment of $15 per week on any other assumption.

It is contended that the terms "employer" and "employé," as defined by sections 13 and 14 of the act, and as held by the commission in McCoy v. Kilpatrick, volume 1, page 601 of the Industrial Accident Commission Reports, import the relation of master and servant, and that the evidence herein does not measure up to the definition of the terms "master" and "servant" as defined by section 2009 of the Civil Code, which reads as follows:

> "A servant is one who is employed to render personal service to his employer, otherwise than in the pursuit of an independent calling, and who in such service remains entirely under the control and direction of the latter, who is called his master."

Beyond dispute, Sohn was employed to render personal service to his employer in undertaking to sell his employer's bread for a fixed compensation per week. Just why the bread was billed to him at retail prices and a weekly settlement was made is not fully explained. It might have well been for the purpose of finding whether Sohn was earning daily or weekly the pay guaranteed, and thus to determine whether it was a profitable arrangement for the master. We do not think the section of the Code, in applying it to the administration of the Workmen's Compensation Act, should be construed to mean that Sohn was not a servant because his master did not specifically control his movements in making sales of the bread. Sohn was not only to receive the bread and sell it, but was to report daily and turn in any earnings in excess of $2.50 per day, which was the daily pay at $15 per week of six working days, and he was to report Saturday night and settle up for the week's sales and to receive whatever was due of his weekly wage of $15. In the course of this particular service he was also to make deliveries to wholesale customers and to retail customers who made purchase at petitioner's store.

[5] We think the evidence sufficient to justify the findings and to show that the relation existing between petitioner and applicant was that of employer and employé.

The award is affirmed.

We concur: BURNETT, J.; HART, J.

34 Cal. App. 296

BENNING v. SUPERIOR COURT OF CALIFORNIA IN AND FOR SACRAMENTO COUNTY et al. (Civ. 1692.)

(District Court of Appeal, Third District, California. July 10, 1917. Rehearing Denied by Supreme Court Sept. 6, 1917.)

1. Executors and Administrators 🔑513(9)—Order Settling Final Account and Decreeing Distribution—Judgment—Statutes.

Under Code Civ. Proc. § 1637, providing that the settlement of an executor's account and its allowance by the court is conclusive, etc., and section 1666, providing that in the order or decree of distribution the court must name the persons and the proportions or parts to which each shall be entitled, etc., the court's order settling the final account of an administrator, and decreeing distribution of the estate, is placed upon the same footing as an ordinary judgment in a civil action.

2. Judgment 🔑336—Nullification—Statute.

A judgment can be nullified by the court which rendered it only: First, on motion for new trial; second, by a motion under Code Civ. Proc. § 473, where the judgment is inadvertently made and where application is made to set it aside within six months; third, by motion therefor at any time where the judgment is void on its face, and, fourth, by an independent suit in equity where the judgment is regular on its face, but extrinsically void for want of jurisdiction or by reason of fraud or mistake.

3. Executors and Administrators 🔑509(3)—Final Settlement—Correction by Appeal.

Where the petition for settling the final account of an administrator and for decree of distribution alleged and the court found that all claims against the estate had been paid, the court's adjudication of the fact of payment of all claims, if wrong, was merely erroneous, and subject to correction on appeal, but not by motion to vacate the court's order by an unpaid claimant's assignee.

4. EXECUTORS AND ADMINISTRATORS 🔑513(1) —FINAL SETTLEMENT—FALSE TESTIMONY—CORRECTION BY APPEAL.

If false testimony was presented to the court at hearing of petition for settling an administrator's account and for decree of distribution, and the court based its decision settling the account and decreeing distribution on such testimony, the judgment was duly made, and must stand unless an appeal is taken.

5. EXECUTORS AND ADMINISTRATORS 🔑 513(11)—ADMINISTRATOR'S ACCOUNT—OMISSION OF CLAIM—REMEDY OF CLAIMANT.

If the superior court's order settling an administrator's account is not conclusive as to a claimant in consequence of the claim not having been included therein, claimant should petition the court for an order directing the administrator to pay her claim, and, should the court refuse such order, she may appeal under Code Civ. Proc. § 963, subd. 3.

Petition for writ of mandate by Anna Benning against the Superior Court of the State of California in and for the County of Sacramento and Peter J. Shields, Judge. Order to show cause discharged, and writ denied.

Thomas B. Leeper, of Sacramento, for petitioner. Elliott & Atkinson, of Sacramento, for respondents.

BURNETT, J. This is a petition for writ of mandate to compel the superior court in and for the county of Sacramento and the judge thereof to set aside an order settling the final account of the administrator and decree of distribution in the matter of the estate of Manuel S. Nevis, deceased.

Petitioner is the assignee of Charles Peterson, a creditor of said estate. Peterson duly presented his claim, which was allowed by the administrator and the judge of the superior court, for $992. Thereafter the administrator paid petitioner $607.61, leaving a balance of $331.13. Thereafter, and upon the 15th day of October, 1913, the administrator filed a final account of the administration of said estate, accompanied by a report and petition for distribution, wherein it was alleged, among other things, that all the "debts of said deceased, expenses of administration, etc., have been fully paid," and that said estate was ready for distribution. After notices had been duly posted as required by law, stating that said account was for final settlement, a hearing was had, and upon evidence being taken in support of the allegations of said report and petition, an order was made settling said account as the final account in said estate and finding that all debts of the estate had been paid, and a decree of distribution was made and entered. Said final account and order made no mention of the balance still unpaid to the petitioner herein.

Afterwards, on the 6th day of December, 1916, petitioner filed a petition, subsequently amended, in said superior court in the matter of said estate, whereby she sought to set aside said decree of distribution, claiming that she had received no notice of the settlement of said final account and petition for final distribution until July, 1916; that she had been prompted to make no inquiry because of promises of Emma Nevis, wife of the deceased, that no settlement nor distribution would be made of said estate until September, 1916, and that petitioner would be fully paid.

Upon a demurrer being interposed to said petition by the distributees of said estate and argument had, the said superior court denied the said petition to set aside the final decree of distribution, upon the ground that the decree of distribution and the order settling the final account had become final and conclusive against said petitioner. Petitioner claims that, since the account did not include her unpaid claim, it is not final nor conclusive as to her, and that she is entitled to have it set aside.

The sole question for consideration is, therefore, whether the petitioner here is entitled to an order of the said superior court setting aside the order settling the final account and the decree of distribution theretofore made in the matter of the estate of Manuel S. Nevis, deceased.

As to the force and effect of the order settling the final account and decree of distribution made by the court of the estate of the decedent, the statute itself is plain and conclusive. As to the former, section 1637 of the Code of Civil Procedure provides:

> "The settlement of the account and the allowance thereof by the court, or upon appeal, is conclusive against all persons in any way interested in the estate, saving, however, to all persons laboring under any legal disability, their right to move for cause to reopen and examine the account, or to proceed by action against the executor or administrator, either individually or upon his bond, at any time before final distribution; and in any action brought by any such person, the allowance and settlement of the account is prima facie evidence of its correctness."

And as to the decree of distribution we find this language in section 1666 of the same Code:

> "In the order or decree, the court must name the persons and the proportions or parts to which each shall be entitled, and such persons may demand, sue for, and recover their respective shares from the executor or administrator, or any person having the same in possession. Such order or decree is conclusive as to the rights of heirs, legatees, or devisees, subject only to be reversed, set aside, or modified on appeal."

[1] These provisions simply mean that the order settling the final account and decreeing distribution of the estate is placed upon

the same footing as an ordinary judgment in a civil action. In support of this statement, authority is hardly needed, but we may refer to the carefully considered case of Bacon v. Bacon, 150 Cal. 477 on page 486, 89 Pac. 317, on page 320, wherein, in reference to section 1666, supra, it is said:

> "The provision may reasonably be interpreted to mean no more than that the decree of distribution should have the same force and effect as other final judgments; that is to say, that it should not be subject to collateral attack, but only to direct attack on appeal, or as otherwise provided by law."

The orders settling the final account and decreeing the distribution of the estate in the present instance, it may be said, are a part of the same document, and really constitute one judgment of the court, and we will therefore so treat it in this opinion.

[2] It cannot be doubted that a judgment can be nullified by the court which rendered it only: First, on motion for a new trial; second, by a motion under the provisions of section 473 of the Code of Civil Procedure, where the judgment is inadvertently made, and where application is made to set it aside within six months; third, by motion therefor at any time where the judgment is void on its face; fourth, by an independent suit in equity where the judgment is regular on its face, but extrinsically void for want of jurisdiction, or by reason of fraud or mistake. In the case at bar no motion for a new trial was or could be made. No application was made under the provisions of section 473 to have the judgment set aside, the motion herein having been made more than three years after the judgment was entered, and upon an entirely different ground from those contemplated by the section. The judgment is not void on its face; on the contrary, it is made to appear that the court had jurisdiction of the person and jurisdiction of the subject-matter. The statutory requirements as to notice to be given preliminary to the settlement of the final account and to the order decreeing the distribution of the estate were strictly complied with; in fact, there is no contention of the lack of jurisdiction on the part of the court to decree said settlement and distribution. And likewise this is not an independent suit in equity to set aside said judgment on any of the grounds that are cognizable in equitable proceedings. It is quite apparent, therefore, that petitioner has not brought herself within any of the recognized methods of procedure whereby said judgment of the court could be legally avoided or nullified. Upon reflection the proposition seems so clear and uncontrovertible that further consideration seems hardly to be demanded.

[3] Indeed, the only error complained of, as far as the action of the court below is concerned, was that the decree was made before all the claims against the estate had been paid, and was therefore made prematurely and without authority of law. Conceding this to be true, nevertheless the petition for settling the final account and for decree of distribution alleged, and the court found, that all claims against the estate had been paid. The court therefore having adjudicated this fact in a matter wherein it had jurisdiction, its adjudication, if wrong, was merely erroneous and subject to correction on appeal.

[4] If false testimony was presented at the hearing, and if upon such testimony the court based its decision, nevertheless the judgment was duly made, and must stand unless an appeal is made therefrom. A similar question to that involved herein was presented in the case of Smith v. Jones (Sup.) 163 Pac. 890, wherein a false return of the service of summons upon the defendant had been made, and upon such false return the court below gave judgment by default. More than one year after the entry of the judgment, the defendant appeared and moved to vacate it upon the ground that he had never been served with summons, and therefore that the court had never acquired jurisdiction over his person, and that the judgment was consequently void. The court granted the motion and vacated the judgment. The plaintiff appealed to the Supreme Court, where the order was reversed upon the ground that the superior court was without authority to vacate its judgment by motion therefor made more than one year after the rendition thereof, though the court in the first instance had no jurisdiction to render judgment in consequence of the failure to serve the defendant with summons. In the opinion in that case it was said:

> "Under the views expressed, the motion of respondent to set aside the judgment was made too late, and for that reason the court had no power to make the order. Under such circumstances the respondent is required to seek whatever relief he is entitled to through an independent action in equity to set aside the judgment for want of jurisdiction in the court to pronounce it. Brackett v. Banegas, 116 Cal. 278 [48 Pac. 90, 58 Am. St. Rep. 164]; Parsons v. Weis, 144 Cal. 410 [77 Pac. 1007]."

In that case, it is to be observed, there was an entire lack of jurisdiction to enter judgment by reason of a failure of service, and hence in that particular there was stronger reason for setting aside the judgment than in the case at bar. Herein, as we have seen, there was, at most, a mere error, an incorrect conclusion of law, or incorrect finding of fact which could not operate to invalidate the judgment except by regular proceedings taken upon appeal, so that in the present instance a motion to vacate would not lie at any time. It is undoubtedly true that the superior court sitting in probate is one of general power, and where it has acquired jurisdiction as in the present case by proper application and notice, its decree rendered therein is not void because of errors committed in the exercise of its jurisdiction, and the validity of its judgment cannot be questioned in a proceeding like this. Crew v. Pratt, 119 Cal. 131, 51 Pac. 44; Estate of Bette, 171 Cal.

583, 153 Pac. 949. In view of said provisions of the statute and the familiar decisions of the courts, we are entirely satisfied that no reason exists for directing the lower court to set aside its order and decree.

[5] Assuming that said order settling the administrator's account is not final and conclusive as to the petitioner in consequence of said claim not having been included therein, then it would follow that petitioner is not injured thereby. In that event her remedy would be to petition the probate court for an order directing the administrator to pay her claim, and should the court refuse to make such an order, she may appeal therefrom under the provisions of subdivision 3 of section 963 of the Code of Civil Procedure. Or if petitioner relies upon extrinsic fraud, as is imperfectly intimated in her petition, she must institute an action in equity to set aside said judgment, as we have hereinbefore indicated.

We should properly confine ourselves strictly to the petition that is before us, and not anticipate any future proceedings that may be taken by petitioner. We will not, therefore, enter upon a consideration of respondents' earnest contention that petitioner seeks to enforce a stale demand and one that is entirely destitute of merit.

There are some cases cited by petitioner from other jurisdictions apparently lending some countenance to her contention. They are based, however, upon different statutory provisions from those that prevail in this state, and we deem specific notice of them inadvisable.

The order to show cause is discharged, and the writ denied.

We concur: CHIPMAN, P. J.; HART, J.

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34 Cal. App. 245

CLEMENS v. GREGG et al. (Civ. 1666.)

(District Court of Appeal, Third District, California. July 5, 1917.)

1. ATTORNEY AND CLIENT 🔑86—AUTHORITY OF ATTORNEY—AGREEMENT AS TO APPEAL—POWER OF ATTORNEYS.

A stipulation entered into between the attorneys of parties to an action to foreclose a trust deed, as to conditions upon which decree of foreclosure and sale may be entered, and waiving all right of appeal therefrom, is binding on parties within Code Civ. Proc. § 283, providing that an attorney shall have authority to bind his client to any steps of an action by agreement filed with clerk, etc.

2. ATTORNEY AND CLIENT 🔑86—AUTHORITY TO ENTER INTO STIPULATIONS—PRESUMPTIONS.

A stipulation between attorneys is presumed to have been authorized by client where he recognizes its validity by acting under it or acquiescing in action under it for nearly four years.

3. STIPULATIONS 🔑9—FILING—STATUTE.

Stipulation is agreement filed with clerk within meaning of Code Civ. Proc. § 283, though it is not filed until long after being entered into, though before decree is entered pursuant to it, where no one is injured by delay.

4. APPEAL AND ERROR 🔑125—DECISIONS APPEALABLE—"CONSENT DECREE"—WHAT ESSENTIAL TO.

A decree is by consent within rule that such decree is not appealable, where stipulation pursuant to which it is entered provides that it shall be entered upon determination of rights of certain parties, though decree as entered departs from form of decree settling those rights agreed upon, where appellant's rights are not injuriously affected thereby.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Consent Decree.]

5. STIPULATIONS 🔑9—FILING—EFFECT OF DELAY.

Mortgagor is not injured by delay in filing stipulation entered into between parties to action to foreclose trust deed providing for lower rate of interest after decree entered than before, where entering of decree did not depend on act of filing.

6. APPEAL AND ERROR 🔑125—REVIEW—"CONSENT DECREE."

A decree of foreclosure entered into pursuant to stipulation is a consent decree, notwithstanding the stipulation left the amount due on notes undetermined because time of entering decree is uncertain, where it pointed out how amount is to be ascertained.

7. MORTGAGES 🔑575—FORECLOSURE—EFFECT OF APPEAL—STAY—WAIVER—STIPULATION.

Where, by stipulation entered into in foreclosure suit, appeal from decree of foreclosure, and supplemental decree of sale is waived, taking of appeal from decree of foreclosure does not stay proceedings on decree so as to prevent court from entering supplemental order of sale.

8. MORTGAGES 🔑494—FORECLOSURE BY ACTION—DECREE—NATURE AND ESSENTIALS.

Decree determining trust deed to be first lien on property and amount due on notes secured thereby, directing sale of property after expiration of time for redemption and application of proceeds, barring equity of redemption, providing for letting purchasers into possession and for deficiency judgment, contains all the elements necessary in decree of foreclosure of mortgage.

9. MORTGAGES 🔑575—FORECLOSURE—STAY OF PROCEEDINGS—NECESSITY FOR UNDERTAKING—MORTGAGE FORECLOSURE.

Where a trust deed provides for foreclosure after condition broken and right of redemption and stipulation between parties to action to foreclose it, and decree entered pursuant thereto, gives full statutory period for redemption, appeal by maker of trust deed in possession from decree foreclosing it does not stay proceedings thereunder unless written undertaking is executed as provided by Code Civ. Proc. § 945, since the instrument was by consent of all parties converted into and foreclosed as mortgage.

Appeal from Superior Court, Inyo County; Wm. D. Dehy, Judge.

Action by Earle Clemens against Wellington Gregg, Jr., as trustee, and others. From judgment adverse to them, the plaintiff and the Keane-Wonder Mining Company appeal. Affirmed.

Gavin McNab, R. P. Henshall, and Oliver B. Wyman, all of San Francisco, for appellants. Morrison, Dunne & Brobeck, of San Francisco, Geo. S. Green, of Reno, Nev., John B. Clayberg, of San Francisco, and Mack & Green, of Reno, Nev., for respondents.

CHIPMAN, P. J. The statement of the case by appellants and respondents in their respective briefs does not differ materially. We have followed that of the respondents mainly.

On April 13, 1909, the plaintiff herein brought suit against Wellington Gregg, Jr., as trustee, under a trust deed made to secure certain notes of the Keane-Wonder Company given to the Francis Mohawk Company and James F. Peck, to enjoin a sale of the property therein described under an advertisement in execution of the power of sale contained in such trust deed, and for an accounting for moneys received and paid on account of indebtedness, and for other relief. A preliminary injunction was issued prohibiting the trustee from making a sale of the property. The defendant Francis Mohawk Mining & Leasing Company filed its answer and cross-complaint in which it claimed that it owned the notes given to it by the Keane-Wonder Mining Company, and alleged that the same, together with certain notes given to James F. Peck, were secured by a mortgage or trust deed covering all the property of the Keane-Wonder Mining Company. It claimed that the lien thus created was valid and enforceable and prayed a foreclosure of the trust deed under the equitable powers of the court.

The defendant Benjamin H. Tatem who had succeeded to the rights of James F. Peck, filed his answer and set forth his right of security under the trust deed in question, and prayed that, if the same be foreclosed, such foreclosure should also be in his interest.

Plaintiff had alleged in his complaint that Frank L. Wildes, as receiver of the State Bank & Trust Company of Nevada, claimed to be the equitable owner of the notes executed by the Keane-Wonder Mining Company to the Francis Mohawk Mining Company; that the Keane-Wonder Mining & Leasing Company was uncertain as to the ownership of these notes, and desired that the question be determined before it paid any money thereon.

While the pleadings were in this condition, all the then parties to the suit, by their respective attorneys, entered into two stipulations, for the purpose of settling all matters of controversy between them, and of giving the Keane-Wonder Mining Company the opportunity to liquidate its indebtedness in whole or in part, by the operation of its mining properties. In the first stipulation it was recited that Wildes, as receiver, had been made a party to the suit "with the purpose and object that his claim, if any, to said promissory notes or the money due thereon, or the indebtedness represented thereby, should be fully and finally determined." The stipulation then proceeded:

> "Now, therefore, in consideration of the premises and for the purpose of enabling the said Keane-Wonder Mining Company to pay its said indebtedness, and of enabling its creditors to receive payment thereof as speedily as possible, and to avoid further litigation and expense of all parties thereto, and to finally determine this litigation, it is hereby stipulated and agreed," etc.

It is also provided that the Keane-Wonder Mining Company should pay monthly to A. L. Meyerstein, as trustee, the net proceeds of the operation of its mines which should accrue from the 1st day of November, 1909, to be held by Meyerstein as trustee until it should be determined whether Wildes, as receiver, or the Francis Mohawk Mining Company, was entitled to the same, and, upon such determination being reached, to pay over this one-fourth to Tatem and three-fourths to the party thus found to be entitled thereto; the amount when paid over to the respective parties to be credited on the notes belonging to the respective parties as of the date of such payment. It then provided how the net proceeds should be determined, provided for the inspection of the mine's operation, records and books of the company, and made further provisions immaterial to the questions now before the court. It finally provided, however, that all proceedings in the action between the parties to the stipulation should be stayed so long as such net proceeds were deposited with Meyerstein, "until the question as to the ownership of the indebtedness represented by the notes given to the Francis Mohawk Mining Company is finally decided, and it is finally determined whether the same belong to Frank L. Wildes, as receiver of the State Bank and Trust Company, or said Meyerstein, as receiver of the Francis Mohawk Mining Company."

This stipulation was preliminary to another entered into on the same day settling all questions and controversies between the parties. It recites:

> "Whereas, it is the desire and purpose of all the parties to this action to compromise and settle all issues involved herein between them and to permit the Keane-Wonder Mining Company to liquidate its indebtedness out of the net proceeds of its property, if possible, and to avoid any interruption of its own management of said property or the sale thereof."

It then recites the execution of the preliminary stipulation above noted, and provides that the second stipulation was entered into in consideration of such compromise and settlement, for the purpose of carrying the same into effect and fully perfecting the intention of the parties. It provides that there is due to the owners of the Francis Mohawk Mining & Leasing Company's notes the amount thereof, and to Benjamin H. Tatem, the amount of the notes given to Peck; that a decree of foreclosure should be entered after such litigation between Wildes and the Francis Mohawk Mining & Leasing Company had been settled, and such decree should find that there was due Wellington Gregg, as trustee, under the deed, $500 as his compensation as trustee and $500 for his attorney's fees, and provided:

> "Which by the terms of said decree shall be paid out of the first monthly net proceeds of the mines of the Keane-Wonder Mining Company next accruing."

It then provides that it should be determined by said decree that the trust deed was a valid and enforceable obligation, and that the owners of the notes should have and be given the first lien upon all the property of the Keane-Wonder Mining Company as described in the trust deed, for the payment of all moneys due thereon; that the deed of trust be foreclosed in equity on behalf of the owners of the notes, and that such owners should be entitled to a sale of all and singular the property of the Keane-Wonder Mining Company described in the deed or so much thereof as might be necessary to fully liquidate the indebtedness. It then recites:

> "Thus finally settling and determining all matters of issue in this case between the parties to this stipulation."

It further provided that no order of sale of the property of the Keane-Wonder Mining Company should be made at the time of the entry of such final decree, but that the Keane-Wonder Mining Company should have the right to pay the amount found due by the decree, in the way and manner described in the stipulation; that the court in granting the decree should especially retain jurisdiction, and if the Keane-Wonder Mining Company did not fully pay the amount so found due, the court should enforce the decree and make its terms effective by thereafter entering a supplementary decree or order that all property described in the deed of trust, or so much thereof as might be necessary, be sold in the same manner as mortgaged property under a decree of foreclosure, and that the Keane-Wonder Mining Company might have one year after the sale to redeem the property. It provided the method whereby the Keane-Wonder Mining Company should pay the amount found due under the decree, and further provided that no order of sale should be entered so long as the Keane-Wonder Mining Company should deposit monthly the net proceeds of the mine to the credit of the owners of the notes, that company agreeing that the total net proceeds for any six continuous months should be $15,000; that if the $15,000 was not paid every six months, the owners of the notes might apply to the court for an order of sale of all the property described in the trust deed. The stipulation made a further provision that, if at any time the owners of the notes should claim that the Keane-Wonder Mining Company was not in good faith paying monthly to the bank such proceeds, and should claim the right to apply to the court for an order of sale, then they should give the parties to the stipulation 20 days' notice previous to such application, and said court should determine the question. It further provided for a release of all injunctions, bonds and securities. It was further "stipulated and agreed that each and all of the parties hereto hereby directly and distinctly waive any and all rights of appeal, not only from the original decree herein provided for, but from any supplemental decree or order which may be necessary to be made and entered by said court under the terms of this stipulation." A form of the decree of foreclosure was attached to the stipulation.

After the execution of these two stipulations Wildes appeared in the case and filed his answer to the complaint, and also joined therewith a cross-bill setting forth his rights as receiver to the notes given by the Keane-Wonder Mining Company to the Francis Mohawk Mining Company. This answer and cross-complaint was amended, and, after such amendment, the Francis Mohawk Mining Company filed its answer to such cross-bill.

While it is true that Wildes, in his cross-complaint, asked for an accounting from defendant Benjamin H. Tatem, and sought to recover judgment against the Francis Mohawk Mining & Leasing Company for the amount of money which might have been wrongfully paid to it by the Keane-Wonder Mining Company, such proceedings were thereafter had in court that Wildes waived his claim for an accounting against Tatem, settled all controversies between himself and the Francis Mohawk Mining & Leasing Company, and became the owner of one-fifth of the indebtedness held by the Francis Mohawk Mining Company. This was in strict accord with the stipulation, and the judgment is not in question here. This settlement is disclosed by the stipulation between the attorneys for Wildes as receiver and the attorneys of the Francis Mohawk Mining & Leasing Company, dated January 16, 1914, and the interlocutory decree entered by the court on the 24th day of January, 1914. All controversies between Wildes as receiver and the Francis Mohawk Mining & Leasing Company having been settled by the above interlocutory decree, application was made for a decree of foreclosure, as provided for in the stipulation of November 6, 1909. This decree was duly entered by said court on the 26th day of June, 1914, and from this decree plaintiff and the Keane-Wonder Mining Company filed a notice of appeal on July 23, 1914.

On April 14, 1914, the owners of the notes served a notice of motion for a supplemental decree or order of sale accompanied by a petition. This motion came on regularly for hearing on the 6th day of May, 1914, and the court made an order that the motion should be at that time denied, without prejudice to the right of the parties to renew their motion and their application for said order on the 26th day of July, 1914, or at such time thereafter as might be convenient to the court, without further notice of the motion. On the 4th day of August, 1914, the motion was renewed upon the original and a supplemental petition, and the application came on for hearing before the court on the 27th day of

August, 1914. Attorneys for the plaintiff and the Keane-Wonder Mining Company appeared and filed demurrer to the petitions, which were overruled. They then filed answers which set forth certain objections to the granting of the application of which counsel for appellants mentions the three following: (a) That the final judgment could not be enforced for the reason that it had been appealed from to the Supreme Court, and that said appeal was pending and undetermined; (b) that the amount of the judgment was over $15,000 in excess of what was due from the Keane-Wonder Mining Company to the Francis Mohawk Mining Company, according to the terms of the stipulation; (c) that the decree was void on its face for the reason that it was entered without notice to any one pursuant to a stipulation of compromise and signed by the attorney for the parties which they were without authority to enter into.

After filing the answers, the court proceeded to the hearing of the issues then raised and made an order that the sale be made as prayed for. The order recites that:

> "Upon full consideration of the testimony, both oral and documentary, presented and given in open court in behalf of the respective parties, and the admission of the attorney and solicitor for the plaintiff and the defendant the Keane-Wonder Mining Company, made in open court, the court now finds that said petitioners are entitled to the sale of all and singular the property, rights, and privileges described in the original decree of foreclosure duly made and entered January 26, 1914. Now, therefore, in pursuance of the exercise of the jurisdiction of this court, especially reserved in said original decree of foreclosure and as supplemental to said decree, it is hereby ordered," etc.

Appeals were also taken by each of the appellants from this order of sale.

Respondents have moved the court to dismiss each of the appeals on the ground that all right of appeal was waived by the stipulations under which the decree and subsequent order were made. The following is the provision relied upon:

> "It is hereby further stipulated and agreed that each and all of the parties hereto hereby directly and distinctly waive any and all rights of appeal, not only from the original decree herein provided for, but from any supplemental decree or order which may be necessary to be made and entered by said court under the terms of this stipulation."

Concededly both the original decree and the order of sale were made pursuant to the stipulations, and respondents contend that, having thus been entered with the consent of appellants, neither the decree nor order was appealable citing Erlanger v. S. P. R. R. Co., 109 Cal. 395, 42 Pac. 31, and Pacific Paving Co. v. Vizelich, 1 Cal. App. 281, 82 Pac. 82.

> "It is the universal rule," said the court, in Hibernia Savings, etc., Socy. v. Waymire, 152 Cal. 286, 92 Pac. 645, "that a judgment or order will not be disturbed on an appeal prosecuted by a party who expressly consented to the making thereof. This doctrine is established * * * by a long line of decisions [citing cases]. It is also settled in this state that, where a party who has expressly consented to and stipulated for the making of a certain judgment or order, * * * so agreed to and made in pursuance of the consent and stipulation, the appellate court will not consider the appeal at all, but will dismiss it on motion in that behalf [citing cases]."

It was said, in the Erlanger Case, supra:

> "A judgment under stipulation is a judgment by consent."

Appellants advance several propositions in answer to the motion. It is contended that the attorneys who signed the stipulation (including, of course, themselves) had no authority to do so. Appellants say:

> "If this decree had been a consent decree, if in open court the parties had appeared and had consented to the entry of the decree appealed from, an appeal obviously would not have laid from it."

It is urged that this was not a consent decree, because the terms of the decree, "in great part, were left thereafter to be settled"; for example, the amount due on the notes was left blank in the proposed form of decree. Furthermore, the decree was "to be entered upon certain contingencies," as shown by the following provision of the stipulation:

> "That immediately after the happening of any or all of the events mentioned in the attached stipulation * * * a final decree of foreclosure of said deed of trust under the equity of this court shall be duly made upon the stipulation," etc.

It is further contended that the stipulation or agreement is not within the purview of section 283 of the Code of Civil Procedure, which provides that an attorney shall have authority to bind his client to any of the steps of an action or proceeding "by his agreement filed with the clerk, or entered upon the minutes of the court, and not otherwise."

[1, 2] Upon the point last above mentioned we understand the law to be that:

> The attorney is the "agent of the client for the management and conduct of the cause while it is pending before the court for determination, and, as such agent, he has authority to bind his client in all matters pertaining to the conduct and management of the suit. * * * As a general rule, a stipulation of the attorneys will be presumed to have been authorized by the client, as well in order to uphold the action of the court, as for the protection of the other party to the stipulation; but when the adverse party, as well as the court, is aware that the attorney is acting in direct opposition to his client's instructions or wishes, the reason of the rule ceases and the court ought not to act upon the stipulation." Knowlton v. Mackenzie, 110 Cal. 183, 188, 42 Pac. 580.

In the present case no sort of opposition was interposed by any of the parties to the stipulations. On the contrary, appellant Keane-Wonder Mining Company recognized their validity during a period of nearly four years, and acted under the stipulations by payments to Meyerstein, trustee for the owners of the notes; and as to appellant plaintiff in the action, a stockholder in said company, he remained passive, making no move to have the action brought to a final hearing, apparently acquiescing in the stipulations as the agreement by which the controversy was to be settled.

[3] The stipulations were not filed until March 13, 1913, over three years after they were entered into, about nine months before the original decree was entered. This was sufficient compliance with section 283 of the Code of Civil Procedure, for the stipulations then became the agreement of the parties "filed with the clerk." No injury is shown for the delay in filing the stipulations. It was not necessary to file them immediately. Smith v. Whittier, 95 Cal. 290, 30 Pac. 529.

[4] As to the alleged "contingencies" that were to happen, it appears that the "events mentioned in the stipulation" had reference exclusively to the relative rights of said Wildes, as receiver of the State Bank & Trust Company, and of said Meyerstein, as receiver of the Francis Mohawk Mining & Leasing Company, to the indebtedness of the Keane-Wonder Mining Company. These rights were fully settled by the parties themselves and their proportionate share determined before the decree was entered. We cannot see that appellants' rights were in any wise injuriously affected or, indeed, involved in this adjustment. All parties stipulated that the indebtedness of the Keane-Wonder Mining Company, as evidenced by its promissory notes referred to in the stipulations, was a valid indebtedness. In the form of decree agreed upon, these notes were mentioned as belonging to the Francis Mohawk Mining Company, while in the decree as entered Wildes, as receiver, was recognized as owning a certain ascertained interest therein. But of this departure from the form agreed upon appellants cannot complain, since it did not in any way increase or diminish the liability under the notes, the execution and delivery of which latter stood admitted, and that they were secured by the trust deed.

[5] Appellants further contend that the delay in filing the stipulations resulted in the commission of error in the amount found therein to be due. The Tatem (originally the Peck) notes bore interest at 1 per cent. per month, and the stipulation provided that the amount due Tatem should bear interest at 7 per cent. per annum from the date of the decree. Appellants contend that, had the stipulations been filed immediately after being signed, the amount due at that time would have borne interest at 7 per cent., and that the interest was erroneously computed at 1 per cent. per month during this period of delay. The stipulation provided:

> "That a final decree of foreclosure of said deed of trust under the equity powers of this court shall be duly made * * * finding and decreeing that there is due and owing from said Keane-Wonder Mining Company * * * to Benjamin H. Tatem * * * on all the notes given by said Keane-Wonder Mining Company to James F. Peck, * * * together with all interest due thereon. Said decree shall be entered * * * in favor of Benjamin H. Tatem, as successor in interest of the said James F. Peck, * * * and the amount found due to the said Benjamin H. Tatem shall bear interest from the date of said decree at the rate of 7 per cent. per annum."

We think what was here meant was, without doubt, that interest was to be computed at the rate fixed in the notes, and that the principal, from and after the date of the decree, was to bear interest at 7 per cent. per annum, and this was done. The filing of the stipulations could not have had any influence in carrying out the terms of the stipulations. The entering of the decree did not depend upon the act of filing the stipulations, but upon their terms, which latter show that the decree was not to follow immediately upon making or filing the stipulations.

[6] It is also urged that the decree was not a consent decree because a part of its terms "were left thereafter to be settled." Necessarily the amount due upon the notes was left blank, but the stipulations clearly pointed out how the amount was to be ascertained. The things left to be settled were things for the settlement of which the stipulations made provision.

We have endeavored to consider the points urged against the motion, and have assumed that, while the decree was entered under the stipulations, appellants have the right to show that it was not entered in accord with the terms of the stipulations. We have been unable to discover that there was any substantial or material deviation from the terms of the stipulations or that there was any departure therefrom in any way prejudicial to appellants.

Appellants contend that it was error to enter the order of sale for the reason that an appeal was pending from the decree of foreclosure, which, under section 949 of the Code of Civil Procedure, stayed all proceedings on the decree. Respondents reply that appellants waived their right to appeal from both the decree and the order; furthermore, that in their appeal from the decree as well as from the order appellants filed only cost bonds in the sum of $300, and no application was made to fix the amount of stay bond under section 945 of the Code of Civil Procedure.

[7, 8] We think both points are well taken by respondents. What has been said as to the waiver of the right to appeal applies equally to the decree and the order. The decree contains all the elements commonly regarded as necessary in a decree of foreclosure of a mortgage, and it seems to us that the stipulations clearly indicate that foreclosure proceedings were contemplated as the means of finally bringing about a settlement of the controversy. The decree determined the validity of the trust deed as enforceable and as creating a first lien on

the property to secure payment of the notes to the owners thereof and determined the amount due thereon; it directed the sale of the property as a whole and the application of the proceeds of the sale, and also provided that the property should be sold by the sheriff "after the time allowed by law for redemption has expired, to wit, one year from and after the date of said sale"; it barred the equity of redemption, provided for letting the purchaser into possession of the property, and also provided for a deficiency judgment. We can discover no element of foreclosure wanting.

[9] That the decree was not followed by an immediate sale does not affect its validity. In the present case the delay was expressly provided for by the decree in pursuance of the terms of the stipulation upon which it was based. Section 945 reads as follows:

> "If the judgment or order appealed from direct the sale or delivery of possession of real property, the execution of the same cannot be stayed, unless a written undertaking be executed on the part of the appellant, with two or more sureties, to the effect, [then follow certain things which the appellant must refrain from doing], which must be specified in the undertaking." And "when the judgment is for the sale of mortgaged premises, and the payment of a deficiency arising upon the sale, the undertaking must also provide for the payment of such deficiency."

The facts in this case, it seems to us, clearly bring it within the provisions of section 945.

In the case of Owen v. Pomona Land & Water Co., 124 Cal. 331, 57 Pac. 71, cited in Zappettini v. Buckles, 167 Cal. 27, 138 Pac. 696, the latter cited by appellants, the court held that the decree taken in its entirety was "in substance an ordinary decree of foreclosure," but the court said:

> "If the defendant had been in possession of the real property, the bond to stay proceedings should have secured to the respondent the damages by waste, and the value of the use and occupation; but, the plaintiff being himself in the exclusive possession, these clauses of the statute (section 945) have no application, and the case not being one of mortgage, no undertaking for payment of the deficiency was required."

In the present case defendant Keane-Wonder Mining Company was in possession at all times mentioned, and still is, so far as appears.

In Bank of Woodland v. Stephens, 137 Cal. 458, 70 Pac. 293, the action was foreclosure of a mortgage. It was held that a stay bond was necessary where judgment for a deficiency was waived and a receiver of rents, issues, and profits had been appointed, leaving the tenant of the mortgagor in possession; that a stay bond must be given against waste. In Painter v. Painter, 98 Cal. 625, 33 Pac. 483, cited by appellants, the court stated that:

> "No undertaking to pay the deficiency is required in order to stay its execution (the execution of the decree), because such lien was not created by mortgage, and it is only in such case that an undertaking to pay the deficiency is required by section 945 of the Code of Civil Procedure. This was so held in Englund v. Lewis, 25 Cal. 354, in construing section 352 of the old Practice Act, which contained similar provisions to those found in section 945 of the Code of Civil Procedure. It was there said: 'Where the sale is directed for the purpose of satisfying any lien other than a mortgage lien, the undertaking need not provide for the payment of any deficiency which the judgment may direct. To this extent the statute discriminates in favor of mortgage, and against all other liens.'"

Mr. Jones, in his work on Mortgages, volume 1, § 62, says:

> "A deed of trust to secure a debt is in legal effect a mortgage."

In Koch v. Briggs, 14 Cal. 257, 73 Am. Dec. 651, it was held that a deed of trust is not a mortgage requiring a foreclosure. In that case it was insisted that the title of defendant could not be divested except by judicial foreclosure and sale. The distinguishing difference between a trust deed and mortgage pointed out was that:

> "Where there is a mortgage, there is a right, after condition broken, to a foreclosure on the part of the mortgagee, and a right of redemption on the part of the mortgagor."

In the present case the stipulation made provision for this feature, and the decree gave the full statutory period for redemption. By consent of all parties the instrument was converted into and treated as a mortgage and was foreclosed as such.

Substantially all the points urged in support of the appeals upon their merits have been considered and disposed of in dealing with the foregoing matters. What has been said in connection therewith sufficiently shows, we think, that no error prejudicial either to the defendant Keane-Wonder Mining Company or its stockholders, for whom plaintiff brought the action, appears either in the decree or order of sale, and both the decree and order of sale are therefore affirmed.

We concur: HART, J.; BURNETT, J.

(34 Cal. App. 272)

CLEMENS v. GREGG et al. (Civ. 1664.)

(District Court of Appeal, Third District, California. July 7, 1917.)

1. APPEAL AND ERROR ⚷522(1)—RECORD — PREPARATION—MINUTES OF JUDGE.
   Where appeal is taken under Code Civ. Proc. § 953a, record must contain transcript of evidence and proceedings prepared by phonographic reporter, and transcript made up by judge from his minutes is not sufficient.
2. APPEAL AND ERROR ⚷553(2)—SUBSTITUTE FOR BILL OF EXCEPTIONS — REPORTER'S TRANSCRIPT.
   Where notice of appeal, request for preparation of transcript, and trial judge's certificate show the transcript was prepared under Code Civ. Proc. §§ 953a–953c, defective transcript cannot be regarded as a bill of exceptions contemplated by Code Civ. Proc. § 650,

though trial judge certified that it constituted a full, true, and fair record of proceedings taken before him.

3. Appeal and Error 🔑640—Dismissal—Grounds—Defective Record.

Notice given by appellant to clerk vests appellate court with jurisdiction, notwithstanding defectiveness of transcript, and it will not be dismissed; the remedy in such case being a motion to affirm for lack of record, and not a motion to dismiss.

4. Appeal and Error 🔑548(1)—Record—Defects—Effect.

Under Supreme Court rule 29 (119 Pac. xiv), court cannot review superior court order unless evidence taken on hearing is authenticated by incorporating it in bill of exceptions or in transcript prepared under Code Civ. Proc. §§ 953a–953c.

5. Judgment 🔑89 — Correction—Inconsistencies.

Where a decree foreclosing trust deed, entered pursuant to stipulation between the parties, provides for payment of trustee's fees both from special fund according to stipulation and on terms inconsistent therewith, the court may correct the decree on motion by striking out repugnant provisions, though more than six months have elapsed since it was entered.

Appeal from Superior Court, Inyo County; William D. Dehy, Judge.

Action by Earle L. Clemens against Wellington Gregg, Jr., and others. From judgment for plaintiff, defendant named appeals. Affirmed.

Morrison, Dunne & Brobeck and Edward Lynch, all of San Francisco, for appellant. Gavin McNab and R. P. Henshall, both of San Francisco, C. O. Whittemore, of Los Angeles, Frank J. Solinsky, of San Francisco, Mack & Green, of Reno, Nev., and John B. Clayberg, of San Francisco, for respondents.

BURNETT, J. This is an appeal by Wellington Gregg, Jr., as trustee, from an order of the superior court of Inyo county made and entered on December 23, 1914, which modified a decree made and entered on January 26, 1914, ordering the sale of certain mining property under the terms of a deed of trust executed by the defendant Keane Wonder Mining Company.

Before proceeding to consider the merits of the controversy, we deem it the more orderly first to dispose of a motion made by the respondents other than the Keane Wonder Mining Company to dismiss the appeal.

The record before us is entitled: "Clerk's and Judge's Transcript." It contains copies of certain documents, requested by appellant to be inserted in the "clerk's transcript," certified as correct by the clerk in the usual form. The next following page is entitled "Judge's Certificate to Transcripts on Appeal," and contains a certificate by Hon. Wm. D. Dehy, judge of said superior court, who presided at the proceedings, that the documents included in the clerk's transcript are correct copies, and then proceeds:

> "I further certify that on December 23, 1914, the following proceedings took place in said cause: [Here follows a statement that certain documentary evidence, describing it, was received in evidence and that one witness testified, giving a synopsis of his testimony.]"

The certificate concludes with the statement:

> "I further certify that said transcripts and this certificate were prepared under the provisions of sections 953a, 953b, and 953c of the Code of Civil Procedure, and that said transcripts were duly presented to me for approval within the time allowed by law and under the provisions of said sections," etc.

It appears from an affidavit of Judge Dehy:

> That "there was present no stenographer or any person acting in his behalf in the taking of stenographic or other notes of the proceedings or the evidence offered and received; * * * that no transcript of the phonographic report of the hearing of said petition above referred to, including therein copies of all or any writings offered or received in evidence at said hearing, or of any matter or thing, was ever prepared or filed with the clerk of said superior court of Inyo county, but that a transcript of the testimony admitted on said hearing was prepared from the notes of this affiant; * * * that the certificate to the truth and correctness of said transcript was made by this affiant, as such judge, upon the transcript prepared as above stated, and not otherwise."

The motion to dismiss the appeal is made upon the following grounds:

> "(1) That no printed transcript on appeal has ever been filed; (2) that the record or transcript contains no proper or legal certification of the evidence taken, or of papers introduced on the hearing of the proceeding, which culminated in the order appealed from; (3) that no official or other stenographer was present at such hearing; (4) that no transcript of the notes of an official or other stenographer taken upon said hearing was ever prepared as required by the statutes of the state of California, and particularly section 953a, C. C. P.; (5) that no legal statement was ever settled by the judge of the superior court of Inyo county, state of California, under the provisions of section 953a, C. C. P."

Among the reasons suggested by appellant for which the motion to dismiss should be denied is the unreasonable delay of respondents in making the motion. The notice of appeal herein was filed on January 4, 1915; the transcript on appeal was filed in the Supreme Court (to which the appeal was originally taken) on February 27, 1915. The notice of motion to dismiss the appeal was filed in this court on May 9, 1917.

[1] Section 953a, Code of Civil Procedure, under which the appeal was taken, provides: That a person desiring to perfect an appeal by the method therein provided for shall file a request with the clerk that a transcript of the testimony taken at the hearing, all rulings, acts, or statements of the court, all objections or exceptions of counsel, and all matters to which the same relate, be made up and prepared. Appellant attempted to comply with this requirement. But, having been advised that the proceedings were not taken by a stenographer, appellant specified in his notice that the transcript should con-

tain a copy of the minutes of the court with particular reference to the portion of the order which recites:

> "Counsel for the petitioners introduced oral and documentary evidence in support of said petition" with a statement "of the substance of said oral and documentary evidence, giving the names of the witnesses and specifying the documents used and introduced, and that said copy of, or statement of, the minutes of the court shall include copies of said documents relevant to the appeal herein, which copy of the minutes of the court, or statement of the minutes of the court, shall be certified by the judge of the superior court as provided by section 953a of the Code of Civil Procedure to the effect that: 'The judge shall thereupon certify to the truth and correctness of said transcript.'"

It is clear enough from the language of said section that the statement is to be prepared by the stenographer, and not by the judge. The purpose is to have a literal and exact record of the proceedings. There is no provision therein for the settlement of a statement prepared by the judge from his own minutes. In order to avoid the printing of the record, appellant may avail himself of said alternative method, but that his effort may be effective he must comply with its terms.

In Harpold v. Slocum, 168 Cal. 364, 367, 143 Pac. 609, 610, it is said:

> "The appellant did not follow section 953a, and therefore he must print the transcript and serve and file copies thereof in the manner provided by those rules."

In Allen v. Conrey, 22 Cal. App. 409, 134 Pac. 730, the Court of Appeal for the Second District declared:

> "If a party to an action expects to take his appeal under the alternative method and have his record prepared according to the procedure affecting that method, then he must see to it that the official phonographic reporter is present at the trial in order that a transcript of the evidence and proceedings may be furnished by the one officer whose duty it is to prepare it."

In Bush v. Allen, 172 Cal. 102, 155 Pac. 456, upon an appeal under the alternative method, an application was made to the trial judge to affix his certificate to the transcript, and an objection was made by respondents upon the ground that there was no phonographic report of the trial, and that the judge's certificate is properly affixed only when there is a phonographic reporter present at the trial, and that phonographic reporter has prepared his transcript of the evidence and proceedings in accordance with law. The Supreme Court said:

> "Such is the settled law upon this matter of procedure. Totten v. Barlow, 165 Cal. 378 [132 Pac. 749]."

And the court approved the ruling of the Court of Appeal in the collateral proceeding in the same case (22 Cal. App. 409, 134 Pac. 730), an application having been made thereto for a writ of mandate. It was further stated:

> "Under the law of the case thus made we have before us a transcript under the clerk's certificate alone and are empowered to consider only the judgment roll."

Therein was an appeal from the judgment, and hence there was a separate record made by the clerk of the court constituting the judgment roll which seems to have been duly authenticated, but there is no such consideration here in the appeal from the order made after judgment, since there is no separate and distinct judgment roll. The transcript settled as provided by said section 953a constitutes the only record of the proceedings in the court below. In other words, the only record cognizable in this appeal is the said typewritten transcript purporting to have been prepared and settled according to said statute, but which, as we have seen, falls short of the requirement. Under the authorities we think it must be plain, therefore, that the record, considered as a substitute for or in lieu of a bill of exceptions or statement of the case, is fatally defective, and must fail of its purpose.

[2] In the closing brief of appellant, however, we find this claim:

> "Moreover, the lower court held in this case that the transcript signed by him constitutes 'a full, true and fair record' of the proceedings taken before him. That is all that the ordinary bill of exceptions amounts to. Accordingly the transcript involved may be regarded as a bill of exceptions prepared under the old method and defective merely in that it is not printed. Lang v. L. & T. Co., 161 Cal. 295, 119 Pac. 100. Certainly a failure to comply with the court rule requiring it to be printed can be waived, and was waived by the court in allowing the case to be brought on for argument without ever questioning the sufficiency of the record. Though the transcript does not show that it was served upon respondents, and time for proposed amendments allowed, it will be presumed that this was done in the absence of a showing to the contrary."

The presumption would be, probably, as stated by appellant, if there were room for it, but it would be flying in the face of the record to hold that the transcript constitutes a "bill of exceptions" as contemplated by section 650 of the Code of Civil Procedure. In the notice of the appeal and request for the preparation of the transcript it is recited by appellant that:

> "Said transcripts to be prepared as required by the laws of the state of California, and particularly as provided by sections 953a, 953b, and 953c of the Code of Civil Procedure of the state of California."

It is also certified by the trial judge:

> "That said transcripts and this certificate were prepraed under the provisions of sections 953a, 953b, and 953c of the Code of Civil Procedure, and that said transcripts were duly presented to me for approval within the time allowed by law and under the provisions of said sections, and that due notice was given by the clerk of said court to the attorneys appearing in said cause that said transcripts had been filed and would be duly presented to me for approval, and that at the expiration of the time set in said notice I have hereto affixed my signature."

The foregoing leaves no room for presumption. It clearly appears that the proceedings were taken under said sections of the code and that appellant sought to avail himself of what is known as the alternative method. To hold that this record may be considered a bill of exceptions would be to disregard utterly the distinction made by the code and to violate the established rule of appellate practice.

Appellant finds much comfort in the contention that respondents should not prevail by reason of the great delay in presenting his motion, more than two years having expired since the appeal was taken.

In Dietrich v. L. & N. W. R. Co., 13 Neb. 500, 14 N. W. 528, in considering a motion to quash a bill of exceptions for defects in its execution, the Supreme Court of Nebraska said:

> "Objections to a bill of exceptions must be filed before the case is submitted, and should be at the earliest opportunity. Such objections are not favored, and usually are merely technical; and he who objects upon merely technical grounds must himself be free from fault. Besides, it is but justice to the adverse party that the objections should be made at the earliest opportunity, so that, if it is apparent that they are well taken and the case depends upon the bill of exceptions, no further expense will be incurred in continuing the prosecution."

In McDermott v. Hacker, 109 Iowa, 239, 80 N. W. 338, a similar ruling was made by the Supreme Court of Iowa on a motion to dismiss the appeal on the ground that the transcript was not filed within the time required by the Code of Rules and Practice. Other analogous cases which appellant cites are Walker v. Hill, 111 Ind. 223, 12 N. E. 387; Jones v. Henderson, 149 Ind. 458, 49 N. E. 443; Garr, Scott & Co. v. Nelson, 166 Mo. App. 51, 148 S. W. 417.

The delay here is as reprehensible as in any of said cases, and, if a proper case for it, the doctrine of laches should be applied. As we have seen, the transcript was filed in the Supreme Court in February, 1915, and appellant's opening brief was filed in April following. The brief of respondents was filed in June and the final brief of appellant in July, 1915. The case was transferred to this court in March, 1917, and set down for oral argument for April 10th. It was continued by consent to April 12th, and on that day an order was made allowing respondents 15 days to file another brief and appellant 10 days to reply, the cause then to stand submitted. Respondents, however, failed to file their brief, and on May 9th, for the first time, they made the motion to dismiss the appeal.

[3] It is not necessary, though, to determine the question whether the motion to dismiss should be denied by reason of such delay; as it is apparent that no sufficient reason has been shown for a dismissal. Notwithstanding said infirmity in the transcript, the court has jurisdiction of the appeal. The notice given by appellant to the clerk under the new system vests the higher court with authority to consider the cause. Hibernia Savings & Loan Society v. Doran, 161 Cal. 118, 118 Pac. 526. The consequence of the defective authentication of the record in the present case may be substantially the same as though a dismissal were had, but respondents' motion should be denied. As suggested in the Hibernia Case, supra, the proper motion would be for an order to affirm the judgment for lack of a record, and not to dismiss the appeal. "This may sound extremely technical," as said by the late Chief Justice Beatty, in Dennis v. Bint, 122 Cal. 49, 54 Pac. 378, 68 Am. St. Rep. 17 "but such is the nature of the case." Respondents' contention is somewhat technical, and it is not improper to meet it with a technicality.

[4] But, as before stated, this concession can be of no real service to appellant. It would seem that we have no legally authenticated record to enable us to review the action of the court. Rule 29 of the Supreme Court (119 Pac. xiv) provides:

> "In all cases of appeal from the orders of the superior courts, the papers and evidence used or taken on the hearing of the motion must be authenticated by incorporating the same in a bill of exceptions, except where another mode of authentication is provided by law."

We have before us no bill of exceptions, and the other "mode of authentication" has not been pursued. The situation is therefore like that described in 161 Cal. 118, 118 Pac. 526, as follows:

> "Appellant, therefore, having pursued neither method to perfect his appeal, it results that that appeal stands here upon a record making it impossible for the court to review the order appealed from."

[5] But, assuming that the record before us may be consulted, what conclusion naturally and legally follows? The application upon which the order complained of was based prayed for a construction of said decree, and particularly that it be determined whether the provision of said decree "to pay Wellington Gregg, Jr., as trustee, provided at that time the said Wellington Gregg, Jr., as trustee, has not been paid the $1,000 hereby declared to be owing to him by the Keane Wonder Mining Company under and by virtue of the terms of the stipulations hereinabove recited, or any balance of said $1,000 which may be then due and unpaid," be not "inoperative and void and of no force and effect under the terms of the stipulations upon which the decree was based and the form of final decree attached to said stipulation and agreed to by the parties." Furthermore, the prayer was that, if the court should hold said provision to be inoperative and void, the decree be amended by striking out from the same said clause.

There can be no doubt that said provision was utterly at variance with the stipulation of the parties and the agreed form of the decree, and therefore the order of the court striking out said provision was altogether just, even though the action of the court cannot be sustained by the technical rules of law.

That it was so inconsistent appears from this clause of the stipulation:

> "That said decree shall find that there is due to Wellington Gregg, Jr., as trustee under the deed of trust, the sum of $500, as his fees and compensation as trustee, and the further sum of $500 as and for his attorney's fees, which by the terms of said decree it shall be provided shall be paid out of the first net monthly proceeds of the mines of the Keane Wonder Mining Company next accruing; that it shall also be found, decided, and determined in and by said decree that said deed of trust is a valid and enforceable obligation against the said Keane Wonder Mining Company, and that the said A. L. Meyerstein, as receiver of the Francis-Mohawk Mining & Leasing Company, and the said Benjamin H. Tatem have and are given a first lien upon all of the property of the Keane Wonder Mining Company which is described in said deed of trust, for the payment of all the moneys decreed to be due upon any and all of said notes, as above provided."

It may be said also that the agreed form of decree corresponded with the stipulation.

It is thus to be seen that, by stipulation of the parties, appellant's claim was to be satisfied out of a special fund, and the property covered by the trust deed was to be impressed with a lien exclusively for the benefit of Meyerstein as receiver and of Tatem, and that the modification of the decree made by the court would operate to give effect to their stipulation.

Moreover, notwithstanding the objections to the court's order made by appellant, we think the correction could be legally made, although more than six months had elapsed since the decree was signed.

There was an inconsistency in the terms of the final decree, one part providing for the payment of appellant as agreed upon, and the other giving an additional remedy not contemplated by the stipulation of the parties. While it is hardly a case of clerical misprision, nor does it seem to fall strictly within the category of the cases cited, we think there is such repugnance between the two said provisions as to justify the court in considering the stipulation to determine whether the provision in controversy did not constitute redundancy, the result of inadvertence, and should be disregarded. Otherwise, in consequence of conflicting provisions, a decree might be unintelligible and unenforceable, and the court powerless to correct the manifest infirmity. We do not see why the case should not be regarded as similar to the instances of doubt, obscurity, and ambiguity referred to in Atlantic, etc., Co. v. Wright, 11 Cal. App. 179, 104 Pac. 460; Clay v. Hildebrand, 34 Kan. 694, 9 Pac. 466, and Walker's Ex. v. Page, 21 Grat. (Va.) 636.

In the first of these the rule, as gathered from the authorities, is stated as follows:

> "In case of ambiguity, a judgment should be construed with reference to the pleadings, and when it admits of two constructions, the one will be adopted which is consonant with the judgment which should have been rendered on the facts and the law of the case."

The other two cases are to the same effect, the first referring to an obscure judgment, and the other to an instance of doubtful signification.

The only serious question, we think, is whether respondents should not have resorted to a suit in equity to correct the mistake. That such course could have been successfully pursued admits of no doubt in view of the clear exposition of the subject in Bacon v. Bacon, 150 Cal. 477, 89 Pac. 317. However, we are of the opinion that the error was of such character that it could be corrected on motion, and if we are right in this conclusion, there can be no question, of course, that reference may be had to the stipulation of the parties. Thayer v. McGee, 20 Mich. 195. It must be true also that the only way to make the decree consonant with said stipulation and form of decree agreed upon is either to treat said provision as of no force and effect or, what is in effect the same thing, to strike it out.

We think the order should be affirmed; and it is so ordered.

We concur: CHIPMAN, P. J.; HART, J.

34 Cal. App. 314

AHEARN v. LANE et al. (Civ. 1648.)

(District Court of Appeal, Third District, California. July 13, 1917.)

1. Principal and Agent 🔑23(4)—Existence of Agency—Sufficiency of Evidence.

In an action by the lessee, on failure to get possession, to recover payments to the lessor's alleged agent and for damages, evidence *held* to support the findings of the trial court that defendant lessor rented to plaintiff and that the lessor's agent was in fact such.

2. Principal and Agent 🔑189(1)—Pleading.

In an action to recover payments made to an agent, the complaint, alleging that the said agent represented to plaintiff that he was the agent of the owner of property, and that it was agreed between plaintiff and defendant (naming the agent) that the purchase price of the furniture should be $350, $150 to be paid by plaintiff to defendant (naming the agent) "as the agent for said defendant" (naming him), sufficiently stated a cause of action against defendant owner, though not directly alleging that his agent was such, nor that he was authorized to represent the owner.

3. Appeal and Error 🔑193(5)—Preservation of Objections—Defective Allegation—Waiver.

Though advantage may be taken at any time of the entire absence of a material averment in a complaint, the privilege of challenging a defective allegation may be waived, and the complaining party be deprived of the right to urge the imperfection as a ground of reversal, by failing to file demurrer, and by making no objections to the introduction of evidence.

Appeal from Superior Court, Humboldt County; Denver Sevier, Judge.

Action by Esther Ahearn against Jack Lane and William Boitana. From a judgment for plaintiff against both defendants, defendant Lane appeals. Judgment affirmed.

G. M. Pittman, of Eureka, for appellant. E. M. Frost, of Eureka (L. M. Burnell, of Eureka, of counsel), for respondent.

BURNETT, J. This is an appeal by Jack Lane from a judgment of the superior court in and for the county of Humboldt against the two defendants for $150.

William Boitana, representing himself to be the agent of defendant, Jack Lane, induced plaintiff to rent a lodging house belonging to said Lane and purchase the furniture therein. To this end plaintiff paid said Boitana $60 rental and $150 toward the furniture, receiving receipts therefor signed by Boitana. Thereafter plaintiff was refused possession of the premises, and she brings this action for the recovery of the sum of $210 paid by her to Boitana and for $375 damages due to loss of rental profits.

[1] In his brief appellant declares:

> "The only material question at issue is as to whether or not the defendant and appellant, Jack Lane, rented the property to the respondent or to the defendant William Boitana, and was the defendant William Boitana the agent of appellant Jack Lane."

It may be said that the complaint of the plaintiff is based upon the theory that he was such agent and that plaintiff's dealing was directly with said William Boitana. It is earnestly claimed by appellant that there is no proof of such agency. Plaintiff, however, testified that before entering into the contract with Boitana she telephoned to said Lane and he informed her that "he was acting through Mr. Boitana." It is true that other portions of the plaintiff's testimony are rather inconsistent with this declaration, and that the showing of the appellant to the contrary is quite strong and persuasive, but these were considerations for the trial court, and we cannot say that the conclusion of the trial judge was entirely unsupported. He had the legal right to accept at its full value the said statement of plaintiff and to act upon it, and it is not within our province to dispute the correctness of his conclusion.

As to the other proposition contended for by appellant that the property was not rented to plaintiff, the testimony of plaintiff is positive and unequivocal that she had such agreement with William Boitana, and in pursuance thereof paid him said sum of money, and, as before suggested, this was supplemented by the testimony as to agency based upon said conversation with appellant.

[2] Another point is made by the appellant for the first time in his closing brief to the effect that the complaint fails to state a cause of action against said Jack Lane. It must be said that the complaint is inartificially drawn, and it is quite defective in the respect suggested. There is no direct allegation that Boitana was the agent of Lane, nor that he was authorized to represent the latter in the transaction relied upon. The direct allegation is that:

> "The said William Boitana represented to said plaintiff that he was the agent of the owner of said furniture in said lodging and rooming house at said No. 236 Second street in said city of Eureka, said county of Humboldt," etc.

An allegation that he represented himself to be the agent is, of course, not an allegation of the fact of agency. However, it is further alleged:

> "That it was then and there orally agreed to by and between said plaintiff and the said defendant, said William Boitana, that the purchase price of said furniture should be the sum of $350, $150 to be then and there paid by said plaintiff to said defendant William Boitana as the agent for said defendant said Jack Lane," etc.

We think it thus appears that an attempt was made to allege that the defendant Boitana was the agent of Lane in the transaction. It, of course, falls short of the direct and explicit averment that should be found in a pleading of this character, but we think it may be regarded as an instance of an imperfect allegation of a material element rather than an utter failure to make an essential averment of a cause of action.

In this connection it may be said that no demurrer was filed to the complaint; that no objection was made to the introduction of evidence on the ground that the complaint failed to state a cause of action against the appellant; furthermore, that the action seems to have been tried upon the theory that the complaint was sufficient in the respect indicated, and that no attention was called to this defect until the closing brief of appellant was presented in this court.

[3] While, of course, advantage may be taken at any time of the entire absence of a material averment in a complaint, yet it is well settled that the privilege of challenging a defective allegation may be waived, and the complaining party be thereafter deprived of the right to urge such imperfection as a ground of reversal. The infirmity herein suggested could have been easily remedied, and appellant should have called attention to it. Manifestly plaintiff was quite careless in drafting her complaint, but this did not justify appellant in remaining silent until the last word was about to be spoken in the appellate court, and then, with no opportunity for respondent to reply, demanding a reversal for a defect that in no wise operated to his prejudice.

We think under the circumstances that the complaint should not be held so radically defective as to demand a retrial of the cause. The judgment is therefore affirmed.

We concur: CHIPMAN, P. J.; HART, J

34 Cal. App. 306

WILDENHAYN v. JUSTICE'S COURT OF CITY AND COUNTY OF SAN FRANCISCO. (Civ. 1948.)

(District Court of Appeal, First District, California. July 13, 1917.)

1. JUSTICES OF THE PEACE 🔑138(12)—RECORD—AMENDMENTS.

A justice's court has the right to amend its records so as to make them speak the truth with respect to the actual orders which it makes.

2. JUSTICES OF THE PEACE 🔑138(12)—RECORD—AMENDMENTS.

A justice's court granting an order to set aside a default judgment, and thereafter reciting by an order that its former order failed, through inadvertence, to contain the terms of the actual order, had power to order the minutes of his court to be corrected.

3. JUSTICES OF THE PEACE 🔑208(1)—REVIEW—CERTIORARI—FINDING.

The finding and decision of a justice's court that its order had been inadvertently entered in the minutes was conclusive upon the trial court on a writ of review, as its only power was to review jurisdiction of justice's court to make such order in any case.

Appeal from Superior Court, City and County of San Francisco; James M. Seawell, Judge.

Application by Ernest Wildenhayn for a writ of certiorari against the Justice's Court of the City and County of San Francisco. From a judgment of the superior court annulling an order of the Justice's Court vacating and setting aside a default judgment in an action before it, defendant appeals. Reversed.

Pierce Coombes, of San Francisco, for appellant. Samuel B. Russell, of San Francisco, for respondent.

RICHARDS, J. This is an appeal from a judgment rendered upon an application for a writ of certiorari whereby the trial court annulled an order of the justice's court of the city and county of San Francisco vacating and setting aside a default judgment in an action before it.

The record shows the following to be the facts: On or about September 15, 1915, the plaintiff herein commenced an action in said justice's court against C. E. Herrick, Incorporated, to recover the sum of $142, and caused summons therein to be forthwith issued and served. On September 23, 1915, judgment by default was rendered against said defendant. On September 28, 1915, the defendant moved for an order vacating and setting aside said default judgment and permitting said defendant to appear and plead therein. Said motion was heard on October 1, 1915, by Justice Frank T. Deasy, in whose court said action was pending, and on said last-named day the justice made an order granting said motion. The said order, as it was then entered in the clerk's record of said court, did not contain any provision for the payment of costs by the defendant as a condition of granting said motion, as required by section 859 of the Code of Civil Procedure. The defendant thereupon filed its answer. On October 6, 1915, the plaintiff moved said justice's court for an order setting aside its last above named order vacating the default judgment, upon the sole ground that the court had not jurisdiction to make the same in the form in which it appeared to have been made on the records of the court; it being the contention of the plaintiff that such order, in the absence of a condition requiring the payment of costs by the defendant, was void. On February 3, 1916, Justice Frank T. Deasy made and entered an order reciting that its order of October 1, 1915, at which the motion was aimed, as entered in the minutes of said court, failed through inadvertence to contain the terms of the actual order as given by the court upon the date thereof, in that from the said minute order was omitted the requirement as to the payment of costs which the actual order made in open court had contained; and the justice therefore ordered the minutes of his court to be corrected in that regard, and thereupon denied the plaintiff's said motion; whereupon the plaintiff applied to the superior court for a writ of review, and the said court, with the record of the justice's court showing the above facts before it, annulled the last-named order of the justice's court, the effect of which was also to work an annulment of the former order of the justice's court as the same appeared upon its unamended minutes. From that judgment the defendant prosecutes this appeal.

[1] The first and in fact the only question presented upon this appeal is as to whether or not a justice's court has the right to amend its records so as to make them speak the truth with respect to the actual orders which it makes. This inherent power courts of record have always possessed and exercised, and their action in so doing has in this state been uniformly upheld. Hall v. Polack, 42 Cal. 218; Bostwick v. McEvoy, 62 Cal. 496; Wiggin v. Superior Court, 68 Cal. 398, 9 Pac. 646; Crim v. Kessing, 89 Cal. 486, 26 Pac. 1074, 23 Am. St. Rep. 491; Egan v. Egan, 90 Cal. 15, 27 Pac. 22; Kaufman v. Shain, 111 Cal. 16, 43 Pac. 393, 52 Am. St. Rep. 139; Dickey v. Gibson, 113 Cal. 26, 45 Pac. 15, 54 Am. St. Rep. 321; People v. Curtis, 113 Cal. 68, 45 Pac. 180; People v. Durrant, 116 Cal. 179, 48 Pac. 75; Scamman v. Bonslett, 118 Cal. 93, 50 Pac. 272, 62 Am. St. Rep. 226; Homeseekers' L. Ass'n v. Gleeson, 133 Cal. 312, 65 Pac. 617. We can discover no reason, and we are referred to no authority, denying the possession of a like inherent power in courts not of record in proper cases.

[2] Upon the record before us this would seem to have been a proper case for the ex-

ercise of such a right by the judge of the justice's court; and his finding and decision that the order in question was inadvertently entered in the minutes of his court in an erroneous form was conclusive upon the trial court upon the hearing on a writ of review, whose only power was that of reviewing the jurisdiction of the lower tribunal to make such an order in any case.

[3] It must be conceded that, if in fact the order as made by the justice in open court did comply with the requirements of section 859 of the Code of Civil Procedure, and if in fact the order as entered in the minutes of the court inadvertently omitted a condition essential to its validity which the actual order contained, a grave and irremediable injury would be done the defendant in the denial to it of the right to have a hearing upon the merits of the case.

Judgment reversed.

We concur: KERRIGAN, J.; BEASLY, Judge pro tem.

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34 Cal. App. 309

TAFT et al. v. HAAS et al. (Civ. 2386.)

(District Court of Appeal, Second District, California. July 13, 1917.)

1. Mandamus 🔑23(2)—Petitioners "Beneficially Interested"—Statute.

Taxpayers of a city were "beneficially interested," within Code Civ. Proc. § 1086, providing that writ of mandate must be issued on the verified petition of the party beneficially interested, in a proceeding to compel the board of trustees of a city to canvass the returns of an election therein to determine whether the city should be consolidated with the city of Los Angeles, since the question of consolidation bore a direct relation to the question of the amount of taxes to be paid in future by petitioners, etc.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Beneficially Interested.]

2. Elections 🔑244—Failure to Sign Roster of Election Precinct.

The roster kept at an election precinct being in charge of the precinct officials, it is their duty to require electors to sign it, and neither the vote of a nonsigning elector nor that of the precinct is invalidated by their failure to discharge the duty.

3. Elections 🔑259—Canvass—Completion.

Where the board of trustees of a city, canvassing the returns of an election, threw out the entire vote of two precincts, consolidated for the particular election, because the number of names on the precinct roster fell short by three of the number of names on the polling list and the number of ballots cast, the canvass was not complete; the board's action in throwing out the vote of the precincts being improper.

4. Mandamus 🔑74(4)—Completion of Canvass—Propriety of Remedy.

Mandamus on the petition of taxpayers of the city was the proper remedy to require the board of trustees to complete the canvass by counting the vote of the thrown-out precincts; the statute providing for election contests having no application to the particular election, which was on the question of consolidation with another city.

Application for writ of mandate by S. H. Taft and others against William Haas and others. Peremptory writ directed to issue as prayed.

Tanner, Odell & Taft, of Los Angeles, for petitioners. J. W. Ballard and Charles D. Ballard, both of Los Angeles, for respondents.

WORKS, Judge pro tem. The respondents are the city clerk and the members of the board of trustees of the city of Sawtelle, and in this proceeding we are asked to require the trustees to canvass the returns of a certain election held in the city, to require the clerk to enter the result of the canvass upon the minutes of the trustees, and to direct all the respondents to perform certain other acts required by law in the premises. The petitioners are taxpayers, property owners, and registered voters and electors of Sawtelle.

[1] The respondents contend that the petitioners are not beneficially interested in the relief sought, section 1086 of the Code of Civil Procedure providing that the writ of mandate "must be issued upon the verified petition of the party beneficially interested," and that, for that reason, the petitioners have not legal capacity to sue. The election in question was held for the purpose of determining whether the city of Sawtelle should be consolidated with the city of Los Angeles. Whether the former city is to become one with the latter bears a direct relation to the question of the amount of taxes in future to be paid by petitioners, and either consolidation or no consolidation with Los Angeles is bound to affect the value of all property in Sawtelle. The petitioners are therefore beneficially interested in this proceeding. Eby v. Board of School Trustees, 87 Cal. 166, 25 Pac. 240; Frederick v. San Luis Obispo, 118 Cal. 391, 50 Pac. 661.

It becomes necessary now to state more fully the facts upon which this controversy is based and as to which there is no dispute. On the day of the election 300 votes were cast at one of the election precincts, which we may designate as precinct A, as shown by the tally list and by the certificate of the precinct election board. Of these 153 voted for consolidation and 147 against consolidation. While, however, 300 voters actually registered a choice at precinct A, the roster signed by the electors showed a total only of 297 signatures. Three who voted did not sign. In that part of Sawtelle not including precinct A the total vote for consolidation was 366 and against consolidation 369. Thus without precinct A the result was against consolidation with a margin of 3 votes. The total vote, including the vote of precinct A, was, for consolidation 519, against consolidation 516; a direct reversal of the situation, also with a majority of 3 votes. When the board of trustees came to canvass the result of the election, the vote of precinct A was rejected from consideration upon the advice of the city attorney of Sawtelle that the discrepancy between the tally list and certificate, on the one hand, and the roster, on the other, had the effect to nullify the vote of the precinct.

[2] The first question to be determined is whether the trustees were justified in casting out the vote of precinct A. They were not. The city attorney's advice to them in that regard is indefensible. The roster kept at an election precinct is in the charge of the precinct officials. It is their duty to require electors to sign it, and neither the vote of a nonsigning elector nor that of the precinct is invalidated by their failure to discharge that duty. Hayes v. Kirkwood, 136 Cal. 396, 69 Pac. 30; Starkweather v. Dawson, 14 Cal. App. 666, 112 Pac. 736; People v. Butler, 20 Cal. App. 379, 129 Pac. 600. The showing of the tally list and of the certificate of the election officers controlled the showing made by the roster.

Notwithstanding the palpable fact that the electors of Sawtelle have indicated a desire that their municipality be consolidated with Los Angeles, we are confronted with the question whether we can relieve them from an apparent showing of record that their desire is exactly the reverse. The respondents contend that the board of trustees has exhausted its functions as a canvassing body, and that mandate will not issue to compel its further action in that behalf. The action taken by the trustees in their canvass of votes is shown by their minutes. In them mention is made of precincts 3 and 5. These were really consolidated for the election in question and constituted the precinct we have called precinct A. This is the showing made by the minutes, and the recital presents everything that the trustees did in the premises:

> "The board canvassed the returns of the annexation election. In precinct No. 3 a discrepancy was found, the number of names on the roster falling short by 3 of the number of names on the polling list and of the number of ballots cast. The city attorney said the law required that these must agree, and that only such number be reported as were found on the roster of voters. Gledhill and Aldrich moved that precincts Nos. 3 and 5 be thrown out owing to the fact that the official roster did not correspond with the tally sheets or the number of votes reported, as required by the Supreme Court of the state. The vote stood: Walker, Gledhill, Aldrich, and Haas voting 'Aye'; noes none; absent, one. The returns of the remaining precincts were then considered. They showed a total of 735 votes cast, of which 366 were yeas and 369 were nays."

[3] The contention of respondents is that the minutes show that the board acted upon the entire returns before them, that, accordingly, the work of the canvass was completed, and that nothing further can be required of the board by the mandate of this court. Section 2 of the act under which the election was held (Stats. 1913, p. 578) contains a provision requiring the legislative body of a city in which such an election takes place, at the time of its regular meeting next after the election, to meet and canvass the returns thereof. The section further provides:

> "Such canvass shall be completed at such meeting, if practicable, and in any event, as soon as practicable, avoiding adjournment or adjournments, until said canvass is completed."

This provision places no time limit upon the labors of the canvassing board. In effect, its only requirement is that the canvass be completed, and that the work be performed as soon as practicable. Did the respondents trustees complete the canvass of the votes of the Sawtelle election? They did not include the vote of precinct A in the result stated by them in their minutes. As we have seen, that vote was properly cast and was a legal and necessary part of the entire vote of the city, from which the choice of the electors was to be determined. In rejecting the vote of the precinct the trustees assumed to decide a legal question and decided it wrongly, acting, of course, upon the advice of the city attorney. They tabulated and added together a part of the vote and rejected a part which was equally unimpeachable as a declaration of the choice of a considerable body of the electorate. Under such circumstances the conclusion seems inevitable that their work of canvassing was not completed and that it yet remains undone.

[4] The question now left to be determined is: Will our mandate issue to require the completion of the canvass? It is conceded that the statute of the state providing for election contests has no application to an election such as the one with which we are now concerned. That being so, it would seem that mandate is the proper remedy for the situation here disclosed. We will naturally be diligent to discover some remedy for the existing ill, as it is shocking to a sense of justice to contemplate the possibility of a considerable electorate being disfranchised through the action of a canvassing board and of the result of an election being finally declared by such board to be the opposite of the true result.

The courts of California have spoken on questions closely related to the present one. The respondents rely upon Gibson v. Twaddle, 1 Cal. App. 126, 81 Pac. 727. That case was like the present in some of its particulars. There a board of supervisors had refused to canvass the returns of a certain precinct, but had tabulated those of all the other precincts in the county. The court was asked to require the supervisors, by mandate, to include the returns from the omitted precinct. The writ was refused, but upon the express grounds that the supervisors had concluded the canvass by certifying that one of the parties to the controversy had been elected to the office in question, that his certificate of election had been issued to him, and that section 1111 et seq. of the Code of

Civil Procedure, as to election contests, provided a plain, speedy, and adequate remedy for the petitioner. It is true that there is some general language in the opinion which, upon a cursory reading, seems opposed to the view of the petitioners in this proceeding, A careful study of the case, however, convinces that it does not really so stand in opposition. The case of Cerini v. De Long, 7 Cal. App. 398, 94 Pac. 582, is authority for resort to the remedy by mandate in such a case as the present. There the canvassing board declared an election void, refused to canvass any part of the vote, and ordered a new election. The board was required, by mandate, to make the canvass. People v. Murphy, 20 Cal. App. 398, 129 Pac. 603, deserves mention in this connection. There the writ of mandate was refused in a case in which it was asked for the purpose of requiring a canvassing board to disregard a certificate of election and to canvass returns solely upon the showing made by the tally lists; but much of the language of the opinion is favorable to the use of the writ where a plain case of violation of duty, with a consequent injury to the rights of the electorate, is shown. People v. Butler, 20 Cal. App. 379, 129 Pac. 600, is authority, in general, for the use of the writ of mandate to compel a canvassing board to perform its duty.

A peremptory writ of mandate will issue as prayed for.

We concur: CONREY, P. J.; JAMES, J.

176 Cal. 1

JAMESON et al. v. CHANSLOR-CANFIELD MIDWAY OIL CO. (STRASSBURGER, Intervener). (L. A. 3968.)

(Supreme Court of California. Aug. 28, 1917. Rehearing Denied Sept. 27, 1917.)

1. MINES AND MINERALS ⟹77—LEASE—FORFEITURE — PARTIES — "CREATED" — "RESERVED."

Under Civ. Code, § 1431, providing that a right created in favor of several persons is presumed to be joint, and not several, which presumption can be overcome only by express words to the contrary, the right, under oil and gas leases executed by three parties as lessors, to declare the leases void at their election on the lessee's failure to perform any of the conditions under the leases for 30 days after notice by the lessors to perform such conditions, was a right "created," and not a right "reserved," in favor of the lessors jointly; so that a notice by two of the lessors requiring the lessee to perform such conditions on penalty of forfeiture and a subsequent notice of forfeiture and demand for possession was not effective to declare a forfeiture.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Create; Reserve.]

2. MINES AND MINERALS ⟹77—OIL AND GAS LEASE—FORFEITURE—STATUTE.

A provision in oil and gas leases that the lessee's failure to perform any of the conditions for 30 days after notice to perform given by the lessor should render the leases void on the lessor's election, amounted to a condition subsequent on the happening of which the leases should become forfeited, and was governed by Civ. Code, § 1442, providing that a condition involving a forfeiture shall be strictly interpreted against the party for whose benefit it is created.

3. EVIDENCE ⟹448 — PAROL EVIDENCE — MODIFICATION OF CONTRACT—ACTS OF PARTIES.

Where the terms of a contract are clear, and there is no latent ambiguity, it cannot be varied by the subsequent conduct of the parties or by circumstances; as the parties must be deemed to be bound by such contract, regardless of the result produced.

4. MINES AND MINERALS ⟹77—NOTICE OF FORFEITURE—STATUTE.

Under Code Civ. Proc. § 1161, subd. 3, requiring notices served in actions of forcible entry and detainer to be in writing, and to require performance of the conditions or covenants or the possession of the property, a notice requiring the lessee in oil and gas leases to perform the conditions of the leases, containing nothing concerning possession of the property, and a notice of forfeiture and demand of possession not requiring performance were defective under the strict construction to be given the statute in the case of a forfeiture.

5. MINES AND MINERALS ⟹77 — LEASE — BREACH OF CONDITION—FORFEITURE.

Under oil and gas leases providing that, if the lessee failed to do the annual assessment work upon any unpatented mining claim prior to September 1st and to record the necessary proofs thereof for any year, the leases should be void as to such claims, and that money expended by the lessee should be regarded as in full rental of such claims, under which the lessee obtained patents for 6,000 acres of an 8,000-acre tract, a breach of such provision as to remainder did not justify a forfeiture of the lease upon the part upon which the patents were issued, or a judgment for its possession.

In Bank. Appeal from Superior Court, Kern County; J. E. Prewett, Judge.

Action to quiet title by J. W. Jameson and T. J. Wrampelmeier against the Chanslor-Canfield Midway Oil Company; I. Strassburger, intervener. Judgment for plaintiffs, motion for new trial denied, and defendant appeals. Judgment and order reversed.

See, also, 173 Cal. 612, 160 Pac. 1066.

E. W. Camp, of Los Angeles, Oscar Sutro, of San Francisco, and M. W. Reed and U. T. Clotfelter, both of Los Angeles, for appellant. Waters & Goodcell, of San Bernardino, James F. Farraher, of Bakersfield, and Heney, Farraher & Johnson, of Los Angeles, for respondents.

SHAW, J. This is an action by the plaintiffs to quiet their title against the alleged claims of the defendant to an undivided three-fourths interest in some 8,000 acres of land. The complaint alleges that the plaintiffs are the owners of said interest in the land, that the defendant, without right, claimed an interest therein adverse to plaintiffs, and prayed that the title of the plaintiffs be quieted and for general relief. The answer admits that the plaintiffs are the owners of an undivided three-fourths of the land, subject to certain rights of the defendant, and alleges that the defendant holds the land and is entitled to possession thereof under certain oil leases executed by the plaintiffs and I. Strassburger, the intervener, as lessors, and duly assigned to defendant.

The court made findings and gave judgment in favor of the plaintiffs. Defendant appeals from the judgment and from an order denying its motion for a new trial.

The execution of the leases referred to in the answer and the assignments thereof to the defendant are conceded. The plaintiffs' action is based upon the theory that the leases were forfeited prior to the beginning of the action, and that the defendant was in possession at that time without right. The only proposition which we find it necessary to determine is the question whether or not the leases held by the defendant have been terminated by the notices given to the defendant by the plaintiffs.

The leases contain covenants whereby the lessees agreed to drill wells for oil and gas upon the land, do the annual assessment work, and take the steps necessary to acquire patents to the lessors for the land from the United States, operate pumps to obtain from the land oil and gas, and pay to the plaintiffs a royalty thereon. These agreements, except one, extended for a period of 30 years and granted to the lessees the possession of the land for all the purposes necessary to enable them to perform the stipulations of the lease on their part.

The main controversy arises upon four leases. Two of them were executed on September 6, 1900, one on September 28, 1901, and the fourth on October 1, 1901. All of these leases contain a paragraph numbered XII, which is as follows:

> "It is especially agreed by said parties of the second part that failure upon their part to perform any of the conditions embodied herein for a period of thirty days after notification by the parties of the first part to perform such conditions shall render this agreement null and void if said first parties shall so elect."

These leases were executed by J. W. Jameson, T. J. Wrampelmeier, and I. Strassburger, as lessors, except one which was executed by the Midway Oil Company, the entire capital stock of which was owned by said persons, who also, it appears, owned the land covered thereby. By subsequent transactions the said individuals were recognized as the real lessors, the corporation acting as their agent in making the lease. Except as stated in paragraph XII, the leases contained no provision for a forfeiture, or for a reentry by the lessors. There is one unimportant exception which will be hereinafter noticed. On September 25, 1911, Wrampelmeier and Jameson served on the defendant a notice referring to the aforesaid paragraph XII of the leases and to the implied covenants of the leases and requiring the defendant, within 30 days after service of the notice, to perform each and every of the conditions embodied in each of the said leases, setting forth the particulars thereof, and stating that the failure of the defendant to perform any of said conditions for a period of 30 days after service of notice would render the said leases, respectively, null and void, and that in that event said Wrampelmeier and Jameson would elect to terminate the said leases because of said failure.

Thereafter, on December 6, 1911, Wrampelmeier and Jameson served upon the defendant a notice and demand, referring to the previous notice of September 25, 1911, and declaring that because of the failure of the defendant to perform the conditions embodied in said leases and mentioned in said notice, and each and every of them, within the 30 days thereafter, said Wrampelmeier and Jameson did thereby elect to declare said leases null and void and to terminate the same, and they thereby demanded of the defendant that it immediately surrender possession unto them all of said property and every part thereof and cease to occupy or use the same. Three days thereafter, to wit, on December 9, 1911, they began the present action.

The two plaintiffs owned a three-fourths interest in the land, and Strassburger owned a one-fourth interest. The judgment of the court purports to quiet the title of the plaintiffs to their three-fourths interest in the lands. It contains a provision declaring that Strassburger was, and still is, the owner of an undivided one-fourth interest as tenant in common with the plaintiffs, and that said one-fourth interest of Strassburger still remains subject to the leases of the defendant which the court declared had been forfeited as between the two plaintiffs and defendant. The judgment also provides that the plaintiffs shall have a writ of possession for the three-fourths interest adjudged to belong to them as against the defendant.

[1, 2] The defendant insists that under paragraph XII of the leases it was not within the power of two of the lessors to declare a forfeiture of the leasehold interest, and that such forfeiture could be declared only by the joint or concurrent act of all the lessors. We are of the opinion that this proposition must be sustained.

The case comes clearly within the provisions of section 1431 of the Civil Code. It reads as follows:

> "An obligation imposed upon several persons, or a right created in favor of several persons, is presumed to be joint, and not several, except in the special cases mentioned in the title on the interpretation of contracts. This presumption, in the case of a right, can be overcome only by express words to the contrary."

The "special cases" referred to in this section have no bearing upon the present question, nor does the clause relating to "an obligation imposed" affect the case.

As applied to this case, the section is to be read as follows:

> "A right created in favor of several persons is presumed to be joint and not several. This presumption can be overcome only by express words to the contrary."

The plaintiffs contend that this section has no application to the case, because, as they say, the right existing by reason of paragraph XII of the leases is not a right "created" in favor of the lessors, but is a right "reserved" to them. With this we cannot agree. The paragraph does not reserve to the lessors a part of the estate included in the grant to the lessees, but merely prescribes a mode for the termination of that estate upon a breach of conditions. This right did not exist and would not have existed, but for the insertion of this clause in the lease. 1 Taylor on Landlord & Tenant, § 290. The word create means "to bring into being." Webster's Dic. Words are to be construed according to the approved usage of the language. Civ. Code, § 13. The word "create" is an appropriate term to describe a right which is brought into being by a provision of a contract. It is strictly in accordance with approved usage to say that this right to declare a forfeiture was "created" by the contract, and as it was created "in favor of several persons," and there are no words, express or otherwise, declaring it to be a several right, it follows that, even if it is not, because of its nature, a joint right of all the lessors, it becomes so by force of this section of the Civil Code.

The effect of paragraph XII and of a notice and declaration by the lessors availing themselves thereof would be to cause a forfeiture of the interest of the lessees. The paragraph, in effect, states a condition subsequent, upon the happening whereof the estate of the lessees shall become forfeited. The construction of such a provision is governed by the rule laid down in section 1442 of the Civil Code:

> "A condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created."

The intention of this provision was to enable the lessors to procure a strict and faithful performance of the provisions of the leases, or, on failure to do so, to retake the property from the lessees, and therefore it was for the benefit of the lessors and is to be strictly interpreted against the lessors. 1 Underhill on Landlord & Tenant, p. 625, § 391.

It is not necessary to resort to strict construction, however, to reach the conclusion that the forfeiture here provided for can be brought about only by the joint action of all of the lessors. The event which causes the forfeiture is the failure of the lessee to perform any of the conditions embodied in the lease for a period of 30 days after a notification. By the language of the paragraph this notification must be given "by the parties of the first part." It is only upon the giving of this notice and the failure to perform the conditions mentioned therein that the forfeiture can be declared. This is the condition which must happen in order to give a right to declare the forfeiture. The condition cannot be said to have happened upon notification given by some of the parties of the first part or any number of them less than all. After the notification has been given by all of the parties a forfeiture may be brought about only "if said first parties shall so elect." Here again the action of all of said first parties is necessary to the happening of the condition. It is argued that the only purpose of the notification was to give information to the lessee, and that this could be given as well by notice from one of the parties as from all. But the contract measures the rights of the parties in this respect, and, being a contract regarding a forfeiture and to be strictly construed, its requirements must be fully met before the right depending thereon can be complete.

Many reasons might be given for the requirement, which it is to be presumed the parties of the second part insisted upon, that the three lessors should unite in such proceedings for a forfeiture. The condition brought about by this judgment is a good illustration of a very important reason. While the respective lessors each owned an interest in the property as tenants in common and each for the purposes of the lease granted to the lessee his individual interest, yet the lessee thereby acquired a lease-hold interest in the entire estate. The purposes of the lease clearly indicate that this was one of the inducing causes for the acceptance of the lease by the lessees. A well for the production of oil bored upon a tract of land is as beneficial to one tenant in common, according to his interest, as to another. It cannot be supposed that the lessee would have been willing to have made the development work here necessary, expending therein somewhere near $1,000,000 in so doing, upon a lease from one or two of three tenants in common. The result would have been that the tenants in common not joining in the lease would have had an equal common right with the lessee to the oil produced. The present judgment, if valid, makes the plaintiffs and the defendant, with respect to the wells and the possession of the land for the purpose of producing oil, tenants in common, notwithstanding the forfeiture. By the terms of the leases the defendant is bound to continue the drilling and operation of wells on the land and the production of oil therefrom. By the judgment it remains bound to do so in favor of Strassburger, and the plaintiffs will be entitled to three-fourths of the oil extracted and be under no obligation to defendant except that which arises from the common-law duty of a tenant in common to make contribution. The plaintiffs would also have an equal right to operate the wells. It is clear that the parties never intended to enter into a contract which would bring about such consequences. Such construction is not only contrary to the axiomatic rule of section 1442 of the Civil Code that "a condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created," but in view of the nature and objects of the contracts of lease it would be entirely unreasonable and absurd.

If this, as respondent contends, places any two of the lessors at the mercy of the other, it only does that which was intended by the terms of the contract, and they cannot complain unless for fraud or mistake, of which there is no claim. We are not dealing with the rights and remedies secured to the lessors by force of the law, but with the rights which they secured to themselves by the provisions of their contract. They attempted to lay the foundation for a forfeiture by proceeding under their contract which requires the joint action of all the lessors to accomplish that result. The contract does not permit it to be done by less than all of the lessors.

[3] We perceive no force in the argument that the conduct of the parties subsequent to the execution of the lease gives evidence of their understanding that the right in question was several and not joint. It may have happened frequently in the dealings between the parties that one of the lessors has acted for all, either by express authority or by acquiescence and consent. Such conduct has little significance in the interpretation of a contract. It is sufficient to say, however, that where the terms of the contract are clear

and explicit, where the meaning is not doubtful and there is no latent ambiguity, it cannot be varied by the subsequent conduct of the parties or surrounding circumstances. The parties must be deemed to be bound by such contract, regardless of the results produced.

This view of the effect of the contract is supported by abundant authority both in this state and elsewhere. In Randol v. Scott, 110 Cal. 590, 42 Pac. 976, a covenant by "said lessees" not to permit an assignment of the lease to be made by bankruptcy or otherwise, without the written consent of the lessors, was held not to be violated by the filing of a petition in insolvency by one of the lessees and the resulting transfer of his interest in the leasehold to an assignee. The court said that:

> "The meaning of the parties is presumed to be that the lease should not be assigned in the only way in which it could have been assigned, namely, by the joint act of the lessees."

So in Spangler v. Spangler, 11 Cal. App. 322, 104 Pac. 995, the covenant was that "the lessees" should not "assign the lease without the written consent of the lessors under penalty of forfeiture." It was held that an assignment by one of the lessees only was not a breach of the covenant. In Calvert v. Bradley, 16 How. (57 U. S.) 596, 14 L. Ed. 1066, there was a lease by several tenants in common with a covenant by the lessee to keep the premises in repair. It was held to be a joint covenant and that all must join in an action for a breach of it. The court said:

> "So far as the reservation and payment of rent to the covenantees, according to their several interests, made a part of the lease, the contract was several. * * * But in this same lease there is a covenant between the proprietors and the lessee, that the latter shall keep the premises in good and tenantable repair, and shall return the same to those proprietors in the like condition, and it is upon this covenant or for the breach thereof that the action of the plaintiffs has been brought. Is this a joint or several covenant? It has been contended that it is not joint, because the stipulations are with the several covenantees jointly and severally. But the answer to this position is this: Are not all the covenantees interested in the preservation of the property demised, and is any one or a greater portion of them exclusively or separately interested in its preservation? And would not the dilapidation or destruction of that property inevitably affect and impair the interests of all, however it might and necessarily would so affect them in unequal amounts? It would seem difficult to imagine a condition of parties from which an instance of joint interests could stand out in more prominent relief."

Substantially the same reasons exist here with respect to the covenants to bore wells, develop oil and other minerals, and store the same, protect the property from liens, and do the assessment work necessary to keep the mining locations alive. These are the most important of the things mentioned in the notice to perform. And even stronger reasons exist, as we have shown, for holding that the right created in the lessors by paragraph XII is joint, where giving it that effect serves to protect the tenant in possession not only from a partial forfeiture, but also from a sort of tenancy that could not reasonably have been intended or contemplated. See, also, Foley v. Addenbrock, 4 Q. B. 197; Kitchin v. Buckley, 1 Levinze, 109; Bradburne v. Botfield, 14 Mees & W. 559; Thompson v. Hakewill, 19 C. B. [N. S.] 713; Clapp v. Pawtucket, 15 R. I. 494, 8 Atl. 697, 2 Am. St. Rep. 915.

Some of the authorities above cited involved the question of the right of tenants in common to sue severally for the breach of a covenant running to all of them jointly, and not to the right of less than all to declare a forfeiture, or re-enter for such breach. In this state it may be that the rule has been changed by statute with regard to the necessity for the joinder of all the co-owners in such actions. In the early history of the state it was held that tenants in common "must sue severally in real actions, generally (the case was ejectment), as they all have separate titles." Johnson v. Sepulbeda, 5 Cal. 151; Throckmorton v. Burr, 5 Cal. 400. These decisions were made in the year 1855. In 1857 the Legislature passed the act, now incorporated into the Code of Civil Procedure as section 384, providing that all the tenants in common, or any number less than all, may jointly or severally sue "for the enforcement or protection of the rights of such party." Stats. 1857, p. 62. The Code also provides that "those who are united in interest must be joined as plaintiffs or defendants." Code Civ. Proc. § 382. In the case of a joint right created in favor of tenants in common by the covenants of a lease made by them it may be a matter of doubt, under these sections, whether they may sue severally or whether all must join. In Johnson v. Sepulbeda, supra, and in Parke v. Kilham, 8 Cal. 79, 68 Am. Dec. 310, it was said that the necessity for the joinder of all depends on the nature of the injury to the common property, or of their interest in the thing in controversy. But the cases first cited settled the question of the nature of a covenant or right such as that here involved, and whatever may be the statutory rule regarding the right of each to sue severally after a forfeiture has been declared in the manner prescribed by the contract, it is plain from these decisions that a right given to several lessors, by a contract of lease, to declare a forfeiture for breaches of the character here involved must be exercised by all and cannot be exercised by less than all.

[4] The notice of September 25, 1911, requiring performance of the conditions of the leases expressly states that it is predicated, not alone upon paragraph XII of the leases, but also upon subdivision 3 of section 1161 of the Code of Civil Procedure. It may be, in view of section 384, Code of Civil Procedure, above mentioned, that if a forfeiture

had taken place in favor of several tenants in common in pursuance of a notice under section 1161, either of them might maintain an action of unlawful detainer under the latter section. Perhaps, also, section 384 would require the court to hold that either of the tenants in common could, under section 1161, produce a forfeiture, as in that section provided, by giving a separate notice. This again would raise the question whether it would be a forfeiture of the entire estate, or only of the estate held under the common owner who gave the notice. The question would also arise whether, upon such statutory forfeiture, where, as here, the lease contains no provisions for a re-entry by the lessor, he could maintain ejectment, or an action to quiet title, or would be confined to the action of unlawful detainer which section 1161 was designed to sustain, and in which special authority is given by section 1179 for relief to the tenant after judgment, in case of hardship. Section 791 of the Civil Code provides for a re-entry and forfeiture by giving the notice provided in section 1161, Code of Civil Procedure, in all cases where the right of re-entry is given by the lease. As none is given by these leases, section 791 has no application and the lessors have no rights, except such as are given by paragraph XII of the lease and by said section 1161. But it is unnecessary to decide these questions. The plaintiffs' notice does not conform to the requirements of section 1161. The notice prescribed in subdivision 3 is a "notice in writing, requiring the performance of such conditions or covenants, or the possession of the property." The notice of September 25, 1911, required performance of the conditions, but contained nothing concerning possession of the property. The notice and demand for possession served on December 6, 1911, did not require performance, and it did not give any time, but demanded immediate possession. Neither of the notices was a compliance with the statutory provisions. It cannot be disputed that proceedings of this character, involving, as they do, the forfeiture of valuable estates for years, a thing not favored by the law, must conform substantially to every material requirement of the statute by which they are authorized. Opera House Ass'n v. Bert, 52 Cal. 471. Statutes of this character are looked upon by the courts in the same light as contracts providing for forfeiture. Concerning the latter it has been said:

> "It has always been considered that it was necessary to restrain it to the most technical limits of the terms and conditions upon which the right is to be exercised," and that "covenants of this description are construed by courts of law with the utmost jealousy to prevent the restraint from going beyond the express stipulation." Randol v. Scott, 110 Cal. 596, 42 Pac. 977.

The plaintiffs acquired no rights under section 1161.

[5] The statement that the leases create no right of re-entry, except as set forth in paragraph XII, requires some explanation. Paragraph IV provides that, if the lessees fail on their part, to do the assessment work upon any unpatented mining claim prior to September 1st and record the necessary proofs thereof for any year, the lease "shall be null and void as to such claims and all moneys expended by" the lessees upon such claims "shall be regarded as full rental of such claims till that date." It is questionable whether this provides for a re-entry upon such unpatented claims. But it appears that patents were obtained for 6,000 acres of the land. It is obvious, therefore, that a breach of this stipulation as to the remainder would not justify a forfeiture of the lease upon the part for which the patents were issued and could not justify the judgment for the possession of the same.

These conclusions render it unnecessary to consider the other points presented in the case. The attempt of the plaintiffs to forfeit the estate of the lessee as tenant in possession under the leases was ineffectual. Consequently there is no foundation for the action or for the judgment.

The judgment and order are reversed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; HENSHAW, J.; MELVIN, J.; LORIGAN, J.

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175 Cal. 763

HANNAH v. CANTY et al. (Sac. 2330.)

(Supreme Court of California. Aug. 28, 1917.)

1. TRUSTS 🔑372(3)—PURCHASERS FROM TRUSTEE—NOTICE OF INTEREST—SUFFICIENCY OF EVIDENCE.

In an action to declare a trust in lands in favor of plaintiff, evidence *held* to support findings that defendants never acquired any interest in the lands as bona fide purchasers from the alleged trustee, and that each had full notice and knowledge of plaintiff's rights in the land at the times of conveyance to them.

2. LIMITATION OF ACTIONS 🔑39(11), 182(1)—STATUTE APPLICABLE — ACTION TO ESTABLISH TRUST IN LANDS—PLEADING.

Code Civ. Proc. § 343, limiting actions not hereinbefore provided for, is the only statute of limitations applicable to an action to establish a trust in lands, though it asks an accounting as incidental to the action; and, such statute not having been pleaded, the court was justified in finding the cause was not barred.

3. TRIAL 🔑396(3)—RESPONSIVE FINDING.

In an action to establish a trust in lands, a finding that neither defendant was ever in actual possession and occupation of the land in controversy was properly responsive to defendants' plea of adverse possession.

4. APPEAL AND ERROR 🔑1071(1)—HARMLESS ERROR—FINDING.

A finding that the legal title to the land was held by defendants in trust, if a conclusion of law, was harmless to defendants.

5. TRIAL 🔑404(3)—FINDING OF FACT—CONCLUSION OF LAW.

The finding that the legal title to the lands was held by defendants in trust was a finding of ultimate fact, not a conclusion of law.

6. TRUSTS 🔑99—SUIT TO ESTABLISH—SALE OF LANDS.

Where plaintiff and a defendant agreed that plaintiff should select timber lands and defendant furnish the price for them, and that, after deducting the price and expenses and taxes, together with interest, the sums realized from the sales or issues of the property should be equally divided between plaintiff and defendant, plaintiff could maintain a suit to establish a trust in the lands before sale thereof by defendant.

7. TRUSTS 🔑108—EVIDENCE OF TRUST—DOCUMENTARY EVIDENCE.

In an action against husband and wife to establish a trust in lands, a document comprising an acknowledgment of plaintiff's interest in the lands, which defendant wife refused to sign, though not prepared by her, being merely part of a declaration to her by plaintiff's agent eliciting the reply that she had no interest in any timber lands that she knew of, was admissible as part of her conversation with plaintiff's agent.

8. EVIDENCE 🔑283—DECLARATIONS AGAINST INTEREST.

In an action to establish a trust in lands, recitals in a quitclaim deed from a defendant's brother to defendant's wife, the other defendant, the deed being dated and acknowledged nearly six months after the commencement of the action, were not admissible as declarations against interest, the brother admittedly having no interest in the property when they were made.

9. EVIDENCE 🔑283 — UNSWORN DECLARATIONS.

Recitals in a quitclaim deed, not being the best evidence of the purported facts, and amounting at best to unsworn declarations of one not a witness, were properly excluded in an action to establish a trust in land.

In Bank. Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by J. A. Hannah against D. J. Canty and Laura A. Canty. From a judgment for plaintiff, and order denying their motion to set aside and vacate such judgment, defendants appeal. Judgment and order affirmed.

Royle A. Carter, of Fresno, and William A. Barnhill, of Los Angeles, for appellants. Hannah & Miller and Maurice E. Power, all of Visalia, for respondent.

MELVIN, J. The purpose of this action was to declare a trust in certain lands in favor of plaintiff and incidentally that an accounting should be had between the parties to the action. The nature of the litigation is discussed in the opinion of the District Court of Appeal in Hannah v. Canty, 1 Cal. App. 225, 81 Pac. 1035, given upon the sustaining of the order of the lower court denying a motion for change of place of trial. At the trial plaintiff was successful, and defendants appeal from the judgment and from an order denying their motion to set aside and vacate said judgment.

The court found that in 1890 plaintiff and D. J. Canty entered into an agreement whereby Hannah undertook to find, examine, and select certain valuable timber lands, and Canty promised to furnish the purchase price for such properties, together with the necessary expenses of acquiring title to them; that there was also a mutual agreement that after deducting the purchase price and amounts paid for expenses and for taxes on the land by Canty, together with interest at an agreed rate, the sums realized from the sales or issues of the property should be equally divided between the plaintiff and D. J. Canty; that in pursuance of this agreement Hannah bought certain valuable timber lands in Tulare county, D. J. Canty advancing the purchase price and necessary expenses; that title to this property was taken in the name of D. J. Canty; and that on January 2, 1892, D. J. Canty executed and delivered to plaintiff a certain instrument in writing which is set out in full in the findings. By this writing Canty acknowledged and declared that J. A. Hannah was entitled to one-half of the selling price, rents, issues, and profits of 701.12 acres of land in Tulare county which is particularly described, after first deducting from said selling price, rents, issues, profits, and proceeds, together with interest at 12 per cent. per annum, certain enumerated sums advanced at given dates and all taxes on said lands paid by Canty, with interest at the same rate. This instrument, as the court found, was never acknowledged so as to entitle it to be recorded. The writing, according to the findings, truly described the land purchased under the original agreement, and correctly specified the sums furnished by Canty thereunder. The court also found as follows:

> "That afterwards the said D. J. Canty executed a deed purporting to convey said lands to his brother, J. M. Canty, and thereafter the said J. M. Canty, by said D. J. Canty as his attorney in fact, executed a deed purporting to convey said lands to the defendant Laura A. Canty. That whatever interest, if any, was acquired by said J. M. Canty, and said Laura A. Canty, or either of them, under the said deeds or either of them, was acquired without valuable consideration, and with full notice and knowledge of the said rights of plaintiff in the said lands."

There were further findings to the effect that the lands are of the value of $25,000; that D. J. Canty pretends that said lands belong to his wife, defendant Laura A. Canty; that on September 26, 1902, said Laura A. Canty for the first time denied and repudiated the trust as to said lands existing in favor of plaintiff; that plaintiff had offered to pay into court one-half of all sums found due upon an accounting for advances and taxes with interest, under the terms of the agreement with D. J. Canty upon the execution of a sufficient conveyance of an undivided one-half interest in the lands; and that plaintiff's cause of action is not barred by the provisions of subdivision 2 of section 336, nor by section 337, nor by subdivisions 1 or 4 of section 338, nor by subdivision 1 of section 339 of the Code of Civil Procedure. There were very elaborate findings, to the effect that neither J. M. Canty nor Laura A. Canty had paid any consideration for the property;

that neither had ever been in possession of it; that the taxes were paid by D. J. Canty during all the time the land was nominally owned by his brother J. M. Canty or his wife; that J. M. Canty had expressly disclaimed ownership; and that Laura A. Canty had never known of a purported conveyance to her until informed of it by H. T. Miller on September 26, 1902. Other findings relate to and declare untrue certain matters of defense set up by D. J. and Laura A. Canty.

[1] Appellants first attack those findings to the effect that neither J. M. Canty nor Laura A. Canty ever acquired any interest in the land as a bona fide purchaser, and that each had full notice and knowledge of the rights of plaintiff in the said lands at the times of the purported conveyances to them respectively. These findings are attacked upon the ground that they are not supported by the evidence. While the testimony, as might be expected, was conflicting, we are of the opinion that these findings are amply supported.

There is no dispute regarding the fact that defendant executed a deed of the property to his brother, and that this indenture was recorded about eight months after its purported execution; but plaintiff testified that after he learned of the recordation of the deed he had a conversation with J. M. Canty, in which the latter admitted that he had not bought the property. According to Mr. Hannah he said to J. M. Canty: "I see you have been buying some timber land." To this remark Mr. Canty replied, with a smile:

> "I have been buying nothing. Dan has played hell over there at Fresno, as usual, and had to put his property out of his hands. It stands as it always did, and it is fixed just so Dan can do what he likes with it."

On another occasion, as plaintiff testified, J. M. Canty said he had given D. J. Canty a power of attorney to do as he liked with the land; that he had not bought the property at all; but that D. J. Canty had simply put it in J. M. Canty's name to keep D. J. Canty's creditors from getting it. Plaintiff also stated under oath that many times prior to the date of the deed to J. M. Canty he had told the latter of his contract with D. J. Canty and their arrangements regarding the land. Before the time of the trial J. M. Canty had died. It is argued that plaintiff's statements regarding his conversations with a man long dead are entitled to small weight, but that giving them full value they do not show mala fides on the part of J. M. Canty in taking the land. We do not indorse this view. If J. M. Canty made the statements attributed to him by plaintiff, they showed his taking of the deed from his brother to have been a mere subterfuge. True it is that if the purported declarations of the grantee, given in evidence after his death, stood alone they might be regarded as of slight probative force, but other facts given in evidence which were uncontradicted and unexplained by defendants tend to support Mr. Hannah's version of his conversations with J. M. Canty. The defendant D. J. Canty continued to pay the taxes on the land while it was standing of record in the name of his brother and was assessed to the latter. Such payments were made through the agency of plaintiff at the request of D. J. Canty, who furnished the money. According to Hannah's testimony, J. M. Canty told him, early in 1895, that a power of attorney had been given D. J. Canty so that he could do as he liked with the land. The power of attorney under which D. J. Canty subsequently executed a deed from J. M. Canty to Laura A. Canty was acknowledged in 1898. Respondent's argument is this: While defendant could not contradict any testimony regarding J. M. Canty's declaration with reference to the earlier power of attorney, because of J. M. Canty's death, he could have denied the truth of the statement alleged to have been made by J. M. Canty if it were not true. This he failed to do. Another circumstance tending to support plaintiff's testimony is that after the deed from D. J. to J. M. Canty was executed, the former asked Hannah to find a purchaser for the land. This request, as Hannah testified, was made by a letter which he lost before the trial of the case took place. D. J. Canty did not explain the letter nor deny having written it. We have therefore, in support of the finding against the good faith of J. M. Canty's apparent acquisition of the property, Hannah's account of J. M. Canty's disclaimer of any real interest therein, the payment of taxes by D. J. Canty, and the interest which D. J. Canty took in the sale of the land evidenced by his request that Hannah attempt to dispose of it. Added to this is the fact that D. J. Canty himself offered in evidence a letter written to J. M. Canty, but given to D. J. Canty by his brother, in which a third party made inquiries looking to the renting of the property. Respondent's counsel ask with much force why this letter was turned over to D. J. Canty if he had ceased to be the owner of the land.

Another circumstance which tends to support both findings is found in the gross inadequacy of D. J. Canty's own account of the transfers of the title to his brother and from the latter to Laura A. Canty by a deed executed by her husband as his brother's attorney in fact. D. J. Canty said that his indebtedness to his brother was the consideration for the first deed, and that J. M. Canty's indebtedness to Laura A. Canty was the consideration for the second transfer, yet the testimony utterly fails to show that in either case any credit was given on such indebtedness by reason of the transfer, or that it was in any degree reduced by reason of the delivery of the deed. D. J. Canty as a witness stated that his brother had given him a power of attorney, so that he could sell or trade the timber land, and with the proceeds or as a result of the trade get a home for his (D. J. Canty's) family. Yet D. J. Canty, as attorney in fact, deeded the property to his wife, for an expressed consideration of $2,103, which, according to his statement, was intended as a partial set-off for a larger amount, between $3,000 and $4,000, owed Mrs. Canty by her brother-in-law. There is not one word of testimony to show that J. M. Canty knew of this transaction or authorized it, but there is evidence which tends to contradict D. J. Canty and to prove that Mrs. Canty knew nothing about the purported transfer of the property to her until long after it was made. Mr. H. T. Miller testified that in 1902 he went to see Mrs. Canty for the purpose of asking her to sign a certain document in acknowledgment of Mr. Hannah's interest in those lands, which in the interview were spoken of as "timber lands up on Tule river." She said: "Why I don't own any timber lands on Tule river." However, she refused to sign the document, disclaiming any interest in the property. Mrs. Canty did not appear as a witness at the trial, and Mr. Miller's testimony stands uncontradicted. The entire transaction was such that the court was fully justified under the evidence in making the two findings negativing the good faith of J. M. Canty and Laura A. Canty in the apparent acquisition of title to this land by them.

Appellants also object to the finding that Laura A. Canty first repudiated the trust on September 26, 1902. The testimony of Mr. Miller fixes that time as the date of her refusal to sign an acknowledgment of Hannah's interest. This was ample support for the finding.

[2] This was an action "to be regarded as having for its sole object to establish a trust in the lands and the accounting asked for, as merely incidental to the action." Hannah v. Canty, 1 Cal. App. 227, 81 Pac. 1035. Therefore the only statute of limitations applicable to actions of this character is section 343 of the Code of Civil Procedure. This section was not pleaded. Therefore the court was justified in finding that the cause of action was not barred.

[3] The court found also that neither J. M. Canty nor Laura A. Canty was ever in actual possession and occupation of the land in controversy. This was properly responsive to the plea of adverse possession made by defendants, but not supported by any offer of proof.

Another finding to which defendants object is one to the effect that plaintiff and D. J. Canty never agreed that the latter might sell the land at his option for such price or to such person as he might desire. This was in negation of certain of the allegations contained in the pleadings of the defendants. It is supported by the testimony appearing in the record.

[4, 5] The finding that the legal title to the land is held by defendants in trust is criticized as being in reality a conclusion of law. Even if this were conceded, we do not see that defendants or either of them would thereby suffer any harm. The finding, however, was one of ultimate fact.

[6] In various forms the contention is made that no suit may be maintained until the sale of the land by Canty, if indeed it be held in trust by defendants. In other words, it is argued that in any view of the case there can be no trust in the land itself in favor of plaintiff, but only in the proceeds after the sale. This argument is completely answered by the opinions in the cases of Green v. Brooks, 81 Cal. 328, 22 Pac. 849 (cited with approval by the District Court of Appeal on the former appeal in this case), and Donohoe v. Rogers, 168 Cal. 700, 703, 144 Pac. 958.

Other findings are attacked in the brief of appellants, but all of the material matters urged in that behalf have been treated in the foregoing discussion.

[7] Objection was made to the introduction in evidence of a document prepared for the signature of Mrs. Canty. This was the writing which she refused to sign, reference to which has been made heretofore in this opinion. The bases of the objections were that the writing was not binding upon defendants; that its introduction was an attempt to establish a trust by a document in the preparation of which defendants had no hand; and that it was a self-serving declaration of the plaintiff. This writing was offered at the court's suggestion as a part of the testimony of Mr. Miller. Its contents, of course, could not bind Mrs. Canty. It was merely a part of the declaration to her by Mr. Miller which elicited the reply that she had no knowledge of any deed executed by her husband as his brother's attorney in fact purporting to vest title to the timber lands in her. As a part of the conversation it was admissible. It merely showed, in connection with the rest of Mr. Miller's testimony, the nature of the demand made upon Mrs. Canty.

[8, 9] Defendants sought to introduce a quitclaim deed from J. M. Canty to Laura A. Canty for the declared purpose of showing a confirmation of the earlier deed purporting to have been made by him through his attorney in fact. The court admitted the instrument in evidence, but excluded numerous declarations in the deed regarding the source of the money with which the land was originally purchased, the alleged indebtedness of J. M. Canty to his sister-in-law and other things which defendants vainly endeavored to prove to the court's satisfaction in the trial of the case. The ruling excluding these declarations is assigned as error. The deed containing these recitals was dated and acknowledged April 4, 1903, nearly six months after the commencement of this action. They were not admissible as declarations against interest or otherwise. J. M. Canty admittedly had no interest in the property when they

were made. The statements sought to be introduced were not against, but in favor of, the title of his successors. Moreover, they were not the best evidence of the purported facts recited by them, and they amounted, at best, to unsworn declarations of one not a witness. Such recitals were very properly excluded.

No other alleged errors merit analysis, discussion or comment.

The judgment and order are affirmed.

We concur: ANGELLOTTI, C. J.; HENSHAW, J.; SHAW, J.; SLOSS, J.

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175 Cal. 751

FULLER & TODD REALTY CO. v. SUPERIOR COURT IN AND FOR ALAMEDA COUNTY et al. (S. F. 8479.)

(Supreme Court of California. Aug. 27, 1917.)

MORTGAGES 🔑571—RIGHT TO REVIEW OF JUDGMENT—PERSON NOT PARTY.

A judgment of foreclosure will not be reviewed at instance of one holding under junior mortgage recorded before notice of lis pendens, who was named as a party to action without being summoned, and was dismissed from it, since his interest is not affected thereby.

In Bank. Application by the Fuller & Todd Realty Company for writ of certiorari to be directed against the Superior Court in and for Alameda County and Hon. Fred V. Wood, judge thereof. Denied.

Fernhoff & Sevier and Cedric W. Petersen, of Pleasanton, for petitioner.

PER CURIAM. Application for a writ of certiorari to review a judgment of foreclosure of mortgage in so far as it is claimed to affect petitioner, a junior mortgagee. The petitioner was originally made a party defendant, as one claiming some interest as purchaser or mortgagee, which interest was alleged to be subsequent to and subject to the lien of the mortgage sought to be foreclosed. Petitioner alleges that it was never served with summons, and never had notice of the action until the time for appeal from the judgment had expired.

The judgment given recites that the action was dismissed as to said petitioner, with the result that if its mortgage was recorded, as is alleged, prior to the recording on April 7, 1914, of the notice of lis pendens in the foreclosure action, the situation is precisely as it would have been if petitioner had never been a party to the action, and its interest as a mortgagee is in no way affected by the judgment of foreclosure or the sale thereunder. The judgment given, properly construed, does not purport to bar any one claiming under defendant Chase, whose interest in the premises was acquired prior to the filing for record of the notice of lis pendens on April 7, 1914, and was properly shown on the public records.

The application for a writ is denied.

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175 Cal. 752

MONO COUNTY v. INDUSTRIAL ACC. COMMISSION. (Sac. 2597.)

(Supreme Court of California. Aug. 27, 1917.)

1. MASTER AND SERVANT 🔑364—WORKMEN'S COMPENSATION ACT—"EMPLOYEE"—"HIRE" —"APPOINTMENT OF HIRE"—"APPOINTED" —"ELECTED."

The duly elected and qualified sheriff of Mono county was not an "employee," within Workmen's Compensation Act (St. 1913, p. 284) § 13, as amended by St. 1915, p. 1081, defining the term "employer" as the state, each county, etc., who has any person "in service under an appointment," etc., and section 14 as amended by St. 1915, p. 913, providing the term "employee," shall be construed to mean every person in the service of an employer, as defined by section 13, "under any appointment or contract of hire or apprenticeship," as he was not in service under an "appointment," the word "appointed" not being equivalent to "elected" or including both "appointed" and "elected," and the use of the word "hire" being in some degree indicative of an intention to exclude elective officers invested with a portion of the sovereign power of the government.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Appoint; Elect; Employee; Hire.]

2. MASTER AND SERVANT 🔑364—WORKMEN'S COMPENSATION ACT — RE-ENACTMENT — EXCLUSION OF EXCEPTION.

Although Workmen's Compensation Act (St. 1911, p. 797, § 6), after defining the term "employee" as used in the present act (St. 1915, p. 913), expressly excluded from the definition any state or county officer, failure of the Legislature of 1913 to include in the present act the part excluding state and county officers did not evidence an intent that they should be included.

In Bank. Certiorari by Mono county against the Industrial Accident Commission to review an award made under the Workmen's Compensation Act for the death of James P. Dolan, sheriff of Mono county. Award annulled.

O. F. Hakes, Dist. Atty., of Bridgeport (Hartley F. Peart, of San Francisco, of counsel), for petitioner. Christopher M. Bradley, of San Francisco (Warren H. Pillsbury, of Oakland, of counsel), for respondent. John D. Murphey, of Berkeley, and W. H. Metson, of San Francisco, amici curiæ.

SLOSS, J. James P. Dolan was the duly elected and qualified sheriff of Mono county. In July, 1915, he was called to a ranch where depredations had been committed. While looking for the offenders, he encountered two men, whom he accosted. They opened fire, and inflicted fatal wounds upon him. The commission made an award in favor of his widow and against the county. Upon the petition of Mono county, this court issued a writ of certiorari to review the award.

Assuming for the moment that the sheriff is an "employee" of the county within the meaning of the Workmen's Compensation Act (St. 1911, p. 796), we see no merit in the petitioner's contentions that the injuries received by Dolan did not arise out of or in the course of his employment, or that they were caused by his willful misconduct.

[1] The only question worthy of consideration is whether he was an "employee" within the meaning of the Workmen's Compensation Act. The statute, as it read on July 26, 1915, contained these definitions:

> "Sec. 13. The term 'employer' as used in sections twelve to thirty-five, inclusive, of this act shall be construed to mean: The state, and each county, city and county, city, school district and all public corporations * * * therein, and every person, firm, voluntary association, and private corporation (including any public service corporation), who has any person in service under any appointment or contract of hire, or apprenticeship, express or implied, oral or written, and the legal representatives of any deceased employer. (St. 1915, p. 1081.)
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> "Sec. 14. The term 'employee' as used in sections twelve to thirty-five, inclusive, of this act shall be construed to mean: Every person in the service of an employer as defined by section thirteen hereof under any appointment or contract of hire or apprenticeship, express or implied, oral or written, including aliens and also including minors, but excluding any person whose employment is both casual and not in the usual course of the trade, business, profession or occupation of his employer, and also excluding any employee engaged in farm, dairy, agricultural, viticultural or horticultural labor, in stock or poultry raising or in household domestic service." (St. 1915, p. 913).

Under these sections, the essential condition of the relation of employer and employee is "service under any appointment or contract of hire or apprenticeship." Does this language describe the status of an officer, like a sheriff, holding his office by virtue of an election, taking an official oath, giving an official bond, and having a tenure fixed by law? Certainly such an officer is not in service under any contract. "It is well settled that salaried public offices, created by the Legislature, are not held by contract." Miller v. Kister, 68 Cal. 142, 8 Pac. 813; Pennie v. Reis, 80 Cal. 266, 22 Pac. 176; Blynn v. City of Pontiac, 185 Mich. 35, 151 N. W. 681. Under the statute of Connecticut, which defines as employee "any person who has entered into or works under any contract of service or apprenticeship with an employer," it has been held that the sheriff is not an employee, because the relation "between him and the public is not the creature of contract, nor is the office itself a contract." Sibley v. State, 89 Conn. 682, 96 Atl. 161, L. R. A. 1916C, 1087.

The only other ground upon which the sheriff may be brought within the terms of our statute is that he is in service under an "appointment of hire." To so hold would, however, require us to read the word "appointed" as equivalent to "elected," or as including both "appointed" and "elected." There is a clear and well-understood distinction between appointment and election. In Wickersham v. Brittan, 93 Cal. 34, 28 Pac. 792, 29 Pac. 51, 15 L. R. A. 106, this court said:

> "The term 'election' carries with it the idea of a choice, in which all who are to be affected with the choice participate; whereas from the word 'appointment' we understand that the duties of the appointee are for others than those by whom he is appointed. As distinguished from an election, an appointment is generally made by one person, or by a limited number, acting with delegated powers, while an election is the direct choice of all the members of the body from whom the choice can be made."

Continuing, the court quoted with approval this expression from the opinion in Magruder v. Swann, 25 Md. 214: "No latitude of construction can justify the reading of 'elected' as the synonym of 'appointed.'" See, also, Conger v. Gilmer, 32 Cal. 75. Not only had the two words been defined judicially, but their distinctive meanings were commonly known when the Legislature enacted the Workmen's Compensation Act. We would not be justified in saying that the framers of the act intended to extend its scope beyond the fair and settled signification of the words employed. Furthermore, the use of the word "hire" in sections 13 and 14 is, in some degree, indicative of an intention to exclude elected officers invested with "a portion of the sovereign power of the government to be exercised * * * for the public good." Sibley v. State, supra. If the sheriff is covered by the terms of the act, there is no ground for excluding other officers, such as the governor, the attorney general, the justices of this court, judges of the superior court, district attorneys or the like. But such officers would hardly be said to be in service under any appointment or contract of hire. It is true that, in a sense, every office is an employment. U. S. v. Morris, 2 Brock, 103, Fed. Cas. No. 15,747. But the officer is not an employee, within the meaning of the statute, unless he is in service under an appointment or contract of hire. The state, and every governmental subdivision, employs many persons who fall within the terms of the definitions contained in sections 13 and 14. But the language of the act would have to be distorted from its true meaning to include in the definition of employees sheriffs and like elected officers.

[2] Attention is directed to the fact that the original employers' liability act (Stats. 1911, p. 797, § 6), after defining "employee" in the language used in section 14 of the present act, expressly excludes from the definition "any official of the state or of any county * * * who shall have been elected or appointed for a regular term of one or more years, or to complete the unexpired portion of such regular term." This exception is not incorporated in the act now in force. It is argued that, by expressly excluding elected officials, the Legislature of 1911 indicated its understanding that without such exception the general language would have included the excepted class. And, so the argument proceeds, when the Legislature of 1913, in reenacting the same general language in the new act, failed to exclude elected officers, it showed its intent that they should be cover-

ed by the law. It is, no doubt, the general rule that provisos or exceptions may be construed as indicating that, in their absence, the preceding general language would have covered the matter included in the proviso or exception. S. F. v. Pac. Tel. & Tel. Co., 166 Cal. 244, 251, 135 Pac. 971. But this mode of interpretation is not universal. "The limitation upon this rule is that it must not be carried too far, —that an exception from the general language of a statute is sometimes made out of an abundance of caution, and not to indicate that without the exception its subject-matter would come within the scope of the act." Tognazzini v. Jordan, 165 Cal. 19, 23, 130 Pac. 879, 881 (Ann. Cas. 1914C, 655). We think the statute of 1911 affords an appropriate illustration of the kind of cases to which this limitation is applicable. The fact that the Legislature took the precaution to except elected officers from the provisions of the act of 1911 is not a sufficient ground for stretching the preceding words ("in service under an appointment") to cover such officers. Still less reason is there for holding that the asserted meaning of the word "appointed" had become so fixed by the addition of the excluding clause that, when this word was incorporated in a new statute without the exception, it must still be given the enlarged meaning which, as is claimed, arose from the now omitted exception.

The amendment of 1915 to section 14 (Stats. 1915, p. 913), excluding from the definition of employee certain classes of deputies, was not in force at the time of Dolan's death. It can throw no light upon the proper interpretation of the section enacted in 1913. Furthermore, we do not think that the exception tends to show anything more than that, in its absence, deputies of clerks, sheriffs, or constables would be included in the definition of employees.

The award is annulled.

We concur: SHAW, J.; MELVIN, J.; HENSHAW, J.

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175 Cal. 746

PURCELL v. FIRTH. (L. A. 3967.)

(Supreme Court of California. Aug. 24, 1917.)

1. Brokers 🔑86(1)—Right to Commission.

In broker's action for commission for selling land, evidence *held* to support a recovery.

2. Brokers 🔑63(2)—Right to Commission—Contract—"Consummate."

Where the owner of land, on receiving an inquiry from realty brokers in the interest of a prospective purchaser, wrote the brokers stating his terms, and that he would pay the regular commission of 5 per cent. on the sale, "when the same is consummated," though "consummate" means to bring to completion, to finish, to perfect, to achieve, the brokers' commission was earned, though completion of the sale was prevented by failure of perfect title or by the mere will of the owner; the purchaser having been ready, willing, and able to meet his terms.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Consummate.]

Department 2. Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by W. J. Purcell against Emil Firth. From judgment for plaintiff, and order denying his motion for new trial, defendant appeals. Judgment and order affirmed.

Sheldon Borden and Richard J. Culver, both of Los Angeles, for appellant. Conkling & Brown and Eshleman & Swing, all of El Centro, for respondent.

MELVIN, J. W. J. Purcell, as assignee of Purcell-Sargent Land Company (a copartnership), sued successfully for a commission alleged to have been earned under a contract for the sale of real estate. Defendant appeals from the judgment and from an order denying his motion for a new trial.

It appears from the testimony that L. J. Rose, desiring to purchase a rancho in Imperial county known as "tract 85, township 15 south, range 15 east, S. B. M.," inquired of Purcell-Sargent Land Company regarding the price for which the property could be purchased. The land belonged to Emil Firth, a resident of Los Angeles. L. J. Rose, the prospective purchaser, was living in San Diego. The real estate agents resided in El Centro, Imperial county. On receiving the request for information regarding the land, Mr. Sargent, one of the partners, telephoned to Mr. Firth, who said he would accept $140 per acre for the ranch upon certain terms. When this information was communicated to Mr. Rose he deposited $1,000 with the agents. Subsequently, on the same day, April 12, 1913, Mr. Firth sent a telegram to the agents and also a letter. The following quotations from the latter writing give the terms of the proposed sale:

"Supplementing our telephone conversation, I enclose herewith copy of a night letter which I am sending you tonight, and which I herewith confirm.

"'Will take for tract eighty five forty-four thousand eight hundred dollars on terms of seventy five hundred cash, eighty six hundred fifty dollars one year, eighty six hundred fifty dollars two years, subject mortgage of twenty thousand dollars, as per phone. See letter mailed today. Wire if offer is accepted.'

"As stated in the message, I will take $44,800 or $140 per acre for the 320 acres, * * * on the following terms: $7,500 cash; $8,650 on or before one year and $8,650 on or before two years, with 7% interest payable semiannually, to be evidenced by notes and secured by trust deed on said property.

"I will pay you the regular commission of 5% on the sale when the same is consummated.

"My price on the land is $150 per acre, and this offer is made subject to immediate acceptance only. If you make the sale, have the purchaser deposit 10% of the purchase price, or all of the first payment, in the First National

Bank in escrow, and have the bank wire me to that effect."

The letter also described in detail a mortgage on the land for $20,000 which the purchaser would have to assume in case a sale should be made. The sum of $1,000 paid by Mr. Rose before the receipt of the writings was turned over to the First National Bank, the escrow holder named in the letter from the owner of the land. This payment was made on the 14th of April, 1913, and appellant insists (while respondent denies) that the remaining $6,500 necessary to make up the sum of $7,500 specified in the letter as the amount of the first payment was never deposited with the bank in compliance with the contract. This contention of appellant is without merit. It is true that for some time the sum of $1,000 was all the money that the bank had received on behalf of Mr. Rose, but this was known to Mr. Firth, who made no objection, until the deficiency had been made up. Mr. Firth had deposited his deed in escrow as promised. In his letter to the bank dated April 17, 1913, he wrote, after giving his escrow instructions:

> "If you cannot comply with the foregoing instructions, please return all papers, together with $1,000 deposited with you by Mr. Rose for my account, less expense."

This, according to respondent, amounted to a waiver of any failure strictly to perform on the part of L. J. Rose, but in truth no waiver was necessary as no particular time had been fixed for the payment of the first installment. In a letter to the Purcell-Sargent Land Company, dated April 30, 1913, defendant did mention the fact that the amount deposited was not in compliance with the terms of the proposed sale, but he did not withdraw from the transaction at that time and indeed when he wrote the letter of April 30th the entire amount had been placed in the hands of the escrow holder and there it remained until after Mr. Firth had ordered that all of the papers be returned to him. Before defendant's repudiation of the agreement, Mr. Rose and his wife had executed and delivered to Mr. Firth's escrow agent the trust deed and notes necessary to carry out the purchaser's part of the agreement. The buyer was ready, able, and willing, as the court was justified in concluding from the evidence, to accept defendant's deed and to take the land subject to the mortgage. He entered upon the property and expended a considerable sum in preparing a part of the land for the planting of crops, but he abandoned further work of this sort when he discovered, through an abstract company's report, that there was an outstanding unrecorded lease to the land which would not expire until the middle of June, 1913. This cloud on the title had not been disclosed by the vendor in his letter setting forth the terms upon which he would dispose of the property. There was also a pending suit against Henderson, the lessee, by the owner, to foreclose a chattel mortgage, and the abstract company refused to certify a clear title because in the pleadings in that case the unrecorded lease was referred to. While it does not clearly appear whether or not Mr. Firth's attention was called to the specific objection to the title subject to the lease, by his letters to the bank dated May 3 and May 8, 1913, he declared that he would not complete the sale unless Mr. Rose was willing to take the land with such title as he was able to convey. That there was objection to the title he did know; that he had failed to disclose the existence of the lease in his letter to plaintiff's assignor was undoubtedly true; and the court was justified in believing that he had no intention of clearing the title.

[1] Under the foregoing facts, the court properly found that plaintiff's assignor in pursuance of its agreement did find and procure a buyer ready, willing, and able to purchase the property on the terms and conditions fixed by the owner, and that therefore the commission had been earned.

[2] There is no force in appellant's contention that the commission was to be paid only upon the passing and recording of a deed from Firth to Rose. Great stress is laid by appellant's counsel upon the language in the letter to the land company, "I will pay you the regular commission of 5% on the sale when the same is consummated." It is learnedly argued that since the word "consummate" means "to bring to completion, to finish, to perfect, to achieve," there could be no fee earned by the agent until the bargain had been executed beyond recall by both parties to the agreement. It is cheerfully conceded that ordinarily an agent earns the fee when he brings to the seller a purchaser willing and able to accept the offered transfer upon the stipulated terms, but counsel say that this is quite different from the usual contract. To this respondent's representatives reply that the words "regular commission" impart a promise to pay when the ordinary services for which real estate agents are hired have been performed. There can be no doubt that contracts may be and frequently are executed by the terms of which a real estate agent's commission is made to depend upon the actual sale of the property involved. We think that the contract before us, however, fairly interpreted, is not the sort of agreement which appellant would have us find it to be, but that it is a broker's and his client's usual arrangement for the payment of the former's compensation for securing a desirable buyer. It greatly resembles the writings considered by the District Court of Appeal in Shepherd-Teague Co. v. Hermann, 12 Cal. App. 394, 107 Pac. 622. The agent's claim in that case was based upon two written instruments executed by the defendant, in one of which the payment of a commission is promised "in the event this

exchange is made" and in a modifying document a definite sum of money is specified as the amount to be paid "in the event the trade is consummated." No exchange of properties ever took place, yet the District Court of Appeal held that the agreement was the usual one between the intending seller of real property and his broker, such as is described and analyzed in such cases as Phelps v. Prusch, 83 Cal. 627, 23 Pac. 1111. It was justly decided that the language of the agent's authorization must be read in the light of the evident purpose of employing him, which was the securing of a valid and binding acceptance of his principal's offer; that having done this he had performed the only consummation within his power; and that the final consummation involved in the exchange of deeds was one over which the plaintiff had no control. In the case at bar the agent had not only procured a purchaser, but that buyer had partially executed the agreement of sale by meeting all of the proposals contained in the instructions of the intending seller to the holder of the documents in escrow. Clearly the fee had been earned.

Whether the sale was prevented by the failure of perfect title or by the mere will of the vendor makes no difference. In either case the compensation had been earned by the agent. Smith v. Schiele, 93 Cal. 144, 28 Pac. 857; Phelan v. Gardner, 43 Cal. 306–311; Justy v. Erro, 16 Cal. App. 519–522, 117 Pac. 575; Neilson v. Lee, 60 Cal. 555; Stanton v. Carnahan, 15 Cal. App. 527–529, 115 Pac. 339.

No other alleged errors merit discussion.

The judgment and order are affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

(175 Cal. 771)

PALM v. PLANADA DEVELOPMENT CORP. (Sac. 2302.)

(Supreme Court of California. Aug. 28, 1917.)

1. Appeal and Error 🔑1151(2)—Amount of Judgment—Reduction.

In an action on a common count for work and labor performed, a judgment for plaintiff for $20 more than was pleaded or proved must be reduced by such amount on appeal.

2. Stipulations 🔑14(12)—Construction.

In an action on a contract, plaintiff charged that defendant was bound to furnish plaintiff with $3,500 worth of work, and it only furnished work amounting to $3,106.62 to plaintiff's damage in the sum of $393.38. The court found that $493.38 was the difference between the amount of work which defendant was to furnish and the value of that which it furnished, and that such amount was stipulated by defendant's counsel to be the amount of the difference. The stipulation was not one to the effect that defendant had furnished only $3,006.62 worth of work, but was simply a stipulation that plaintiff "was entitled to receive" that sum for work done. *Held*, that the finding was not warranted.

3. Damages 🔑62(3)—Breach of Contract—Amount—Statute.

Under Civ. Code, § 3300, declaring that for breach of contract the measure of damages is the amount which will compensate for all detriment proximately caused thereby, and section 3358, declaring that no one can recover greater damages for a breach than he might have gained by the full performance, plaintiff could not recover $1,000 for time lost while waiting for defendant to perform his contract to furnish him work amounting to $3,500, on a showing that during that time he was obliged to refuse other offers for work which would have brought him a profit of more than $1,000.

In Bank. Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by A. Palm against the Planada Development Corporation. Judgment for plaintiff, and defendant appeals. Modified, and affirmed.

Flint & Jutten and H. S. Mackay, Jr., all of Los Angeles, for appellant. Farrar & Mahon, of Merced, for respondent.

HENSHAW, J. Plaintiff's complaint charged upon three causes of action. The following statement of them is sufficient for the consideration here to be had: Plaintiff had entered into a written agreement with defendant's predecessor, under which he was to dig for it a well a thousand feet deep, if necessary, to secure a flow of water satisfactory to defendant's predecessor. Thereafter defendant and plaintiff entered into an agreement substituted for the earlier one, whereby it was contemplated that plaintiff, instead of digging one well of a thousand feet depth, "will undertake the drilling of shallow wells * * * until the amount of $3,500 that would have become due and payable for aforesaid one thousand foot well shall have been made up." In his first cause of action plaintiff alleged that he had in the matter of digging these wells done work for which he had not been wholly paid. Upon the trial of this cause the court found that there was due to plaintiff for work thus actually performed the sum of $216.62, and this determination is accepted without question by appellant.

[1] The second cause of action was in effect a common count for $78.99 for work and labor performed by plaintiff in repairing a pump for defendant. This cause was somewhat inartificially stated. However, sufficient was alleged to pass general demurrer. Trial was had upon it, and the court found thereon. But in so finding it gave a judgment for $20 more than was pleaded or proved. The judgment must be reduced by this amount.

[2] The third cause of action charged in effect that defendant was bound, under its contract, to furnish plaintiff with $3,500 worth of work, but that in fact "plaintiff was only furnished by defendant sufficient work to aggregate to him the sum of $3,106.62." It is further alleged that by rea-

son of this refusal plaintiff suffered damage: First, in the sum of $393.38; and, second, "in the further sum of $1,000 for time lost by plaintiff while waiting for defendant to furnish to plaintiff work sufficient to enable him, the said plaintiff, to perform the conditions of said contract by plaintiff thereunder to be performed." The court found that $493.38 was the difference between $3,500, the amount in value of the work which defendant was to furnish plaintiff, and the value of the amount of work which defendant actually did permit plaintiff to perform, and the findings declare that this amount "was stipulated by counsel for defendant in open court to be the exact amount of said difference." It will be remembered that the complaint itself charged this difference as being $393.38. The stipulation to which the court thus makes reference does not bear out the court's statement of its purport and effect. It was not a stipulation that defendant had furnished only $3,006.62 worth of work, but it was simply a stipulation that "the plaintiff was entitled to receive the sum of $3,006.62 for his work in digging or drilling three wells." This stipulation was made in reference to the trial of the first cause of action, and it is a stipulation only as to the amount which the plaintiff "was entitled to receive," and not at all as to the amount of value of the work which defendant had furnished. For aught that appears to the contrary, the amount which the plaintiff was entitled to receive might have been materially reduced by set-offs adjusted between the parties during the progress of the work. Clearly defendant is not bound by this stipulation in the trial of the third cause of action, and the only evidence upon the matter is that supporting plaintiff's pleading to the effect that that amount was $393.38. The court allowed four-fifths of the amount, or 80 per cent. of it, presumably as profits which would have accrued to plaintiff if the work had been given him to do. Accepting this basis for an estimate of the profits, plaintiff clearly was entitled to but 80 per cent. of $393.38, or $314.68. The award of $394.70 as loss of profits should therefore be reduced to $314.68.

[3] There is no basis whatsoever for the added award of $1,000 damages "for time and work lost by plaintiff while waiting for defendant to furnish to plaintiff work sufficient to enable plaintiff to perform the conditions of his contract," and it is incomprehensible how the court, in view of the plain language of our Code, should have granted it. The evidence of plaintiff was that it would have taken him three months, or in other words that he would have had three months' additional work, if defendant had given him added work to measure up in value to the $3,500; that he waited around for three weeks, after finishing the last well, expecting to receive this new employment; that during this time he was obliged to refuse offers to dig wells elsewhere; specifically to dig four wells of about 300 feet depth, upon each of which he would have made $800 or $900, and to dig another well of greater depth, for which he was to receive 80 acres of land. He further testified that his actual damages were vastly greater than $1,000, as plainly they would have been (if in point of law they were damages at all), since each of the four wells would have brought him as profit $800 or $900. Manifestly if such evidence is admissible to swell the damages for a breach of contract, he could have impoverished, and indeed bankrupted, the defendant by merely increasing the showing of the working contracts which he could have taken. Our law, however, contemplates no such measure of damage, and, indeed, distinctly forbids it. The Civil Code (section 3300) declares that for the breach of an obligation arising on contract, the measure of damages is the amount which will compensate the party aggrieved for all detriment proximately caused thereby; and that there may be no manner of doubt as to the interpretation to be put upon this language, section 3358 of the same Code further declares that:

> "Notwithstanding the provisions of this chapter, no person can recover a greater amount in damages for the breach of an obligation than he could have gained by the full performance thereof on both sides."

The exceptions to this general rule have no application to a contract such as this.

It follows herefrom that from the judgment given, the award of $1,000 damages must be stricken out. The award of $493.38 must be reduced to $314.68. The award of $98.99 must be reduced to $78.99. So modified and reduced, the judgment will stand affirmed, and defendant will recover its costs on this appeal.

We concur: ANGELLOTTI, C. J.; MELVIN, J.; LORIGAN, J.; SHAW, J.; SLOSS, J.

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175 Cal. 785

PEOPLE v. FRYER. (Cr. 2061.)

(Supreme Court of California. Aug. 28, 1917. Rehearing Denied Sept. 27, 1917.)

1. CRIMINAL LAW ⟹42 — IMMUNITY — SELF-INCRIMINATION—STATUTE.

Under Pen. Code, § 1324, providing for immunity to a witness whose testimony may incriminate himself where defendant, charged with murder, had been called as a witness on preliminary examination of another, and had been sworn and testified, incriminating himself, without a word of instruction as to his rights, the statute not having been read to him, defendant was thereafter immune from prosecution.

2. STATUTES ⟹118(1)—TITLE—SUFFICIENCY.

The title of Pen. Code, § 1324, "An act to add a new section to the Penal Code, to be numbered section 1324, relating to testimony of witness refusing to answer on the ground that such answer will incriminate himself" (St. 1911, p. 485), is sufficient, though it does not contain anything about the granting of immunity or anything about when the state will refuse to prosecute a person charged with crime.

Angelotti, C. J., and Lawlor and Lorigan, JJ., dissenting.

In Bank. Appeal from Superior Court, Trinity County; James W. Bartlett, Judge.

Loren A. Fryer was convicted of murder, and from the judgment and an order denying his motion for new trial, he appeals. Judgment and order reversed.

PER CURIAM. Due to a division of opinion of the justices of the Third appellate district, this appeal was transferred to this court for decision. With the records of the case came the following opinion of Chipman, Presiding Justice, which is adopted as the opinion of this court and for the reasons therein given the judgment and order appealed from are reversed:

"Defendant was convicted of the murder in the first degree of one Lem Sing, and was sentenced to life imprisonment. He appeals from the judgment and from the order denying his motion for a new trial.

"The deceased was a Chinaman engaged in placer mining near the town of Weaverville, Trinity county. The evidence showed that deceased was wantonly murdered by defendant for the purposes of robbery. It is not contended that the evidence was insufficient to justify the verdict.

"It appears that one Ray Glenn was complained against for the murder of this same person, Lem Sing, and that at his preliminary examination this defendant was called as a witness, sworn, and examined, and he then and there testified to facts, in response to questions propounded by the district attorney, which incriminated himself; that previous to his testifying, he was not instructed as to his constitutional rights in any manner, nor was section 1324 of the Penal Code read to him by any person.

"The trial of the cause was set for March 20, 1916, and on that day before the examination and impanelment of the jury, defendant's counsel moved to dismiss the information on the grounds that at the preliminary examination of said Ray Glenn, this defendant was called as a witness and was compelled to and did give incriminating evidence against himself, and that the provisions of section 1324 of the Penal Code were not complied with, the same being a renewal of the motion previously made on February 14, 1916, at the arraignment of defendant. After the verdict, defendant moved in arrest of judgment on the ground that the court had no jurisdiction of the offense charged; also moved for a new trial on all the grounds above stated. The motions were denied.

"At the hearing of defendant's motion made at the commencement of the trial, defendant testified that he was 16 years old; that before being called as a witness at the preliminary examination of Ray Glenn, he had several conversations with the district attorney and also just before he was called to testify.

"'Q. Did he, at any of these conversations, or at that conversation, state to you anything in regard to your rights as a witness in this matter? A. No, sir. Q. Did he give you any instructions or advice in reference to your testifying in that case? A. Well, he gave me a little advice—what I would call advice.

"'Mr. Threshie: Q. Previous to your testifying and at the last consultation you had with the district attorney, what did you say in reference to that, if anything? A. I told him I wouldn't appear against Ray. Q. What did he say? A. He told me I didn't know what that meant. Q. What 'appear' meant? A. Yes, sir. Q. What did you say? A. I told him I did. Q. Did he at that time instruct you in any manner as to your rights under the law, as a witness? A. No, sir. Q. At the preliminary hearing of Ray Glenn who called you as a witness—who came after you? A. Mr. Bigelow (the sheriff). Q. What did he do? A. He came down there and unlocked the door and brought me up. Q. Did he say to you what you were wanted for? A. No, sir. * * * Q. When you were in the courtroom, I will ask you whether or not you were called as a witness and placed upon the witness stand? A. I was. Q. At that time did you receive any instructions from the district attorney, the magistrate holding the hearing, or anybody in regard to your rights? A. No, sir. Q. Did you or did you not then testify in the case? A. I did.'

"The evidence taken at the Glenn preliminary was introduced. The testimony there given by defendant Fryer was that he personally killed the deceased in pursuance of a scheme concocted by him and Glenn to rob the mine of deceased and other mines. After the people had rested, Sheriff Bigelow was recalled by Glenn's attorney. He had previously testified that Fryer had made a statement to him that Glenn had proposed to Fryer to rob certain mines, including deceased's mine. On his recall, Bigelow testified that 'he had conversation with him (Fryer) a good many times,' that he had a conversation with him shortly before Glenn's preliminary examination: 'Q. What was that conversation? A. Well, I was out working on the books; and I let him out for exercise, and he rapped on the window and called me to the door and said he had decided to tell the truth, and I said "All right," and he said "Mr. Glenn was not over when this robbery or murder," I forget which way he worded it—"was committed; I did it myself." Q. Did he say anything in connection at that as to whether or not Mr. Glenn was connected with it in any way? A. He said he went over to the mine in the morning, and the Chinaman ordered him out of the mine, and I asked him why the Chinaman ordered him out of the mine, and he said he didn't know. I was sitting down, and he said, "He made a rush at me and hit me with the flat part of the shovel, and my head has been sore ever since," and he knocked him out for a while and when he came to, he said: "I will just come back and get you, you Chinese son of a bitch."' Witness further testified: 'The boy told me in the morning, and then again he told me different. He contradicted his story again in the afternoon.' Later, as we have seen, Fryer testified at the Glenn preliminary implicating Glenn. Among other stories told by him was one—that a number of Chinamen, 'had hired him to kill Lem Sing.' This was substantially all the evidence taken at the Glenn preliminary. There was then introduced in support of the motion the evidence taken at Fryer's preliminary examination, Mr. Threshie appearing for defendant. Defendant did not testify at his preliminary hearing. The testimony consisted in part of statements made by defendant to the district attorney, the sheriff, and his deputy, in which he narrated with particularity his movements on the day of the murder and when and how and why he killed the deceased.

"It appeared that defendant was taken into custody about 9 o'clock on the morning of November 12th, three days after the killing. Some facts had previously been elicited pointing towards defendant as having some knowledge of or connection with the crime. On this morning, after having made some statement to the district attorney and sheriff concerning his movements on November 9th, stating, among other things, that he had been out hunting on that morning and was in the neighborhood of the Lem Sing mine, he consented to go with the officers and show them the route he traveled. This he did, and it corresponded to a particular point where he crossed a gulch, with the tracks which the officers had followed by back-tracking from the point near where the body of Lem Sing was found. At this point of divergence there were no tracks found leading in the direction which defendant said he had taken, but the trail from that point led to the place from which he shot deceased. There was evidence that the tracks made in the snow corresponded with the tracks made by the shoes defendant was wearing as was shown by applying them to the tracks with defendant's consent. The district attorney learned before the information was filed that defendant was seen by a schoolgirl on November 9th going towards the Lem Sing mine with a gun.

"The complaint in the justice's court against Fryer was filed on November 20, 1915, and his preliminary examination did not take place until January 18, 1916. The complaint against Glenn was filed November 22d, and his preliminary examination was held on December 6, 1915. The information against Fryer was filed February 7, 1916.

"From the foregoing it will appear that defendant, while in jail upon the charge of murder and in the custody of the sheriff, was taken before the magistrate without counsel to testify in a case wherein Ray Glenn was charged by a complaint duly filed with having murdered this same Lem Sing. There was then on file in the justice's court a complaint against Fryer for the same crime. But the information against Fryer was not filed until the following February. It does not appear when an information was filed against Glenn.

"The principal, indeed the only, witness whose testimony in any way implicated Glenn was the defendant Fryer. There can be no doubt but that Glenn was held to answer upon the testimony of Fryer. And the question is fairly presented whether, under the provisions of section 1324 of the Penal Code, the motion should have been granted. That the exact situation of Fryer at the time he was called to testify may be known, we quote from the record of the Glenn preliminary examination:

" 'Court: Are you ready to proceed, gentlemen?

" 'Mr. Reid: Yes, sir. We ask that Mr. Woodbury be appointed as reporter in this case.

" 'Mr. Given: No objection at all your honor. (Mr. Woodbury was sworn.)

" 'Mr. Reid: The court will inform the defendant (Glenn) as to his rights as to counsel and so forth.

" 'Mr. Given: That has already been done. There is no use taking up time doing it any further. I represent the defendant.

" 'Mr. Reid: Call Loren Fryer.

" 'Court: You do solemnly swear the testimony you will give in the case now pending before this court, wherein the people of the state of California is plaintiff and Ray Glenn is defendant, shall be the truth, the whole truth, and nothing but the truth, so help you God.

" 'Loren Allen Fryer: Yes, sir.

" 'Mr. Reid: What is your name? A. Loren Allen Fryer. Q. How old are you? A. I will be 16 on the 21st of December.'

"The witness, in response to questions, then narrated the story of his crime in response to questions put by the district attorney, and Glenn's connection with it. We have in an earlier part of this opinion quoted from the testimony of defendant given at the hearing of the motion which is undisputed. He there states that he had a conversation with the district attorney the morning of the preliminary hearing of Glenn or the evening before, and that neither then nor when he was called before the magistrate was he given any advice or instructions as to his rights as a witness or with reference to his testifying. As having some possible bearing upon the question, it may be stated further that on November 13, 1915, Fryer made a statement in the district attorney's office in the presence of the district attorney, W. R. Bigelow (sheriff), Harvey Bigelow, Loren Allen Fryer, and Frank I. Woodbury (stenographer). This statement was introduced at the Fryer preliminary, but was objected to by defendant's counsel on the ground that no proper foundation was laid for it. In this statement or confession, Fryer narrated the circumstances of the killing; claimed that he was hired to do it by some Chinamen, but did not in any way implicate them.

"We made an effort to ascertain the scope of section 1324, Penal Code, in People v. Knowles, 27 Cal. App. 498, 155 Pac. 137. In that case, Knowles was one of a number of persons being investigated on the charge of offering a bribe to an officer which was alleged to have been received by that officer in connection with the granting of a certain liquor license. He was called before the grand jury and sworn and examined. Before testifying, he was told by the district attorney the purpose of the investigation and that he, Knowles, was one of the parties being investigated. He was cautioned in certain particulars, but, as we held, not in conformity with the provisions of section 1324, and this section was not read to him. After being thus cautioned he was asked if he cared to make any statement to the grand jury in reference to the matter, and answered: 'I do.' It was conceded that Knowles' testimony did, in fact, incriminate himself as well as the others charged in the indictment, and was the testimony on which, in part, the indictment was found.

"The construction given the section in the Knowles' Case seemed to us the correct one, and the writer of this opinion still adheres to it, although, if adopted as the law in the present case, it will lead to the freedom of a confessed murderer. The responsibility for such a regrettable result lies not necessarily with the statute, but in the failure to follow its mandates in conducting the proceedings against these two men. The purpose of the act is to compel a confederate in the commission of crime to testify against his co-confederates, which could not be done under the law as it stood prior to the enactment of this section. But to make this possible without violating the Constitution, the act extended complete immunity to the witness as a reward for his service to the state. In putting the section into practice it rests with the district attorney to decide which one of the confederates, if either, is to be made a witness, and having so decided and so acted, wisely or unwisely, he cannot deprive this witness of the fruits of such decision.

"Beyond question, the testimony given by defendant was against another person who, with the defendant, was charged with the same offense and was given in a 'trial, proceeding, or lawful investigation or judicial proceeding.' We are also satisfied that the testimony was not given 'voluntarily.' It is true that defendant failed 'to ask to be excused from testifying,' and neither did he 'demand that he be excused from testifying.' Notwithstanding this fact, however, the section provides that 'any person shall be deemed to have asked to be excused from testifying * * * unless, before any testimony is given * * * the judge, foreman or other person presiding at such trial, hearing, proceeding, or investigation, shall distinctly read this section of this Code to such witness.' If this provision is to be given any force, it must mean that whether or not the witness 'demands that he be excused' or 'asks to be excused from testifying,' the statute has made the demand or request for him in providing that he 'shall be deemed to have asked to be excused from testifying * * * unless before any testimony is given * * * by such witness, the judge * * * shall distinctly read this section of this Code to such witness.'

[1] "The section provides that the witness shall not be exempt from 'indictment, presentment by information, prosecution or punishment for the offense with reference to which he may have testified as aforesaid, * * * where such person so testifying * * * does so voluntarily.' The section also provides that he shall not be exempt 'when such person so testifying or so producing evidence fails to ask to be excused from testifying or so producing evidence.' But if, as the statute says, such person 'is deemed to have asked to be excused from testifying' unless the section is read to him before testifying, his silence or failure to ask to be excused cannot be taken as bringing him within the class of persons who testify 'voluntarily.' The section is a long one, and is set out fully in the Knowles Case. In that case there was some attempt made to inform the witness of his rights. In the present case the witness, a mere boy, was taken from his cell in the jail and called to the witness stand, was sworn, and testified without a word of instruction as to his rights and the section was not read to him. We are unable to distinguish this case from the Knowles' Case and must hold, as there, that defendant earned his right to immunity, and his motion should have been granted.

"The Attorney General urges the application of section 4½, art. 6, of the Constitution, claiming that as defendant's testimony at the Glenn preliminary was not used at defendant's trial 'there is nothing upon which to presume prejudicial error' and that 'under the present practice, the duty is cast upon defendant of clearly showing injury to the extent of resulting in a miscarriage of justice.' The argument proceeds upon the assumption that defendant was undoubtedly shown to be guilty, and hence there could not possibly have been a miscarriage of justice in bringing him to trial. But section 1324 is based on the assumption of the guilt of the person compelled to testify, and its purpose is to bring others to the bar of justice by granting immunity to one of the confederates. The promise made to him is that he shall not be put to trial at all. As was said in State v. Nowell, 58 N. H. 314: 'His legal immunity from prosecution was equivalent to his legal innocence of the crime disclosed by his testimony.' To hold that section 4½ applies would render the statute inoperative for no one could be expected to incriminate himself if he knew he was liable to be tried for the crime he confesses, and that the statutory promise was but a scrap of paper of no binding force upon the state.

"The Attorney General attacks the section as in violation of several articles and sections of the Constitution, and among other grounds that the title to the act is fatally deficient. We are not inclined to enter upon an extended discussion of this point. The general objection to this kind of legislation as unconstitutional has been before the court quite frequently, and has, as we believe, been sustained by the weight of authority. We content ourselves with the following citations: Ex parte Clarke, 103 Cal. 352, 37 Pac. 230; Ex parte Cohen, 104 Cal. 524, 38 Pac. 364, 26 L. R. A. 423, 43 Am. St. Rep. 127; Counselman v. Hitchcock, 142 U. S. 547, 12 Sup. Ct. 195, 35 L. Ed. 1110; In re Buskett, 106 Mo. 602, 17 S. W. 753, 14 L. R. A. 407, 27 Am. St. Rep. 378, and note; State v. Nowell, 58 N. H. 314.

[2] "The title of the act is as follows: 'An act to add a new section to the Penal Code, to be numbered section 1324, relating to testimony of witness refusing to answer on the ground that such answers will incriminate himself.' It is said that the title does not contain a word about the granting of immunity to a witness nor anything about when the state will refuse to 'prosecute a person charged with crime' and fails to support the second and third subdivisions of the section. Without going into the matter in detail, it seems to us that the question of immunity to a witness whose testimony may incriminate himself would naturally arise and become a part of an act dealing with the subject mentioned in the title, and so also the other provisions found in the act which seem to us to be germane to the title. 'It was never expected that the title to an act should be an index to all of its provisions, and so long as the provisions themselves are cognate, attingent, and germane to the subject-matter of the title, no violence is done to the Constitution' (Mr. Justice Henshaw, in Ex parte Hallawell, 155 Cal. 112, 99 Pac. 490), and the court deemed it proper to say 'that the constitutional provision invoked was not designated as a loophole of escape from, or a means for the destruction of legitimate legislation.' See Ex parte Liddell, 93 Cal. 633, 29 Pac. 251; note to Treadwell's Annotated Constitution, page 243, under article 4, § 24, of the Constitution.

"We do not think the court would be warranted in forcing a construction of the statute which would justify the ruling of the court in order to prevent what otherwise would lead to a miscarriage of justice, for the cases all hold that this class of legislation is to be liberally construed."

The judgment and order are reversed.

ANGELLOTTI, C. J. (dissenting). I dissent. I agree with Mr. Justice Hart of the District Court of Appeal as to the construction that should be given to section 1324, Penal Code, and concur generally in the opinion written by him and concurred in by Mr. Justice Burnett. That opinion is as follows:

"I am not prepared to agree with the conclusion of the Presiding Justice as to the construction of section 1324 of the Penal Code. It is readily to be conceded that the language of that section as a whole is singularly ambiguous, and the real intent of the statute correspondingly obscure. Indeed, the several provisions of the section appear to be inconsistent with themselves; and for this very reason the language of the section should not be too literally followed, but given a construction which, it seems to me, will discover what may well be said to be the true intent of the statute—a consideration not wholly without support from the language of the section and under which its primary and important purpose may as well be effectuated as by the construction given it by my Associate, and at the same time afford less reason for apprehending from its practical application serious consequences to the public and society. So much of the section as is necessary for my purposes here reads as follows:

"'No * * * person shall be exempt from indictment, presentment by information, prosecution or punishment for the offense with reference to which he may have testified as aforesaid, or for or on account of any transaction, matter or thing concerning which he may have testified as aforesaid, or produced evidence, documentary or otherwise, where such person so testifying or so producing evidence, documentary or otherwise, does so voluntarily, or when such person so testifying or so * * * fails to ask to be excused from testifying or so producing evidence, on the ground that his testimony or such evidence, documentary or otherwise, may incriminate himself; but in all such cases, the testimony or evidence, documentary or otherwise, so given may be used in any criminal prosecution or proceeding against the person so testifying or producing such evidence, documentary or otherwise.

"'Any person shall be deemed to have asked to be excused from testifying or producing evidence, documentary or otherwise, under this section, unless before any testimony is given or evidence, documentary or otherwise, is produced by such a witness, the judge, foreman or other person presiding at such trial, hearing, proceeding or investigation, shall distinctly read this section of this code to such witness, and the form of the objection by the witness shall be immaterial, if he in substance makes objection that his testimony or the production of such evidence, documentary or otherwise, may incriminate himself, and he shall not be obliged to object to each question, but one objection shall be sufficient to protect such witness from prosecution for any offense concerning which he may testify, or for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, upon such trial, hearing, proceeding or investigation.'

"A careful examination of the section will, I think, show that there are three propositions contained therein which cannot be disputed, to wit: (1) That immunity will not be granted to one who voluntarily gives testimony which incriminates or tends to incriminate himself; (2) that such immunity will not be granted unless the witness asks to be excused; (3) that where he desires to be excused he must make an objection in some form to the giving of the testimony.

"Very clearly, if a witness voluntarily testifies, the provision of the statute that he may gain immunity by asking to be excused has no application. Voluntarily testifying and testifying only after asking to be excused are obviously two entirely different propositions. If a witness testifies only after he has asked or demanded to be excused, he is not a voluntary witness; for he may not even then be excused from testifying. On the contrary, he is compelled to testify whether he wants to or not, but, having asked to be excused, he may not be prosecuted for the offense or charge to which his testimony so given relates. But the question arises: How and by whom is it to be made known that he does not appear as a voluntary witness? I think that the reply to this question is to be found in the latter part of the section, where language is used plainly implying that the witness must himself make it known, in some manner or form, in the proceeding in which he is called as a witness that he objects to testifying in said proceeding, because his testimony so given will incriminate him. Not only does this appear to be true, but the same language of the section to my mind implies that, unlike the case where extrajudicial incriminatory statements are sought to be shown against one accused on trial, the onus or burden is upon the witness to show that he made timely objection to giving the testimony, otherwise his testimony will be treated as having been voluntarily given. This must be the correct view because it is not a case where his guilt is being proved, he having already admitted that he committed the crime, but a case where he is asking the favor of the law; in other words, asking immunity from prosecution, and therefore, from the consequences of his criminal act.

"But much stress is laid upon the provision of the section that where the entire section is not read to the witness, he shall be deemed to have asked to be excused; and it is said that if that provision of said section is to be given any force, it must mean that whether or not the witness 'demands that he be excused' or 'asks to be excused from testifying,' the statute has made the demand or request for him. True, the statute makes the demand or request to be excused for him, where the section is not read to the witness as prescribed; but, under my view of the section, as above indicated, the statute can make no such 'demand' or 'request,' nor, indeed, is there any occasion for the interposition of the statute in that regard, until the witness has himself objected in some manner to the giving of testimony and so disclosed that he is not a voluntary witness.

"The statute does not require nor contemplate that the witness shall specifically request to be excused. He may merely object in a general way to testifying, claiming that his testimony will incriminate him, or make any objection that will disclose that he is not on the stand as a voluntary witness. When he has made such objection, in whatever form, then, if the statute is not read to him, he will be deemed to have asked to be excused, although he may not in specific language have asked or requested or demanded to be excused.

"In conclusion, and by way of recapitulation, my view of the section is this: That no witness who, without objection in any manner or form whatsoever, takes the stand and gives testimony whereby he incriminates himself can claim immunity under the statute; that, if he would claim immunity from prosecution, he must first object or in some manner show that he is not a voluntary witness, and that until he does this, the provision presuming him to have asked to be excused, does not apply.

"It does not appear from the proceedings of the preliminary examination of his alleged confederate relating to his testimony that he objected to giving testimony therein; and, under the provision of said section implying that it was his duty to so object if he would be entitled to the immunity guaranteed by said section, this court may presume that he made no objection, and was therefore a voluntary witness.

"I therefore think that the judgment and the order appealed from ought to be affirmed."

We concur: LAWLOR, J.; LORIGAN, J.

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175 Cal. 774

CROSE v. CITY COUNCIL OF CITY OF LOS ANGELES et al. (L. A. 4873.)

(Supreme Court of California. Aug. 28, 1917.)

1. MUNICIPAL CORPORATIONS ⚷40 — "BOROUGH"—CONSTITUTION.

A "borough," within Const. art. 11, § 8, providing that it shall be competent in any city charter to provide for the division of the city into boroughs, etc., is one of the units composing a territorial fraction of a city, and having certain powers with reference to local concerns.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Borough.]

2. MUNICIPAL CORPORATIONS ⚷40 — BOROUGH GOVERNMENT—CONSTITUTION.

Under Const. art. 11, § 8, providing that it shall be competent in any city charter to provide for the division of the city or city and county governed thereby into boroughs, etc., the right of borough government cannot be extended to a part of the territory of a city and denied to another portion, as borough government, when established, must extend over all the municipality.

In Bank. Petition for writ of mandate by A. J. Crose against the City Council of the City of Los Angeles, and M. F. Betkouski and others, members of said city council. On demurrer to the petition. Demurrer sustained, and alternative writ dismissed.

Carter & Torchia, of Los Angeles, for petitioner. Albert Lee Stephens, City Atty., of Los Angeles, for defendants. McClure & Turner, of Los Angeles, amici curiæ.

MELVIN, J. This matter comes before us on a demurrer to the petition for a writ of mandate.

Petitioner, who is a resident and an elector within that part of the city of Los Angeles formerly known as Wilmington, asks that the council of the city of Los Angeles be commanded to call an election as prayed in a petition by which the signers requested that an election should be had within a certain district in said city to determine whether or not such territory should have a borough government and to elect the trustees of such borough if a sufficient number of citizens should vote for the formation of such a government. The refusal of the city council is based upon the belief of the members of that body that they are without power and authority to call such an election. The questions involved are purely legal, and may be finally determined therefore upon this general demurrer.

Los Angeles is a city having a freeholders' charter. In 1909 this charter was amended by the insertion of a provision for the establishment and government of boroughs within a limited area of the city. When this amendment to the charter was made there was no provision in the Constitution of California for the creation of borough governments. Since that time through the Constitution by amendment the people have formally recognized the right to establish boroughs. Section 8 of article 11 of the Constitution in its present form is in part as follows:

> "It shall be competent in any charter to provide for the division of the city or city and county governed thereby into boroughs or districts, and to provide that each such borough or district may exercise such general or special municipal powers, and to be administered in such manner, as may be provided for each such borough or district in the charter of the city or city and county."

The provisions relative to formation of boroughs are found in section 258 of article 25 of the charter of Los Angeles which provides that a borough may be established in any territory annexed to the city of Los Angeles after the adoption of the amendment, such borough to contain not less than 500 inhabitants; that the government thereof shall be vested in a board of trustees of five members to be elected by the qualified electors of the borough and other officers to be appointed by the trustees pursuant to the terms of the charter; that whenever a petition shall be presented to the city council of the city of Los Angeles signed by at least 50 per cent. of the qualified voters residing in such territory, computed upon the number of votes cast at the last state election, describing the boundaries and stating the selected name of the proposed borough "and praying for the establishment therein of a borough system of government, the city council of the city of Los Angeles must without delay submit to the voters of such territory the question whether such proposed borough shall be established, at a special election to be called and held for that purpose." These provisions are followed by requirements for the publication of notice of the election, and it is further provided that:

> "Such notice shall particularly describe the boundaries of such proposed borough; shall state the name thereof, and shall require the voters to cast ballots, which shall contain the words, 'For the Establishment of the Borough,' or 'Against the Establishment of the Borough,' or words equivalent thereto, and also the names of the persons to be voted for to fill the office of members of the board of trustees of such proposed borough."

The charter further provides that if upon the canvass of the votes cast at the election a majority are in favor of the establishment of such borough, the council shall declare it duly founded with the name thereof as stated in the petition and shall announce that the five persons receiving respectively the highest number of votes are duly elected members of the board of trustees of such borough.

It is not necessary to discuss all of the reasons suggested for sustaining the demurrer to the petition. We shall consider but one.

[1] We shall not be at pains carefully to define the word "borough," nor to follow counsel in their learned and interesting discussion of the origin and development of boroughs in England and in certain states of our Union, notably New York. It is sufficient for us to declare the obvious truth that a borough is one of the units composing a territorial fraction of a city and vested with certain powers having reference to local concerns. Petitioner insists that by the solemn constitutional provisions of 1911 and 1914 the people of this state have recognized the principle of municipal government through a system of boroughs. This is true, but we are aided little by that fact in solving the problem now before us.

[2] We have quoted above section 8 of article 11, in its present form. In 1911 this part of the Constitution made it competent in any city charter to provide "for the establishment of a borough system of government for the whole or any part of the territory of such city." Stats. 1911, p. 2179. It will be noticed that the later amendment which is now in effect contemplates a "division of the city or city and county" into boroughs; therefore the policy of the state as expressed in the Constitution is undoubtedly opposed to a system extending the right of borough government to a part of the territory of a city and denying it to another portion. The Constitution as it now stands controls the matter, and section 8 of article 11 clearly provides that borough government when estab-

lished shall extend over all, and shall not be applied to a part of a municipality. The scheme provided in the charter of the city of Los Angeles for the erection of borough governments is therefore opposed to the Constitution.

The demurrer is sustained, and the alternative writ of mandate heretofore issued is dismissed.

We concur: ANGELLOTTI, C. J.; HENSHAW, J.; LORIGAN, J.; SLOSS, J.; LAWLOR, J.

(175 Cal. 756)

PEOPLE, by WEBB, Atty. Gen., v. CALIFORNIA SAFE DEPOSIT & TRUST CO. et al. (GOLDARACENA, Intervener). (S. F. 8088.)

(Supreme Court of California. Aug. 27, 1917.)

1. Appeal and Error 🔑1097(1) — Law of Case—Holding on Former Appeal.

A holding on former appeal is binding on the Supreme Court.

2. Trusts 🔑358(1) — Following Trust Funds.

The beneficiary of a trust may follow and recover the trust funds if any property in the hands of the trustee or of those taking with notice can be identified whether as the original property of the cestui or as its product.

3. Trusts 🔑358(1) — Following Trust Funds.

Where the identity of a trust fund has been lost, the beneficiary, seeking to follow it, is relegated to the position of general creditor, and must share pro rata with the other general creditors.

4. Trusts 🔑372(1)—Mingled Funds—Presumption—Statute.

If a trustee mingles his own funds with the trust fund, and thereafter draws from time to time from the commingled mass, it will be presumed that the moneys so drawn were from his own portion of the fund, rather than from the moneys held in trust; the underlying presumption, by Code Civ. Proc. § 1963, subd. 1, being that a person is innocent of crime or wrong.

5. Banks and Banking 🔑39 — Subscriptions to Stock—Fraud—Mingled Funds—Presumption.

The doctrine that a trustee who mingles his own with trust funds and thereafter draws from the commingled mass will be presumed to draw from his own funds rather than from trust funds has no application where the trustee is such involuntarily only because it has obtained property by fraud, as in case of a bank fraudulently inducing one to subscribe for its stock and receiving payment.

In Bank. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by the People of the State of California, by U. S. Webb, Attorney General, etc., against the California Safe Deposit & Trust Company, a corporation, and others, E. De Los Magee being receiver, wherein O. M. Goldaracena intervened. From judgment granting the intervening petitioner some, but not all, of the relief claimed by him, he appeals. Affirmed.

See, also, 168 Cal. 241, 141 Pac. 1181, L. R. A. 1915A, 299; 167 Pac. 181.

Wm. M. Abbott and Wm. M. Cannon, both of San Francisco, for appellant. De Laveaga & Magee, of San Francisco, for respondent Magee.

SLOSS, J. On October 30, 1907, California Safe Deposit & Trust Company, a banking corporation, closed its doors. The bank commissioners took possession of its assets, and an action was begun, pursuant to the provisions of the statute then in force (Stats. 1903, p. 365), to have the said bank declared insolvent, and to have a receiver appointed for the purpose of liquidating its affairs. On January 14, 1908, adjudication of insolvency was made, and a receiver appointed.

On April 10, 1908, O. M. Goldaracena, the appellant herein, filed his petition, asking that the receiver be declared to hold the sum of $12,000 in trust for him, and that he recover the same, with interest. A second amended petition was subsequently filed. The court sustained the receiver's demurrer to the latter pleading, and the petitioner appealed. The appeal resulted in a reversal of the judgment entered upon the sustaining of the demurrer. People v. Cal. Safe Dep. & Trust Co., 19 Cal. App. 414, 126 Pac. 516, 520. The case went back for trial, and judgment was entered granting the petitioner some, but not all, of the relief claimed by him. His appeal from the second judgment is now before us.

[1] The allegations upon which the petitioner sought relief were, in effect, that on September 20, 1906, the California Safe Deposit & Trust Company had, by means of false and fraudulent representations, induced him to purchase 100 shares of the capital stock of said company, for the sum of $12,000, that he had not learned the falsity of the representations until shortly before beginning this action, and that he had promptly served upon the bank and the receiver his notice of rescission. He further alleged that the said sum of $12,000 paid by him remained in the possession of the bank continuously until the adjudication of insolvency, and that it thereupon passed into the hands of the receiver, who has since held the same, "and that the same can be traced and identified in his hands, and is the identical money of the petitioner." It was held on the former appeal that the petition stated a cause of action, and this holding is, of course, binding here.

When the case came to be tried, the court found in favor of petitioner's allegations with respect to fraud, discovery, and rescission. It found, however, that no part of the sum of $12,000 paid by the petitioner as the purchase price of the stock was continuously in the possession of said bank from the time of the payment until the appointment of the receiver, that the receiver did not receive any part of said sum, and that no part of it can be traced or identified into his hands. Accordingly the court concluded that petitioner was entitled to a rescission of his contract, and to an allowed claim against the bank for $11,350, being the amount paid by him for his stock, less dividends declared and paid by the bank prior to the adjudication of insolvency. The judgment was that said claim be paid in due course of administration and liquidation of the affairs of the bank by the receiver, and that the petitioner be paid the dividends theretofore paid by the receiver to other general creditors, amounting to 13⅓ per cent. with interest, and that he is entitled to receive on his claim such further dividends as may be declared and ordered paid upon common claims.

Upon this appeal the appellant insists that he was entitled to payment in full, rather than as a general or common creditor. His position is that the bank became an involuntary trustee of the $12,000 which it had obtained from him by fraud (Civ. Code, § 2224), and that he had sufficiently traced this trust fund into the hands of the receiver to be entitled to payment in preference to general creditors.

[2] It is well settled that the beneficiary of a trust may follow and recover the trust fund if any property in the hands of the trustee or of those taking with notice can be identified either as the original property of the cestui que trust, or as the product of it. Thompson's Appeal, 22 Pa. 16.

[3] Where, however, the identity of the trust fund has been lost, the beneficiary is relegated to the position of a general creditor, and must share pro rata with other general creditors. Lathrop v. Bampton, 31 Cal. 17, 89 Am. Dec. 141. The court below found that the fund claimed by petitioner could not be identified or traced into the assets going into the hands of the receiver, and the judgment is therefore clearly right, unless the appellant can establish his contention that the findings in this regard are contrary to the evidence. The record shows these facts: On September 20, 1906, the day when the bank sold this stock to the petitioner, it had on hand in its vaults the sum of $177,664.13, and on the same day it had on deposit with other banks the sum of $1,326,436.98. At no time between said 20th day of September, 1906, and the closing of the bank on October 30, 1907, did the amount of money held by the bank fall below $123,693.96. On the day when the bank closed its doors it had on hand $189,564.89 in cash, and $135,848.37 on deposit with other banks. The total deposits in the bank on September 20, 1906, were $8,507,505.07, and on October 30, 1907, $9,064,510.64. Between these two dates the deposits and withdrawals from the bank aggregated many millions of dollars; the deposits during that period amounted to more than $6,600,000, and the withdrawals about the same. Claims aggregating $331,082.60 have been presented by persons who made deposits on the last four days of the active life of the bank. Such depositors demand that the amount of their deposits be allowed as preferred claims.

The appellant insists that upon these facts the court was bound to find that the $12,000 received from him as aforesaid remained intact in the hands of the bank during the entire period intervening between the purchase of the stock and the closing of the bank, and that such fund had been identified and traced into the hands of the receiver. The argument is that since it appears that the bank had on hand at all times a sum in excess of $12,000, the amount claimed by the petitioner, it must be presumed that it retained this sum to meet his claim arising from the fraud perpetrated upon him.

[4] The argument is based upon the well-settled rule that, if a trustee mingles his own funds with the trust fund, and thereafter draws from time to time from the commingled mass, "it will be presumed that the moneys so drawn were from his own portion of the fund, rather than from the moneys held by him in trust." Elizalde v. Elizalde, 137 Cal. 634, 641, 66 Pac. 369, 70 Pac. 861; In re Hallett's Estate, L. R. 13 Ch. Div. 696; National Bank v. Insurance Co., 104 U. S. 54, 26 L. Ed. 693; Lewin on Trusts, *895. Various expressions have been used in defining the nature of the rule. In some of the cases, as pointed out by the appellant, it has been said that equity will "attribute" the withdrawals to the trustee's private account. In others, as in the Elizalde Case, above cited, it is said that the trustee will be "presumed" to have drawn his own money. In one case (Crawford County Commissioners v. Strawn, 157 Fed. 49, 84 C. C. A. 553, 15 L. R. A. [N. S.] 1100) the doctrine is explained as resting upon a "fiction." But, whatever name be given to it, the rule originates in and rests upon the underlying presumption "that a person is innocent of crime or wrong." Code Civ. Proc. § 1963, subd. 1.

[5] Has the doctrine any proper application to a case like this, where a party has fraudulently induced another to enter into a contract, and holds what he has received thereunder in trust, not by virtue of any contractual or acknowledged fiduciary relation, but merely because the law declares that he is an involuntary trustee of property obtained by fraud? Is it to be presumed that one who has obtained property fraudulently under an agreement whereby it becomes his own (subject merely to the other party's right of rescission) will, notwithstanding his acquisition and holding under a claim of ownership, keep the property intact for the benefit of the one from whom he has obtained it? Can the wrongful act of the party obtaining the money furnish the basis for making him a trustee, and at the same time the ground for presuming that he acts rightfully? These ques-

tions have been directly presented to the Supreme Court of Iowa, which has answered them by saying that the rule relied upon by the appellant does not apply to involuntary trusts arising solely from fraud. In Re First State Bank of Corwith, 149 Iowa, 662, 129 N. W. 70, that court said:

> "While we have held that, where a bank receives money wrongfully, 'a trust arises as between it and the true owner of the money,' * * * we have never held that the wrongful act of the bank will alone create a preference as against general creditors. Are the appellees herein entitled to the aid of the legal presumption that their money reached the hands of the receiver in the form of increased assets of the bank, and that it may be taken therefrom without impairing the rights of the general creditors? We are of the opinion that an affirmative answer to the inquiry would require us to go a step farther than we have ever gone, and to establish a rule that would be unjust and inequitable. * * * In all of our cases, except one which will be noticed later, where the presumption has been given force, the deposits were of trust funds, the character of such funds was known to the banks when the deposits were made, and the deposits involved no wrongful act on the part of the banks. The presumption was in every instance based on the theory that the bank, knowing the character of the fund and acting honestly, would not use or dissipate it as long as it had funds of its own."

The court then goes on to explain Whitcomb v. Carpenter, 134 Iowa, 227, 111 N. W. 825, 10 L. R. A. (N. S.) 928, the exceptional case to which it had referred, by saying that the bank had there become a trustee by contract.

"But in any event," continues the opinion, "we do not think that it can be presumed that a bank will keep money that it has obtained by means of willful and deliberate criminal acts. The ordinary thief disposes of stolen property as soon as possible, and it would be going a long way to say that a bank that has obtained money by means of its deliberate forgery will be presumed to have kept it on hand to be returned to the injured party intact. We are not willing to so hold, and without such presumption the appellees have made no showing that entitles them to preference."

The appellant is not correct in his statement that the case just cited has been overruled. On the contrary, it has been approved in a later decision by the same court. In Re First State Bank, 152 Iowa, 724, 133 N. W. 354. Nor are we cited to any authorities holding the contrary. In Re Hallett, supra, a leading case, is relied on by the appellant. It does not, however, hold that the presumption applies to cases like the one before us. It merely holds that it is applicable not merely to the technical relation of trustee and cestui, but to all relations of a fiduciary character, as, for example, that of principal and agent. In all of the other cases cited the money in question was either received in trust, or was taken from a trustee with notice of the character in which he held it.

There is, of course, no pretense that petitioner has traced, or can trace, his $12,000 into the possession of the receiver, except by means of the artificial presumption or fiction upon which he relies. The controversy, in its essence, is between the petitioner and other claimants whose only recourse is to a fund insufficient to meet the demands upon it. All concerned must suffer some loss through the mismanagement or misconduct of the officers of the bank. In equity there is no reason why the petitioner should be preferred to all other creditors or claimants. For over a year the petitioner occupied the position of a stockholder, and received dividends on his stock. According to his claim, the bank was insolvent when he purchased his shares. Nevertheless it went on doing business, and accepted deposits of many millions from others. The greater part of the $9,000,000 on deposit when the bank closed its doors had been received after the petitioner purchased his stock. It is not to be supposed that any one would deposit money in a bank which he knew to be insolvent, and we may fairly assume, therefore, that every one who deposited money after the petitioner's purchase of stock did so under the belief, mistakenly held, if not fraudulently induced, that the bank was in a sound condition. These depositors, to say nothing of those who claim to be entitled to preferential payment (their claims exceeding all of the funds on hand), are as much entitled as is the petitioner to the favorable consideration of a court of equity. We do not think that any rigid legal presumption should be applied for the purpose of giving to one claimant a preferential right over others whose position does not in justice differ from his.

It becomes unnecessary to consider other points made by the respondent.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; MELVIN, J.; HENSHAW, J.; LAWLOR, J.

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175 Cal. 777

CITY OF LOS ANGELES et al. v. LEWIS, Auditor of Los Angeles County (KANE, Intervener). (L. A. 4591.)

(Supreme Court of California. Aug. 28, 1917. Rehearing Denied Sept. 27, 1917.)

1. TAXATION 🔑22—PRIVATE PURPOSE—CONSTITUTIONALITY OF STATUTE.

A legislative act clearly and designedly authorizing taxation for a private purpose is void, as under our system of government taxes can be laid only for a public object—one within the purpose for which governments are established.

2. COUNTIES 🔑47—POWERS OF BOARDS OF SUPERVISORS—STATUTE.

Pol. Code, § 4041, as amended by St. 1913, p. 667, circumscribing all grants of power to boards of county supervisors within "such limitations and restrictions as are subscribed by law," neither adds to nor detracts from the force and effect of the powers granted, as, even if such language were not used, their powers would be so limited.

3. Waters and Water Courses 🔑203(1)—Public Utility—Disposition of Surplus.

Where a municipal corporation is authorized to engage in a work of a public nature, such as furnishing water or light to its inhabitants, an excess or surplus beyond their needs arising in the prudent operation of the work may be disposed of to private individuals.

4. Constitutional Law 🔑48—Construction of Statutes—Presumption of Constitutionality.

The courts construe a legislative enactment with a strong predilection favoring its constitutionality, and seek by every legitimate means to uphold its constitutionality, though in an effort to save a law they cannot properly pervert or destroy its plain meaning and make it express that which the Legislature itself did not declare.

5. Constitutional Law 🔑47—Construction—Validity.

The supreme test of the validity of the legislative enactment is, not what may have been done under it, but what may be done under it.

6. Taxation 🔑23—Private Purpose—Validity of Statute—Powers of Board of Supervisors.

Pol. Code, § 4041, subd. 9a, as amended by St. 1913, p. 669, authorizing county supervisors to operate or lease a cement manufacturing plant and to sell its products upon such terms as they may deem proper, and giving the state and its municipal corporations a preferred right to purchase its products at the same price at which they are offered to private persons, and providing that no such plant shall be operated or leased until a prescribed notice of intention to do so shall have been published stating the time of the hearing before the supervisors, but not requiring that the plant shall bear any relation to the county's estimated needs or negativing a manufactured product in excess of its needs, and under which, in view of the fact that cement may be carried over without deterioration, there would be no surplus incidentally produced, and in effect authorizing the county to manufacture all of the cement that the plant could produce and to sell all it wished to private consumers, was invalid, as authorizing taxation by the county for private purposes.

In Bank. Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Mandamus by the City of Los Angeles and the Board of Public Service Commissioners of the City of Los Angeles against Walter A. Lewis, Auditor of the County of Los Angeles; M. H. Kane, intervener. General demurrers to the petition filed by the intervener and the auditor overruled, and judgment for petitioners, and the auditor and the intervener appeal. Judgment reversed, and cause remanded, with directions to sustain the demurrers.

O'Melveny, Stevens & Millikin, Walter K. Tuller, and J. P. Chandler, all of Los Angeles, for appellant Kane. Fredericks & Hanna, of Los Angeles, for appellant Lewis. Albert Lee Stephens, City Atty., W. B. Mathews, Wm. B. Himrod, and A. J. Hill, Co. Counsel, Roy V. Reppy, Asst. Co. Counsel, and Robert B. Murphy, Deputy Co. Counsel, all of Los Angeles, for respondents.

MELVIN, J. The city of Los Angeles was the owner of a plant for the manufacture of Portland cement, located in Kern county, Cal. It had used the product of its factory in the construction of its waterworks. Thereafter, in 1913 (St. 1913, p. 669), the Legislature of the state, in its enumeration of the powers of boards of supervisors, added a new section to the Political Code (section 4041—9a) providing as follows:

"To purchase, lease, construct or otherwise acquire, own, operate, manage and control, in any county in the state, cement manufacturing plant; and to sell the products of the same in such manner and upon such terms and conditions as to them shall be deemed proper: Provided, that the state of California and municipal or public corporations of the state shall have a preferred right at the same price as the products are offered to private persons to purchase the same; and to purchase, lease, or otherwise acquire real or personal property to be used in connection with such plant: Provided, however, that no such plant shall be purchased, leased, or otherwise acquired, neither shall said works be constructed on real or personal property purchased or acquired until notice of the intention to make such purchase or construct such works shall have been given for a period of thirty days by publication in a newspaper of general circulation published within the county, or, if there be none, then by posting a notice for said period in a conspicuous place in three public places in the county; such notice shall contain a description of the property to be purchased or works to be constructed, a statement of the amount of money to be invested, the terms upon which it is to be invested and the time when the proposition will come before the board of supervisors to be acted upon."

Then, on July 10, 1915, the city of Los Angeles and the county of Los Angeles, acting under the authority thus conferred, entered into a written contract of lease, whereby the county of Los Angeles took over the operation and control of the city's cement plant located in the county of Kern. The lease contained a number of terms and conditions, some of which will hereinafter demand consideration. For the present it is enough to say that the rental to be paid by the county of Los Angeles to the city of Los Angeles for the use of this cement plant for the first year is $27,500, to be paid in equal monthly installments of $2,291.66 each. In time the city of Los Angeles and its Board of Public Service Commissioners made demand upon the auditor of the county of Los Angeles to indorse his approval of the first month's installment of rent payable under this leasehold contract. Upon his refusal so to do this action in mandate was brought, and appellant M. H. Kane, as a citizen and taxpayer of the county, was permitted to intervene therein. The intervener and the auditor filed their general demurrers to the petition. These demurrers were overruled, and judgment for petitioners followed. From this judgment the auditor and intervener have taken their appeals.

[1] The first and fundamental proposition urged upon appeal is that the legislative act is itself unconstitutional, in that it clearly and designedly authorizes taxation for a private purpose, whereas under our system of

government taxes can be laid only for a public object—one within the purposes for which governments are established. Indisputably, if the Legislature has authorized the doing of this thing, its authorization, under all of the authorities, is void. Dillon, Mun. Law, §§ 84, 1351; Loan Association v. Topeka, 20 Wall. (87 U. S.) 655, 22 L. Ed. 455; Cole v. La Grange, 113 U. S. 1, 5 Sup. Ct. 416, 28 L. Ed. 896; In re Opinion of Supreme Judicial Court, 58 Me. 590; In re Opinion of the Justices, 155 Mass. 598, 30 N. E. 1142, 15 L. R. A. 809; In re Opinion of Justices, 211 Mass. 624, 98 N. E. 611, 42 L. R. A. (N. S.) 221; Union Ice & Coal Co. v. Town of Ruston, 135 La. 898, 66 South. 262, L. R. A. 1915B, 859, Ann. Cas. 1916C, 12; People v. Town of Salem, 20 Mich. 452, 4 Am. Rep. 400; In re Opinion of Justices, 204 Mass. 607, 91 N. E. 405, 27 L. R. A. (N. S.) 483; Attorney General v. City of Eau Claire, 37 Wis. 400; Keen v. Mayor, 101 Ga. 588, 29 S. E. 42. Respondents in answer do not contend against the soundness of this principle, nor its applicability to the construction of the Code section. They argue, however, that every court will presume in favor of the constitutionality of a legislative enactment, and wherever possible, as between two permissible constructions, will adopt that which will uphold the law, and therefore they say that this law should be construed as authorizing a county to construct, purchase, or lease a cement plant, to use its product solely for the public purposes of the county. They find confirmatory evidence of this intent in the act itself from the declaration therein contained that boards of supervisors, as to all of the powers by the Legislature conferred on them, as well as to this specific grant of power, are restrained by "such limitations and restrictions as are prescribed by law." The power to sell, so respondents further argue, will then be "limited to an authority to sell the surplus cement incidentally produced."

[2, 3] Such are the opposing views concerning the construction of this law, and to a determination of what in fact the law actually means we are thus brought. Certain phases of the matter may be at once disposed of. The general provision of section 4041 of the Political Code, which circumscribes all grants of power to boards of supervisors within "such limitations and restrictions as are prescribed by law," neither adds to nor detracts from the force and effect of the powers granted. Even if this express language were not used, those powers would still be circumscribed by the limitations and restrictions prescribed by law. It is true that, where a municipal corporation is authorized to engage in a work of a public nature, and where the character of that work is like that of purveying water or the production and sale of electric light and power to its inhabitants, it has been held that an excess or surplus beyond the needs of those inhabitants, which may arise in the prudent operation of the public works, may be disposed of to private individuals. Dillon, Mun. Corp. § 1300; Clark v. City of Los Angeles, 160 Cal. 36, 116 Pac. 722; South Pasadena v. Pasadena Land & Water Co., 152 Cal. 579, 93 Pac. 490. But it must be plain that this rule or principle can only be invoked when it has first been made manifest that the primary and principal purpose is a public one. Respondents do not contend—no one can successfully contend—that the manufacture and sale of Portland cement for commercial purposes is work of a public or municipal character, any more than would be the manufacture of bricks, the manufacture of harness, of fire engines, of ventilating apparatus, or the many hundreds of manufactured products which a municipal corporation may use in the furtherance of public affairs.

[4] Again, while in construing a legislative enactment a court will enter upon that construction with strong predilection favoring its constitutionality and seek by every legitimate means to put an interpretation upon the law which will confirm its constitutionality, there is a well-defined limit to every court's power in this regard. No court, in its effort to save a law, can properly pervert or destroy its plain meaning, and so make it express that which the Legislature itself did not declare.

> "But the courts cannot go beyond the province of legitimate construction in order to save a statute; and where the meaning is plain, words cannot be read into it or out of it for that purpose." (Lewis' Sutherland on Statutory Construction, par. 83; Rogers-Ruger Co. v. Murray, 115 Wis. 267, 91 N. W. 657, 59 L. R. A. 737, 95 Am. St. Rep. 901.

[5, 6] Controlled by these fundamental principles of construction, no person, lawyer or layman, reading this provision, could entertain the slightest doubt as to the power which the Legislature conferred and meant to confer upon boards of supervisors. In brief, it was an authorization to any county in the state to purchase, lease, construct, or otherwise acquire, own, and operate any cement manufacturing plant in its own or in any other county of the state, and to engage in the business of manufacturing and selling cement to any and every purchaser. Says the statute itself, "to sell the products of the same in such manner and upon such terms and conditions as to them shall be deemed proper." The only limitation upon this otherwise absolutely free power of manufacture and sale is that the state and its municipal and other public corporations shall have the right to purchase the cement "at the same price as the products are offered to private persons." There is in this not only no limitation of manufacture and use for the public needs of the county only, but there is every contemplation that the manufacture shall exceed the uses of a county, and this must necessarily have been in the mind of the Legis-

lature, since the act places no restriction upon a county as to the magnitude of the plant which it may see fit to acquire. There is no provision that the plant shall bear any relation to the actual or estimated public needs of the county purchasing it. The county of Mono, requiring, let us say, for its public needs the use of 1,000 barrels of cement a year, may purchase or lease a plant whose output is 1,000 barrels of cement a day. It requires no technical knowledge of this or of any other manufacturing industry to know that economy of production bears a direct ratio to efficiency of operation, and that the cost of production is lessened the more nearly that any manufacturing plant is operated to its maximum of production. Precisely, therefore, as any county operating any cement plant must employ skilled business methods to make the output of that plant as large as possible, so was this clearly in the contemplation of the Legislature when it conferred powers absolutely unrestricted (save in the dealings with the state and its mandatories in the matter of the sale of its surplus product). Moreover, from the nature of that product itself there could be, if force be given to respondents' construction of the act, no "surplus cement incidentally produced" demanding private sale, as is not infrequently the case in the public supply of water or hydroelectric energy. Portland cement is a product which can be carried over without deterioration. The necessary products for the needs of a county for a given year can unquestionably be closely estimated in advance by the county authorities. Their factory can therefore manufacture that amount and no more. But if there should chance to be an incidental surplus, the exigencies of the situation do not demand that that surplus should be sold, since it may safely and economically be carried over for next year's consumption. The theory therefore of a surplus "incidentally produced" is as wholly without reason as it is wholly without the purview of the law under review, which at least is founded upon the sound business principle that the county shall manufacture all the cement of which its plant is capable, and which manifestly does not contemplate that a county shall commit business harakiri by purchasing or building a cement plant with a capacity of 1,000 barrels a day to supply its needs of 1,000 barrels a year, with authority to sell only the small surplus over the 1,000 barrels a year which may be "incidentally produced." What the Legislature did was to authorize the counties of the state to engage in the general business of the manufacture and sale of Portland cement, without restriction or attempt or desire to restrict these counties to their individual public needs. And whatever change in position the exigencies of the law have forced the attorneys for the city of Los Angeles to take, it is quite apparent from a reading of the lease between the city and the county that such was the interpretation which the contracting parties put upon the law at the time they entered into their agreement.

It has been said that to save even a legislative enactment nothing can be read into it nor read out of it. The supreme test of the validity of any such law is not what may have been done under it, not, as here, what the contracting parties may by convention agree to do or not to do under it, but it is what may be done under it. Lewis' Sutherland Stat. Cons., § 107; City of Beatrice v. Wright, 72 Neb. 689, 101 N. W. 1039; State v. Stark County, 14 N. D. 368, 103 N. W. 913; Stuart v. Palmer, 74 N. Y. 183, 30 Am. Rep. 289; Minneapolis Brewing Co. v. McGillivray (C. C.) 104 Fed. 258; State v. O'Leary, 43 Mont. 157, 115 Pac. 204. No man can doubt but that under this law a county acquiring a cement plant is authorized to manufacture all of the cement which that plant can produce and sell all that it desires to private consumers. To deny this right and power under the law is to destroy the law itself and to frame a law distinctly the contrary of that which the Legislature deliberately and advisedly formulated and passed. So plain is this that respondents cannot successfully urge the severability of the statute and that a part of it can be saved by a construction limiting the cement production to the public needs of the county; for this, as we have said, would be to make a law which the Legislature has not made and which requires legislative deliberation and determination before it can be made.

The invalidity of the section of the Code thus declared renders unnecessary any detailed consideration of the contract entered into between the city of Los Angeles and the county of Los Angeles. But in exemplification of the statement above made, that the contracting parties did not in their agreement contemplate that the law designed to limit the manufacture of cement to the county needs, it may be pointed out that by the terms of the lease the county is bound to manufacture a total of 180,000 barrels of cement each year, and this without regard to the county requirements. The county may require much or little, or none at all, but it must manufacture this product and either sell it or suffer tremendous financial loss if it does not do so. Not this alone, but the city, in lieu of the cash rent which the county is to pay for the use of the plant, may exact from the county the manufacture and delivery to it—the city—of cement at an agreed price. The county further agrees to pay a royalty of 5⅝ cents per barrel on every barrel of cement manufactured. It is also to pay a depreciation charge of $11,000 a year. The city is to have the right to purchase 60,000 barrels of cement a year at a price fixed in the lease, without regard to what may be the actual market value of Portland cement at the time the city elects to take it.

All of this and much more indicate too plainly to call for discussion the fact that the contracting parties viewed this law as only it can be regarded, and for the reasons given the judgment in favor of these respondents and against the defendant auditor of Los Angeles and against the intervener is reversed, and the cause remanded, with directions to the trial court to sustain these appellants' general demurrers to petitioner's complaint.

We concur: ANGELLOTTI, C. J.; HENSHAW, J.; LORIGAN, J.; SHAW, J.; SLOSS, J.

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175 Cal. 797

MILLAR v. MILLAR et al. (Sac. 2415.)

(Supreme Court of California. Aug. 28, 1917. Rehearing Denied Sept. 27, 1917.)

1. APPEAL AND ERROR 🔑694(1)—QUESTIONS REVIEWABLE—SUFFICIENCY OF EVIDENCE.

The question of the sufficiency of the evidence to sustain a finding cannot be considered on appeal from a judgment, where the bill of exceptions relied on contains no specification of insufficiency of evidence, and the same is true as to an appeal from an order denying new trial, where based on a bill of exceptions.

2. APPEAL AND ERROR 🔑302(6)—QUESTIONS REVIEWABLE—SPECIFICATION OF ERROR.

Where the notice of intention to move for new trial specified in general terms as a ground insufficiency of the evidence to justify the findings, decision, and judgment of the court, the general specification of the insufficiency of the evidence was not sufficient to enable the court on appeal to review the question of its sufficiency.

3. APPEAL AND ERROR 🔑241—QUESTIONS REVIEWABLE—DENIAL OF NONSUIT.

Where the only ground stated for motion for nonsuit was that there was no evidence justifying the court in granting the relief prayed for, or any relief whatever, the court on appeal could not consider the evidence to review the trial court's ruling denying the motion for nonsuit, since an appellate court will not review the finding of the trial court denying such a motion upon any ground not precisely and specifically stated in it, and where no ground is sufficiently stated will not review it at all.

4. MARRIAGE 🔑60(6) — ANNULMENT — STATUTE—"FRAUD."

The secret determination of one of the parties to a marriage, when entering into the relation, absolutely to refuse to the other sexual intercourse, a course consistently persisted in at all times after the marriage, the other party having acted in good faith, is a "fraud" within Civ. Code, § 82, subd. 4, specifying as a ground for annulment of marriage that the consent of either party was obtained by fraud, etc., since a promise made without any intent to perform constitutes actual fraud.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Fraud.]

5. MARRIAGE 🔑60(6)—ANNULMENT—FRAUD—PLEADING—STATUTE.

In a wife's suit for maintenance, the husband's cross-complaint for annulment on the ground that the wife had entered the marriage relation with the intention of refusing him sexual intercourse alleged that, owing to the wife's persistent refusal, the parties had never had marital intercourse after the marriage, and that within a reasonable time the husband notified the wife that their relations were terminated, etc., while, according to the allegations of the wife's complaint, the husband forthwith willfully failed to provide the wife with the common necessaries of life or any money. *Held*, that the cross-complaint sufficiently negatived the exception of Civil Code, § 82, subd. 4, providing that a marriage may be annulled, when the consent of either party was obtained by fraud, "unless such party afterwards with full knowledge of the facts constituting the fraud freely cohabited with the other as husband and wife."

6. MARRIAGE 🔑58(7)—ANNULMENT—FRAUD—WAIVER—STATUTE.

Under Civ. Code, § 82, subd. 4, making it ground for annulment of marriage if the consent of either party was obtained by fraud, unless such party afterwards, with full knowledge of the facts constituting the fraud, freely cohabited with the other as husband and wife, if a wife entered the marriage relation intending to refuse her husband sexual intercourse, thus committing a fraud upon him, and he, with full knowledge of the facts, assumed the rights of marriage, cohabiting with his wife as such, thus forming the relation notwithstanding the fraud, he waived it, and can maintain no action for annulment on account of it.

7. DIVORCE 🔑15 — MARRIAGE 🔑57 — "ANNULMENT"—"DIVORCE."

"Divorce" means the dissolution of the bonds of matrimony, based upon the theory of a valid marriage, for some cause arising after the marriage; an "annulment" proceeding is maintained on the theory that for some cause existing at the time of marriage no valid marriage ever existed, even though the marriage be only voidable at the instance of the injured party.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Divorce.]

8. MARRIAGE 🔑65—ANNULMENT—EFFECT OF DECREE.

The decree of nullity in a proceeding to annul a marriage determines that no valid marriage ever existed.

9. DIVORCE 🔑15 — ANNULMENT — STATUTE—"DIVORCE."

In view of Civ. Code, §§ 82–132, relative to nullity and dissolution of marriage and causes for denying divorce, the word "divorce," as used in Civ. Code, §§ 128, 131, 132, providing that plaintiff in actions for divorce must be a resident, etc., does not include proceedings for annulment of marriage or any action except the original action for divorce for some cause arising after marriage.

10. DIVORCE 🔑48 — MARRIAGE 🔑59 — ANNULMENT—"CONDONATION."

"Condonation," the conditional forgiveness of a matrimonial offense constituting a cause for divorce, is a defense only in the ordinary divorce action for some cause arising after marriage, and the statutory provisions as to such defense have no part in a proceeding for annulment of marriage for fraud consisting in a wife's determination to deny sexual intercourse.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Condonation.]

11. MARRIAGE 🔑65—ANNULMENT—EFFECT OF JUDGMENT.

In a wife's action for maintenance, wherein her husband cross-complained for annulment the provision of the final judgment that the wife was not entitled to recover from her husband any payment of alimony or any money whatsoever for her maintenance or otherwise merely adjudicated that the wife should not recover any alimony or sum by way of permanent maintenance, a necessary result of the decree of nullity, and the provision did not preclude the wife from collecting any money due her under order pendente lite, made for temporary support, etc.

In Bank. Appeal from Superior Court, Solano County; W. T. O'Donnell, Judge.

Action by Katherine A. Millar against Robert F. Millar and another, executor and executrix of the will of James Millar, deceased, substituted as defendants in place of James Millar. From a judgment for defendants, an order denying her motion for new trial, and an order denying her motion for further allowance of costs and counsel fees, plaintiff appeals. Judgment and orders affirmed.

Metson, Drew & Mackenzie and Roy G. Hudson, all of San Francisco (Marion De Vries, of counsel), for appellant. Frank R. Devlin, of Fairfield, and A. E. Bolton, of San Francisco, for respondents.

ANGELLOTTI, C. J. Katherine Millar brought this action against James Millar for separate maintenance. Millar answered, denying the validity of the marriage, and by way of cross-complaint alleged that his consent thereto was obtained by fraud. He asked that the marriage be annulled. Judgment was given for him, annulling the marriage. The appeal is taken by plaintiff from the judgment and the order denying her motion for a new trial, and also from an order denying her motion for a further allowance of costs and counsel fees.

Millar died after the judgment had been entered and pending the appeal.

It is earnestly contended that the evidence was not sufficient to sustain certain findings of the trial court. The sufficiency of the evidence to sustain the findings of the trial court cannot be reviewed on the record before us.

[1] It is settled by a long line of decisions of this court that the question of the sufficiency of the evidence to sustain the findings cannot be considered on appeal from a judgment where the bill of exceptions relied on contains no specification of insufficiency of evidence. The same thing is true as to an appeal from an order denying a new trial where the appeal is based on a bill of exceptions. Howley v. Harrington, 152 Cal. 188, 92 Pac. 177.

[2] Some reliance is placed on the claim that the notice of intention to move for a new trial specified in general terms "insufficiency of the evidence to justify the findings, decision, and judgment of the court," but even if such a general specification were sufficient, which it is not, the notice is not included in the bill of exceptions, and constitutes no part of the record on appeal.

[3] It is further suggested that we may consider the evidence for the purpose of reviewing the ruling of the trial court denying a motion for a nonsuit. The answer to this is that the motion for a nonsuit did not sufficiently specify any ground. The only ground stated was that:

> "There is no evidence before the court justifying it in granting the relief prayed for, or any relief whatever."

It is thoroughly settled by a long line of decisions that an appellate court will not review the ruling of the trial court denying a motion for a nonsuit, upon any ground not precisely and specifically stated in the motion, and, where no ground is sufficiently stated, will not review it at all. In Miller v. Luco, 80 Cal. 261, 22 Pac. 195, the ground stated was "that plaintiffs had failed to prove a sufficient case." It was said:

> "'It is settled law in this state that a party moving for a nonsuit should state in his motion precisely the grounds on which he relied so that the attention of the court and the opposite counsel may be particularly directed to the supposed defects in the plaintiff's case.' * * * The motion made here did not comply with this rule and it was therefore properly denied."

See, also, Coffey v. Greenfield, 62 Cal. 608; Coghlan v. Quartararo, 15 Cal. App. 668, 115 Pac. 664; Sanchez v. Neary, 41 Cal. 487; Shain v. Forbes, 82 Cal. 582, 23 Pac. 198; Bronzan v. Drobaz, 93 Cal. 650, 29 Pac. 254; Durfee v. Seale, 139 Cal. 607, 73 Pac. 435. It follows from what we have said that as to all questions of fact we are concluded by the findings of the trial court, which must be taken as true for all the purposes of this appeal.

The findings of the trial court, so far as material, are substantially as follows: On January 2, 1913, a marriage was duly solemnized between the parties in San Jose. At the time of such marriage plaintiff did not intend to consummate the marriage, in that she did not intend to have sexual intercourse with Millar. She "entered into the marriage contract and the solemnization thereof with the intent that she would not consummate the marriage or fully enter into the relation arising out of the marriage contract, and entered into the same for the purpose of obtaining maintenance, support, and property from said defendant, and without any intent upon her part to perform the obligations of the contract of marriage or be anything more to the defendant than a wife in form." Ever after the marriage plaintiff persistently refused to have sexual intercourse with Millar, notwithstanding his solicitations, and without any reasonable excuse therefor, and at all times refused to occupy the same bed with him, all in pursuance of her determination existing at the time of the marriage to so refuse. By reason of her refusal, the parties have never had any sexual connection. So far as appears they did until August 15, 1913, remain together in the manner usual to husband and wife, the court finding that after the marriage, in accord with the plan theretofore made, they journeyed together to several places in the United States and back again to California. Millar entered into the marriage contract in good faith with the intent to fully perform all the obligations of the marriage relation, and then believed that plaintiff did the same, and was deceived "by the false and fraudulent consent thereto, given by plaintiff." On August 15, 1913, Millar notified plaintiff in writing substantially to the effect that because she entered into the marriage with no intent of performing the duties and obligations thereof, and persisted in refusing to perform, he "rescinded said contract," and would not contribute further toward her support and maintenance. Plaintiff's action for maintenance was commenced prior to October 31, 1913, and Millar's answer and cross-complaint were filed February 9, 1914.

1. Our Civil Code, in the section prescribing the grounds existing at the time of the marriage upon which the marriage may be annulled, specifies as one of such grounds "that the consent of either party was obtained by fraud, unless such party afterwards, with full knowledge of the facts constituting the fraud, freely cohabited with the other as husband or wife." Subdivision 4, § 82. An action based on this ground may be brought by the injured party within four years after the discovery of the facts constituting the fraud. The main question presented by this appeal, in view of the findings, is whether the secret determination of one of the parties to a marriage at the time of entering into the contract or relation of marriage to absolutely refuse to the other all sexual or "matrimonial intercourse as husband and wife," as it is termed in section 96, Civil Code, consistently persisted therein at all times after the marriage, the other party having acted in good faith, constitutes such a fraud as is included within the scope of subdivision 4, section 82, Civil Code, and warrants an annulment of the marriage.

[4] Upon further consideration of this question we are satisfied that the conclusion reached thereon in department was correct, and that the question must be answered in the affirmative. Marriage is defined by our Civil Code as:

> "A personal relation arising out of a civil contract, to which the consent of parties capable of making that contract is necessary." Section 55.

As we have seen, our law provides that when such consent on the part of either party is obtained by "fraud," the marriage may be annulled at the suit of the other, unless the fraud is waived by free cohabitation after discovery; in other words, such marriage is voidable at the instance of the injured party. As was said in Sharon v. Sharon, 75 Cal. 1, 8, 16 Pac. 345, while the contract is simply that the parties forthwith enter into the relation of marriage, "the rights and obligations of that status (relation) are fixed by society in accordance with the principles of natural law." These principles of natural law are perfectly understood, certainly in so far as the particular matter here involved is concerned. The obligation of the relation in this behalf is such, to use the language of the Supreme Judicial Court of Massachusetts in Smith v. Smith, 171 Mass. 404, 50 N. E. 933, 41 L. R. A. 800, 68 Am. St. Rep. 440, as to be "essential to the very existence of the marriage relation," a proposition as to which there appears to be no dissent in the authorities. See in this connection Sharon v. Sharon, 75 Cal. 33, 16 Pac. 345; Dickinson v. Dickinson, Law Reports (Eng.) Probate Div. 1913, p. 198. Our own statutes expressly recognize this by making it a ground for annulment of marriage "that either party was, at the time of marriage, physically incapable of entering into the marriage state, and such incapacity continues, and appears to be incurable." Subdivision 6, § 82, Civ. Code. The physical incapacity here referred to, as is thoroughly established, is the physical incapacity to consummate the marriage by coition. In consenting to a marriage, in consenting to enter that personal relation, each of the parties impliedly promises the other that he or she will perform the duties and obligations of the relation, and the promise and consent of one are given in consideration of and in reliance upon the promise and consent of the other. As it was put in Moore v. Moore, 94 Misc. Rep. 370, 157 N. Y. Supp. 819:

> "So one who goes through the marriage ceremony represents in so many words his intention and purpose to fulfill all the obligations of a husband to the woman he marries."

One who so promises and represents, thus obtaining the consent of the other, with the secret determination not to fulfill the promise, must be held to have obtained such consent of the other party by fraud—at least where the promise relates to a material matter. That a promise made without any intention of performing it constitutes actual fraud is elementary law with relation to ordinary contracts, and is expressly declared by our Civil Code. Section 1572. As said in Martin v. Lawrence, 156 Cal. 194, 103 Pac. 913:

> "Where a defendant makes a promise touching a substantive part of the consideration moving to the plaintiff, in bad faith and without intent to perform the promise, it constitutes a species of fraud well recognized in equity and in terms denounced by the Code."

We can see no good reason why this is not true with regard to the marriage relation. It may readily be conceded that a court should not annul a marriage on the ground of fraud except in extreme cases, where the particular fraud goes to the very essence of the marriage relation, and especially is this true where the marriage has been fully consummated and the parties have actually assumed all the mutual rights and duties of the relation. In such a case considerations of public policy intervene, and courts are loath to annul a marriage. See Smith v. Smith, supra. But no consideration of public policy precluding relief exists under such circumstances as are established by the findings in this case, and the authorities generally recognize that in such cases the marriage should be annulled for fraud. The latest case to which our attention has been called is that of Anders v. Anders, 224 Mass. 438, 113 N. E. 203, L. R. A. 1916E, 1273, in which it was held that the husband was entitled to a decree annulling the marriage on the ground of fraud where the woman went through the marriage ceremony solely to secure the right to appear as a married woman, secretly intending to leave the husband immediately after the ceremony, and carried the plan into effect, and where the husband was deceived and acted in good faith. Referring to the earlier case of Cowles v. Cowles, 112 Mass. 298, in which the court held that utter denial of marital intercourse was not ground for a decree of nullity, saying, "It plainly does not go to the original validity of the marriage, and affords no ground for declaring the nullity of it," the court said:

> "It is pretty plain that in deciding Cowles v. Cowles this court did not have in mind the case of a woman going through the marriage ceremony with a preconceived intention never to allow marital intercourse."

In deciding the case the court said.

> "In the case at bar the libelee went through the marriage ceremony with an intention never to perform any one of the duties of a wife. * * * That plan she carried into effect. It is well settled that a contract for the sale of goods is induced by fraud, and for that reason voidable, where the purchaser had an intention when the contract was made not to perform his promise to pay for them. If an intention not to perform his promise renders a contract for purchase of property voidable, a fortiori the same result must follow in case of a contract to enter into 'the holy estate of matrimony.'"

There is no distinction in principle between that case and the one at bar. It is true that there the intention was never to perform "any * * * of the duties of a wife," while here the intention was only as to one. But that one was of such a character as to be "essential to the very existence of the marriage relation," and the fraud was one going to the original validity of the marriage within the contemplation of section 82, subd. 4, Civil Code. It was said by the New York court in Moore v. Moore, supra, with relation to the representations implied from a consent to a marriage, "misrepresentations of purpose and intention, whether express or necessarily implied, which constitute a material fact inducing another to act, constitute a fraud affecting the validity of a contract induced thereby." In that case the marriage was annulled. We find nothing in the authorities to contravene the conclusion we have reached on this question.

That the law provides for the dissolution of the relation of marriage by divorce for specific violations after marriage by one party of duties appertaining to the relation, including the particular obligation here involved, is altogether immaterial. Such subsequent violations in no way go to the original validity of the marriage. The alleged fraud in this case is not based upon any mere violation of any duty of the marriage relation, but upon a fraudulent misrepresentation made by plaintiff at the time of the marriage, by which the consent of Millar to enter into the marriage was obtained, a matter, as we have seen, which goes to the original validity of the marriage, and renders it, at the suit of the injured party, void ab initio.

2. It is claimed that the cross-complaint does not state facts sufficient to constitute a cause of action, in that it does not allege that immediately upon discovery of the fraud Millar ceased to cohabit with plaintiff, and also that no such condition is established by the findings. This point appears never to have been made until the petition for rehearing in this court after decision in department. No demurrer was interposed to the cross-complaint in the lower court, and the cause was apparently tried upon the theory that it sufficiently alleged a cause of action for annulment, on the ground of fraud.

[5] As we have seen, the law provides that a marriage may be annulled on this ground at the suit of the injured party "unless such party afterwards, with full knowledge of the facts constituting the fraud, freely cohabited with the other as husband and wife." It may be conceded that a complaint based on this ground should substantially negative this exception, and that the same should be substantially found. While the cross-complaint is perhaps not as precise and specific in this regard as it might have been made, we think the facts alleged and found sufficiently negative the exception declared by the statute to withstand the attack now made. It is definitely alleged, and found, that, owing to the persistent refusal of plaintiff, there was never any marital intercourse between the parties, and that, within what must be held to be a reasonable time, Millar, on account thereof, notified plaintiff that their relations were terminated, and that he would no longer contribute to her support and maintenance. According to the allegations of her complaint he thenceforth willfully failed to provide her with the common or any necessaries of life, or with any money with which to support herself. Absence of any waiver of his rights on the part of Millar sufficiently appears. We think the facts alleged and found are necessarily inconsistent with any theory that Millar "freely cohabited" with plaintiff as his wife within the meaning of subdivision 4 of section 82, Civil Code. The mere fact that they remained together, under the circumstances alleged and found, during the few months between the marriage and the separation, ostensibly as husband and wife, does not in our opinion establish such cohabitation on his part. The language used in the statute was designed to declare what conduct on the part of the injured party should conclusively establish a waiver by him of the fraud, in

so far as any action for annulment was concerned.

[6] If, with full knowledge of the facts he freely assumed the rights of marriage, thus affirming the relation notwithstanding the fraud, he must be held to have waived the fraud, and is barred from any action for annulment. The cohabitation specified is cohabitation as husband and wife, and we have no manner of doubt that in the connection in which the words are used they repel the idea that the mere remaining together of the parties for the time preceding the final separation, under the circumstances alleged and found, is such cohabitation as was intended to bar an action for a decree of nullity. There was no true matrimonial cohabitation in the sense in which the words are here used, for they must be taken as meaning not simply the mere staying together of the parties ostensibly as husband and wife, but such a full and free assumption by the injured party of marital rights as fairly indicates his assent to the relationship, notwithstanding the fraud.

3. Based upon the contention that certain provisions of our Civil Code pertaining to ordinary divorce actions are applicable to actions for annulment of marriage, it is claimed that the cross-complaint of Millar failed to state a cause of action for the reason that it did not allege residence on his part in the state of California for one year and in the county where the action was brought for three months next preceding the commencement of the action (section 128, Civ. Code), and also that the final judgment entered without an interlocutory judgment having first been given is void. Sections 131 and 132, Civ. Code. This point was made for the first time in the petition for rehearing.

[7] An examination of the authorities shows that the term "divorce" has sometimes been declared to include annulment proceedings, especially where the marriage was not void in the extreme sense, but only voidable at the option of the injured party. This, however, is not in accord with modern usage. Strictly speaking the word "divorce" means a dissolution of the bonds of matrimony, based upon the theory of a valid marriage, for some cause arising after the marriage, while an annulment proceeding is maintained upon the theory that, for some cause existing at the time of marriage, no valid marriage ever existed. This is true even though the marriage be only voidable at the instance of the injured party, or in the words used in Estate of Gregorson, 160 Cal. 25, 116 Pac. 60, L. R. A. 1916C, 697, Ann. Cas. 1912D, 1124, "capable of being annulled."

[8] And the decree of nullity in such a proceeding determines that no valid marriage ever existed. The opinion in Coats v. Coats, 160 Cal. 671, 118 Pac. 441, 36 L. R. A. (N. S.) 844, shows this to have then been the view of this court, and it was clearly enough stated in the opinion that there was no statutory provision applicable to annulment proceedings for the apportionment of what would be community property if the marriage was valid, although complete provision for the disposition of community property in the event of "the dissolution of the marriage by the decree of a court of competent jurisdiction" was made by section 146, Civil Code. The broader meaning is, however, often given to the word "divorce" by reason of the manner in which it is used in statutory provisions.

[9] But we can see no warrant in our own statute for holding that, as used in sections 128, 131, and 132, Civil Code, it includes annulment proceedings, or any action except the ordinary action for divorce for some cause arising after marriage. These sections are in terms confined to actions for divorce. They are all contained in article 3 of chapter 2, tit. 1, part 3, of the Civil Code, an article entitled "Causes for Denying Divorce." The preceding article (2) is entitled "Dissolution of Marriage," while article 1 is entitled "Nullity," and contains full provision for the annulment of marriage for specified causes existing at the time of marriage. A careful reading of the provisions of these three articles makes it apparent to us that the provisions of article 3 (causes for denying divorce) relate only to the actions referred to in article 2. Article 1, as we have seen, treats fully of the annulment of marriages, prescribes the various periods of time within which actions therefor may be brought, and recognizes that a judgment of nullity is conclusive as against the parties. The first section of article 2 (section 90) declares that:

> "Marriage is dissolved only: One. By death of one of the parties; or, Two. By the judgment of a court of competent jurisdiction decreeing a divorce of the parties."

There follows, in section 92, a statement of the causes for which "divorces" may be granted, which statement is, of course, exclusive of all other causes, and which specifies only causes arising after marriage. Then follow definitions of the various grounds of divorce so specified. It is obvious that the term "divorce" is nowhere used in this article as including a proceeding for or a decree of nullity. Coming to article 3 (causes for denying divorce) we find that section 3 provides that divorce must be denied upon showing connivance, or collusion, or condonation, or recrimination, or limitation or lapse of time. A reading of the sections defining the first four of these things shows that they can refer only to the divorce actions treated in article 2. As to the matter of limitations or lapse of time it is provided in this article, in section 127, that:

> "There are no limitations of time for commencing actions for divorce, except such as are contained in section one hundred and twenty-four."

Section 124, in the same article, prescribes the time as to all such actions. Section 83 in article 1, relating to nullity, prescribes the period of limitation as to all action for nullity. It is in this article (3) that we find section 128 providing that "a divorce must not be granted" unless the plaintiff has certain qualifications of residence in the state and county where the action is brought, section 130 providing that "no divorce can be granted upon the default of the defendant," etc., and sections 131 and 132 relating to interlocutory and final decrees "in actions for divorce," all designed to guard against fraudulent dissolutions of valid marriages, or to discourage resort to an action for such a dissolution with a view to a hasty marriage with another, and to afford a time between interlocutory and final decree within which the parties to a valid marriage may be reconciled and the status maintained. It seems to us to be too clear for question that the divorce action referred to in all these provisions is the ordinary action for divorce referred to in article 2, and that it does not include nullity proceedings. As against this view is simply the fact that the chapter containing these articles (chapter 2) is entitled "Divorce," and that as there used in this very general way the term includes annulment proceedings, as well as divorce proceedings. Dunphy v. Dunphy, 161 Cal. 87, 92, 118 Pac. 445. It was said in the opinion in the case just cited that:

> "It may well be argued that such provisions in the subdivision entitled 'General Provisions' (article 4) as are appropriate in actions for annulment are applicable thereto."

However, even this was not decided, and it was distinctly declared in effect in Coats v. Coats, supra, that section 146 (contained in article 4) does not apply to nullity proceedings. And we are not concerned here with any of these "general provisions." In view of the more specific headings of the various articles, and the nature of their provisions, we are satisfied that, notwithstanding the use of the word "Divorce" as the title of the chapter, the term "divorce" in article 3 cannot be fairly construed as including nullity proceedings.

[10] 4. It is claimed that the evidence was such as to require a finding on the question of "condonation," even though there was nothing in the pleadings attempting to set up any such defense. Regardless of all other answers that might be made to this claim, it is sufficient to say that "condonation" is a defense only in the ordinary divorce action for some cause arising after marriage, and is defined as being "the conditional forgiveness of a matrimonial offense constituting a cause of divorce." The statutory provisions as to this defense can play no part in the present proceeding. We have already seen that there was no waiver of the fraud which was the basis of this action for annulment.

[11] 5. As to the appeal on the ground of error in the matter of alimony, costs, and counsel fees, the only point now made is as to the provision of the final judgment "that the plaintiff * * * is not entitled to have or recover of or from James A. Millar, the defendant, any payment of alimony, or any payment of money whatsoever for her maintenance or otherwise." It is urged that this is an adjudication that plaintiff was not entitled to any alimony pendente lite, or costs or counsel fees necessary to enable her to maintain the action. It seems to us that learned counsel for plaintiff mistake the purpose and effect of this provision of the judgment. To our minds it has no reference whatever to any of these matters. The action was, as we have seen, one by plaintiff for permanent alimony or maintenance, and the provision complained of is in response to her claims in that regard, and nothing else. It simply adjudicates that she shall not recover any such alimony or sum by way of permanent maintenance, a necessary result of the decree of nullity. If under any order pendente lite made for temporary support, or payment of costs or counsel fees, money is still due her, she is not precluded by this provision of the judgment from collecting it. Nor do we think the injunctive provision of the judgment refers to this matter, and we cannot see how it in any degree prejudicially affects plaintiff.

We can see in this record no sufficient warrant for disturbing the judgment of the superior court. No point is now made as to the order denying a further allowance of costs and counsel fees.

The judgment and orders appealed from are affirmed.

We concur: SHAW, J.; VICTOR E. SHAW, Judge pro tem.; SLOSS, J.; HENSHAW, J.

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In re WHITNEY'S ESTATE. WHEELER v. LANDERS et al. WHITNEY v. SAME.

(S. F. 7778, 7834.)

(Supreme Court of California. Aug. 28, 1917. Rehearing Denied Sept. 27, 1917.)

1. PERPETUITIES ⟹6(3)—SUSPENDING POWER OF ALIENATION.

Testator gave the residue of his estate in trust for the use and purposes set forth in his will. The residue was to be treated as a whole until his son V. became 35 years old or until the son's death if he died earlier. During such period there was to be paid to each child a stated sum per month, and at the end of the period the residue was to be divided into three equal parts. One part was to be conveyed to V. if he lived to be 35 years old; if not, to be held in trust for his issue. The second part was to be held in trust for P. and his issue, and the third part for H. and her issue, "in the manner hereinafter provided." Upon the distribution into parts it was provided substantially with reference to the one-third share of each child that there should be paid to him a stated amount each year, and that, "if at the time of his death his youngest child, if a son, shall have arrived at the age of twenty-one years or if a daughter, shall have arrived at the age of eighteen years, the third of the property held for his benefit shall be distributed equally among his children. * * * In case the youngest child at the time of his death shall not have arrived at the age mentioned above the property shall be held in trust until the youngest child shall have arrived at the age designated and then the property shall be distributed among his issue as aforesaid." In case of the death of a child of testator without issue the third of the property held for his benefit was to go in equal parts to the others or to the trust for their issue. Civ. Code, § 749, provides that the death of the testator is to be deemed the time of the creation of the limitation, condition or interest. Section 716 declares that every future interest is void which by any possibility may suspend the power of alienation longer than the Code permits. *Held*, that the limitations of the will created future interests which suspend the absolute power of alienation for a longer period than during the continuance of lives in being at the death of testator in violation of Civ. Code, § 715, making the limitation void in its creation.

2. WILLS 🔑473—TRUST INVALID IN PART—SEPARATION.

As the remainders over after the death of testator's children were not remainders vesting at their death respectively, but only when the youngest surviving child became of age, they were void, and the trust for that purpose being incapable of separation from the trust otherwise valid, the entire disposition in trust must be held invalid.

3. WILLS 🔑440—CONSTRUCTION—INTENT OF TESTATOR.

The intent of the testator must be determined by the language of his will.

4. WILLS 🔑448—CONSTRUCTION—AVOIDING INTESTACY.

Where there is doubt as to the meaning of a will, that interpretation is to be preferred which will avoid intestacy.

5. WILLS 🔑629—CONSTRUCTION—VESTED REMAINDERS.

A construction that, a remainder is vested is to be taken rather than one which would make such remainder contingent.

6. PERPETUITIES 🔑9(1) — ACCUMULATION OF INCOME.

As the effect of the provisions as to the income of the property after the death of the testator was to provide for an accumulation of all income in excess of monthly allowances, the children being adults, the provisions were void as contrary to Civ. Code, §§ 722–726, forbidding the accumulation of income except for the benefit of minors in being during their minority.

7. WILLS 🔑800 — ELECTION TO TAKE—CONSTRUCTION.

The wife elected "to accept and acquiesce in the provisions of said will and hereby waive all claims to my share of any community property and any all other claims that I may have upon any of the estate disposed of by the said will." *Held*, that such waiver was not a waiver of the widow's right to claim a share under the law of succession in any property of decedent of which the will made no valid disposition.

Department 1. Appeals from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

In the matter of the estate of Joel Parker Whitney, deceased. From an order denying her petition for partial distribution, Helen Beryl Whitney Wheeler appeals, and from an order denying his separate petition for partial distribution, Parker Whitney appeals. Orders reversed.

See, also, 171 Cal. 753, 154 Pac. 855.

W. T. Plunkett, Sullivan & Sullivan and Theo. J. Roche, Louis V. Crowley, and James P. Sweeney, all of San Francisco, for appellants. Corbet & Selby, of San Francisco, for respondent trustees and others. Cushing & Cushing, of San Francisco, for respondent widow. Hamilton A. Bauer, of San Francisco, for respondent guardian of minors.

SHAW, J. Two appeals are presented by the records in the cases above entitled. No. 7778 is an appeal by Helen Beryl Whitney Wheeler from an order denying her petition for partial distribution of the estate of Joel Parker Whitney, deceased. No. 7834 is an appeal by Parker Whitney from an order denying his separate petition for a partial distribution of said estate.

The questions involved in the two appeals are substantially the same and they may as well be considered together. The two appellants are children of the testator. Each claims a right to partial distribution before final settlement on the ground that the time for presenting claims has expired; that the estate is but little indebted; that a large part of the assets is in condition for distribution; and that said decedent, although he left a will which has been duly admitted to probate, made no valid or lawful disposition of his estate thereby. All of these grounds are conceded, except the asserted invalidity of the will, and that is the only question presented for consideration.

Joel Parker Whitney died on January 17, 1913. He left surviving as his only heirs at law his widow, Lucy Whitney, and his three children, namely, Parker Whitney, Vincent Whitney, and Helen Beryl Whitney Wheeler. His estate consisted of the capital stock of the Whitney Estate Company, a California corporation, appraised at $847,821.15, and two parcels of real property, one in Maine, worth $2,000, and one in Colorado, worth $7,500. After the satisfaction of certain legacies and devises, the will gave the residue, which the court found to be of the value of $839,271.15, to three persons named, as trustees, in trust for the uses and purposes set forth in the will.

The general plan of this trust was that the widow should receive the sum of $1,200 per month during her life, in lieu of all other interests and rights she might have in the estate, including her rights in the community property, if any; that the said residue should be treated as a whole until his son Vincent became 35 years old, or until his death, if he died earlier; that during that period there should be paid to each child $300 per month, and that at the end of that period the residue should be "divided or distributed into three equal parts"; that one part should be transferred and conveyed to Vincent absolutely, if he lived to be 35 years old, if not, then to be held in trust for his issue, subject to a provision to be made for his widow; that the second one of the parts should be "held in trust for the benefit of Parker and his issue in the manner hereinafter provided"; and that the third of said parts should be "held in trust for the benefit of Helen Beryl and her issue in the manner hereinafter provided."

[1] The contention of the appellants is that the limitations of the will create future interests which suspend the absolute power of alienation for a longer period than during the continuance of lives in being at the death of the testator. Such suspension is forbidden by sections 715 and 749 of the Civil Code. It is also claimed that the will provides for unlawful accumulations of the income of the property, contrary to provisions of the Civil Code on that subject. Sections 723 to 726. The limitations attacked are those providing for the disposition of the property after the division of the residue into three parts as above mentioned.

The time of the death of the testator is deemed to be the time of the "creation of the limitation, condition, or future interest" declared to be void by the Code sections above mentioned. Civ. Code, § 749. Section 716 declares that "every future interest is void in its creation which, by any possibility," may suspend the power of alienation longer than the Code permits. This possibility is to be determined by the conditions existing "at the time of the creation" of the limitation or future interests, that is, at the time of the death of the testator.

> "The statute does not permit us to wait and see whether events may not so transpire that in fact no perpetuity results, but if under the terms of the deed or will creating the trust, when properly construed, the instrument 'by any possibility may suspend' the absolute power of alienation beyond the continuance of lives in being, the instrument, whether a deed or will, is void, and no trust is created nor any estate vested in the trustees." Estate of Steele, 124 Cal. 537, 57 Pac. 564; Gray on Perpetuities, § 231.

The limitations in favor of the issue of Vincent, in case of his death before becoming 35 years of age, are similar, so far as the objections under consideration are concerned, to those for the issue of Parker and Helen. It is therefore unnecessary to state more fully the terms of those limitations. The questions may be as well determined by a consideration of the language of the will relating to the disposition of the shares of Parker and Helen.

With respect to the shares of Parker and Helen, the first declaration of the will is that, upon the division or distribution into parts:

> "The second of these three parts shall be held in trust for the benefit of my son Parker and his issue, in the manner hereinafter provided, and the third of these three parts shall be held in trust for the benefit of my daughter Helen Beryl and her issue, in the manner hereinafter provided."

The special provision as to the share of Parker is:

> "The third of the property set apart for the benefit of my son Parker and his issue * * * shall be held and disposed of as follows: * * *
>
> "There shall be paid to my said son Parker the sum of thirty-six hundred dollars a year in equal monthly payments of three hundred dollars so long as he shall live. If at the time of his death his youngest child, if a son, shall have arrived at the age of twenty-one years, or, if a daughter, shall have arrived at the age of eighteen years, the third of the property heretofore held for his benefit shall be distributed equally among his children, the children of any deceased child taking by right of representation, the trustees retaining in their hands during the life of my wife a sufficient amount of the property to pay four hundred dollars a month to my wife as one-third of the provision for her. In case his youngest child at the time of his death shall not have arrived at the age mentioned, above, the property shall be held in trust for the benefit of his children until the youngest child shall arrive at the age designated, and then the property shall be distributed among his issue as aforesaid. In case my son Parker shall die without leaving issue, the third of the property theretofore held for his benefit shall go in equal parts, one-half to my son Vincent, subject to the charge for the benefit of my wife, or to the trust for his issue, and the other half to the trust for the benefit of my daughter Helen Beryl and her issue."

As to Helen's share it is:

> "The third of the property set apart for the benefit of Helen Beryl and her issue * * * shall be held and disposed of as follows:
>
> "There shall be paid to my daughter Helen Beryl the sum of thirty-six hundred dollars a year in equal monthly payments of three hundred dollars, and the trustees acting unanimously at any time shall have the power to increase the income paid to my said daughter to the full amount of the net income derived from the property held for her benefit, after deducting the amount required to provide one-third of the amount required for the monthly payments to my wife.
>
> "Upon the death of my daughter Helen Beryl, so much of the income as the trustees shall consider appropriate and necessary shall be paid to her issue until her youngest child, if a son, shall have arrived at the age of twenty-one years, or, if a daughter, shall have arrived at the age of eighteen years, when the third of the property theretofore held for the benefit of my daughter Helen Beryl shall be distributed equally among her children, the children of any deceased child taking the parent's share by right of representation, the trustees retaining in their hands during the life of my wife a sufficient amount of the property to pay four hundred dollars a month to my wife as one-third of the provision for her.
>
> "In case my daughter Helen Beryl shall die without leaving issue, the share of the property which would have been or shall have been held for her benefit shall be divided equally one-half to my son Vincent, subject to the charge for the benefit of my wife, or to the trust for the benefit of his issue, and the other half to the trust for the benefit of my son Parker and his issue."

If the effect of these provisions, in the possible event that a child shall die leaving a minor child or children, is that the title to the share is to be held by the trustees thereafter until the youngest child is of age, and shall at that time, and not before, become vested in those of the issue that may then be living and the children, if any, of any deceased child, then it would constitute a gift to a class of persons, not in being at the death of the testator, and neither the number of the class nor the persons who are to compose the class could be known or ascertained until the youngest surviving child became of age. See Civ. Code, § 1337. Such remainder would be a future contingent interest which could not be aliened, until the child became of age. Civ. Code, §§ 693, 695. Then, for the first time, the persons who are to own it would become known. That event must occur after the termination of the life of the child of the testator. From the death of such child, until the youngest of such issue became of age the power of alienation would be suspended, contrary to section 715, aforesaid. Estate of Cavarly, 119 Cal. 409, 51 Pac. 629. Under section 716, such limitation would be void in its creation.

If these dispositions of the remainder in the shares of Helen and Parker are void for the reasons stated, the result is that the decedent made no testamentary disposition of that portion of his estate; that he died intestate as to that part of his property and the same descended at his death to his heirs at law according to our law of succession. The share set apart for Helen and her issue would not, in that event, go entirely to her issue, as the testator intended, upon the arrival of her youngest child at majority, nor even to her heirs exclusively at her death. It would go to the heirs of the testator, and would vest in them at his death, and not at the death of Helen. If it was his community property, his widow would take one-half, and the three children would each take one-sixth of this remainder in the one-third part directed to be set apart to Helen. If it was his separate property, the widow would take one-third and each child two-ninths. The court did not find on the issue whether it was community property or separate property.

[2] Nothing can be clearer than the proposition that the testator did not intend that his widow, or either of the other children, should have any part of the share so set apart to one child, except in the contingency he provided for; that is, the death of one of his children without issue. To do this would destroy a very material part of the plan of the testator for the disposition of his estate, and would produce a result which he did not contemplate and to which it cannot be supposed that he did consent or would have consented.

Where a will or deed disposes of property upon trusts for several purposes, some of which are valid and some void, the "valid trusts should not be disregarded because in the instrument creating them one particular invalid trust is declared, unless the latter is so inseparably blended with the others that it cannot be eliminated without destroying the main intent of the trustor, or working manifest injustice to other beneficiaries." Estate of Willey, 128 Cal. 11, 60 Pac. 471. If the elimination of the void trust causes no important practical change in the testator's general scheme, if such void trust is not essential thereto, and does not impair the validity of the other dispositions of the will, it may be cut off and the other dispositions allowed to stand. Manice v. Manice, 43 N. Y. 381. If the trust created "is of such a nature as to make it indivisible, and incapable of being carried out as to that trust which is clearly legal, because of the * * * invalidity of the other trust," the whole trust must be held void. Nellis v. Rickard, 133 Cal. 620, 66 Pac. 32, 85 Am. St. Rep. 227.

"The question whether the valid clauses can stand depends upon whether or not the invalid ones are so interwoven with them that they cannot be eliminated without interfering with and changing the main scheme of the testator. In Darling v. Rogers, 22 Wend. [N. Y.] 495, Senator Verplanck correctly stated the rule as follows: 'When a will is good in part and bad in part, the part otherwise valid is void if it works such a distribution of the estate as, from the whole testament taken together, was evidently never the design of the testator. Otherwise when a good part is so far independent that it would have stood had the testator been aware of the invalidity of the rest.'" Estate of Fair, 132 Cal. 540, 60 Pac. 442, 64 Pac. 1000, 84 Am. St. Rep. 70.

The conclusion necessarily follows that, if these remainders over after death of the testator's children are not remainders vesting at their deaths, respectively, but only when the youngest surviving child shall become of age, they are void, that the trust for that purpose is incapable of being separated from the trusts otherwise valid, and that the entire disposition in trust must be declared void. It is therefore necessary to determine whether, by the terms of the will, these remainders are to vest at the death of the respective children, or afterward, upon the coming of age of the youngest child.

[3-5] The intention of a testator must be determined by the language of his will. Where there is doubt as to its meaning, that interpretation is to be preferred which will avoid intestacy as to the whole or any part of the estate. Le Breton v. Cook, 107 Cal. 416, 40 Pac. 552; Civ. Code, § 1326. A construction which leads to the conclusion that a remainder is vested is to be taken rather than one which would make such remainder contingent. Williams v. Williams, 73 Cal. 102, 14 Pac. 394.

Giving due weight to these rules and policies, we are nevertheless unable to reach the conclusion that the will provides that the interests of the children of Parker, if one is a minor, shall vest on the death of the parent. On the contrary, the only reasonable interpretation of its language is that the title to such remainder is to remain in the trustees until his youngest child becomes of age, and is at that time to be distributed by the trustees, and is then to vest in his children then living and the children then living of any deceased child, and that the same meaning must be given to the provisions as to the like remainder in the Helen one-third.

The will declares at the outset that the residue is given, devised, and bequeathed "to the trustees, in trust, for the uses and purposes hereinafter mentioned." The title to the whole residue is thereby vested in the trustees. Of necessity it must remain in them so long as the duties of the trust require them to deal with the title, or to dispose of the property. The "estate" so vested in them passes out of them, or "ceases," only when the purposes for which the trust was created, as to any particular share, are accomplished, or have "ceased," as the Code expresses it. Civ. Code, § 871. The effect of the first provision above quoted regarding these two parts, or shares, as to the Parker share, for example, is not that the title to the remainder shall at his death go to, or vest in, his issue, but that such title shall remain in the trustees, to be by them "held in trust for the benefit of my son Parker and his issue in the manner hereinafter provided." The provision as to the Helen share is the same.

Looking into the "manner hereinafter provided," we find that the provision for the disposition upon the death of Parker leaving a minor child surviving contains no word or phrase purporting to transmit the title or estate at that time from the trustees to his issue or children, or which purports to make any change at that point of time in the title. The trust does not then cease. On the contrary, the provision is that "the property shall be held in trust (that is, by the trustees in whom the title still remains) for the benefit of his children" thereafter, until the youngest child becomes of age. The opening phrase regarding the disposition by the trustees of this share, the words, "The third of the property set apart for the benefit of my son Parker and his issue," does not aid the respondent on this point. That is not a declaration that the property is set apart to Parker or to his issue, but that it is or has been set apart "for the benefit of" Parker and his issue, and it implies that the property is to be held by the trustees and disposed of by them as directed; that is, when the youngest minor child becomes of age after Parker's death. There is no direction that any title to or estate in that share shall pass out of the trustees in any manner until the event last mentioned occurs. The only words providing for the transmission of title to this future interest by or from the trustees are those directing that, when the youngest child becomes of age, "then the property shall be distributed among his issue as aforesaid"; that is, equally, the children of any deceased child "taking by right of representation." This clause defines the manner in which this remainder held in trust is to be disposed of by the trustees, and it is the only clause that does define it. The trust would then terminate, because no further duties or powers are left for the trustees to perform regarding that share. The use of the word "taking" in the phrase "the children of any deceased child taking by right of representation" implies that the ultimate beneficiaries are to take the property; that is, that they are to receive the title thereto. And since it could not be determined until that time who would be the persons entitled to take, or the proportion going to each, the necessary implication is that the persons who are to take are the children and grandchildren, as the case may be, then surviving, and that the heirs, as such, of any who had in the meantime died, would not take any interest. The widow of a deceased child would be an heir, but would not take. Under these circumstances the provision that the property shall then be distributed to the designated class should be construed to mean that the property previously held by the trustees shall then vest in and be delivered to the persons composing the class.

While the provisions as to Helen's share are not couched in precisely the same words, there is no substantial difference in meaning, and the same conclusions follow. The same result would be declared as to Vincent's part in the event, possible at the time of the creation of the trust, that he should die under the age of 35 years.

[6] It is to be further noted that the effect of the provisions concerning the income of the property after the death of the testator is to provide for an accumulation of all of the income in excess of $2,100 a month and such additional allowance as the trustees may give to Helen, if there should be such excess. The three children were adults at the death of the testator. These provisions are void, so far as they provide for such accumulations during the lives of the three children, because they are contrary to sections 722 to 726, inclusive, of the Civil Code, forbidding accumulations of income except for the benefit of minors in being and during their minority.

The result is that the dispositions of these remainders are void, that the testator died intestate as to that portion of his estate, and that, as this trust cannot be separated from the others without changing the dispositions intended by the testator and practically making a new will, the entire trust provision is void. The trustees took no title to or interest in the property.

In Estate of Yates, 170 Cal. 254, 149 Pac. 555, cited by respondents, there were words denoting a clear intent to vest the title to the bequests in the beneficiaries at the death of the testator; the time of delivery only being postponed. The case is not in point here. The law is thus stated in Estate of Blake, 157 Cal. 459, 108 Pac. 287:

> "The general rule is that where the legacy or devise is given to a person to be paid at a

future time, it vests immediately. When, however, it is not given until a future time, it is contingent, and does not vest until that time occurs."

The decision in Estate of Winter, 114 Cal. 186, 45 Pac. 1063, is to the same effect and the language of the will there construed is substantially the same as that of the limitation here involved.

[7] A further statement is necessary in regard to the rights of the widow of the testator. The will declared that it was the intention of the testator thereby to dispose of all of his property, including any community property in California, "with the written consent and acceptance" of his wife. It directs the trustees, out of the residue given to them in trust, to pay to his wife $1,200 a month from the time of his death until her death, and makes certain specific bequests to her which are not embraced in the residue. Attached to the will was an instrument, executed by the wife on the day of the execution of the will, whereby she declared:

> That she had read the will, and that, "clearly understanding that my said husband by his said will, disposes not only of all his individual property, but also all of our community property, in case there is any such, including my half as well as his own, I hereby elect to accept and acquiesce in the provisions of the said will, and hereby waive all claims to my share of any community property, and any and all other claims that I may have upon any of the estate disposed of by the said will, being fully convinced in my own mind of the reasonable and proper character of the said will, and the wisdom of its provisions, and hereby accepting such of the said provisions as apply to or concern me."

See Estate of Whitney, 171 Cal. 753, 154 Pac. 855.

We are satisfied that this instrument, under the circumstances of this case, does not waive the widow's rights to claim a share, under the law of succession, in any property of the decedent of which the will makes no valid disposition. By its terms she waived only such claims as she had upon property disposed of by the will. Her annuity was to be paid by the trustees out of the residue given to them to be held in trust. It was in consideration of this annuity, the payment of which was made a paramount charge upon the trust property, that she elected to waive all claims to the other avails of the residue and in the corpus thereof. Now that the trust disposition of the residue must be declared void, the trustees will have no property, and she can receive nothing from them. Justice requires that she be relieved of her election and restored to her legal rights as widow and heir in the residue. The sums already paid to her on the annuity will be chargeable against her as advances upon her share.

The will stands as to the special legacies, amounting to something over $16,000. The disposition of the residue to trustees being void, such residue must be distributed according to the law of succession, and, upon the facts found and admitted, both Parker and Helen were entitled to partial distribution.

The respective orders denying partial distribution are reversed.

We concur: SLOSS, J.; LAWLOR, J.

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34 Cal. App. 344

In re WHITTINGTON. (Cr. 557.)

(District Court of Appeal, Second District, California. July 21, 1917.)

EXTRADITION ⚷30—"FUGITIVE FROM JUSTICE."

One is not a fugitive from justice from the state of Texas, so as to be subject to extradition thereto, where, having been arrested in that state for an offense there committed, he was with permission of its authorities taken on process under extradition to the state of California, there to answer to a charge of having committed a crime, though the latter charge was later dismissed.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Fugitive from Justice.]

In the matter of the application by Calvin K. Whittington for writ of habeas corpus. Petition discharged.

William Thomas Helms, Frank Dominguez, Milton Cohen, and Guy Eddie, all of Los Angeles, for petitioner. F. W. Shelley, Deputy Dist. Atty., of Los Angeles, for respondents.

JAMES, J. Petitioner herein claims to be illegally restrained of his liberty, and prosecutes this writ for the purpose of securing discharge from custody of the police authorities of the city of Los Angeles and from the custody of the sheriff of Tarrant county, state of Texas. The latter officer claims the right to the custody of the petitioner under the authority of a warrant of rendition issued by the Governor of California upon a requisition made by the Governor of Texas.

The facts shown are these: Petitioner was heretofore arrested in the state of Texas, for a crime alleged to have been there committed, and was taken into custody by the peace officers at Ft. Worth. While there held in custody a requisition issued by the Governor of California was honored by the Governor of the state of Texas. This requisition upon the Governor of Texas was made upon a showing that petitioner here had theretofore committed the crime of murder in the state of California. The police authorities at Ft. Worth, upon having presented to them the Governor's warrant of that state then in the hands of the agent of the state of California, relinquished control and custody of the petitioner, and he was immediately taken under the warrant mentioned to the state of California to answer to the charge of murder. The latter charge was not pressed to trial in California. It was dismissed or otherwise disposed of, whereupon the Governor of Texas made requisition upon the Governor of California to have petitioner returned to Texas to answer to the same offense for the alleged commission of which he was held under arrest at the time the police authorities of Ft. Worth relinquished him into the hands of the state agent to be returned to California. Petitioner has never been released from custody since he was first arrested in the state of Texas for the crime there alleged to have been committed by him.

It is his contention now that under these facts he cannot be considered as being a fugitive from justice, within the meaning of that term as it is included in section 2 of article 4 of the Constitution of the United States. That provision is, in part, as follows:

> "A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime."

No serious contention is urged as to the right of the court upon habeas corpus to go behind the warrant of rendition and inquire as to the matter here put in issue. It is the contention, however, of respondents that whenever, upon examination of the question, it appears that the person sought to be extradited has committed a crime in a sister state, and is found within the state issuing the warrant of rendition, it must be at once concluded that such person is a fugitive from justice, and that the inquiry there ends. We are cited to People v. Pinkerton, 17 Hun (N. Y.) 199; Roberts v. Reilly, 116 U. S. 80, 6 Sup. Ct. 291, 29 L. Ed. 544; Appleyard v. Massachusetts, 203 U. S. 223, 27 Sup. Ct. 122, 51 L. Ed. 161, 7 Ann. Cas. 1073; State v. Richter, 37 Minn. 436, 35 N. W. 9. These cases are all harmonious to the point that the question of the motive or intent of a person who, having committed a crime in one state, leaves that state and is apprehended in another jurisdiction, is immaterial, and that it will be presumed that his leaving the state within which the offense was committed was with intent to avoid prosecution therefor. Some very broad language is used in People v. Pinkerton, supra, where the court says:

> "The charge that he committed a crime in that state, coupled with the fact that he is found in this state, is conclusive upon the question whether he is a fugitive from justice."

None of these cases present facts which fit those illustrated by the evidence before us, in that no question was involved as to the act of the accused in departing from the state being other than one governed by his own volition and not under the compulsion of legal process, and therein we think lies a most important distinction. In this case the petitioner had been taken into custody to answer to the charge pending in the state of Texas, and the authorities there voluntarily turned him over to the agent of the state of California, to be brought here to answer for the offense alleged to have been committed in California. The California authorities held him in custody, and, deciding finally not to prosecute him in this state, continued to restrain him of his liberty, and delivered him into the custody of the agent from the state of Texas, to be taken back there to answer for the crime which he was not permitted to have trial of when first arrested. This we think may not be done. Cases have arisen where a person, having committed a crime in state A, has appeared in state B, there committed another crime, and in turn fled to state C, from which latter state he has been extradited, and returned to state B. After the authorities of state B no longer desired to hold the prisoner, state A has sought by requisition to extradite him, and the accused by habeas corpus has presented the question that, having been brought forcibly back into state B from state C, he could not be returned to state A without being first allowed his liberty. The courts have held in such a case that the controlling fact against the prisoner was that he left state A in the first instance through his own volition, and therefore became a fugitive from justice in whatever state he might thereafter be apprehended. Some of these cases are referred to in Hackney v. Welsh, 107 Ind. 253, 8 N. E. 141, 57 Am. Rep. 101. The court there in remanding the prisoner lays particular stress upon the fact that the accused was shown to have voluntarily departed from the state which sought his extradition.

We find no cause to dispute the proposition, as announced in the authorities cited by respondents, that where a person has committed a crime in one state, and is found in another state, he will be presumed to have fled from the jurisdiction of the first. But in this case the prisoner did not leave the state of Texas by any voluntary act of his own. He was taken out of the state against his will and under compulsory process, at a time when the state of Texas had him in custody, with full right and power to prosecute him for the offense for which it now seeks to have him returned. Not only may it be said that he is not a fugitive, because he did not voluntarily leave that state, but because, also, the state of Texas voluntarily relinquished the jurisdiction of its courts over his person and waived its right to thereafter have him brought back from the California jurisdiction to answer for the same offense. In an argumentative way the case of Hess v. Grimes, 5 Kan. App. 763, 48 Pac. 596, is authority for the conclusion last announced.

The prayer of the petition is granted, and petitioner is ordered to be discharged from the custody of respondents.

We concur: CONREY, P. J.; WORKS, Judge pro tem.

34 Cal. App. 336

PEOPLE v. LENSEN. (Cr. 396.)

(District Court of Appeal, Third District, California. July 18, 1917.)

GRAND JURY 🔑5—JURORS—QUALIFICATIONS—WOMEN—"MEN."

The word "men," as used in Code Civ. Proc. § 190, defining a jury as "a body of men," and section 192, providing that a grand jury is "a body of men," did not include women, notwithstanding Pen. Code, § 7, providing that words used in the masculine gender include feminine; hence an indictment presented by a grand jury of 11 men and 8 women, prior to the amendments approved May 29, 1917 (St. 1917, p. 1282), was not "found as prescribed in this Code," within the meaning of Pen. Code, § 995, providing that such indictments be set aside.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Men.]

Appeal from Superior Court, Modoc County; Clarence A. Raker, Judge.

R. E. Lensen was convicted of crime, and he appeals from the judgment and from orders denying his motions for a new trial and to set aside the indictment. Order denying new trial reversed, with direction to grant motion to set aside the indictment.

Jamison & Wylie, of Alturas, for appellant. U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

CHIPMAN, P. J. The defendant is charged by indictment with having sold alcoholic liquors in violation of the statute. On his arraignment, he filed a motion to set aside the indictment upon the ground that the grand jury that found and presented the indictment was not a legal grand jury, in that it was composed of only 11 men; that is to say, it was composed of 11 men and 8 women, and that 12 men did not concur in finding the indictment. He was tried by a jury, and convicted, filed his motion for a new trial, which was overruled, and was sentenced to pay a fine of $400. It is now specified as error: (1) That the court overruled defendant's motion to set aside the indictment; (2) that there was no evidence presented by the prosecution to the jury that the alleged beer, which the defendant was charged with selling, contained in excess of 1 per cent. of alcohol.

We do not think it necessary to notice other than the first assignment of error. At the time this indictment was found, section 192 of the Code of Civil Procedure read as follows:

"A grand jury is a body of men, nineteen in number, returned in pursuance of law, from the citizens of a county, or city and county, before a court of competent jurisdiction, and sworn to inquire of public offense committed or triable within the county, or city and county."

Since the first statutory enactment in 1863, defining a grand jury, the law has remained unchanged. A "jury" is defined by section 190 of the Code of Civil Procedure to consist of "a body of men." Section 990 of the Penal Code provides that the defendant may, upon his arraignment, move to set aside the indictment; and by section 995 of the Penal Code, it is provided that the indictment must be set aside by the court in which the defendant is arraigned:

"(1) Where it is not found, indorsed, and presented as prescribed in this Code."

Unless it can be said that in the enactment of these provisions of law it was intended that women should be regarded as qualified to act as members of a grand jury, we cannot hold that an indictment presented by women or by 12 members of a grand jury, one of said 12 necessarily being a woman, would be an indictment "found" as prescribed by law.

"A jury is a body of men summoned and sworn to decide upon the facts in issue at the trial." Hunnel v. State, 86 Ind. 431, 434.

"A jury is a body of men temporarily selected from the qualified inhabitants of a particular district, and invested with power (1) to present or indict a person for a public offense. * * *" Ann. Codes & Stats. Or. 1901, par. 959; Ballinger's Ann. Codes & Stats. Wash. 1897, par. 4730.

"Forsyth, in his History of Trial by Jury, published in 1852, says: 'The distinctive characteristic of the system is this: That the jury consists of a body of men taken from the community at large, summoned to find the truth of disputed facts.'" Hopkins v. Nashville, C. & St. L. R., 96 Tenn. 409, 34 S. W. 1029, 1031, 32 L. R. A. 354.

"Trial by jury is by 12 free and lawful men, who are not of kin to either party, for the purpose of establishing the truth of the matter in issue." Smith v. Times Pub. Co., 178 Pa. 481, 499, 36 Atl. 296, 297, 35 L. R. A. 819.

"'Jury,' as the term is used in the clause of the Constitution providing that the right of trial by jury shall not be denied, 'means 12 competent men, who are free from all ties of consanguinity and all other relations that would tend to make them dependent on either party. It means 12 men who are not interested in the event of the suit, and who have no such bias or prejudice as would render them partial towards either party.'" State v. McClear, 11 Nev. 39, 46.

"The terms 'jury' and 'trial by jury' are, and for ages have been, well known in the language of the law. They were used at the adoption of the Constitution, and always, it is believed, before that time, and almost always since, in a single sense. A jury for the trial of a cause was a body of 12 men, described as upright, well-qualified, and lawful men, disinterested and impartial, not of kin or personal dependents of either of the parties," etc. Dennee v. McCoy, 4 Ind. T. 233, 237, 69 S. W. 858, 860.

From the earliest period in the history of the common law, juries, grand and petit, have been composed exclusively of men. In speaking of challenges to the polls, which were, by Coke, reduced to four heads as mentioned by Blackstone, one of these was on account of incompetency (propter defectum). Mr. Blackstone said:

"Under the word 'homo,' also, though a name common to both sexes, the female is, however, excluded, propter defectum sexus (because not of the male sex), except when a widow feigns herself with child, in order to exclude the next heir, and a suppositious birth is suspected to be intended; then upon the writ de ventre inspiciendo (of inspecting pregnancy), a jury of women is to be impaneled to try the question, whether with child or not." Volume 2, Cooley's Blackstone (4th Ed.) p. 1123.

The grand assize was chosen by the sheriff selecting 4 knights, who in turn selected 12 others to serve with them, "and these, all together, form the grand assize, or great jury, which is to try the matter of right, and must now consist of 16 jurors." Id. p. 1115.

Blackstone defines an indictment to be "a written accusation * * * presented upon oath by a grand jury" to consist of "24 good and lawful men of the county." Id. p. 1453. Mr. Justice Field, while on circuit, gave an extended charge, frequently referred to as an admirable statement of the functions of a grand jury. Among other things, he said:

> "No person shall be required, according to the fundamental law of the country, except in the cases mentioned, to answer for any of the higher crimes, unless this body, consisting of not less than 16, nor more than 23, good and lawful men, selected from the body of the district, shall declare," etc. Charge to Grand Jury, 2 Sawy. 667, Fed. Cas. No. 18,255, cited in note, Jones' Blackstone, vol. 2, p. 2525.

Section 7 of the Penal Code, in defining the senses in which words are used in that Code, provides that "words used in the masculine gender include the feminine and neuter"; and the other Codes have similar provisions. We do not think the word "men," as found in the sections above referred to, is used in its generic sense, and hence was intended to include women, as, for example, the word "horse" at common law was held to include "mare," and as held in People v. Pico, 62 Cal. 50.

> "The English Representation of the People Act, 1867, giving the franchise to every man possessed of a certain qualification, did not enfranchise women. Although by the statute 13 & 14 Vict., c. 21, par. 4, it was enacted that 'in all acts, words importing the masculine gender shall be deemed and taken to include females,' the word 'man,' in the ordinary and popular sense of words, is used in contradistinction to the word 'woman.' Chorlton v. Lings, L. R. 4 C. P. 374." 19 Am. & Eng. Ency. of Law (2d Ed.) pp. 705, 706.

When the statute was enacted defining the terms "jury" or "jurors," or the persons qualified to act in finding indictments, and mentioning such persons as "men," the statute carried with it the implication that they should be males, for such was then the common law that women were incompetent to act as jurors. Mr. Justice Turner, in Harland v. Territory, 3 Wash. T. 131, 13 Pac. 453, held that this implication arose even where the Code declared all "qualified electors" as competent to serve as grand jurors, and the Code also made females of like age with males qualified electors.

The question has been removed from the field of controversy by the recent statute, approved May 29, 1917 (St. 1917, p. 1282), by which the various sections of the Code of Civil Procedure relating to jurors are so amended as to render women competent to act both as grand jurors and trial jurors, and also to sit upon juries of inquest. By section 7 of the act it is made the duty of the superior court in each of the counties of the state, in making an order designating the estimated number of grand and trial jurors for the year, to make the selections "of men and women suitable and competent to serve as jurors," etc. The question now here must, of course, be decided with reference to the statute law heretofore existing.

The order denying defendant's motion for a new trial is reversed, with direction to grant the motion to set aside the indictment.

We concur: BURNETT, J.; HART, J.

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33 Cal. App. 694

WRIGHT v. LOCOMOBILE CO. OF AMERICA. (Civ. 2062.)

(District Court of Appeal, First District, California. May 17, 1917.)

APPEAL AND ERROR ⚷1011(1) — REVIEW — FINDINGS OF FACT.

Decision on a substantial conflict in evidence that a contract for laying a floor was substantially complied with will not be disturbed on appeal, especially where the judge took a view of the premises.

Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by Charles Wright against the Locomobile Company of America. Judgment for plaintiff, and defendant appeals. Affirmed.

Elliott McAllister and H. S. Young, both of San Francisco, for appellant. Jacob Samuels, of San Francisco, for respondent.

PER CURIAM. Action upon a contract for the laying of a floor of a specified description in a building. Plaintiff recovered judgment, from which defendant appeals, as also from an order denying its motion for a new trial.

The main question relied upon for a reversal of the judgment and order is as to whether or not there was a substantial compliance with the terms of the contract, and the appellant is challenging the sufficiency of the evidence to support the finding of the trial court to that effect. The judge of the court below, after hearing all of the evidence and going into all of the technical facts in relation to the different classes of floor, visited the building and examined the floor itself. It seems to the court, upon an examination of the entire record, that this is a case where there is a substantial conflict in the evidence, and that particularly is true where the judge of the court, after hearing the testimony of the respective contractors and experts went and examined the premises himself, saw the floor, and then decided that there had been a substantial compliance with the terms of the contract. Under those circumstances we will not undertake to review or reverse the decision of the trial court, and for the reasons stated the judgment and order are affirmed.

34 Cal. App. 340

KEITH v. RAMSEY, County Auditor.

(Civ. 1636.)

(District Court of Appeal, Third District, California. July 19, 1917.)

1. Officers ⚷100(2) — Compensation — Increase—Constable.

A constable of a township is within Const. art. 11, § 9, inhibiting increase, during his term of office, of the compensation of a county, city, town, or municipal officer.

2. Officers ⚷100(1)—Statutes—Operation —Presumption.

St. 1915, p. 1379, amending Pol. Code, § 4281, by increasing salary of certain officers and changing compensation of constable from fees to salary, not declaring that the change does not increase the constable's compensation, will be presumed intended to have a uniform operation, and so not to apply to any of the officers mentioned during their terms theretofore commenced.

Appeal from Superior Court, Lassen County; H. D. Burroughs, Judge.

Mandamus by Joe Keith against C. L. Ramsey, Auditor of Lassen County. From an adverse judgment, plaintiff appeals. Affirmed.

Grover C. Julian, of Susanville, for appellant. J. A. Pardee, of Susanville, for respondent.

CHIPMAN, P. J. Plaintiff was on the 18th day of October, 1915, appointed constable of No. 3 township, Lassen county, to serve an unexpired term of that office which commenced on the first Monday in January, 1915. At the commencement of the term, constables were compensated by the fee system, as provided in section 4281 of the Political Code amended in 1913 (Stats. 1913, p. 1226). At the session of the Legislature in 1915, said section was amended by fixing the salary of the constables in Lassen county at $25 per month. Plaintiff made demand upon the county auditor for payment of salary as provided by the section as amended in 1915, but warrant was refused. Thereupon plaintiff brought his action in mandamus against the said auditor in the superior court of Lassen county, and judgment went in favor of defendant. Plaintiff thereupon appealed to this court, and now contends: (1) That the office of constable is a township office, and that the constitutional inhibition of article 11, section 9, does not apply thereto; and (2) that the change from fee to salary does not constitute an increase in compensation.

[1] In support of the first point it is contended that said section 9 of article 11 of the Constitution prohibits an increase in the compensation of county, city, town, or municipal officers, but does not apply to constables, for the reason that they are neither county, city, town, nor municipal officers. This question was raised in the case of Cox v. Jerome, 31 Cal. App. 97, 159 Pac. 884, and was decided adversely to appellant's contention. The court there said:

"In cases in which the question as to the right to increase the compensation of justices or constables was involved, and there have been several, it has never been denied that the provisions of section 9 of article 11 affect these officers, and the Supreme Court has so assumed, without any suggestion that the subject was open for debate."

As bearing somewhat upon the subject, Smith v. Mathews, 155 Cal. 752, 103 Pac. 199, and Crockett v. Mathews, 157 Cal. 153, 106 Pac. 575, may be consulted.

[2] The position taken by appellant upon the second proposition is:

"Where an act substitutes a salary for the previous fee system, and fails to disclose whether an increase of compensation is thereby produced, and is to take effect during the incumbency of the officer, the conclusive presumption is that the Governor and the Legislature have investigated and determined that the change does not result in an increase of compensation, and the courts have no right to review such determination"—citing Crockett v. Mathews, supra.

In that case it was expressly stated in the opinion that the doctrine of Smith v. Mathews, supra, is not opposed to the conclusion reached in Crockett v. Mathews. In Smith v. Mathews attention was called by appellant—

"to the fact that in numerous sections of the new law [then under consideration] salaries of various officers in several classes of counties are plainly and unequivocally raised, and since it cannot be held that the Legislature intended those parts of the act to be operative on the incumbents of current terms, there is no reason for holding it to be operative upon those officers whose compensation is altered without disclosing whether the result is an increase or reduction of compensation."

The Chief Justice stated, in rendering the majority opinion, that this view was well sustained by the appellant. He said:

"If it was not intended to put in immediate operation provisions raising salaries, upon what ground are we to hold that it was intended to have immediate operation in those instances where it changes the compensation attached to an office without disclosing whether the change effects an increase or reduction, and where, as far as the court can see, it is as likely to be an increase as a reduction? If in one case the old law continues to operate, why not in the other?"

Section 4281 of the Political Code relates to salaries of various county and township officers, and plainly shows that by it the compensation was increased as to several officers; for example, the section as amended in 1915 provides that the recorder shall receive a salary of $1,900 per annum, while his salary theretofore was fixed at $1,600 per annum. Stats. 1913, p. 1225. The salary of the auditor was increased from $500 to $800. As in the section there is no finding or declaration by the Legislature as to whether it was intended that there should be or should not be any increase in compensation of constable, and as it clearly appears on the face of the act that it was intended to increase the compensation of some of the officers named therein, it is a fair presumption that it was intended by the Legislature that the act should be given uniform operation, and was not intended to apply to any of the officers therein mentioned during their current terms of office.

In a concurring opinion by Mr. Justice Shaw in Smith v. Mathews, supra, he said:

> "If it [the amendatory act] changes from fees to salaries, as it may if it finds that the salary allowed will not increase the compensation, it can declare that there is no increase and that it is to apply immediately to the present incumbents. Perhaps the fact of no increase would be inferred from the declaration that it should apply to present incumbents; but, where neither statement appears, it is to be inferred that an increase was contemplated and that it was intended to apply prospectively only."

Where it appears, from a comparison of the provisions of the statute as it stood before and after amendment, that there was by express direction in the new law an increase in compensation intended, "it has been the settled doctrine of this court ever since the decision in Dougherty v. Austin, 94 Cal. 601, 28 Pac. 834, 29 Pac. 1092, 16 L. R. A. 161," said the Chief Justice in Smith v. Mathews, supra, "that in such cases the incumbent cannot claim the increased compensation, but continues to receive that which was provided by the law in force at the date of his election, which as to him continues in force (unless expressly repealed) to the end of his term notwithstanding the fact that the amended law is also in force in most cases for more than 18 months before the end of his term for the purpose of fixing the compensation of his successor in a new term." See, also, Harrison v. Colgan, 148 Cal. 73, 82 Pac. 674. The same, we think, is also true where, by fair implication, though not by express direction, an increase in compensation was intended.

The fact that plaintiff is seeking to obtain compensation by salary, instead of by fees, is a very strong circumstance tending to show that the compensation has been increased by the amendatory act, for it is not probable he would be invoking the power of the court to obtain a salary which was no greater than he was receiving under the fee system.

We think the judgment should be affirmed; and it is so ordered.

We concur: BURNETT, J.; HART, J.

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34 Cal. App. 348

BAILEY v. SECURITY TRUST CO.

(Civ. 2361.)

(District Court of Appeal, Second District, California. July 21, 1917. On Petition for Rehearing, July 31, 1917. Rehearing Denied by Supreme Court Sept. 17, 1917.)

1. MANDAMUS 🔑154(2)—PETITION.

Statements in petition to Supreme Court for mandamus, while not essential to showing legal rights of parties, will not be stricken, being appropriate under Supreme Court rule 26 (119 Pac. xiv), requiring petition to set forth the circumstances which, in applicant's opinion, render it proper that the writ issue originally from the appellate court.

2. REPLEVIN 🔑49—CLAIM AND DELIVERY—FAILURE OF DEFENDANT TO JUSTIFY SURETIES—RIGHT TO DELIVERY.

Failure of defendant in claim and delivery to cause its sureties to justify on its redelivery bond is an abandonment of its attempt to require return of the property, giving plaintiff right to have it delivered to him by the sheriff as though no such undertaking had been given.

3. MANDAMUS 🔑151(2)—PROPERTY HELD BY SHERIFF'S AGENT.

The sheriff having wrongfully redelivered the property to defendant in claim and delivery, its possession is that of the sheriff as his agent, as regards right, under Code Civ. Proc. § 1085, to mandamus to require delivery to plaintiff in such action.

4. MANDAMUS 🔑151(2)—PARTIES.

Where sheriff wrongfully redelivered property to defendant in claim and delivery, and then went out of office, his successor is not a necessary party to mandamus to compel delivery of the property by such defendant to plaintiff in such action.

5. MANDAMUS 🔑154(2)—PETITION—PLEADING COMPLIANCE WITH STATUTE.

It is enough for the petition for mandamus to state that the affidavit, undertaking, and order in claim and delivery, which constituted the process under which the property was seized by the sheriff, were made in accordance with the provisions and requirements of Code Civ. Proc. §§ 510–512, without setting out their contents; those sections stating what their contents should be.

On Petition for Rehearing.

6. MANDAMUS 🔑164(3)—RETURN—DENIALS.

The return in mandamus, denying the respondent was ever served with a copy of the affidavit made by petitioner in the claim and delivery action, as set forth in the petition, but that a copy of the only affidavit served on him in said action is annexed, does not charge a defect in the affidavit in the claim and delivery action, but merely that the sheriff did not serve on him a true copy.

Mandamus by Matthew Bailey against the Security Trust Company. Peremptory writ granted.

E. L. Foster and Charles A. Barnhart, both of Bakersfield, and Leon E. Morris, Sullivan & Sullivan, and Theo J. Roche, all of San Francisco (Robert M. Clarke, of Los Angeles, of counsel), for petitioner. Wiley & Lambert, of Bakersfield, for respondent.

CONREY, P. J. This is an application for a writ of mandate to require that the respondent deliver to the petitioner the personal property described in the petition. An alternative writ was issued. Respondent is now before the court for the purpose of showing cause why a peremptory writ should not be granted. Such writ should not issue unless it appears that respondent should be compelled to perform the demanded act as an act which the law specially enjoins upon respondent "as a duty resulting from an office, trust or station," or unless the writ should issue to compel the admission of petitioner "to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such * * * person." Code Civ. Proc. § 1085.

This is a proceeding incidental to an action for the possession of the described property. An appeal by the defendant from a judgment in that action is now pending in the Supreme Court. At the time of commencement of the action in June, 1913, an affidavit and undertaking in claim and delivery were made, which, on July 18, 1913, were delivered by the plaintiff to the sheriff, together with an order indorsed by the plaintiff's attorney upon the affidavit, requiring the sheriff to take the property from the defendant. These documents were filed by the sheriff, T. A. Baker, on the 26th day of July, 1913, in the office of the clerk of the superior court of Kern county, with the sheriff's return thereon, showing that on the 18th day of July, 1913, he took possession of the property. In his return the sheriff further stated that:

> "At the same time I delivered to the defendant, Security Trust Company, a copy of the within affidavit and order and undertaking duly approved by me, and the defendant, not having excepted to such surety, claimed the redelivery of said property by giving me an undertaking in due form, and the sureties thereon having justified, and no other person having made claim to such property in due form, I redelivered the said property to the defendant."

At the time of filing its return to the alternative writ herein, respondent by its attorneys moved this court to strike from the petition filed in this proceeding those portions thereof reading as follows:

> (1) "That prior to said demand, and on the 12th day of January, 1917, this petitioner made a written demand, a copy of which is hereto annexed, and made a part hereof, and referred to as 'Exhibit B,' upon one D. B. Newell as sheriff of the said county of Kern, said D. B. Newell being the duly elected successor in office to said T. A. Baker, whose term of office expired January 2, 1915, to take said property into his possession and deliver the same to said petitioner, but said sheriff then refused and has ever since refused to do so; that at the time of this demand upon said D. B. Newell, to wit, the 12th day of January, 1917, petitioner made a written demand upon the respondent herein, a copy of which demand is hereto attached, marked 'Exhibit C,' and referred to and made a part hereof, to deliver said property to said D. B. Newell for delivery to said E. L. Foster and Chas. A. Barnhart as attorneys for this petitioner; that said respondent failed and refused to do so; that the said property now is, and at all times herein mentioned, except as otherwise alleged in paragraph V hereof, has been, in the possession and control of the respondent herein."
>
> (2) "That said property has greatly increased in value since the commencement of the action in claim and delivery mentioned in paragraph IV hereof, and is now worth more than eighteen thousand ($18,000.00) dollars, and is worth seventy thousand ($70,000.00) dollars; that this petitioner is as of right entitled to the possession of said property; that the possession of said property would greatly enhance said petitioner's security for the due execution and satisfaction of the judgment rendered by the superior court hereinabove referred to in the event that said judgment should be affirmed by the Supreme Court of this state; that in the event said judgment be so affirmed this petitioner would prefer and desire to have the said property, rather than a sum of money, in satisfaction of said judgment; that the said property would be of greater value to him than the sum of eighteen thousand ($18,000.00) dollars; that said property is of a peculiar value, in that the shares of stock of the said Kern Mutual Telephone Company are very limited in number and cannot be obtained in the market."
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> (3) "That petitioner has constantly tried to obtain the possession of said property, and for that purpose has taken the following proceedings, all of which failed: On or about the 26th day of August, 1913, the petitioner herein petitioned the superior court of the state of California in and for the county of Kern, for a writ of mandate to compel the aforesaid T. A. Baker as sheriff of the county of Kern, to deliver to said petitioner the said property. The writ was denied by the said superior court, but on an appeal to this, the honorable District Court of Appeal of the State of California for the Second Appellate District, the judgment of the lower court was reversed. Bailey v. Baker (1915) 28 Cal. App. 537, 153 Pac. 242. Upon a subsequent trial in the said superior court, the writ of mandate was issued. From the judgment therein said T. A. Baker appealed, and pending said appeal refused to comply with the mandate. Thereupon the petitioner herein presented to said superior court an affidavit setting forth the fact of said Baker's refusal to comply with the order of the court, and upon which he prayed that a citation be issued to said Baker, requiring him to appear and show cause why he should not be punished for contempt of court in so refusing to obey the writ of mandate. The court refused to issue such citation, whereupon petitioner herein petitioned this, the honorable District Court of Appeal of the State of California for the Second Appellate District, for a writ of mandate to be directed to the said superior court, requiring it to issue the citation to said Baker as prayed for. This writ was issued. Bailey v. Superior Court (July 11, 1916) 31 Cal. App. 78, 159 Pac. 990. The citation was then issued, and said Baker, failing to show cause, was committed by said superior court for contempt. The said Baker then petitioned this, the said honorable District Court of Appeal, for a writ of habeas corpus. This writ was issued on the ground that said Baker was no longer sheriff, his term having expired January 2, 1915. Matter of T. A. Baker (Dec. 13, 1916) 162 Pac. 922."
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> (4) "That this petition is made in the first instance to this, the honorable District Court of Appeal of the State of California for the Second Appellate District, rather than to the superior court of the state of California in and for the county of Kern, for the reason that petitioner desires to have the possession of said property at and before the time when the Supreme Court of the state of California shall render its decision in the aforesaid action entitled 'Matthew Bailey, Plaintiff, v. Security Trust Company, a Corporation, John Doe and Richard Roe, Defendants'; that any process or writ issued from any court will be useless after such decision; that an application to the said superior court would involve the possibility of a great and injurious delay; that such delay might be sufficient to prevent this petitioner from securing the desired, or any, relief prior to a decision by the Supreme Court as above stated; and that this proceeding is the only plain, speedy, and adequate remedy available to petitioner."

[1] We find no important reason for striking from the petition the quoted paragraphs. While the facts stated in those paragraphs may be not essential to a complete statement exhibiting the legal rights of the parties, they serve to show that the plaintiff has diligently sought to obtain the relief demanded by him, and the facts stated are appropriate when the petitioner is appealing to the discretion of the court, particularly in the mat-

ter of granting the writ originally in this court without requiring the petitioner in the first instance to resort to the superior court. Rule 26 of the rules of the Supreme Court and District Courts of Appeal (119 Pac. xiv) requires that the petition, "in addition to the necessary matter requisite by the rules of law to support the application, shall also set forth the circumstances which, in the opinion of the applicant, render it proper that the writ should issue originally from the appellate court to which such application is made, and not from such lower court." The motion to strike said paragraphs from the petition is denied.

[2] The petition states that at the time of commencing his action, in June, 1913, the petitioner "made an application in accordance with the requirements and provisions of section 510 of the Code of Civil Procedure and delivered said affidavit, together with an order and an undertaking executed in accordance with the provisions and requirements of section 512 of the Code of Civil Procedure, to one T. A. Baker, as sheriff of the county of Kern, in which county the said property was then and is now located, requiring said sheriff to take the said property from the respondent herein; that the said sheriff forthwith took into his possession the property described in said affidavit, which is the same property described in paragraph II hereof." Then follows a statement of the subsequent return of the property by the sheriff to the defendant, under circumstances stated, which are the same as are described in our decision in Bailey v. Baker, 28 Cal. App. 537, 153 Pac. 242. In that decision we held that the failure of the Security Trust Company to cause its sureties to justify (after notice to plaintiff), on its redelivery bond, amounted to an abandonment of its attempt to require the return to it of the property; that such abandonment gave to the plaintiff the right to have the property delivered to him by the sheriff the same as if no such undertaking had been given at all. We remain satisfied that the law is as in that decision it was held to be.

[3] The return of respondent herein does not deny the essential facts. In the meantime Sheriff Baker has gone out of office without completing the performance of his duty. Wrongfully he delivered to the defendant, Security Trust Company, the property held by him as sheriff under valid process which constituted his authority to act in the matter. Ex parte Baker, 162 Pac. 922. Wrongfully the defendant received, and wrongfully it holds, that property in its possession. The affidavit, undertaking, and order under which the seizure was made by Sheriff Baker are in the office of the clerk of the superior court, although they should now be in the hands of Newell, the present sheriff. Ex parte Baker, supra. In the proper performance of his duty Newell would obtain possession of those papers, and would execute the process by taking the property and delivering it to the plaintiff; but he has refused to do so, notwithstanding that the plaintiff has demanded of him the performance of that duty. The property, when taken into possession by Sheriff Baker, became property in custodia legis, and its status has never changed. Detroit & M. Ry. Co. v. Alpena Cir. Judge, 152 Mich. 201, 115 N. W. 724; August v. Gilmer, 53 W. Va. 65, 44 S. E. 143. The Security Trust Company holds this property in its actual possession, but not in legal possession. So far as this proceeding is concerned, its possession is the sheriff's possession, in the same sense that this would be true if Sheriff Baker had left the property in the hands of some keeper employed by him. Such keeper or deputy would have the property in possession by virtue of no rights other than those pertaining to an agent of the sheriff. See Aigeltinger v. Whelan, 133 Cal. 110, 65 Pac. 125, where a warehouseman receiving attached goods from a sheriff was held to be the sheriff's agent. Such agent would be compellable by mandate to surrender the goods to the person entitled. So it is with this defendant. It holds property that is in custody of the law. Its holding under the circumstances constitutes a trust for the delivery of the property to the plaintiff. The performance of that duty is by the law specially enjoined upon the sheriff, and therefore is enjoined upon his agent, the defendant. In refusing to perform the duty and execute the trust enjoined upon it, the defendant is unlawfully excluding the plaintiff from the use and enjoyment of a right to which he is entitled.

[4] Upon the stated facts, the petitioner might ask for and would be entitled to a writ of mandate against Sheriff Newell, and that officer would have been a proper party defendant in this proceeding. But the demurrer filed by the respondent does not include any claim of defect of parties, and we think that the failure to join the sheriff as defendant does not affect the validity of the plaintiff's cause of action as stated against the defendant Security Trust Company. The plaintiff being entitled to immediate possession of property which is legally in the custody of the court, the remedy is essentially the same, whether the delivery be made directly by the defendant to the plaintiff, or whether it be made through the hands of the sheriff. The difference between the two modes of delivery would be rather of form than of substance. If there is any force in the law, plaintiff should have the benefit thereof as directly as legal procedure will allow. It has been held that, even where by authority of claim and delivery proceedings property seized in replevin was rightfully delivered by the sheriff to one of the parties, the property continued to be in custodia legis, and the party in possession thereof stood substituted for the sher-

iff as custodian pending the action. Mohr v. Langan, 162 Mo. 474, 63 S. W. 409, 85 Am. St. Rep. 503. Much more should this be so when the sheriff, without right to do so, put such property into the possession of the party not entitled thereto.

[5] Respondent claims that the petition herein does not state a cause of action, because it does not set out the contents of the affidavit, undertaking, and order which constitute the process under which the property was seized by the sheriff. As quoted above, the petition merely states that these documents were made in accordance with the provisions and requirements of the Code of Civil Procedure, and that upon receiving those documents the sheriff took the property into his possession. We think that this was a sufficient pleading for the purpose of stating a cause of action, and that the objection could only be reached by a demurrer for uncertainty, if the objection could be maintained at all. If it were necessary for the plaintiff in an action to show that a summons from a court of record had been duly issued and served prior to the entry of a default, the mere statement of those facts, without setting out a copy of the summons, would ordinarily be sufficient. A denial of the facts alleged would require that the plaintiff produce the record; but in the absence of such denial the fact that the summons was in due form would be assumed. The allegations of a pleading are to be liberally construed. Code Civ. Proc. § 452. Here we have the statement that the affidavit and undertaking were made in accordance with the provisions of sections 510 and 512 of the Code of Civil Procedure, and that an order was made in connection therewith requiring the sheriff to take the property from the defendant. Code Civ. Proc. § 511. Those sections of the Code state what the contents of such documents should be. The allegations of the petition may fairly be construed as equivalent to a statement of the facts showing that the documents were in form and substance in accordance with the requirements of those sections. The sheriff acted upon those documents in taking the property into his possession, and his right so to do was not challenged by the defendant.

Let the peremptory writ issue.

We concur: WORKS, Judge pro tem.; JAMES, J.

On Petition for Rehearing.

PER CURIAM. [6] In its petition for rehearing in this cause respondent insists that we did not fully dispose of its claim that the affidavit filed by plaintiff in the claim and delivery proceeding was insufficient to authorize the sheriff's seizure of the property. We held that the petition herein sufficiently stated facts showing that the affidavit met the necessary requirements of the law. But respondent now directs our attention more particularly to its return filed in this proceeding, wherein respondent "denies that it was ever served with a copy of the affidavit or any affidavit made by or on behalf of petitioner in the cause mentioned and set forth in paragraph IV of petitioner's petition; that the only affidavit ever served upon or received by this respondent in said cause is set forth by an order [copy?] thereof annexed hereto and made a part hereof and marked 'Exhibit A.'" Exhibit A purports to be a copy of an affidavit made by Matthew Bailey wherein Bailey says:

> "That he is the plaintiff in the above-entitled action and that he is entitled to the possession of the following described personal property [giving the description]; that the said property is in the possession of and wrongfully detained by the defendant in this action, and that the alleged cause of detention, as this plaintiff is informed and believes, is that they claim one Matthew S. Platz has some claim on said property; that said property has not been taken for a tax," etc.

It is true that in our decision of this case we did not pay special attention to the foregoing language of the return. This arose out of the fact that respondent's written argument purported to be "in support of demurrer to petition," and we were considering, and our attention was principally directed to, that demurrer, and to the sufficiency of the petition attacked by the demurrer. We did say, however, that the return filed by respondent herein does not deny the essential facts alleged in the pleading, and the record justifies our statement. The return did not state that the copy of affidavit annexed thereto was a copy of the affidavit which had been delivered by the plaintiff to the sheriff in connection with the undertaking and order. On the contrary, respondent denied that it was ever served with a copy of the affidavit made by the plaintiff. Therefore the allegations of the return charge no defect in the process, but merely charge that the sheriff did not serve on the defendant a true copy.

The other points mentioned in the petition for rehearing were considered in rendering the principal decision, and our opinion thereon stands unchanged.

The petition for rehearing is denied.

34 Cal. App. 393

PEOPLE v. FLORES. (Cr. 544.)

(District Court of Appeal, Second District, California. July 31, 1917. Rehearing Denied by Supreme Court Sept. 27, 1917.)

1. CRIMINAL LAW 🔑517(4) — EVIDENCE — CONFESSIONS—PROOF OF "CORPUS DELICTI."

The elements of the "corpus delicti," evidence of which must be introduced to render defendant's confessions admissible, are certain facts forming its basis and the existence of a criminal agency as the cause of them, and to establish the corpus delicti it is not essential to show that the crime charged was committed by defendant.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Corpus Delicti.]

2. CRIMINAL LAW 🔑1170(1)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

In a criminal case, the testimony of a phonographic reporter, who took down statements made by defendant, was admitted. Some of the statements were in English, and some in Spanish, and those in Spanish were translated by an interpreter, and taken down as given to the reporter through the interpreter. On defendant's objection, the reporter's testimony as to those portions of the statement made in Spanish were excluded. *Held* that, as these rulings were in defendant's favor, he had no ground for complaint.

3. CRIMINAL LAW 🔑531(3) — EVIDENCE — CONFESSIONS—LAYING FOUNDATION.

Where, before defendant's incriminating statements were admitted, witnesses were asked whether they made any promises or held out any inducements to get defendant to talk, and whether he talked freely and voluntarily, there was no basis for the claim that no foundation was laid for the admission of the statements, assuming that they were such confessions as required the laying of a foundation.

4. CRIMINAL LAW 🔑1169(9)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

The overruling of objections to questions as to whether any promises were made or inducements held out to induce defendant to make incriminating statements, and whether he talked freely and voluntarily, on the ground that they called for conclusions, if erroneous, was harmless, where opportunity for cross-examination was given, but no improper influences were shown.

5. CRIMINAL LAW 🔑519(9)—EVIDENCE—CONFESSIONS—VOLUNTARY CHARACTER.

That accused is under arrest and in the custody of officers, and that an alleged confession is made in answer to questions, will not authorize its rejection, if it fairly and clearly appears that defendant's statements were voluntary.

6. CRIMINAL LAW 🔑814(10)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

Where, though defendant did not testify, marks on his face were pointed out in connection with evidence offered in an effort to show that his mental condition had been affected by an injury, it was not error for the court to charge that, in determining the matter of his insanity, idiocy, or lunacy, the jury should consider the evidence in the case and the appearance of the defendant before them since the beginning of the trial.

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Albert Flores was convicted of murder, and he appeals. Affirmed.

B. F. Thomas and Francis Price, both of Santa Barbara, for appellant. U. S. Webb, Atty. Gen., Robert M. Clarke, Deputy Atty. Gen., E. W. Squier, of Santa Barbara, and M. F. Shannon, of Los Angeles, for the People.

CONREY, P. J. The defendant was convicted of the crime of murder, and sentenced to imprisonment for life. He appeals from the judgment, and from an order denying his motion for a new trial.

[1] The first error claimed by appellant is based upon the ground that the court admitted in evidence testimony concerning confessions made by the defendant, and that at the time when that testimony was admitted evidence establishing the corpus delicti had not been received. The so-called confessions were not confessions by the defendant that he committed the crime charged. In connection with the statements made by him, the defendant insisted that he did not kill the child, Renata Maccianti. His statements consisted in admissions of fact which tended to show that the murder was committed by him. At the time when these admissions were received in evidence, testimony had been received strongly tending to show, not only that the child was dead, but that at the time and place charged in the indictment she came to her death by violent means, and by the criminal act of some person. At the time when the testimony showing the admissions made by the defendant was received, there was not before the court any evidence tending to show that the crime had been committed by the defendant.

The contention urged by appellant's counsel is that, in order to establish the corpus delicti, it is necessary that the evidence shall not only establish the fact of commission of the crime, but also that it must have tended to connect the defendant with the commission of that crime. Upon this proposition we do not agree with appellant's counsel. The two elements of corpus delicti are: (1) Certain facts forming its basis; and (2) the existence of criminal agency as the cause of them. To establish the corpus delicti it is not essential to show that the crime charged was committed by the defendant. People v. Vertrees, 169 Cal. 404, 146 Pac. 890; People v. Wagner, 29 Cal. App. 363, 155 Pac. 649; People v. Swaile, 12 Cal. App. 192, 196, 107 Pac. 134; People v. Tarbox, 115 Cal. 57, 46 Pac. 896; People v. Ford, 25 Cal. App. 388, 419, 143 Pac. 1075.

[2] The court received in evidence the testimony of the phonographic reporter, who took down in shorthand one of the statements introduced as constituting admissions made by the defendant. Some of the statements made by the defendant at that time were in the Spanish language, and some were in English. Appellant claims that the court erred in receiving the testimony of the reporter concerning the statements made by the defendant in his presence, since it appeared that the statements made in Spanish were translated into English by an interpreter,

and were taken down by the reporter as given to him through the interpreter. But the record shows that, on objection made by the defendant, the court excluded from the testimony of the reporter those portions of defendant's statements which were made in the Spanish language, and refused to receive the same in evidence. Those rulings having been made in favor of the defendant, he is left without foundation for his complaint respecting that testimony.

[3-5] The next point relied upon is that, preliminary to the reception in evidence of testimony concerning the statements or confessions made by the defendant, it was not shown that no inducements were offered or threats made to the defendant before those statements were made by him. Referring to the transcript pages referred to by appellant's counsel in their argument, we find that the record does not in fact support the claim made concerning it. The conversations in which those statements were made by the defendant all occurred on the 30th day of June, 1916; two of them before noon, and two in the afternoon. As to each of those conversations testimony was given to the effect that no threats or promises were made to the defendant, and that his statements were made voluntarily. The district attorney asked such questions as the following:

> "Did you make any promises or hold out any inducements to the defendant to get him to talk on that occasion?" "Did he talk to you freely and voluntarily at that time?"

Objections were made to those questions as calling for the conclusions of the witness, and the objections were overruled. Assuming that these rulings were erroneous, yet on the complete record it does not appear that they were prejudicial. Opportunity was given for cross-examination, and questions were asked by defendant's counsel with respect to the circumstances under which the statements were made; but it was not made to appear that any improper influences were used to open the lips of the defendant. His several statements were made at different times and places—on a public street, and at the scene of the crime, as well as at the jail. It is true that the court reporter, in giving his testimony as above mentioned, did not say anything with respect to the circumstances leading up to the statement of the defendant as reported by him. But that ground had been covered by another witness referring to the same conversation, and the reporter stated that he did not come into the room until the other persons present had assembled there, and that he only took down the formal questions and answers.

Assuming that the extrajudicial statements, or some of them, made by the defendant, should be treated as confessions, and subject to the rule here invoked by the defendant, we nevertheless hold that the record does not establish the claim that there was no foundation for the reception in evidence of the testimony covering those statements. "The mere fact that the defendant is under arrest and in the custody of officers, and that the alleged confession is made in answer to questions, will not authorize the rejection of such confession, if it fairly and clearly appears that the statements of the defendant were of a voluntary nature." People v. Hoge, 25 Cal. App. 456, 458, 143 Pac. 1072.

[6] The court gave to the jury the following instruction:

> "From the evidence in this case, and the appearance of the defendant before you since the beginning of this trial, you are to determine the matter of his insanity or idiocy or lunacy at the time it is alleged that he committed the crime charged in the indictment; these questions being questions of fact, of which you are the sole judges."

Appellant claims error in this instruction, in that defendant was not a witness at the trial, and that the "appearance of the defendant" before the jury was not a fact in evidence. The record shows, however, that the personal appearance of the defendant was brought to the attention of the jury by defendant's counsel in at least one instance. While they were examining the father of the defendant as a witness in his behalf, the witness testified that when five years old the defendant was kicked by a horse, and marks on defendant's face caused by the accident were pointed out and identified by the witness. This evidence was introduced as a part of the effort made to show that the mental condition of the defendant had been affected by the injury so received.

The other objections presented by counsel for defendant with respect to instructions given and with respect to instructions refused, in so far as they are not covered by the propositions heretofore considered in this opinion, are of such slight importance that they do not require discussion. The law of the case was fairly and fully stated to the jury.

The judgment and order are affirmed.

We concur: JAMES, J.; SHAW, J.

176 Cal. 79

EARLEY v. PACIFIC ELECTRIC RY. CO.

(L. A. 4004.)

(Supreme Court of California. Sept. 5, 1917. Rehearing Denied Oct. 4, 1917.)

DEATH ⚷25—ACTION—RELEASE.

Code Civ. Proc. § 377, providing for action for damages against a person causing death by wrongful act creates an entirely new cause of action unknown at common law, and hence, as the damage of widow for the wrongful death of her husband includes not only financial loss, but loss of consortium, the husband's execution prior to his death of a release for damages from the injury which finally resulted fatally will not bar the widow's right of action.

Department 2. Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by Sadie F. Earley, a widow, against the Pacific Electric Railway Company. From a judgment for plaintiff and an order denying new trial, defendant appeals. Affirmed.

Frank Karr, R. C. Gortner, and A. W. Ashburn, Jr., all of Los Angeles (W. P. Millar, of Los Angeles, of counsel), for appellant. Harry A. Hollzer, T. A. Williams, W. O. Morton, and C. B. Morton, all of Los Angeles, for respondent. T. A. Williams, Gibson, Dunn & Crutcher, and Norman S. Sterry, all of Los Angeles, amici curiæ.

HENSHAW, J. This appeal is from the judgment and from the order denying defendant's motion for a new trial. The action was brought under section 377 of the Code of Civil Procedure, by the widow of W. H. Earley. Her husband had been a passenger upon a car of defendant corporation, and was injured by a collision. As the result of his injuries he died. Before his death he executed a release to the defendant in consideration of the payment to him of his hospital expenses and of $5,200 in money. The contract was in writing and released "the Pacific Electric Railway Company from any and all claims and causes of action on account of any and all personal injuries * * * suffered by me * * * and due to collision of a car * * * upon which I was a passenger." When, following her husband's death, the widow commenced and prosecuted this action, this release was presented to and urged upon the court as a complete defense thereto, and around this single proposition revolve all the questions presented upon this appeal.

Section 377 of the Code of Civil Procedure, under which this action was brought, provides that:

> "When the death of a person not being a minor is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case may be just."

The attorney for the appellant, and amici curiæ adopting the same construction of the law as does appellant's attorney, have presented for the consideration of this court elaborate briefs discussing the origin of the right of action for wrongful death under Lord Campbell's Act, the varying statutes of the states of the United States passed after, and some in copy of the English act, and from a learned and elaborate analysis reach the conclusion that the wrong which the defendant committed—the tort upon the person of the deceased—was necessarily but a single wrong, and that, as the defendant had received its full acquittance and discharge from all consequences arising from that wrong from the injured man himself, the wrong itself was compensated for, and in point of law was extinguished, so that it could not be made the basis of any further action by any person whatsoever.

It would not be without interest, but at the same time it is wholly unnecessary to follow these learned counsel in their analyses of the varying statutes and the decisions of the courts upon them. For when the last word shall have been said in such a consideration, the paramount fact will still remain that rights under our section 377 of the Code of Civil Procedure are to be defined not by what other courts have said touching their own statutes, but from the meaning and intent of our own law derived from a reading of it. Upon this matter we are not without light from previous decisions. Thus in Monroe v. Dredging Co., 84 Cal. 515, 24 Pac. 303, 18 Am. St. Rep. 248, referring to this section, it is said:

> "It may be observed that the language of the statute of this state (section 377 C. C. P.) is broader than the language of the English statute."

In the case of Burk v. Arcata & Mad River R. R. Co., 125 Cal. 363, 57 Pac. 1065, 73 Am. St. Rep. 52, it is said:

> "The statutes in the different states, though varying greatly, follow generally Lord Campbell's Act, 9 and 10 Victoria, c. 95. In that it was recited that no right of action existed at common law for such damages. It was then a new right of action. It could not be a continuance of the right which the injured man had for the injury; for the loss to his heirs did not accrue until he died. Under our statute the injured person might survive long enough to sue and recover damages, or to settle with the wrongdoer, and then, by his death, a new cause of action would accrue to his heirs. True, it has been held differently in some states, which have what are called 'survival statutes.' Here it has been ruled, as the fact evidently is, that the statute creates an entirely new cause of action."

Some statutes are but statutes of survivorship. They carry over to some living person after the death of the injured person

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

precisely the right of action and precisely the right of recovery which the injured person would have had if his injuries had not resulted fatally. Manifestly under such a statute a composition agreement and release of the wrongdoer deprives the living person, who may have been empowered by the statute to commence or carry on the action, of all right of recovery. But such is not our statute. Our statute creates a new right of action with a different measure of damage from that which accrued to the injured person as a result of the defendant's wrongdoing. The right of action is to the heirs or representatives of the deceased and the elements of damage (without here attempting to specify them all) include in the case of the widow an admeasurement of the financial loss occasioned to her by the death of her husband through the deprivation of his society, comfort, and protection. Upon the other hand, the right to recover for physical suffering—a right which is always an element of damage when the action is prosecuted by the wronged and injured person—is not from its nature an element of the damage which the heir or personal representative may recover under the action given by our statute.

One simple illustration, we think, will make the matter quite plain. A servant suffers wrongful and debilitating injuries at the hands of a third person. That third person is, of course, liable to the injured servant. The injured servant, however, compromises with the wrongdoer for the injuries which he has received and gives him a full release and acquittance. At the same time and by reason of the same single tort the master has his right of action against the wrongdoer for the loss of his employé's services. This was a right of action recognized at common law and is recognized by the statute law of this state. Civ. Code, § 49. Would any one contend that the release of the wrongdoer by the servant operates also as a release and discharge of the wrongdoer from his liability under the independent right of action given by the law to the master? That right of action is wholly independent, precisely as is the right of action created in favor of the heirs, and it is no less independent because it has its origin in the same tort. The judgment and order appealed from are therefore affirmed.

We concur: MELVIN, J.; SHAW, J.

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176 Cal. 84

HILL v. BOARD OF SUP'RS OF BUTTE COUNTY et al. (Sac. 2600.)

(Supreme Court of California. Sept. 7, 1917.)

1. Counties ⚿105(2)—County Buildings—Right to Initiative and Referendum.

Under Const. art. 4, § 1, as to initiative and referendum, the voters may compel a reference on a resolution for the erection of a county building; such resolution being legislative in character.

2. Statutes ⚿110½(1)—Subjects and Titles of Acts—Validity.

The act to provide for direct legislation, including the initiative, referendum, and recall (St. 1911, p. 577), does not, by designating the act as a provision for direct legislation, invalidate it on the ground that the recall is not legislative, and that therefore it violates Const. art. 4, § 24, requiring every act to embrace but one subject.

In Bank. Appeal from Superior Court, Butte County; W. T. O'Donnell, Judge.

Mandamus by W. F. Hill against the Board of Supervisors of the County of Butte and others. From an order for a peremptory writ, the Board appeals. Affirmed.

Raymond A. Leonard, A. F. Jones, and George F. Jones, all of Oroville, for appellant. Lon Bond and J. R. Robinson, Jr., both of Chico, for respondent.

HENSHAW, J. The board of supervisors of the county of Butte passed its resolution declaring the necessity for the construction of a new hall of records in Butte county, for the purpose of keeping in a safe place the valuable records of the county and for relieving the congested condition of the courthouse. By this resolution it accepted plans, specifications, strain sheets, and working details submitted by an architect for the erection and construction of this building. The clerk of the board was directed forthwith to advertise for bids for the construction of the building in accordance with the plans and specifications. Within due time thereafter a petition was presented to the board, legally sufficient in form and containing the requisite number of signatures of the electors of Butte county, requesting the board to reconsider its resolution, and upon such reconsideration either to repeal it or submit it to a vote of the electors under the referendum. The board refusing to comply with either request, this action in mandate was instituted and determined by the superior court in favor of the petitioner. That court issued its peremptory writ of mandate, and from its judgment the board of supervisors has appealed.

[1] Appellant board of supervisors first contend that the action which it has taken and proposes to take is not subject to the referendum under the law, founding its argument herein upon the indisputable propositions of fact that counties are parts of the political subdivisions of the state; that the duties of county officers are largely duties pertaining to the government of the state, and that to enable them to perform these duties the Legislature required them to construct and maintain safe and suitable public buildings; that, as these duties are in their nature state duties, the laws governing their performance are state laws. From this is drawn the con-

clusion that it was never intended that the people of a county could thus, under the referendum, interfere and thwart the policy of the state and its legislation evincing that policy. In this, it is argued, is found the distinction between the referendum as applicable to counties and as applicable to cities. It is conceded that this case has a close analogue in Hopping v. Council of the City of Richmond, 170 Cal. 605, 150 Pac. 977; but it is argued that, as the Hopping Case was addressed to the right of referendum in a case of a city, whose council desired to erect a city hall, it is not authority, owing to the reasons indicated, controlling the determination of the case at bar.

Unfortunately, however, for appellants' argument, to sustain it would do violence to the express provisions of the Constitution. That Constitution, in section 1 of article 4, reserves to the people of the state the power of instituting legislation under the initiative and of repealing or affirming enactments of the state Legislature under the referendum. These constitutional provisions have received careful analysis from this court in bank in the Hopping Case, supra. The same article and section of the Constitution declares that:

> "The initiative and referendum powers of the people are hereby further reserved to the electors of each county, city and county, city and town of the state, to be exercised under such procedure as may be provided by law. * * * This section is self-executing, but legislation may be enacted to facilitate its operation, but in no way limiting or restricting either the provisions of this section or the powers herein reserved."

Touching these reserved powers, it may be noted that it is not at all singular that the people should reserve to themselves in matters of lesser magnitude (that is to say, in county and in municipal affairs) powers equal to those reserved in matters of greater magnitude (that of state legislation); and so the people have done. Next, it is to be noted that the people have made no distinction, nor effort to distinguish, between those powers so reserved in the case of cities or towns and those reserved in the case of counties. Since the language of the reservation is the same as to each, it would be a strained, distorted, and unwarranted construction which held that the powers thus reserved in identical language may be distinguished and discriminated for or against in the case of any of these public agencies. And, finally, it is self-evident that the Legislature itself could not abridge, nor even hamper, the exercise of those powers by any of the subordinate mandatories of the state—first, because the reservation, being in the Constitution, is not subject to such legislative abridgment; and, second, because the Constitution in terms declares that the Legislature shall have no authority to limit or restrict the powers reserved. That a resolution such as is here under consideration is legislative in character, is conclusively established by the decision in the Hopping Case, supra.

[2] The Legislature of 1911 proposed two amendments to the Constitution—one (article 4, § 1) providing for the initiative and referendum in state, county, and city affairs, quotations from which have heretofore been given; and a recall of public officers (article 23, § 1). Precisely as the constitutional amendment touching the initiative and referendum reserved the same rights and powers to the electors of counties, cities, and towns, so, in the matter of the recall, this constitutional amendment provided that it should also be exercised by the electors of each county, city and county, city, and town of the state with reference to the elective officers thereof. Both amendments were declared in the Constitution itself to be self-executing. The same Legislature adopted an act entitled "An act to provide for direct legislation, including initiative, referendum, and recall by electors in counties, by adding two new sections to the Political Code, to be numbered section 4058 and section 4021a respectively." St. 1911, p. 577. Section 1 of this act, thus placed upon the statute books, declared that:

> "A new section is hereby added to the Political Code, to be numbered section 4058, and to read as follows."

This section set forth a scheme in detail for the exercise of the reserved powers of the initiative and the referendum. Section 2 of the same act of the Legislature declared that:

> "A new section is hereby added to the Political Code, to be numbered section 4021a, and to read as follows."

Section 4021a made provision for the recall of any elective officer of any county or township or supervisorial district thereof, and provided in detail the method of such recall. Our Constitution (article 4, § 24) prescribes that:

> "Every act shall embrace but one subject, which subject shall be expressed in its title."

It is argued that the legislative enactment violates this plain mandate of the Constitution, for that in its title and in its body it deals with two entirely unrelated subject-matters, namely, elections under the initiative and under the referendum provisions, which clearly have to do with legislation, and elections for the recall of officers, which matter has no bearing whatsoever upon legislation, and that, notwithstanding that the general description in the title of the act declares that the act itself provides for "direct legislation," this legislative enactment cannot operate to transform the character of the recall, so as to give it any of the attributes of legislation. If the foregoing is conceded to be sound, then the result contended for is inevitable—the whole act must fall. Cooley, Const. Lim. (7th Ed.) p. 211; Lewis' Sutherland, Stat. Con. (2d Ed.) § 144. To the same effect are

State v. Ferguson, 104 La. 249, 28 South. 917, 81 Am. St. Rep. 123; State v. Lancaster County, 17 Neb. 87, 22 N. W. 228; Oxnard Beet Sugar Co. v. State, 73 Neb. 57, 102 N. W. 80, 105 N. W. 716; Ritchie v. People, 155 Ill. 98, 40 N. E. 454, 29 L. R. A. 79, 46 Am. St. Rep. 315; Pioneer Irr. Dist. v. Bradbury, 8 Idaho, 310, 68 Pac. 295, 101 Am. St. Rep. 201.

The question thus presented is one not free from difficulty; yet, for reasons to be given, we hold the act to be valid. Manifestly, if the title had declared that the act dealt with "elections governing," instead of "direct legislation," all of these objections to the act itself would fall to the ground; for it would be quite within the powers of the Legislature by a single enactment to provide an elective scheme governing the operation of the initiative, the referendum, and the recall, and in the body of the act this is in fact what the Legislature did do. In the last analysis, therefore, the difficulty arises over an unhappy phrase of description found in the title to the act, namely, "direct legislation," and the question to be resolved is whether we shall permit that phrase to control to the destruction of the whole act. Says Sutherland (1 Stat. Con. § 115):

> The courts "agree that, whilst it is necessary to so expound this provision as to prevent the evils it was designed to remove, it is no less desirable to avoid the opposite extreme, the necessary effect of which would be to embarrass the Legislature in the legitimate exercise of its powers, by compelling needless multiplication of separate acts, as well as to introduce a perplexing uncertainty as to the validity of many important laws which must be daily acted upon."

Says Cooley (Const. Lim. p. 206):

> "If the act is not made to cover legislation incongruous in itself, and which by no fair intendment can be considered as having a necessary or proper connection, a title in general terms will be good."

And, finally, declares Sutherland (1 Sutherland, Stat. Con. § 134):

> "The general subject need not appear in the title, if it is clearly disclosed or readily inferred from the details expressed."

We have then before us an act, the body of which deals with elections. It was well within the power of the Legislature to pass such an act. The subject, elections, is one. These new powers reserved by the people to themselves afford a reason as well as a justification, for framing the machinery of these elections in a single act. There is nothing hostile, nor even inharmonious, in the matters treated of in the body of the act. The Legislature was unfortunate merely in selecting for the title of the act a descriptive phrase which unduly circumscribed the legislation actually enacted. But in this it committed no wrong which the constitutional mandate was designed to prevent, and for this reason we hold that the argument against the validity of the act is not well taken.

The judgment appealed from is therefore affirmed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; MELVIN, J.; SHAW, J.; LAWLOR, J.

176 Cal. 28

In re WINETEER'S ESTATE. (L. A. 4982.)

(Supreme Court of California. Aug. 30, 1917.)

1. Appeal and Error 🔑683—Record—Matters Presented for Review.

Under Const. art. 6, § 4½, providing that no judgment shall be set aside or new trial granted because of the improper admission or rejection of evidence, unless after an examination of the entire cause the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice, and Code Civ. Proc. § 475, prohibiting reversals for errors, unless it shall appear from the record that such error was prejudicial and caused substantial injury, a judgment will not be reversed because of any error of the court in limiting the number of depositions which would be received regarding the sanity of a testatrix, where there was nothing embodied in the record by bill of exceptions or otherwise to show what the testimony in the excluded depositions was, or whether it was material or competent.

2. Appeal and Error 🔑970(1)—Discretion—Limiting Number of Depositions.

Under Code Civ. Proc. § 2044, providing that the court may stop the production of further evidence upon any particular point, when the evidence upon it is already so full as to preclude reasonable doubt, a judgment will not be reversed because the court limited the number of depositions which it would admit on the question of the sanity of a testatrix, where it does not appear that it abused its discretion.

3. Trial 🔑57—Limiting Number of Witnesses.

The testimony of numerous intimate acquaintances of a testatrix regarding her mental competency or incompetency is evidence on one point, within Code Civ. Proc. § 2044, authorizing the court to limit the amount of evidence upon any particular point.

4. Wills 🔑334—Contests—Findings.

In a will contest on the ground that the testatrix was not of sound and disposing mind, but insane and mentally incompetent to make a will, the court found that the testatrix conceived and was possessed of the idea that her husband and children had inflicted and were going to inflict great injury and bodily harm upon her, and intended to kill her for the purpose of obtaining her property, that they were conspiring to obtain her property; that this mental condition continued, and was present on the date of the execution of the will; that it was false and utterly lacking in foundation, that the husband and children were dutiful, kind, considerate, and patient, and she had no cause or reason to hold such belief; that at the time of the execution of the will she was possessed of an insane delusion that her husband and children had done her bodily harm, etc., and that on the date of the execution of the will she was not of sound and disposing mind, but was possessed of insane delusions, and was incompetent to dispose of her property by will or otherwise. *Held*, that these findings were adequate and sufficient.

In Bank. Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Proceeding for the probate of the will of Elizabeth A. Wineteer, deceased. From a judgment denying probate, proponent appeals. Affirmed.

Wadham & Munkelt, of San Diego, for appellant. Patterson Sprigg and Dwight D. Bell, both of San Diego, for respondent.

HENSHAW, J. A contest was instituted over the admission to probate of the will of Elizabeth A. Wineteer, deceased. The sole ground of contest pressed at the trial was that the deceased "was not of sound and disposing mind, but was, on the contrary, of unsound mind, and insane and mentally incompetent to make a will." At the trial of this contest evidence, oral and documentary, was introduced, the documentary evidence consisting of depositions, many in number. Of these a large proportion were the views of intimate acquaintances respecting the mental sanity of the deceased, accompanying which views the reasons for the opinions must be given. Code Civ. Proc. § 1870, subd. 10. A time came in the reading of these depositions when the court of its own motion interposed and set a limit to the further introduction of such testimony. Its ruling in so doing is the principal error presented upon this appeal, which follows the findings and determination of the court that the will was the product of an unsound mind.

Herein it becomes of consequence to consider the record. It is as follows: The court declared:

"I have frequently limited the number of witnesses who would be permitted to testify upon a given line in any case. That is a well-recognized practice of the courts, * * * which I have followed where the evidence is purely cumulative. We cannot be expected to sit here and hear every witness that can be dragged into court upon a proposition; time does not permit it, nor is it necessary, nor does it conduce to the best results nor to the furtherance of justice. The limit ordinarily is about four or five witnesses upon a point. * * * Now, I do not know any reason why I should sit here and hear more than 15 witnesses on each side upon this proposition of the sanity or insanity of this party by nonexperts, and all this kind of cumulative testimony, and I am going to ask you to tell me why I should, and, if you do not tell me why, I shall limit the further production of witnesses or depositions on the part of the proponents to three more depositions, and the examination of these brothers, who are present, if they want to. What do you say to this proposition?

"Mr. Munkelt: Had we known we would be limited to a certain number, we could have intensified our testimony.

"The Court: I should say if there is anything special about any of the depositions that takes them out of the general rule that they are not substantially cumulative, you may offer them and have them specially ruled on; of course, you can offer them and have them ruled on any way. I believe that I am justified, that the proper practice would be to limit the production of further evidence on the part of the proponent to three additional depositions along the line of the deposition of the acquaintances—the intimate friends' testimony. You may go over your depositions, and produce such of them as you see fit, not to exceed three; then you can take your oral testimony.

"Mr. Wadham: If the court please, we understand that the order has been made limiting us to the deposition testimony that has now been introduced and is before the court; but, for the purpose of preserving our record, we ask permission to offer certain depositions. First we offer the deposition of L. H. Currier, superintendent, particularly as to the opinion on the sanity of Mrs. Wineteer, the decedent; to the same effect, the deposition of Mary Belle Gray; to the same effect, the deposition of Mrs. Nancy McDonald; to the same effect, the deposition of F. McDonald; to the same effect, Chris Nielson; to the same effect, Mrs. Olive Sherman, Thomas Thompson, Mrs. Ida Devore, Anna Guendel, B. G. Harvey, Sarah Harvey, G. D. Lacey, G. F. Lacey, Mrs. Lottie Lacey, J. M. Miller, and Margaret Miller, and also the deposition of Mary J. Lacey; and we offer to show by her deposition that, when Mr. Wineteer came to her place in 1910, and made inquiry for his wife, he did not make any statement to Mrs. Lacey that he had, or was about to, or had any intention of committing or charging Mrs. Wineteer with insanity.

"The Court: I think you should be permitted to use that portion of Mary J. Lacey's deposition. As to the others, due to the order which the court has made limiting the number of depositions to be used, the court will of its own motion decline to hear the depositions; but as to the deposition of Mary J. Lacey, in so far as it tends to contradict statements made by the husband of the decedent, you may use it.

"Mr. Wadham: To which ruling of the court the deponent excepts in so far as the proffered offer of testimony is ruled out."

[1-3] To appellant's contention that the court erred in the foregoing ruling, respondent's preliminary answer is conclusively sound. Herein it is insisted that conceding error, appellant's record fails utterly to establish injury, and that such injury must be shown, and, failing to show it, the error must be disregarded. Const. art. 6, § 4½; Code Civ. Proc. § 475. It is truly said that appellant has not caused to be embodied in the record, by bill of exceptions or otherwise, anything to show what the testimony in the excluded depositions was, whether it was material, and, if material, whether it was competent. The soundness of respondent's position in this regard is established beyond question by all the authorities. Adams v. Weaver, 117 Cal. 42, 48 Pac. 972; Estate of Angle, 148 Cal. 102, 82 Pac. 668; 4 Corpus Juris, Appeal and Error, p. 150.

But in addition to this, conclusive though it is, it is not here shown that in exercising its discretion in controlling the production of evidence—a discretion which is not only inherently within the power of the court, but which is expressly recognized by our Code (section 2044, Code Civ. Proc.)—this discretion was abused. The Code declares that the court "may stop the production of further evidence upon any particular point when the evidence upon it is already so full as to preclude reasonable doubt." The particular point upon which the court curtailed evidence was that of the mental competency or incompetency of the testatrix under the views of "intimate acquaintances." The industry of appellant furnishes us with one opinion from the Supreme Court of Delaware, holding that the question of soundness or unsoundness of mind under the evidence of such intimate acquaintances is not evidence going to one point. That court bases its determination upon the fact that opportunities for observation of the different witnesses, and consequently their reasons for their determinations, are not identical, and therefore the evidence is not addressed to one particular point, saying:

> "They get different points of observation; different facts and statements * * * which tend to prove one fact. * * * But here is a condition that grows out of a number of observations, and the rule in this case does not apply." Pritchard v. Henderson, 3 Pennewill (Del.) 128, 50 Atl. 217.

We are not persuaded by this reasoning. The cases to the contrary are well considered and numerous. Larson v. Eau Claire, 92 Wis. 86, 65 N. W. 731; In re Winslow's Will (Iowa) 122 N. W. 971; Covington v. Taffee (Ky.) 68 S. W. 629; Madisonville v. Thomas, 140 Ky. 143, 130 S. W. 975; Montgomery v. Morton, 143 Ky. 793, 137 S. W. 540; Eaton v. Green River Coal, etc., Co., 157 Ky. 159, 162 S. W. 807; Burhans v. Norwood Park, 138 Ill. 147, 27 N. E. 1088; Nelson v. Wallace, 57 Mo. App. 397; Carpenter v. Knapp, 66 Hun, 632, 21 N. Y. Supp. 297; Huett v. Clark, 4 Colo. App. 231, 35 Pac. 671; Gray v. St. John, 35 Ill. 222; Ragsdale v. Southern Railroad Co. (C. C.) 121 Fed. 924. Here not only is there a failure to show the materiality, or even the admissibility, of the matters contained in the depositions; but there is likewise an utter failure to show that this evidence, if admissible, was anything other than cumulative.

[4] The only other proposition which appellant advances is that the decree appealed from must be reversed for the court's failure to make adequate findings. The ground of contest was as above quoted. The court found:

> "That the testatrix conceived and was possessed of the idea that her husband and children, and each of them, had inflicted and were going to inflict upon her great injury and bodily harm, and that they intended to kill her for the purpose of obtaining her property, and that they were conspiring together to obtain her property, and that this mental condition, idea, and belief continued and developed, and was present during all of the times, and especially on the date of the execution of the alleged will."

The court further found the falsity and utter lack of foundation of this belief, and further affirmatively found that the husband was "dutiful, kind, considerate, and patient," and that the testatrix had no cause or reason to hold her belief. The same findings are made concerning her children. Still further, the court found that at the time of the execution of the will, and for some time prior thereto, the testatrix "was possessed of an insane delusion that her said husband and children had done her bodily harm and injury, and were about to do her bodily harm and injury, and were going to destroy and kill her for the purpose of getting her property, and were conspiring together to obtain her property." And, further, so runs the finding:

> "It is true that on the 21st day of November, 1907 (the date of the execution of the purported will), said Elizabeth A. Wineteer was not of sound and disposing mind, and was suffering under and possessed of insane delusions, and was not competent to dispose of her property by will or otherwise."

No discussion as to the sufficiency of these findings is called for.

The judgment appealed from is therefore affirmed.

We concur: SHAW, J.; SLOSS, J.; MELVIN, J.; VICTOR E. SHAW, Judge pro tem.

We concur on the first ground discussed: ANGELLOTTI, C. J.; LORIGAN, J.

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176 Cal. 89

BURKETT v. DOTY. (Sac. 2323.)

(Supreme Court of California. Sept. 8, 1917.)

1. Bills and Notes 🔑310—Assigning Note—Executed Contract—"Assign."

An instrument which in terms "assigns" notes is not an executory contract; to "assign," as applied to choses in action, being to transfer the title or ownership.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Assign.]

2. Gifts 🔑31(1)—Assignment of Notes—Consideration.

Consideration is not necessary to valid assignment of notes; a "gift" being, by Civ. Code, § 1146, a voluntary transfer without consideration of personal property.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Gift.]

3. Gifts 🔑31(1)—Delivery—Written Assignment.

As between the parties to a gift inter vivos by writing transferring title, and so right to immediate possession and control, passing of possession of the thing given is not essential to its validity.

4. Gifts 🔑31(1)—Assignment of Notes and Mortgage—Provision Against Recording.

Provision of assignment of notes and mortgage that the assignment shall not be recorded duing the assignor's life does not detract from its effect to transfer title.

5. Gifts 🔑49(3)—Delivery of Assignment—Evidence.

It is no substantial evidence of want of complete delivery of an acknowledged assignment without consideration of notes and a mortgage, constituting, under Civ. Code, § 1053, a grant, delivery of which to the grantee, by provision of section 1056, cannot be conditional, and acknowledgment of which, by provision of Code Civ. Proc. § 1948, is prima facie evidence of complete execution—that is, of delivery with intent to make it operative immediately as a transfer of title—that after its immediate transfer to the assignee the assignor pledged the notes without the assignee's knowledge, and that the assignee made no effort to take possession of the notes till after assignor's death, six months after the assignment, which provided that it should not be recorded till after the assignor's death.

In Bank. Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action by Emma M. Burkett against W. M. Doty. Judgment for defendant, and plaintiff appeals. Reversed.

Devlin & Devlin, of Sacramento, and Lon Bond, of Chico, for appellant. Guy R. Kennedy, of Chico, and W. H. Carlin, of Marysville, for respondent.

SHAW, J. The plaintiff appeals from the judgment. The action is in claim and delivery for the possession of two promissory notes, or for the value thereof, in case a delivery cannot be had.

On September 25, 1911, Harry Harrington executed to Nellie Mead Doty three promissory notes and a mortgage to secure the same. The notes were each for $1,385.95, and were due, respectively, on October 1, 1912, October 1, 1913, and October 1, 1914. Nellie Mead Doty was the wife of the defendant, W. M. Doty. The notes and mortgage were her separate property. This action concerns the two notes falling due in 1913 and 1914 respectively. The answer denies that the plaintiff is the owner, or is entitled to the possession, of the two notes, and alleges that the note falling due on October 1, 1913, was indorsed by said Nellie Mead Doty to the defendant prior to her death, that the note falling due October 1, 1914, was her property at the time of her death, that the defendant has been appointed the administrator of her estate, and that he now holds the last-named note as such administrator.

The findings of the court, in effect, are that the plaintiff is not and never has been the owner of the notes in controversy; that Nellie Mead Doty died on July 18, 1912; that the defendant has been duly appointed and now is the administrator of her estate, and as such administrator holds the possession and title to both of said notes for the benefit of such estate. Thereupon judgment was given for the defendant.

The essential facts are not disputed. On December 30, 1911, Nellie M. Doty was the owner of said notes. At that time they were not in her immediate possession, but were deposited in a tin box kept by her in the vault of the Sacramento Valley Bank at the town of Biggs, and, except as presently stated, they remained there until her death. On December 30, 1911, she duly signed, acknowledged before a notary public, and delivered to Emma M. Burkett, the plaintiff, an instrument in writing which declares that Nellie Mead Doty, in consideration of $10, "by these presents assigns to the party of the second part" the notes and mortgage aforesaid, describing them particularly. The party of the second part was Emma M. Burkett. The instrument differed from the ordinary assignment only in that it contained a clause as follows:

"This assignment of said mortgage is not to be placed as of record during the lifetime of Nellie Mead Doty, the party of the first part."

There was in fact no valuable consideration for the assignment. There is neither an allegation nor a finding that it was made with intent to defraud the creditors of the assignor, or that it was fraudulent or void as to such creditors.

The introduction of the instrument, with the notary's certificate of acknowledgment thereof, was prima facie evidence of the due execution thereof. Code Civ. Proc. § 1948. There was no evidence to the contrary. The instrument was introduced in evidence by the plaintiff and was in her possession. There is no evidence tending to show that the delivery thereof to her was made for any other purpose than that of completing its due execution as an assignment. The notes and mortgage described therein were not produced or delivered to Emma M. Burkett at that time, or at all.

In the following February (1912), in order to obtain funds to pay the necessary expenses of Mrs. Doty at a hospital, to which she was about to be taken on account of her sickness, she directed her husband to get from the box in the bank and bring to her the note due on October 1, 1912. He did so, and she then indorsed it, and at her direction he pledged it to the bank, and thereby obtained money from the bank. So far as appears, the bank still holds the note under said pledge. That note is not in controversy here. It was the subject of an action for damages for conversion against Doty, wherein judgment was given for Doty, which judgment was afterwards reversed by the District Court of Appeal. The facts are more minutely set forth in the opinion of that court on the appeal. Burkett v. Doty, 32 Cal. App. 337, 162 Pac. 1042. A petition for the rehearing of that case was denied by this court. After the pledge of the first note, Nellie Mead Doty, in June, 1912, indorsed to her said husband the note due on October 1, 1913, for a like purpose; but it was not pledged, no money was obtained thereon, and the defendant thereafter retained the same in his possession. No other disposition of either of the notes was ever made by Mrs. Doty.

The respondent claims, first, that the assignment was an executory contract, and that, being without a valuable consideration, it is of no force; second, that if it was a sale of personal property it was void, under section 3440 of the Civil Code, because it was not accompanied by an immediate delivery and followed by an actual and continued change of possession of the notes; third, that it is not valid as a gift of personal property, because there was no evidence of an intent on the part of Nellie Mead Doty to completely divest herself of dominion over the property, and because she did not relinquish all present right to or control over the notes, nor make an immediate transfer of the title thereto.

[1, 2] The assignment is not an executory contract. By its terms it "assigns" the notes to the plaintiff. To "assign," in ordinary legal usage, as applied to choses in action, is to transfer the title or ownership. A chose in action may be transferred by the owner. Civ. Code, § 954. "A gift is a transfer of personal property, made voluntarily, and without consideration." Civ. Code, § 1146. "Transfer is an act of the parties, or of the law, by which the title to property is conveyed from one living person to another." Civ. Code, § 1039. "A transfer vests in the transferee all the actual title to the thing transferred which the transferor then has, unless a different intention is expressed or * * * necessarily implied." Civ. Code, § 1083. "The interest intended to be transferred is, under section 1054 of the Civil Code, vested in the transferee upon the donor's delivery of the grant." Driscoll v. Driscoll, 143 Cal. 536, 77 Pac. 471; Francoeur v. Beatty, 170 Cal. 746, 151 Pac. 123. The fact that there was no valuable consideration, therefore, does not deprive the assignment of its effectual force to pass the title to the notes.

[3] Section 3440 of the Civil Code does not require an immediate delivery, or an actual or continued change of possession, in order that a transfer of a thing in action shall be valid as to creditors. It applies to personal property "other than a thing in action." Hence it has no application to this case. As to a chose in action, to destroy the validity of its transfer, there must be proof of actual fraudulent intent, or of insolvency, or of contemplation of insolvency. Civ. Code, §§ 3439, 3442. Moreover, an administrator cannot avoid a transfer of personal property on the ground that there was not such delivery or change of possession, unless he alleges and proves that there are creditors of the estate and a deficiency of assets to pay the debts. Murphy v. Clayton, 114 Cal. 526, 43 Pac. 613, 46 Pac. 460. The record here contains no allegation or finding to that effect, or on that subject.

The assignment itself purported to transfer the notes immediately to the plaintiff. As it was duly signed, acknowledged, and delivered to the plaintiff, it constituted the strongest of evidence of the intention of the assignor to transfer the notes to the plaintiff in the manner there specified. And as the effect of that assignment, according to its terms, was to immediately transfer to the plaintiff the title and ownership of the notes, it constituted satisfactory, if not conclusive, evidence of the intent of the assignor to do that which the instrument, in law, would accomplish; that is, to divest herself of all right of dominion over the notes, and of all present right to, or control over, them, and to make an immediate transfer of the title thereto. It must be remembered that, as between donor and donee, it is not necessary to the validity of a gift inter vivos, if made by a written instrument transferring the title to the donee, that the possession of the thing given be passed to the donee. The transfer of the right to its immediate possession and control, the title thereto, is sufficient, and the gift then takes effect, although the donor retains all the power of control that can arise from such possession. Driscoll v. Driscoll, supra; Francoeur v. Beatty, supra.

[4] The provision declaring that "this assignment of said mortgage is not to be placed as of record during the lifetime" of the assignor does not purport to operate upon the notes, which, of course, were not entitled to record, as such. It does not purport to operate upon the title to either the mortgage or the notes, nor in any way to change the legal effect of the instrument as a conveyance thereof. The transfer of both was complete without such record.

[5] Section 1056 of the Civil Code declares that:

> "A grant cannot be delivered to the grantee conditionally. Delivery to him, or to his agent, as such, is necessarily absolute, and the instrument takes effect thereupon, discharged of any condition on which delivery was made."

The word "grant," as here used, includes transfers of personal property as well as of real property. Civ. Code, § 1053. There are cases where such grant has been passed over by the grantor to the manual possession of the grantee for inspection only, or for some other purpose than that of completing its execution as a contract, wherein it is always held that such possession of the instrument does not constitute a delivery and does not pass the title to the thing. Gould v. Wise, 97 Cal. 532, 32 Pac. 576, 33 Pac. 323; Gould v. Adams, 108 Cal. 368, 41 Pac. 408. The act of delivery of possession of the instrument must be accompanied with the intent that it shall become operative as a conveyance or transfer. Kenney v. Parks, 137 Cal. 531, 70 Pac. 556. But here the acknowledgment, immediately followed, as it was, by the transfer of the possession of the instrument of assignment to the donee, without explanatory or qualifying words or acts to indicate any other intent, is, by force of section 1948 of the Code of Civil Procedure, prima facie evidence of complete execution; that is, of delivery with intent to make it operative immediately as a transfer of title. And by section 1055 of the Civil Code such an assignment, when thus duly executed, is presumed to have been delivered at its date. No evidence was given to show a different date. There is no substantial evidence of any other or different intent.

The subsequent pledge of the first note and indorsement of the second were made after the delivery of the instrument to the donor. The title had then passed. It was neither proved nor suggested that the plaintiff consented to these dealings, or that she had knowledge thereof at the time, or that she was ever informed thereof until after the death of Mrs. Doty. Those transactions, therefore, cannot be taken as evidence against her. The only fact, in connection with the notes, occuring after the delivery of the assignment, which can be evidence against the plaintiff, is that, although she had the absolute title to them, and the present means of proving such title and of obtaining possession of the notes, she did not take possession, but suffered them to remain in the possession of Mrs. Doty, who, it appears, was her niece. As she had accepted the assignment providing that she should not record it until after the donor's death, and as only six months elapsed before that event occurred, the fact is not of much significance. The failure to take possession, coupled with the direction against recording, might support the inference that there was an expectation by the plaintiff, or an understanding between the parties, that the donor, in the meantime, by reason of the ostensible authority she had from her possession, might receive payments on the notes, or make some disposition thereof for her advantage to innocent third parties. This would be contrary to the legal effect of the instrument, and if given that effect it would operate to change its terms. Its admission as evidence would be contrary to the principle that an agreement in writing, made without fraud or mistake, and not ambiguous, is to be considered as embracing all the terms of the contract and that, between the parties, or their successors in interest, there can be no evidence of the agreement other than the contents of the writing. Code Civ. Proc. § 1856. Under the circumstances shown, the delay in taking possession cannot be deemed substantial evidence that the assignment was not completely delivered as an operative instrument.

The evidence considered in the cases of Estate of Hall, 154 Cal. 527, 98 Pac. 269, and Knight v. Tripp, 121 Cal. 674, 54 Pac. 267, to the effect that there was no intent to make a complete delivery of the written transfers there involved, was of much greater force than the evidence here presented. Those cases go to the extreme limits that can be allowed in holding transfers in the hands of the transferee ineffectual, and we do not think it necessary or advisable to enlarge further the opportunities of attacking contracts deliberately and ceremoniously executed by applying those cases as precedents here.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; HENSHAW, J.; LORIGAN, J.; LAWLOR, J.

176 Cal. 44

PEOPLE v. GRIESHEIMER. (Cr. 2045.)

(Supreme Court of California. Sept. 4, 1917. Rehearing Denied Oct. 4, 1917.)

1. CRIMINAL LAW 🔑1167(1)—APPEAL.

Under Const. art. 6, § 4½, providing that no judgment shall be set aside or new trial granted for error as to pleading unless the court is of the opinion that it resulted in a miscarriage of justice, an alleged defect in an information, charging the crime of obtaining money by false pretenses, in that it failed to show the causal connection between the pretense and the surrender of the money, is not a ground for reversal.

2. CRIMINAL LAW 🔑823(4)—INSTRUCTIONS—ERROR CURED.

In prosecution for obtaining money by false pretenses, alleged defect in instruction, permitting conviction on proof of falsity of a single pretense without proof of causal connection between the pretense and the surrender of the money, was not erroneous, where the further instruction clearly set out the elements of the offense, so that the jury could not have been misled.

3. FALSE PRETENSES 🔑4—ELEMENT OF OFFENSE.

The crime of obtaining money by false pretenses is complete when the defendant obtains the money from the prosecuting witness by false and fraudulent representations, and it is not necessary to show his disposition of the money.

Henshaw, Melvin, and Lorigan, JJ., dissenting.

In Bank. Appeal from Superior Court, City and County of San Francisco; Geo. H. Cabaniss, Judge.

Frederick Griesheimer was convicted of obtaining money by false pretenses, and from the judgment and an order denying new trial, he appeals. Affirmed.

Rothchild, Golden & Rothchild and Oliver Dibble, all of San Francisco, for appellant. U. S. Webb, Atty. Gen., John H. Riordan, Deputy Atty. Gen., and C. M. Fickert and James F. Brennan, both of San Francisco, for the People.

ANGELLOTTI, C. J. The defendant was convicted of the crime of obtaining money by false pretenses under section 532 of the Penal Code, and prosecutes this appeal from the judgment and from on order denying a new trial.

1. It is claimed by the appellant in support of this appeal that his general demurrer to the information should have been sustained. The charging part of the information is as follows:

"The said Frederick Griesheimer, on or about the 25th day of May, A. D. 1915, at the said city and county of San Francisco, state of California, then and there devising and intending by unlawful ways and means, and by false and fraudulent pretenses and representations, to obtain and get into his possession the goods, money, and personal property of one Karl Muck with intent then and there to cheat and defraud the said Karl Muck of the same, did then and there willfully and unlawfully, knowingly and designedly, falsely and fraudulently, pretend and represent to said Karl Muck that he, the said Frederick Griesheimer, was then and there employed by the Fatherland Magazine, a corporation, organized and existing under and by virtue of the laws of the state of New York, and that he, the said Frederick Griesheimer, was then and there authorized, empowered, and instructed by said corporation to solicit loans and subscriptions on behalf of said corporation, and that he, the said Frederick Griesheimer, was then and there authorized and empowered by said corporation to receive and receipt for said subscriptions and loans for and on behalf of the said corporation, and that he, the said Frederick Griesheimer, had then and there solicited and received several specific and distinct contributions of money from the following German-American citizens of the city and county of San Francisco, state of California, to wit: That N. Ohlandt of San Francisco, Cal., had subscribed for and paid to him. the said Frederick Griesheimer, $150 in lawful money of the United States of America, for and on behalf of said corporation; that E. L. Hueter of San Francisco, Cal., had subscribed for and paid to him, said Frederick Griesheimer, the sum of $300 in lawful money of the United States of America, for and on behalf of the said corporation; that C. E. Grunsky of San Francisco, Cal., had subscribed for and paid to him, the said Frederick Griesheimer the sum of $300 in lawful money of the United States of America, for and on behalf of said corporation; that Max Schmidt of San Francisco, Cal., had subscribed for and paid said Frederick Griesheimer the sum of $75 in lawful money of the United States of America, for and on behalf of said corporation, and the said Frederick Griesheimer did then and there show and exhibit to said Karl Muck, a certain written list which said Frederick Griesheimer then and there represented contained the names of each of said parties so subscribing, together with the amounts subscribed by each written in the individual handwriting of each of the said parties so subscribing respectively.

"Whereas, in truth and in fact, he, the said Frederick Griesheimer, was not then and there employed by the said Fatherland Magazine, a corporation organized and existing under and by virtue of the laws of the State of New York, and he, the said Frederick Griesheimer, was not then or there authorized, empowered, or instructed, by said corporation to solicit loans or subscriptions on behalf of said corporation, and he, the said Frederick Griesheimer, was not then or there authorized or empowered by said corporation to receive or receipt for any subscription or loans for or on behalf of said corporation, and he, the said Frederick Griesheimer, had not then or there solicited or received the several and distinct contributions of money from said German-American citizens of San Francisco, Cal., as said Frederick Griesheimer then and there represented to said Karl Muck; that N. Ohlandt of San Francisco, Cal., had not subscribed for or paid to him, the said Frederick Griesheimer, the sum of $150 in lawful money of the United States of America, or any sum in excess of $50 for or on behalf of said corporation; that E. L. Hueter of San Francisco, Cal., had not subscribed or paid to him, the said Frederick Griesheimer, the sum of $300 in lawful money of the United States of America, or any sum in excess of $20 for or on behalf of said corporation; that C. E. Grunsky of San Francisco, Cal., had not subscribed for or paid to him, the said Frederick Griesheimer, the sum of $300 in lawful money of the United States of America, or any other sum of money whatsoever, for or on behalf of said corporation; that Max Schmidt of San Francisco, Cal., had not subscribed for or paid to him, the said Frederick Griesheimer, the sum of $75 in lawful money of the United States of America, or any other sum for or on behalf of said corporation; that said written list which said Frederick Griesheimer showed and exhibited to said Karl Muck, as aforesaid, was not signed by either said Max Schmidt or said C. E. Grunsky, and the amount and amounts as shown on said list as being subscribed by said N. Ohlandt and said E. L. Hueter were false and fraudulent, and he, the said Frederick Griesheimer, did not have any authority whatsoever then or there or at any time to solicit subscriptions for said corporation or to solicit loans for said corporation, and had not authority of any kind or description from said corporation, as he, the said Frederick Griesheimer, then and there well knew:

"And the said Karl Muck then and there believing the said false pretenses and representations so made as aforesaid by the said Frederick Griesheimer to be true, and relying thereon and being deceived thereby, was induced by reason of said false and fraudulent pretenses and representations, so made as aforesaid to deliver, and did then and there deliver, to said Frederick Griesheimer the sum of $300 in lawful money of the United States of America of the value of $300 in gold coin of the United States of America and of the goods and personal property and moneys of the said Karl Muck; and the said Frederick Griesheimer then and there by means of the said false and fraudulent pretenses and representations so made as aforesaid, did then and there willfully and unlawfully, knowingly and designedly and fraudulently, receive and obtain from the said Karl Muck the said goods and personal property and money hereinbefore described with intent to cheat and defraud Karl Muck of the same, and the said Frederick Griesheimer did then and there willfully and unlawfully take and carry away the same."

The particular defect in this information, as urged by appellant, is that it does not show the causal connection between the false pretense and the parting of the property by the prosecuting witness, and therefore fails to state facts sufficient to constitute a public offense.

[1] We are of the opinion that as against the defendant's general demurrer the information should be held sufficient on appeal. While there is no direct allegation that the money was paid to the defendant as a subscription or loan to the Fatherland Magazine, a reader of the information could hardly draw from it any other inference than that the payment was made for such purpose. It may be conceded that a direct allegation to this effect would have been more in accord with technical requirements. But what was intended to be charged in this connection is perfectly plain from the language in fact used, and no person of common understanding could fail to understand that it was substantially charged, by necessary inference at least, that the money was paid because of the alleged false representations, and for the purpose suggested thereby. Section 4½, art. 6, of the Constitution provides that:

> "No judgment shall be set aside, or new trial granted in any case, * * * for any error as to any matter of pleading, * * * unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

We are satisfied that to reverse the judgment on this ground would be to entirely ignore this provision of our Constitution.

2. Complaint is made as to a certain instruction given to the jury. The court instructed the jury as follows:

"In a case of this kind there can be no actual fraud, and there can be no criminal offense, unless the prosecuting witness was actually defrauded; or, in other words, unless the prosecuting witness sustained an actual injury from the alleged false representations. It is not sufficient that the prosecuting witness parted with his money by reason of the alleged false representations, but it must also be proved and established, beyond all reasonable doubt and to a moral certainty, that the prosecuting witness actually sustained a money injury by reason of the same.

"As an amplification of that instruction, and with a view, perhaps, to further and better explain the doctrine which it announces, I will say to you that if a list purporting to contain the names of subscribers to any fund, whatsoever may be its character, is exhibited to another person with a view of inducing him also to subscribe for the fund, and false statements are made as to the giving of subscriptions by some of those whose names are written down upon the fund list, and if misrepresentations are made as to amounts actually subscribed or contributed by some of those whose names are written down upon the fund list, and the party making those misrepresentations knows, at the time he makes them, that they are false, and makes them with intent to thereby prevail upon or induce the party to whom they are made to subscribe money to the fund and to deliver money over to him to be applied to the fund or purpose, and if as a matter of fact those statements made under those circumstances are, by the party to whom they are made, believed to be true, and if he by reason of that fact, namely, his belief in the truth of the representations, subscribes toward the fund and actually pays over money to be applied to it, and he is induced so to do, I think I have already stated, by reason of the misrepresentations made under those circumstances, the party so making those misrepresentations would, as a matter of law, be guilty of the offense of obtaining money under false pretenses.

"In order to constitute the offense of obtaining money or property by false or fraudulent representations or pretenses, four separate and distinct things must concur: First, there must be an actual fraud committed; second, false pretenses must be used for the purpose of perpetrating the fraud; third, the fraud must be accomplished by means of the false pretenses, and the false pretenses must be made use of for that purpose, and the false pretenses must be the cause which induced the owner to part with his money or property; fourth, there must be an intent to defraud; and where one is charged with the commission of such crime, before he can be convicted, you must find, beyond a reasonable doubt and to a moral certainty, that each and all of such elements existed and concurred.

* * *

"If you find that some of the alleged false representations set forth in the information, one or more, but not all, have been established to a moral certainty and beyond all reasonable doubt, and further find, to a moral certainty and beyond all reasonable doubt, that the complaining witness was induced, by reason of his belief in the existence of one or several of the alleged false representations, and he was by reason of his belief in their existence induced to part with his money, you would in that case adjudge the defendant guilty, provided you so find, of course, to a moral certainty and beyond all reasonable doubt.

"If you entertain any reasonable doubt as to whether any one of those false representations has been established to a moral certainty and beyond all reasonable doubt, or if you entertain any reasonable doubt as to whether—assuming that you do find false representations to have been made; if you entertain any reasonable doubt as to whether they, or any one of them or any several of them, caused or induced the complaining witness to part with his money, why, of course, in that case also it would be your duty to return in the case a verdict of not guilty.

"* * * And I think I have made it clear to you, and will again undertake to state the proposition, that, if there be any one false pretense or representation of the several charged in the information, which you find, to a moral certainty and beyond all reasonable doubt, to have been made by the defendant, and which one misrepresentation you further find, to a moral certainty and beyond all reasonable doubt, caused or induced the complaining witness to part with his money, why, that would meet every requirement of the law quite as much as if each and every one of the false pretenses or representations so charge were shown to exist, and so shown to a moral certainty and beyond all reasonable doubt."

[2] It is earnestly urged that the particular instruction commencing with the words, "As an amplification of that instruction," is erroneous in that it directs a conviction on proof of the falsity of only one of the alleged representations as to the amounts subscribed by the various persons whose names appeared on the list shown Mr. Muck, even though the jury was not satisfied that the particular representation was a material inducement to Mr. Muck's subscription. Of course it is admitted that where an information charges several false pretenses, a conviction may be had, and will be sustained by proof of only one of such pretenses, provided it be established to the satisfaction of the jury that the particular pretense provided was material in inducing the complaining witness to part with his property. It requires a somewhat critical and technical analysis of the particular instruction complained of to find anything therein in conflict with this well-settled law, and we are satisfied that in view of all that was said by the court to the jury in this immediate connection, no such effect as is claimed could reasonably have been attributed by the jury to the instruction. Reading the instructions on this subject as we have set them forth, it is plain enough that it was made perfectly clear to the jury that in order to convict upon the ground that any particular representation was falsely and fraudulently made, they must be satisfied beyond all reasonable doubt that the particular representation was material in inducing Mr. Muck to part with his money.

3. As to the claim of insufficiency of evidence: We have carefully considered the record, and feel warranted in asserting that any jury of reasonable and fair men could not but be convinced by the evidence beyond all reasonable doubt of the guilt of the defendant of the offence charged, in so far as the representation that he was employed by the Fatherland Publishing Company and authorized to solicit loans and subscriptions on be-

half thereof was concerned, which it clearly enough appears, was an effective representation inducing the parting with his money by Muck. This transaction was at a time prior to the entry of the United States into the war in which we are now engaged, and the Fatherland was supposed to be engaged in creating sentiment in this country in favor of Germany as against the Allies. Such was the purpose of the requested assistance as outlined in the purported authorization exhibited by defendant to Muck, and the latter, as a strong sympathizer with the cause of Germany, was an easy victim to the scheme of defendant. That this representation had a controlling effect with him indisputably appears from his testimony. Much reliance is placed upon the fact that no direct evidence was introduced showing that the purported written authorization to one "Henry M. Meyers" bearing date April 2, 1915, which was exhibited to Mr. Muck on May 21st by this defendant, as his credentials, he claiming to be Meyers, was not a genuine instrument. Under the circumstances such evidence was not essential. The falsity of the representation as to authority was otherwise sufficiently shown to satisfy beyond all reasonable doubt any fair juror. Admittedly the purported telegram of May 24, 1915, from the Fatherland to "Meyers and Schmidt, Special Representative Fatherland Magazine," exhibited by defendant as Meyers to Muck on May 25th, implying authority in every line, and on the strength of which the last $200 of the $300 was obtained from Muck on that day, was an absolute forgery concocted by defendant. This particular transaction, the obtaining of the $200 on May 25th, was the one as to which the district attorney elected to rely. This, together with other facts and circumstances disclosed by the evidence, amply showed the falsity of the representation as to authority. There is no force in the claim that the $300 was not obtained by defendant. The evidence sufficiently shows that the checks on a Boston bank given by Muck to defendant, after being cashed by defendant at the Fairmont Hotel office, were forwarded in due course of business to the drawee bank and never repudiated. In fact, we are satisfied, as already stated, that every essential element of the offense is clearly and and absolutely shown by the evidence, and that, in view of the record, there can be no doubt of the guilt of the defendant.

[3] 4. It is urged that it was not affirmatively shown that the money obtained by defendant was not in fact subsequently paid by him to the Fatherland. Without this proof it is urged there is no proof of injury to Muck. The crime charged against this defendant was complete upon his obtaining the money from Muck by false and fraudulent representations, and it was not necessary to show what defendant did with it. See People v. Bryant, 119 Cal. 597, 51 Pac. 960.

5. It cannot be held to have been error warranting reversal for the court to refuse to give the requested instruction as to the burden of proof being on the prosecution to prove beyond all reasonable doubt the alleged false representation that defendant was authorized to collect moneys for the Fatherland. The jury could not have understood otherwise from all the instructions given than that such was the situation as to each and all of the material allegations of the information, and there was nothing in this case to make imperative the giving of such an instruction directed specially to one of such allegations.

We find no other point in the briefs of learned counsel that requires notice. We may properly say in conclusion that in our opinion the record shows no error substantially affecting defendant's rights, and that it undoubtedly shows his guilt of the offense charged. This case falls as clearly within the provisions of section 4½, art. 6, of the Constitution as any case that has ever been presented to us.

The judgment and order denying a new trial are affirmed.

We concur: SHAW, J.; SLOSS, J.; LAWLOR, J.

HENSHAW, J. I dissent. In the opinion of the learned CHIEF JUSTICE three main propositions are discussed. The first, the sufficiency of the indictment; the second, the legality of the instructions; the third, the adequacy of the evidence. As to each of these propositions it is demonstrably true that this court's decision is at variance with that of every other court which makes the English common law the basis of its jurisprudence. But even for this I would not feel impelled to express my dissenting views at length saving for the additional fact that section 4½, art. 6, of our Constitution is employed, like the mantle of charity, to cover this multitude of sins. It is against this entirely unwarranted extension of the provision of this section of the Constitution that I am moved to protest.

1. The sufficiency of the indictment. It is to be noted and remembered that the indictment does not charge that Karl Muck gave his money to the Fatherland Magazine, or that he gave it to defendant for the Fatherland Magazine. On the contrary, it is distinctly charged that he gave it to the defendant. The profession is advised by the learned CHIEF JUSTICE that "a reader of the information could hardly draw from it any other inference than that the payment was made for such purpose" (that is, to be delivered to the Fatherland Magazine), and, further, that "no person of common understanding could fail to understand that it was substantially charged, by necessary inference at least, that the money was paid because of the alleged false representations, and for the

purpose suggested thereby" (namely, to be delivered to the Fatherland Magazine). To this I make answer that direct averments are required in every indictment and information, and the only inferences which can be drawn are those which the law itself draws, such as the presumption that a defendant intends the consequences of his act, that he has passed his nonage and is therefore accountable for his acts, and that he is sane and therefore responsible for his acts. Such, and such inferences alone does the law permit. Juries *in weighing the evidence* may draw inferences if reasonably deducible from the evidence, but I take it that this is the first time in the history of criminal pleading that inferences have been indulged in to make good an indictment otherwise lacking in averment, and that such inferences are indulged against the direct allegation of the indictment. Generally, as has been said, inferences to make out the *charge* of crime are not permissible, for two most obvious and oft-repeated reasons: The first, because every inference to be drawn shall be one of fair dealing and not of guilt; the second, because the presumption of innocence countervails against all other inferences or presumptions *until the proofs establish the contrary*. Second, we have not the omission of an allegation in this indictment. We have the direct allegation that the money was given to the defendant, and this, by inference, is distorted to mean what is not alleged, that it was given to the defendant as the agent, for transmission to the Fatherland Magazine. Again, even if such an inference could be indulged as against the express allegation to the contrary, it becomes necessary, as a matter of good pleading, to charge that in fact this money was not so delivered by the defendant to the Fatherland Magazine, or there has been a failure to state the crime, and this is not done. This is not charged. Still further we have an indictment which the defendant, under every rule and principle of law, is entitled to take at its face value. So taking it, the indictment charges in terms that by reason of certain false misrepresentations Karl Muck gave the defendant $300. There is an absolute failure to show the causal connection between the allegations of false representations and the allegation of payment of money, and in any such indictment it is only where the payment follows inevitably and as matter of necessary consequence from the allegations of false representation that the omission so to charge that causal connection does not constitute a fatal defect, in the indictment.

The rules of pleading of actual fraud in a criminal case are certainly no more relaxed than the rules which obtain in pleading the same fraud in a civil case, and if anything should be the more stringently applied where a man is put on trial for a crime. People v. McKenna, 81 Cal 158, 22 Pac. 488. But to make clear my meaning beyond peradventure, let those rules here be briefly summarized. The acts constituting the fraud must be sufficiently set forth. It must be charged that these acts, of speech or conduct, were uttered and done with intent to deceive; that the plaintiff or person injured relied on them and was justified in his reliance on them; that they were false, and either known to be false at the time the defendant committed them, or were said and done under circumstances not warranted by the knowledge of the defendant; and, finally, that because of his justified reliance upon these statements and acts the plaintiff, or person injured, parted with money or property when otherwise he would not have done so. People v. Jordan, 66 Cal. 10, 4 Pac. 773, 56 Am. Rep. 73.

It is manifest, therefore, that the connection between the fraudulent acts by the one and the parting with money or property by the other must appear from the pleading. The fraud and the injury must be shown as cause and result, or, as it is commonly phrased in the law, the "causal connection" between the false pretenses and the deprivation of property must appear. 3 Bishop, Crim. Pro. § 169 et seq.; 1 McLain, Crim. Law, §§ 680, 681. Let this be illustrated by a single simple example. The crime charged is that A. told B. that he had erected a flagstaff 200 feet high in Golden Gate Park. B. was entitled to rely on the statement, and did rely on it. It was made to induce B. to give A. $300. The statement was wholly false, and known to A. to be wholly false at the time he made it, but B. relied on it, and in his reliance was induced to give B. $300, and did so. The human mind might infer and presume to an unlimited extent over the reason why B. gave $300 simply because A. had told him falsely that he had erected a flagstaff in the park. But when the last word was said, that word would be speculative guesswork because no causal connection between the false declaration by A. and the parting with the money by B. is shown. If, however, the complaint further charged that B. had commissioned A. to erect this flagstaff and had promised to pay him $300 when it was erected, the motive inducing B. to part with his money is at once shown, the causal connection appears, and the complaint is a sufficient pleading.

As has already been said, since fraud is never presumed and since a defendant charged with crime is presumed to be innocent, no inferences or presumptions can be indulged in to support a pleading radically defective in its effort to charge fraud (Harding v. Robinson, 166 Pac. 808); although, of course, the usual presumptions accompany and all legitimate inferences may be drawn from the evidence.

The charges of misrepresentation and false representation in this information are two: (1) Touching the defendant's agency and right and power to solicit, receive, and receipt for "loans and subscriptions on behalf of the Fatherland Magazine, a corporation"; (2) that sundry German-American citizens of the city and county of San Francisco, four of whom are named, "had made contributions of money on behalf of the said corporation," while the truth was that two of these citizens had made contributions in sums less than the defendant stated, and the other two had not contributed at all. Karl Muck it is charged, in reliance on these false and fraudulent statements, "did then and there deliver to said Frederick Griesheimer the sum of $300," and Frederick Griesheimer thus and thereby "did then and there willfully and unlawfully, knowingly and designedly and fraudulently, receive and obtain from the said Karl Muck the said goods and personal property and money hereinbefore described with intent to cheat and defraud Karl Muck of the same, and the said Frederick Griesheimer did then and there willfully and unlawfully take and carry away the same." There is in this no charge that Muck "delivered" the money to Griesheimer as the agent of the Fatherland Magazine as and for a loan or subscription to or on behalf of the corporation bearing that name, and as this is not alleged and as the allegation is simply that he "delivered" the money to Griesheimer, and, finally, as the averments cannot be helped out by guesswork or inferences, this charge amounts to nothing more than that because Griesheimer had falsely represented his agency and his power as agent for the Fatherland Magazine, Muck gave him $300. Why he gave him this $300 does not appear. The causal connection is lacking absolutely. It cannot be said, we repeat, that he gave it to him as the agent of the Fatherland Magazine because this is not averred, and, not being averred, the pleading is not open to the inference that such was the fact. To the contrary, the legal inference to be drawn is that it was not the fact or it would have been pleaded. Why then, under this pleading did Muck give $300 to Griesheimer or "deliver" it to him, as the pleading phrases it? Entering the realm of speculation it may be said, as in the flagstaff instance which we have given, that Muck, interested in Griesheimer, had suggested to Griesheimer that he engage in this employment as agent of the Fatherland Magazine, and had assured him that he would make him a donation of $300 when on behalf of the magazine he had succeeded in obtaining "loans and subscriptions" from four or more prominent German-American citizens of San Francisco. If this were true, or if any one of a thousand other sets of circumstances which will readily come to mind was true and was pleaded, the complaint would be sufficient, but without it there is an absence of all showing why the representation, even though false, should have led Muck to part with his money and deliver it to Griesheimer.

Turning to the second phase of this information—the charge of false representation in the matter of the number of subscribers and the amounts of their subscription, the same difficulty appears. Why should Muck have delivered $300 to Griesheimer because Griesheimer had falsely represented that the four men named "had subscribed for and paid to him" (Griesheimer) stated sums of money? Here again we are left in the realm of speculation. Conceivably, A., soliciting for charity from B., might be told by B. that the latter was in no wise interested in his charity, and would not donate to it, but that C. was a wealthy man and a miser. Let A. go to C. and secure a donation from C., and B. would double the amount of that donation either as a gift personal to A. or as a donation to his charity. A. goes to C., tells him what B. has said, declares to him that he will not exact the payment of the money from C., but asks C. to give him a letter addressed to B., stating that he, C., has donated $1,000. With this false letter A. returns to B., and B. "delivers" to him $2,000. A. and C. under this set of circumstances manifestly have defrauded B., but to plead that fraud requires much more than the statement that A. represented to B. that C. had subscribed $1,000 wherefore B. "delivered" to A. $2,000.

It may be well to amplify somewhat the statement hereinbefore made touching the necessity of showing by sufficient pleading the causal connection between the false pretenses and the injury. Says Bishop (3 Bishop Crim. Proc. sec. 175):

> "Such obtaining must not come independently of the false pretenses, but by their means; so must be the allegation and sufficiently in detail to put the defendant in a position duly to make his defense."

Says Cyc. (19 Cyc. p. 429):

> "The indictment must show that the property was obtained by means of the false pretense alleged. Accordingly when there appears to be no natural connection between the pretense and the delivery of the property, such additional facts as are necessary to show the relation must be alleged. A defect in the indictment arising from failure to show the connection between the false pretense and the obtaining is a material one and is not cured by verdict."

In People v. White, 7 Cal. App. 99, 93 Pac. 683, the above language from Cyc. is made the basis of the decision, and that it is sound in principle and abundantly supported by the authorities there can be no doubt. And in People v. Kahler, 26 Cal. App. 449, 147 Pac. 228, it is held that an information which charged a defendant with the crime of obtaining money under false pretense by knowingly and falsely representing that he had a contract for the furnishing of orchestras for cafés and theaters, and that the person to whom these representations were made believed the same to be true, and, relying thereon, paid and delivered to the defendant a certain sum of money, "fails to state facts constituting a public offense, for the lack of causal connection between the payment of the money and the false representations." No single authority is given to support the mere declaration of the prevailing opinion that this indictment is sufficient; no single authority, that is, other than section 4½ of the Constitution. Yet the cases holding such an indictment to be insufficient are very numerous and uniform. A few of them only need be cited: Johnson v. State, 75 Ind. 553; State v. Green, 7 Wis. 571; State v. Baggerly, 21 Tex. 757; Simmons v. People, 187 Ill. 327, 58 N. E. 384; Enders v. People, 20 Mich. 233; Roper v. State, 58 N. J. Law, 420, 33 Atl. 969; Commonwealth v. Dunleay, 153 Mass. 330, 26 N. E. 870; Copeland v. State, 97 Ala. 30, 12 South. 181; Roberts v. State, 85 Ark. 435, 108 S. W. 842; State v. Fitzgerald, 18 N. C. 408; Curtis v. State, 31 Tex. Cr. R. 39, 19 S. W. 604; Campbell v. State, 154 Ind. 309, 56 N. E. 665; White v. State, 3 Tex. App. 605; People v. Gates, 13 Wend. (N. Y.) 311; Jones v. State, 50 Ind. 473; People v. Kinney, 110 Mich. 97, 67 N. W. 1089; State v. Whedbee, 152 N. C. 770, 67 S. E. 60, 27 L. R. A. (N. S.) 363; People v. Brown, 71 Mich. 296; Jacobs v. State, 31 Neb. 33, 47 N. W. 422; State v. Kelly, 170 Mo. 151, 70 S. W. 477; State v. Williams, 103 Ind. 235, 2 N. E. 585.

Moreover, it is held with equal unanimity that where an indictment or information fails by proper allegation to show this causal connection, then, under the principle above enunciated and the authorities cited, there has resulted a fatal omission of a material allegation, with the result that the information or indictment fails to charge a crime. Such a defect in the information, says Cyc., supra, "is a material one, and is not cured by verdict." Such being the case, not only is a general demurrer adequate to raise the legal point, but it may be raised without demurrer at all at any stage of the proceedings. That it can be and has been so raised, a brief consideration of some of the many authorities will demonstrate. Thus, in People v. White, supra, the failure to properly allege the causal connection was raised on general demurrer. The general demurrer was sustained, and the judgment following the demurrer, in turn, was sustained by the Court of Appeals.

In People v. Kahler, supra, the demurrer was general as well as special. While it is frequently said, and while it is often true, that a failure to plead in accordance with section 952 of the Penal Code may be made the ground of special demurrer, it is equally true that when the ground of demurrer is the failure of the pleader to comply with subdivision 3 of this section by omitting properly to charge "the particular circumstances" when such a charge is "necessary to constitute a complete offense," that ground is a ground of general demurrer if the omission be, as here, of a substantive and material allegation. A reading of the decision in People v. Kahler will at once disclose that the court was discussing the insufficiency of the pleading under an attack by general demurrer.

In State v. Miller, 153 Ind. 229, 54 N. E. 808, the defendant moved to quash the indictment simply "on the ground that it did not state facts sufficient to constitute a public offense." Says the Supreme Court of Indiana:

> "The indictment was fatally defective in at least two particulars * * * it showed no connection between the false pretenses and the payment or delivery of the money by White to the appellee."

In Cummings v. State, 36 Tex. Cr. R. 152, 36 S. W. 266, the indictment charged that the defendant falsely represented to Cohen that he was the owner of and had the right to sell to Cohen for $75 a diamond stud; that Cohen relied upon and was induced by said representation to deliver to the defendant the sum of $75. Against this indictment there was presented no demurrer and no motion to quash. But an objection was interposed to the introduction of evidence under the indictment, and this objection the trial court overruled. On appeal the Supreme Court held this indictment to be fatally defective, in that "there was no allegation * * * that the defendant sold to said Cohen, or any one else, the diamond stud." Further proceeds the opinion:

> "We have searched in vain for an allegation that Cummings, as a part of the transaction, sold and delivered to said Cohen said diamond stud. Unless this actual sale and delivery are alleged, we fail to see how the transaction was completed in such shape as to afford the basis of an indictment for swindling."

In Jones v. State, 22 Fla. 532, the indictment charged that the defendant falsely pretended to one Carr that he, the defendant, was one Kirby, by means of which said false pretense the defendant did fraudulently obtain from Carr said money, and Carr was induced to part with the money by reason of this false pretense. The defendant was convicted, and after conviction moved in arrest of judgment upon the ground that the indictment did not allege facts sufficient to charge any offense and sufficient to support any verdict of guilt. Says the Supreme Court:

> "The indictment merely states that Jones represented to Carr that his name was Kirby, whereupon Carr gave him $102. It is insufficient unless it be shown that Kirby had a right to demand the money of Carr, and that it was incumbent on Carr to pay the same to Kirby, or that some such relation was existing between Carr and Kirby as would be sufficient to induce Carr to loan or deliver the money to Kirby, of which Jones in his assumed character availed himself."

In State v. Saunders, 63 Mo. 482, the indictment charged that the defendant falsely represented to the prosecutor that he, the defendant, had loaned one Marshall the sum of $300; that Marshall was solvent and still owed defendant that sum; that the account was good and collectible, and that defendant could and would assign the account to the prosecutor for the sum of $200; that the prosecutor believed such representations and pretenses, confided in them, and parted with the sum of $200; that all the pretenses were false, and "by reason of said false pretenses the defendant feloniously obtained from the prosecutor the sum of $200." Here the defendant was convicted, and on appeal the judgment of conviction was reversed upon the ground that the information failed to state a cause of action, the Supreme Court saying:

> "We think the indictment is defective because it is nowhere averred in it that defendant either sold, assigned, or delivered the account to Sullivan (prosecutor), or that Sullivan bought it and parted with his money for it, relying on the false and fraudulent representations of defendant."

Further, the court quotes with approval the cases of Commonwealth v. Goddard, 4 Allen (Mass.) 312, and State v. Bonnell, 46 Mo. 395, saying:

> "The indictment, failing to aver material facts necessary to be proved on the trial before a conviction could have been had, is not sufficient to support the judgment, and it should have been arrested."

In State v. Bonnell, above cited, the indictment averred that the defendant, intending to cheat and defraud one Jacob Hoover of his goods and moneys, unlawfully, knowingly, and designedly did falsely pretend to him that he, the defendant, was then and there the owner of and had the right to sell and could make a good title to three head of cattle, whereas, Bonnell was not the owner of the cattle and had no title to them as he well knew, "by means of which said false pretenses the said Bonnell did feloniously, * * * obtain from the said Hoover the sum of $30 with intent to cheat and defraud." The defendant was put upon trial, found guilty, and moved in arrest of judgment upon the general ground that the information was insufficient to charge a crime against him. His motion was denied. On appeal the Supreme Court held the plea good, and reversed the trial court, declaring that the indictment "does not contain an averment of the material facts which the state would be bound to prove before it could ask a conviction," and further in the discussion set forth its reasons in admirable terms as follows:

> "Although under the liberal system of criminal practice now prevailing in this state the same strictness is not required that was formerly necessary, still the pleader must set out in the indictment a substantive offense, and *on trial the prosecution will be confined in the proof to the allegations set forth in the indictment.* [Italics my own.] It will be observed that the indictment does not allege any bargain, nor any *colloquium* as to a bargain for the cattle, nor is there any inducement to show by reason whereof Hoover parted with his money. I think that in a case like the present, where the alleged pretenses were injurious only by inducing another person to buy the cattle as to which said false representations were made, such sale, bargain, or agreement, which was the cause of the party advancing or parting with his money, should be set out as a part of the facts relied upon and as a material allegation in the description of the offense."

In Cooke v. State, 83 Ind. 402, the indictment charged that the defendant, with intent to defraud Watt, did falsely pretend to him that he, the defendant, was the owner of a certain tract of land; that it was free from liens and incumbrances; that it was worth $10 an acre; that the soil was rich, black loam, from 8 to 14 inches deep; that it was well-timbered with hardwood timber; that there were no swamps or lakes on it, that the land was situate not more than six miles from Evart, a railroad town and a good market; that it was also not more than nine miles from Hersey, the county seat of the county; which said false pretenses were made by the defendant for the purpose of inducing Watt to execute and deliver, and to induce his wife to join with him, in a deed of conveyance (set forth in full) conveying to the defendant in consideration of the sum of $2,000 the said land; that Watt was then and there the owner of the land described, which was of the value of $5,000; that, believing said false pretenses and representations and relying on them as true and being deceived thereby, he and his wife executed and delivered to defendant said deed of conveyance of the land. It was charged that all these representations of the defendant were in fact false, and were known by the defendant to be false. The defendant moved to quash the indictment, a motion which, of course, is in effect, a general demurrer to it. His motion was denied. He was convicted, and on appeal the judgment of conviction was reversed on the stated ground that his motion to quash should have been granted, the court saying:

> "The first objection urged to the proceedings below is that the court erred in overruling the appellant's motion to quash the indictment. It is insisted that the averments in the indictment did not, in any material sense, show that the false pretenses alleged to have been made by the appellant were the operative cause in inducing Watt to sign the deed of conveyance set out in the indictment. In our opinion the indictment was, in the respect suggested, fatally defective. It contained no averment of any contract or agreement between Watt and the appellant concerning the Michigan land, or of any interest, either present or prospective, which Watt may have had in the subject-matter of the pretenses and representations charged to have been made as an inducement to him to sign the deed. It is true the indictment averred that Watt relied upon these pretenses and representations when he signed the deed. But why did he rely upon them? What reason had he for doing so? That is left to conjecture merely. It may have been that an exchange of lands was at the time in contemplation, but the indictment did not make any such averment. Conceding the representations which the appellant may have made concerning Michigan land to have been false in every particular, why should Watt, for that reason, have made him a deed for another tract of land? We are unable to see any natural connection between the two transactions."

In Wagoner v. State, 90 Ind. 508, the indictment charged, with the usual allegations of fraudulent intent and guilty knowledge, that defendant falsely represented that a certain written order for the payment of money in the sum of $5.50 was good and genuine and of the value of $5.50 and was his, the defendant's, property, "by means of which * * * false token and pretense the said Jacob Wagoner did then and there obtain of and from the said Morrison certain personal property [describing it], all of the aggregate value of $5.50;" that Morrison relied upon and believed these representations, and, "thus relying on the genuineness and validity of said order, then and there delivered said goods to said Wagoner." There followed the usual allegations of the known falsity of the representations. A motion to quash this indictment was made and overruled. Upon appeal following conviction the court held the indictment fatally defective, saying:

> "Appellant's counsel further says: 'It is not shown in the indictment that the order was delivered to Lynn and Morrison, or that it was received by them in exchange for, or in payment of the goods.' This objection to the indictment seems to be well taken, is supported by authority, and must be sustained (citing cases)."

In State v. Fitzgerald, 18 N. C. 410, the defendant moved in arrest of judgment on the ground of a fatally defective indictment. His motion was denied. On appeal the denial was held to be error, the court saying:

> "It is not necessary to inquire whether by means of such a false affirmation a cheat or fraud might not be practiced under circumstances which would subject the offender to a criminal prosecution; but it seems to us essential, in a case where there is no obvious connection between the result produced and the falsehood practiced, that the facts should be set forth which do connect the consequence with the deceitful practice."

In Commonwealth v. Dunleay, 153 Mass. 330, 26 N. E. 871, the agent of an insurance company was indicted for obtaining money under false pretenses by sending to the insurance company a fictitious application upon the acceptance of which he was to receive a commission. The indictment charged that the employment of defendant by the insurance company was to solicit and obtain applications to said insurance company for a compensation to be paid the agent, alleged that the compensation would be due the defendant upon the acceptance by the insurance company of the application. The Supreme Court declared:

> "The indictment does not allege that this application for insurance was ever accepted by the company. We think that the connection between the false pretense and the obtaining of the money or the bank check is not set out with the technical precision required in this commonwealth."

In Commonwealth v. Lannan, 1 Allen (83 Mass.) 590, the indictment charged that the defendant made certain false pretenses to the prosecutor by reason of which he was induced to purchase of defendant a certain horse and gave to the defendant the sum of $250. The defendant's motion in arrest of judgment was denied; the Supreme Court of Massachusetts held that it should have been granted, saying:

> "Although the allegation is directly made that he gave and delivered to the defendant certain property in payment for the horse, it is not averred that he made this payment and delivery by reason of the false pretenses alleged."

In People v. Brown, 71 Mich. 296, 38 N. W. 916, the indictment charged that the defendant represented to the complaining witness that he was the agent of a corporation; that the corporation was a responsible and reliable company; that it had a paid-up capital of $100,000; that it would faithfully fulfill all its contracts, and that, relying on these representations, the complaining witness was induced to sign and deliver two certain promissory notes to the defendant. After conviction defendant appealed, urging that the information did not state a public offense. The Supreme Court of Michigan said:

> "The information does not point out for what consideration these notes were given, or to whom they were payable, or whether negotiable or not. It does not show that the corporation, directly or by agent, made any agreement or had any dealings with respondent. In other words, it does not show in what way it concerned Harmon whether the Bohemian Oat & Cereal Company was an honest and responsible or a dishonest and swindling concern. There is nothing to connect the notes with any fraud practiced on Harmon. * * * The information charged no offense."

In State v. Freeman, 103 Miss. 764, 60 South. 774, the indictment charged that the defendant falsely and fraudulently pretended and represented to the complaining witness that he, the defendant, was authorized to represent a loan company, and "by means of the said false and fraudulent representations and false pretense, procured and obtained from said Rogers, good and lawful money of the United States," etc. A general demurrer to the indictment was sustained. The state appealed. The demurrer was sustained, the court saying:

> "In an indictment for false pretenses, it is necessary to charge that the pretenses were false; that the defendant knew them to be false; that he got from another certain money or other valuable things; and that the pretenses were the moving cause whereby the money or things were obtained. * * * The indictment fails to show why Rogers paid the money to the appellee, or why such false pretense should have moved him to make the payment to the appellee. * * * The indictment fails to sufficiently allege the false pretense, so as to show upon its face why such pretense was the moving cause whereby the money was obtained from Rogers. In fact, it fails to charge with clearness that the pretenses were enough to induce Rogers to turn over the money to the appellee."

In Roper v. State, 58 N. J. Law, 420, 33 Atl. 969, the indictment charged that the defendant falsely represented to the prosecutor that a certain company was a bona fide building and loan association and had $75,000 cash on hand to loan. Then followed allegations declaring the falsity of these statements, and the indictment proceeded to charge that "by color and means of such said false and fraudulent pretenses the said Roper did then and there willfully, unlawfully, and feloniously obtain from the prosecutor $3,000 with intent then and there to cheat and defraud him thereof." The Supreme Court of New Jersey declared the indictment to be plainly insufficient, saying:

> "The rule of pleading in these cases is entirely settled. Lord Mansfield, in a case before him, said that the indictment must contain a history of the offense; that is, the essential facts must be set forth to this extent; that is, if the facts stated shall be proved, the defendant's guilt will be established. * * * The indictment before the court, on this record, is fatally defective."

In Simmons v. People, 187 Ill. 327, 58 N. E. 384, the court overruled defendant's motion to quash the indictment and his motion in arrest of judgment based on the insufficiency of the indictment. The indictment was framed with much elaboration, and charged in six counts. It was charged that the defendant falsely represented to the complaining witness that he was the agent of a syndicate controlling certain corporations, that his son was another such agent, and authorized on behalf of the syndicate to take title of the complaining witness' lot in his, the son's, own name as trustee of the syndicate, and to agree to pay in his own name on behalf of the syndicate an incumbrance on the complaining witness' land of $7,000; that these false pretenses were made to induce the complaining witness to execute a deed conveying a lot to defendant's son, and that the prosecuting witness, by means of such inducements, did execute and deliver said deed to defendant's son, with much more to like effect. The Supreme Court of Illinois declared that, notwithstanding its elaboration, the indictment did not "show that any such pretenses had any connection whatever with the signing and delivery of Bryant's deed," saying further:

> "It was next necessary, by the indictment, to connect them with the making of Bryant's deed, so as to show that they operated in obtaining his signature. The connection between the pretenses and obtaining the signature must appear either by a natural connection between them, or by facts properly averred, so that the facts will lead to a necessary legal conclusion of the guilt of the defendant. * * * The counts in question do not show in any way that the false pretenses as to the character in which the defendant was acting induced the making of the deed."

In Curtis v. State, 31 Tex. Cr. R. 39, 19 S. W. 604, the indictment charged that the defendant falsely represented to one Hawkins that he had sold certain land belonging to him, the defendant, for $250, which would be due and payable in November; that these representations were false, and that "by means thereof he induced Hawkins to deliver to defendant a certain mule of the value of $110." On appeal after conviction the Supreme Court held that the motion in arrest of judgment should have been granted, saying:

> "There is only one question that need be considered, and that is the sufficiency of the indictment. It is not alleged that any contract was made, nor that * * * Hawkins was to be paid out of the said sum of $250 which was to become due November 15, 1891, nor that he was to be paid at all, except by inference. The indictment should allege all the material facts necessary to be proved to convict the defendant, and not leave them to inference and argument (citing cases). * * * Tested by these requirements, we think the indictment fatally defective."

In Roberts v. State, 85 Ark. 435, 108 S. W. 842, the defendant represented to the complaining witness that he was a graduate eye specialist holding diplomas from three separate schools; that he was competent to treat the eyes of the complaining witness' son, and had lawful authority so to do, and falsely pretended that he was a regular practicing oculist, and "by means of which false and fraudulent representations he, the said P. F. Roberts, did then and there fraudulently and feloniously obtain from him" certain moneys and promissory notes, "whereas in truth all of the above representations were false." Defendant, convicted, made a motion in arrest of judgment. It was denied. Upon appeal the Supreme Court held the indictment insufficient upon the ground that the causal connection was not shown, the court saying:

> "A false representation by one claiming to be a physician that he is a graduate of colleges and is authorized by law to practice his profession has, of itself, no apparent tendency to induce a person to part with his money, unless such person is alleged to have engaged his services and paid him for them on account of the false pretenses. The allegations cannot mean that the defrauded person paid the money solely on account of the alleged false pretense, for that alone is not calculated to induce one to part with his property; and yet it cannot be inferred, in the face of the omission, to allege anything else; that something else was done which induced the payment of the money."

It is thus made to appear that the omission to charge the causal connection results in a fatal defect in the information or indictment of which the defendant may avail himself by general demurrer or by motion in arrest of judgment. Nor is this defect cured by section 950 of the Penal Code, which declares that the indictment or information must contain "a statement of the acts constituting the offense, in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended." The argument which invokes this section in aid of this information would seem to imply that any indictment or information should be held sufficient if a person of common understanding knew that the indictment meant to charge a crime. The prevailing opinion declares that:

> "No person of common understanding could fail to understand that it was charged by necessary inference at least," etc.

Here, then, is the startling announcement that the sufficiency of an information is no more to be tested by the long-established and vitally important rules governing the laying of criminal complaints, but is to be determined by what this court may think a man of "common understanding," indulging in inferences, might conclude that it meant. Heretofore I have held the belief that the Code meant that the language of an indictment should be such that the ordinary man would understand the *language* and know what it meant, but that the sufficiency of that language to charge a crime did not rest on what the ordinary man understood it to mean, but always on whether the reasonable meaning of the things said was adequate under the rules of criminal pleading to charge a crime. This belief must now be discarded. But I cannot discard it without the protesting declaration that such until now has never been the law of this state, and that the new law as now declared finds as little warrant in section 4½ of the Constitution as it does in section 950 of the Penal Code. The right of a defendant to have a crime charged against him with precision is a substantial right. The right of a defendant not to be put upon trial unless a crime is charged against him with due exactness is also a substantial right, and while this provision of the Constitution, with this section of the Code, is designed to aid many forms of lameness in pleading, in rulings on evidence, and in the giving of instructions, it was never designed as a panacea for all the infirmities of legal procedure, and least of all to breathe life into a criminal information or indictment which without it would be a corpse. For, I repeat, it is essential to every valid indictment that every fact necessary to charge a crime should be made the subject of direct averment and not left to inference. Barton v. People, 135 Ill. 405, 25 N. E. 776, 10 L. R. A. 306. 25 Am. St. Rep. 375; Connor v. State, 29 Fla. 455, 10 South. 891, 30 Am. St. Rep. 134; 19 Cyc. 419; 20 Cent. Digest, pars. 31 to 53. Says Lord Kenyon in Rex v. Holland, 5 Term Rep. 607:

> "Indictments should be certain, that posterity may know what law is to be derived from the record."

Says Gibson, C. J., in Hartman v. Commonwealth, 5 Pa. 60:

> Precision is "of the last importance to the innocent, for it is that which marks the limit of the accusation and fixes the proof of it."

And this court in bank has said:

> "Constructive crimes—crimes built up by courts, with the aid of inference, implication, and strained interpretation—are repugnant to the spirit and letter of English and American criminal law." People v. McNulty, 77 Cal. 164, 19 Pac. 237, 11 Am. St. Rep. 257.

Let me now address myself to the first phase of what I conceive to be a misapplication and an undue extension of the meaning of section 4½ of our Constitution. The reasoning of the prevailing opinion bears no other construction than this: That because "a reader of the information could hardly draw from it any other inference" than that the information meant to say that which in terms it does not say, and because "no person of common understanding could fail to understand that it was substantially charged by necessary inference at least" that the defendant had committed the crime of obtaining moneys by false pretenses, and as the evidence was sufficient to show his guilt, all errors, irregularities, and omissions in the information (as well as all errors at the trial) become immaterial because a guilty man has been found guilty, and therefore there is no "miscarriage of justice." I have said, and I think I have abundantly shown, that there is such a miscarriage of justice within the meaning of our law when any man is forced to trial upon a criminal charge under an information or indictment which does not measure up to the rules of legal sufficiency. The principle is not that the evidence subsequently taken may show his guilt, but that there was no proper procedure before the court to justify the taking of that evidence, and this the citations and quotations above given abundantly establish.

I have said that the reasoning of the prevailing opinion bears no other construction than that which I have given it. To the end that if it was susceptible of some other construction, that fact might be made plain, I submitted to the learned CHIEF JUSTICE the following questions, stating that his answers to them would tend to clarify to my mind his views of the law and of the scope and applicability of section 4½:

> "1. The indictment charged that 'A. defrauded B. of $300'—no more. Demurrer overruled. The evidence clearly established that within the state of California and within the period fixed by the statute of limitations A. defrauded B. of $300, in the matter of fraudulently selling land twice. Pen. Code, § 533. Is the conviction good, and under your opinion in the Griesheimer Case, and, if not, why is it not good? Every man of common understanding knows what a charge of defrauding means, namely, that by some trick or device or pretense A. cheated B. out of $300. True, fraud is but a conclusion of the pleader, and the facts are not pleaded, but they are implied, and if defendant is guilty he knows what those facts are better than anybody and if he is innocent, he has no occasion for worry and is not injured; and particularly is this true when at the trial defendant was offered all the time he desired to produce evidence to meet that of the prosecution.
>
> "2. The indictment charged that A. 'killed a man'—no more than this. Demurrer overruled. The evidence clearly established that within the state of California A. murdered B. Is the conviction obtained under such an indictment good, and under your Griesheimer opinion why is it not good, since 'any man of common understanding would understand' that the indictment was not a piece of waste paper, and so that it meant to charge that the killing was murder? True, the venue is not laid, but any man of common understanding would know that the state would not charge A. with the crime unless it was committed within its boundaries. True, the name of the man killed is not given, but if the defendant killed him, he knows who is meant, and if he did not kill him it makes no difference who is meant and, besides the defect is cured by the

evidence which clearly establishes that the man murdered was B. Not only is this defect cured by the evidence but it is cured by the verdict which so finds.

"3. The indictment charged that 'A., while walking with B., committed robbery.' Demurrer overruled. The evidence clearly established that A., while walking in San Francisco with B., at a time within the statutory period of limitations, by force and fear and against B.'s will, feloniously took from B.'s possession his watch. Is the conviction good, and under your Griesheimer opinion why is it not good? Robbery is a crime. The indictment charged a crime. Any man of common understanding knows this. Any man of common understanding would infer that the indictment meant to charge that B. was the victim of the robbery, and, in any event, the evidence established it, the jury found it and the defects are cured by the verdict.

"4. The indictment charged that 'A. committed every felony denounced by the Penal Code.' Demurrer overruled. On trial the prosecution elected to stand on seven designated felonies, and so notified defendant. Defendant was given all the time he desired to prepare his defense to each and all of these felonies. He was convicted on one of them, namely, manslaughter. The evidence overwhelmingly established his guilt. Is this conviction good, and under your Griesheimer opinion why is it not good?

"5. Under the same state of facts above given the defendant is convicted of two of the designated felonies, manslaughter and robbery. Why, for the same reasons given in your opinion in the Griesheimer Case, are not both convictions good?"

To my regret these questions have remained unanswered.

2. The prevailing opinion discusses an instruction which the court gave, and, broadly declaring that "it requires a somewhat critical and technical analysis of the particular instruction complained of to find anything therein in conflict with this well-settled law," further declares that "the injurious effect claimed" could not "reasonably have been attributed by the jury to the instruction." I did not understand, until the CHIEF JUSTICE so states, that the "jury attributed any injurious effect" to the instruction. But, passing this by, it will be noted that this conclusion rests upon bald assertion, unsupported by argument, and, while unquestionably this is the easiest way of disposing of a legal proposition, it is certainly the most unsatisfactory. It becomes incumbent on me to show by a citation to record facts, not even adverted to in the prevailing opinion: First, that the instructions are in radical conflict; and, second, that there is strong probability that the instruction complained of, erroneous in law, worked serious injustice to the defendant, even though no injurious effect was attributed to it by the jury.

It will be remembered that the information charged the showing by defendant to the prosecuting witness of a certain written list, as to which the defendant represented that each person whose name appeared on the list had subscribed the amount written opposite his name, and in particular that four German-American citizens, whose names are pleaded, had each given the amount set opposite his name. The information contains no allegation of the falsity of this list, saving as to the four names mentioned. The evidence corresponded to the allegation in showing that two of the named men had subscribed lesser amounts than those stated in the list and charged in the information, and that two others had not subscribed at all. In argument the district attorney repeatedly declared as follows:

> "If we bring in one it is as good as a thousand; and we are not supposed, and we are not obliged, to bring in all the people whose names appear on that list. * * * Now suppose, gentlemen, that the only name that was on the list at the time it was presented to Dr. Muck was the name of Mr. Ohlandt; if we prove that as to Mr. Ohlandt the amount had been changed from $50 to $150, that circumstance would be alone sufficient to convict the defendant in this case."

It is perfectly true that where an information or indictment charges several false pretenses, a conviction may be had and will be sustained by proof of only one of such pretenses, provided, always, that it be established to the satisfaction of the jury that the particular pretense which is so proved was *material* in inducing the complaining witness to part with his money or property. One of the court's instructions so indicates. Another, however, declares as matter of law that, if there was a false representation as to the amounts actually subscribed by some of those whose names are on the list, the defendant is guilty. Now, it must be apparent, if A. presents to B. a subscription list showing that 20 or 50 men have contributed stated amounts of money to a given cause, that the false representation as to the amount which one or two had subscribed may or may not be the material inducement to the subscription of the complaining witness. So, if a man presents a list containing purported subscribers to the stock of a corporation, the falsity of the statement that one man had subscribed might be of no materiality whatsoever, while the falsity of the statement that another man had subscribed might be very material, as the complaining witness might subscribe only upon the faith that some particular man or men of approved business sagacity had already become stockholders. But in every such case the question is an evidentiary one for resolution by the jury itself. It is for the jury to say, under the peculiar circumstances of each case, whether or not the evidence establishes that the proved false statement was a statement inducing the prosecuting witness to part with his money or property. It is not for the court, under such circumstances, to charge the jury that any such false pretense, when established, is in and of itself material. So that, while the judge of the court was careful enough to instruct as he did in the one instruction concerning the materiality of the false pretense before a conviction could be based upon it, in the other of these instructions, following the mistaken declaration of law made by the district attorney, he erred in stating, in effect, that the proof of the falsity established the materiality as matter of law.

What, then, is the logical, reasonable result of a reading of all of the instructions bearing upon this point? It is and can be only this: That the jury was instructed that they must find the materiality of any false pretense before they could base a conviction upon it. But specifically, as addressed to the evidence of this case and as matter of law, they were told that, "if misrepresentations are made as to amounts actually subscribed or contributed, and that Karl Muck, believing in the truth of the representations as to those amounts, himself subscribed toward the fund," this misrepresentation the jury is told was material. It is perfectly easy, of course, to declare that this is a "somewhat critical and technical analysis," but we need not even rest this discussion upon the counter asseveration that it is the only natural and legal analysis. For by adding to this discussion that which is omitted in the prevailing opinion, the injury I think will become plain, even to the man of "ordinary understanding." Those omitted matters are: First, the repeated argument of the district attorney, a fraction of which is above quoted, as where he says, "if we prove that as to Mr. Ohlandt that amount had been changed from $50 to $150, *that circumstance would be alone sufficient to convict the defendant in this case.*" Who can doubt but that the instruction complained of was directly and designedly addressed to this oft-declared view which the prosecuting officer took of the law and of the evidence? But, second, the injury becomes the more apparent because it manifestly appears from the evidence—that of Dr. Muck himself—that he was in no wise influenced in his contribution by any false representation as to any particular name upon the list, nor as to any particular amount set opposite that name. Thus his testimony is:

> "Q. Why did you give this man the money, Doctor? A. First of all because he told me it was to help the German cause, and then because he showed me this list of contributions from very famous San Francisco citizens who gave the money for the same purpose."

Mr. Ohlandt, "a famous San Francisco citizen," had in fact subscribed. Would the man of common understanding, under this evidence, and unless positively instructed by the court to the contrary, say because one name upon a list of 20 or 30 was improperly or falsely there, or because Mr. Ohlandt had given $50 and not $150, in the face of the testimony of the complaining witness himself, that these trifling variances or false representations were in any sense material? Yet by the argument of the district attorney, adopted by the court in its instruction, any one of these is declared to be sufficient to warrant a conviction. And the reason for this will appear in the discussion of the next proposition, that reason being that unless the prosecution could make good its contention upon this evidence, in other words, unless it could have the jury told that such a misrepresentation established its case, the evidence failed utterly, in at least one vital point, to justify the conviction.

3. The foregoing statement is made with a due sense of responsibility occasioned by the language of the learned CHIEF JUSTICE to the effect that the evidence "undoubtedly shows his guilt of the offense charged." But neither this statement nor the following one that the "case falls as clearly within the provisions of section 4½, art. 6, of the Constitution as any case that has ever been presented to us," being mere declarations, can be permitted to stand as a substitute for a fair discussion of the evidence itself. The indictment charged that Dr. Muck's money was given by him to the defendant. The profession is told to read this indictment as meaning to charge, and as sufficiently charging, that Dr. Muck's money was given to the Fatherland Magazine through the agency of defendant. As the indictment in fact charged the offense to have been completed by the delivery of the money to defendant, so the evidence to establish the offense charged would have been complete on a showing of a delivery to and reception by the defendant of that money. This showing was made. The prosecuting officer and the trial court, not then enlightened by this court as to the true construction of the information, and having produced evidence sufficient to establish their charge, namely, the giving of the money to the defendant, there rested, as under their pleading they were entitled to rest. But it now appearing that the information must be read to charge that the money was given to the defendant for the Fatherland Magazine and that it was delivered by him to the Fatherland Magazine, there is an utter and absolute failure of the evidence to show that the Fatherland Magazine did not in fact receive the money. The information, as this court makes it read, is (and necessarily must be to charge any crime at all) that Karl Muck gave the defendant $300 for the Fatherland Magazine on the defendant's representation that he was the authorized agent to solicit and collect donations and subscriptions for that magazine, and that the defendant did not pay the money over to the Fatherland Magazine. To simplify the matter, it is as though the information charged that the defendant represented himself as an authorized collector for the Red Cross, and that the complaining witness, relying on this representation, gave the defendant $300 for the Red Cross. Manifestly if the defendant paid the money over to the Red Cross, the complaining witness has not been injured. Manifestly he is only injured if the defendant did not pay it over. Therefore the averment that it was not paid over is necessary to charge the crime, and proof that it was not paid over is necessary to establish the crime.

Yet this is brushed aside upon the asserted authority of People v. Bryant, 119 Cal. 595, 51 Pac. 960. The case of People v. Bryant, in its essentials is this: The defendant sold to plaintiff a note and mortgage under false representations touching the character of the land, pointing out as the land mortgaged land which was in fact not included in the mortgage. The lands actually mortgaged were of no value. The holding of this court is that such false representations, as it was in reliance upon them that the complaining witness purchased the note and mortgage, are sufficient when established to make out the crime charged, without regard to the question whether or not the complaining witness could ultimately reimburse herself by civil action. The opinion of this court was upon a judgment after demurrer sustained to the complaint. In sum, it is as though A. sold to B. a promissory note signed by himself and Andrew Carnegie upon the representation that Andrew Carnegie's signature was genuine. That signature being charged and proved to be fictitious and the complaining witness charging and proving that he purchased the note upon the faith of that signature, the offense is established without regard to the question whether or no the complaining witness might ultimately collect the principal and interest of the note from the one genuine maker. What this case has to do, or can have to do, with a pleading which charges that the complaining witness gave the money to the defendant for the Fatherland Magazine upon the representation that the defendant was a collecting agent for that magazine, and that the defendant never paid it over to the magazine, while the evidence establishes only the payment to the agent, and fails utterly to show that he did not pay it over to the magazine, I am unable to comprehend.

I do not think it will be contended that it was incumbent upon the defendant to prove his innocence by showing that in fact he had paid it over to the Fatherland Magazine. I take it that it will be conceded that it was the duty of the prosecution in establishing a case under the information, as this court makes it read, to show that the Fatherland Magazine did not receive the money. The evidence of Dr. Muck himself is as follows:

> "I did not give it [the money] to him [defendant]. I gave it to the Fatherland. He told me so."

The gravamen, therefore, of the offense charged in this indictment by the inferences in which the prevailing opinion indulges is that Dr. Muck was induced to make a contribution to the Fatherland Magazine. This contribution he gave to the Fatherland Magazine by delivering it to the man whom he believed to be the accredited agent of the Fatherland Magazine. Even the man of common understanding would recognize that the whole case falls to the ground if the money was in fact delivered to the Fatherland Magazine. Even the man of common understanding, knowing that it is essential to a valid conviction to establish every element of the crime, recognizes that it was vital to the case of the prosecution to show that the Fatherland Magazine did not receive this money. No attempt to make such a showing was even attempted, for the very obvious reason above given, that under the indictment as written the information charged that the money was given to the defendant and the offense was established by showing his reception of that money. Says Bishop (3 New Crim. Pro. § 183), discussing false pretenses:

> "It is essential that the indictment should be in terms to avoid any variance at the trial between allegation and proof. Conformity to this rule is attained only by the exercise of a practical skill in conjunction with legal knowledge."

Conceding that this court can and has supplied the legal knowledge lacking to the sufficiency of this indictment as drafted, it is impossible for me to perceive how it can also supply the lack of sufficient legal evidence. And in conclusion I say that no conviction which has come under my observation falls more clearly within the provisions of section 4½, art. 6, of the Constitution, in establishing a miscarriage of justice.

We concur: MELVIN, J.; LORIGAN, J.

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176 Cal. 33

ADAMS v. PRATHER et al. (S. F. 7916.)

(Supreme Court of California. Aug. 31, 1917.)

1. WILLS 🔑439, 440, 456, 470 — RULES OF CONSTRUCTION—STATUTE.

Under Civ. Code, §§ 1317, 1318, 1324, a will is to be construed according to the intention of the testator as ascertained from the words of the will, which words, in the absence of a clear intention otherwise, are to be taken in their ordinary sense, while section 1321 declares that, unless irreconcilable, all parts of a will are to be construed in relation to each other so as, if possible, to form one consistent whole.

2. WILLS 🔑649 — CONSTRUCTION — INTEREST DEVISED.

By her will a married woman gave all her property to her husband, appointing him executor with power to sell any or all of her real estate and personal property without an order of court. On the death of the husband one-half of the unexpended portion of the testatrix's estate was bequeathed to a specified niece and the other one-half divided among a class. Civ. Code, § 1322, declares that a distinct devise or bequest cannot be affected by any other words not equally clear or distinct. *Held*, that the gift to the husband was modified by the subsequent gifts; and, while he took the estate during his life with the power to consume or dispose of it, and persons dealing with him in good faith would be entitled to protection as fully as though he were absolute owner, yet he could not, during his lifetime, make a gift of the estate or dispose of it by will.

3. GIFTS 🔑77 — CAUSA MORTIS — RIGHTS OF CREDITORS.

Where decedent, who was largely indebted, shortly before his death made a gift of the bulk of his estate, his gift is, under Civ. Code, §

1150, presumed to be a gift causa mortis, which under section 1153 may be, by creditors, treated as a legacy subject to their claims under section 1563 of Code of Civil Procedure.

4. FRAUDULENT CONVEYANCES ⇨58—WHAT CONSTITUTES—FRAUD IN CONTEMPLATION OF INSOLVENCY.

Though defendant's grantor took from his wife's estate property which he might have devoted to payment of his debts, yet, as it could not be reached by his creditors without his action, his gift to defendant of practically all of his own estate available for the payment of his debts, he not having exercised the right to pay his debts out of the estate of his wife, is subject to attack by the grantor's executors under Civ. Code, § 3439, declaring that every transfer of property with intent to delay or defraud any creditor of his demands is void as against all creditors of the debtor and against any person upon whom the estate of the debtor devolves in trust.

5. EXECUTORS AND ADMINISTRATORS ⇨39 — ASSETS OF ESTATE—"EXPEND"—"CONSUME."

Under Civ. Code, § 1324, declaring that in the absence of a clear intention to the contrary words are to be taken in their ordinary and grammatical sense, property given by a wife to her husband is not subject to the payment of his debts, though he was given absolute control, where there was a subsequent gift of any portion unexpended to any beneficiary, for the word "expend" means pay out, use up, and is synonymous with "consume," and where the first taker did not use the property for payment of his debts, it was not expended.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Consume.]

6. WILLS ⇨698 — CONSTRUCTION—JURISDICTION OF COURT.

Where the construction of a will is involved collaterally, a court of equity has jurisdiction to make the construction, even though the construction is ordinarily a question for the probate courts.

7. EXECUTORS AND ADMINISTRATORS ⇨130(2) —ACTIONS TO SET ASIDE CONVEYANCE—TIME OF INSTITUTION.

Where shortly before his death the testator gave to defendant practically all of his property available to satisfy his debts which far exceeded the amount of his estate, the executor may, before obtaining an order from the probate court for sale of the property, sue to set aside the conveyance to defendant under Code Civ. Proc. §§ 1589, 1590, 1591, providing for recovery of property fraudulently disposed of by a testator.

In Bank. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Edson F. Adams, as executor of the last will and testament of Thomas Prather, deceased, against Samuel D. Prather and others. From a judgment for plaintiff, and an order denying motion for new trial, the named defendant appeals. Affirmed.

See, also, 167 Pac. 867.

Chapman & Trefethen, of Oakland, and R. H. Countryman, of San Francisco, for appellant. Corbet & Selby, of San Francisco, Snook & Church, of Oakland, and J. P. O'Brien, of San Francisco, for respondent.

VICTOR E. SHAW, Judge pro tem. This action arose out of the following facts: Thomas Prather and Julia P. A. Prather were husband and wife. On April 6, 1906, Julia died, leaving an estate of some $600,000, which she made the subject of testamentary disposition by an olographic will in form as follows:

> "Oakland, California, Sept. 26, 1904.
>
> "I, Julia P. A. Prather, hereby make my will. I give all the property of which I die possessed to my husband Thomas Prather & appoint him my executor to serve without bonds. I give him power to sell any or all of my real estate and personal property without an order from the court. Upon the death of my husband the said Thomas Prather one half of the unexpended portion of my estate bequeathed to my husband to be given to my niece Julia Adams, daughter of my brother, Edson F. Adams, the other one-half to be given to the surviving daughters of my brother Edson F. Adams in equal shares. I revoke all or any wills heretofore made by me. I declare this will is entirely written and dated and signed by my hand.
>
> "Julia P. A. Prather."

In due time proceedings for the probate of this will were commenced in the superior court of Alameda county, but no decree of distribution of the estate was at any time made, and as yet the estate is unadministered. On April 2, 1913, Thomas Prather was attacked with his last illness, as a result of which he died on April 19th following. On the date when taken ill Thomas Prather owned, exclusive of any interest in his wife's estate, property of the value of approximately $106,000, and owed debts, thereafter proved and allowed against his estate, in the sum of approximately $234,000, all of which had been contracted by him after the death of his wife, and all of which were due and payable on said April 2d, and none of which is shown or claimed to have been incurred by him as executor in the care and management of his wife's estate. During the latter days of his last illness, Prather, by conveyances and assignments without consideration, and by way of gifts, transferred to his brother, Samuel D. Prather, defendant and appellant herein, real and personal property then owned by him and constituting no part of his wife's estate, the value of which was approximately $96,000, leaving at the time of his death, exclusive of his wife's estate then in process of administration, property of the value of $9,737.85. His will, executed June 18, 1907, was admitted to probate, and Edson F. Adams, the brother of his deceased wife, named therein as executor, qualified as executor, and, under and by virtue of sections 1589 to 1591, inclusive, Code of Civil Procedure, brought this action to obtain a decree declaring said transfers of real and personal property, so made by the testator to his brother, Samuel D. Prather, fraudulent and void as to said creditors of deceased, as well as for incidental relief; the theory of the case being that, since there was a deficiency of assets in the hands of the executor, the transfers of property so made by deceased to Samuel D. Prather were made in contemplation of insolvency and for the purpose and with the intent to hinder and defraud his creditors. Judgment was entered for plaintiff, from which defendant appeals upon a bill of exceptions wherein, among other alleged errors, is exhibited an order of court denying his motion for a new trial.

The answer filed not only denied all the material facts upon which the fraud was predicated, but alleged affirmatively that at the time of the transfers, as well as at all times thereafter, and at the time of his death, Prather owned and possessed unincumbered property and estate, other than that so transferred to Samuel Prather, of the value of $600,000, conceded, however, by defendant to have been represented by his interest in the property of the estate of Julia P. A. Prather, deceased, then in process of administration. It is likewise conceded that, other than the interest in his deceased wife's estate and exclusive of the property so transferred as gifts to his brother, Samuel D. Prather, Thomas Prather at the time of his death left property not exceeding the sum of $10,000 in value with which to pay creditors, whose established claims amounted to upwards of $234,000.

If, in fact, Prather, as alleged by defendant, left an unincumbered estate of $600,000 subject to the payment of his debts, then manifestly there was no deficiency of assets within the meaning of section 1589 of the Code of Civil Procedure under which his executor was entitled to maintain the action. Nor, since, if such condition existed, there was ample property to meet in due course all demands of the creditors, could the transfers be said to have been made "for the purpose and with the intent to hinder, delay, and defraud the creditors" or "in contemplation of insolvency." The only evidence offered by defendant in support of the alleged fact that Prather left this large estate and was not insolvent at the times in question was the will of Julia P. A. Prather, copy of which is hereinbefore set out.

The determination of the questions involved depend largely, indeed almost wholly, upon the interpretation of this will. The contention of the appellant is that by virtue of its terms and provisions Thomas Prather acquired title in fee simple absolute to the entire estate of his deceased wife, while respondent insists that he took a life estate therein without restriction as to his use of the same.

[1, 2] "A will is to be construed according to the intention of the testator" (Civ. Code, § 1317), and that "intention is to be ascertained from the words of the will, taking into view the circumstances under which it was made" (Civ. Code, § 1318), which words, in the absence of a clear intention to use them otherwise, "are to be taken in their ordinary and grammatical sense" (Civ. Code, § 1324). Unless irreconcilable, "all the parts of a will are to be construed in relation to each other, and so as if possible to form one consistent whole." Civ. Code, § 1321. Applying these rules, and having in mind that "a clear and distinct devise or bequest cannot be affected * * * by any other words not equally clear and distinct" (Civ. Code, § 1322), we find no difficulty in arriving at the intention of Julia P. A. Prather as expressed in her will. In disposing of her property she recognized her husband as being first entitled to consideration, but in providing for him she gave expression to the thought of her nieces, particularly the one who bore her name, Julia. While the first dispositive clause of the will, namely, "I give all the property of which I die possessed to my husband Thomas Prather, * * *" is clear and, taken alone, admits of no construction other than that an absolute disposal of her estate to him was intended, the second dispositive clause, to wit, "Upon the death of my husband the said Thomas Prather one-half of the unexpended portion of my estate bequeathed to my husband to be given to my niece Julia Adams, * * * the other one-half to be given to the surviving daughters of my brother Edson F. Adams in equal shares," is equally clear and distinct. Estate of Tooley, 170 Cal. 164, 149 Pac. 574, Ann. Cas. 1917B, 516. Hence, unless irreconcilable with the first clause, it should be construed in relation therewith. Read in connection with the first clause, it is clear that in using the words "unexpended portion of my estate," she had reference to that portion of her estate which should remain unconsumed by her husband at his death, and this part of her estate so remaining was, by the terms of the will, addressed, not to her husband as legatee, but to the executor of her will, "to be given" in the manner provided by law to her nieces. Thus addressed to the executor the words were not precatory in character, but are words of command. Estate of Marti, 132 Cal. 666, 61 Pac. 964, 64 Pac. 1071. The second clause cannot be construed as the expression of a wish or recommendation of Julia as to the husband's disposition of the unexpended portion of the estate, since she herself makes it the subject of a legacy to her nieces. Her intention was to limit the estate given the husband to such part thereof only as he might in his lifetime expend, consume, or make use of, without in any manner restricting him in the control and disposition thereof for such uses. Subject to such control and disposal for his use and consumption to its complete exhaustion, it was Julia's estate, and, after such carving therefrom as the husband might make for his use and consumption, the portion, if any, remaining at his death, and designated by Julia as "the unexpended portion of my estate," she made the subject of testamentary disposition, directing it "to be given," not by her husband, who, as we have seen, had no interest therein, but by her executor and the law to the nieces mentioned. The meaning of the second clause of the will, when viewed in con-

nection with the first, in our opinion is as clear and distinct as any other part of the will, and, thus construed in relation to the first, effect is given to both, and the intention of the testatrix made clear.

Not only is this construction of the will justified by statutory rules of interpretation, but like interpretations of like provisions of wills have been frequently made by the courts. Thus in the case of In re Dickinson's Estate, 209 Pa. 59, 58 Atl. 120, the language of the will was as follows:

> "All the rest, residue, and remainder of my estate, real, personal and mixed, and wherever situated. I give, devise, and bequeath unto my beloved husband, Henry B. Dickinson, his heirs and assigns. * * * And should my husband not expend the whole of my estate, then it is my desire at his death to give so much of it as remains to my sister, Annie Ulrich, and my two brothers, Algernon J. Martin, and John J. Martin."

In construing this language, the court said:

> "The concluding sentence expresses the desire of the testatrix to give the whole of her estate, not expended by her husband, to her sister and brothers. It is her wish to thus give her estate. It is not her desire or wish or recommendation that her husband shall give the unexpended estate to them. The estate is not committed to him with expressions of desire as to how he dispose of it. The testatrix makes the disposition herself. She gives him the estate. This carries with it the power to convert, sell, convey, assign, and transfer. He could have expended the whole of it, for there is no limitation, restraint, or condition attached to the bequest. But if he did not consume or expend it, then what remained at his death she gave to others. This is the reasonable interpretation of the will. He did not consume the whole. What remains, therefore, is her estate, and passes by her will to the legatees."

The language quoted is peculiarly applicable here. In the Estate of Tooley, 170 Cal. 164, 149 Pac. 574, Ann. Cas. 1917B, 516, the wording of the will considered was as follows:

> "I give all my property at my death to my daughter Logan Mattie Tooley. If at her death she has neither husband or children I desire any property that may be left divided equally among my sisters and brother."

In construing the will this court, speaking through Mr. Justice Shaw, held that the words of disposition contained in the second clause were equally clear and distinct as those of the first, and that upon the death of the daughter, Logan Mattie Tooley, leaving neither husband nor children, the property of the estate passed to the sisters and brother of the testatrix, and hence was not subject to testamentary disposition by Logan Mattie Tooley. The words "unexpended portion of my estate to be given" used in the will now under consideration are certainly more apt and appropriate as dispository words than those "I desire," used in the Tooley will.

In Johnson v. Johnson, 51 Ohio St. 446, 38 N. E. 61, the will under consideration gave all property of the testator to his wife, will full power to dispose of the same, which clause, considered alone, concededly vested her with absolute title. The will, however, contained a clause to the effect that if at the time of the wife's decease any of the property should remain unconsumed, it should be equally divided between the testator's brothers and sisters. In construing the will the court said:

> "The plain intention of the testator as shown by the whole will is that the property is given to the widow to be by her used and consumed, and that, while so using and consuming the same, she is empowered to bargain, sell, convey, exchange, or dispose of the same as she may think proper, limited, however, in the exercise of such power, to the purpose for which the property is given to her; that is, for her consumption. The devise over to his brothers and sisters and their children is of itself enough to show that the testator intended, that his widow should use and consume the property only during her lifetime, and that he did not intend to empower her to dispose of the fee by gift during her life, nor by will at her death. This is clearly the intention of the testator, when effect is given to the whole will, and the intention should always govern."

The intention of Julia P. A. Prather as expressed in her will was to give her estate to her husband for his unrestricted use and consumption during the term of his natural life, with power to control, manage, exchange, sell, and dispose of the same, limited, however, in the exercise of such power to the purpose for which the property was given him, viz. his use and consumption thereof. While as to the property, persons dealing with him in good faith would be entitled to protection as fully and to like extent as though he were absolute owner in fee thereof, he could not, as of right in his lifetime, give it away or make it the subject of testamentary disposition at his death. Hardy v. Mayhew, 158 Cal. 95, 110 Pac. 113, 139 Am. St. Rep. 73, and cases there cited. And herein lies the distinction between the case at bar and those cited by appellant, wherein the first taker is vested with the absolute jus disponendi. It follows that Thomas Prather's estate has no interest in the unadministered estate of Julia P. A. Prather, deceased, without which the former's estate is concededly insolvent.

[3] This insolvency, in part at least, is due to the gifts of the property here involved made to the defendant Samuel Prather during the last illness of the deceased. "A gift made during the last illness of the giver * * * is presumed to be a gift in view of death." Civ. Code, § 1150. Section 1153 of the Civil Code declares that "a gift in view of death must be treated as a legacy, so far as relates only to the creditors of the giver." Hence the property so transferred by Thomas Prather during his last illness must, as to the creditors, since there exists a deficiency of assets with which to meet their demands, be deemed the subject of testamentary bequest, and as such is therefore, as provided in section 1563, Code of Civil Procedure, lia-

ble for the debts and obligations of the deceased.

[4] Assuming that, under the will of his wife, Thomas Prather obtained a life estate only, coupled with the powers hereinbefore mentioned, appellant insists that at the time of making the gifts he could, in the exercise of such powers, have used the property of the estate and proceeds of the sale thereof for the purpose of paying his debts. Conceding this to be true, it is answered by the fact that he did not exercise such power which he alone could exercise, but during the latter days of his illness, lasting less than three weeks, conscious as he must have been of his early demise, charged with knowledge that the interest in his wife's estate, from which during his lifetime he was empowered voluntarily to pay his debts, would terminate upon his death, and knowing that, in the absence of such voluntary payment, his creditors, who under the circumstances were powerless to enforce their demands by process of law, must look to his estate for payment, he gave away the sole and only property possessed by him which at his death could be subjected to the payment of his large indebtedness, and which but for such acts would have been appropriated to such purpose. A man controlling property out of which he may voluntarily pay his debts, if he will, but which for any reason cannot be reached by process of law, and thus without his consent subjected to such payment, is nevertheless insolvent. Eddy v. Baldwin, 32 Mo. 369; Schwabacher v. Kane, 13 Mo. App. 126. The property of Prather's deceased wife was so situated that, conceding he might voluntarily have used it to pay his debts, the circumstances were such that it could not, by legal process, be reached after his death by his creditors who, as we have seen, were dependent for payment upon an act, the performance of which he withheld. The effect of his acts, under the circumstances shown, was, as found by the court, to create a condition of insolvency as to his creditors, and ample evidence exists for the finding that the gifts were made in contemplation of the insolvency of his estate and with the intent and purpose of defrauding his creditors. Section 3439, Civil Code, provides that:

> "Every transfer of property * * * with intent to delay or defraud any creditor * * * of his demands, is void against all creditors of the debtor * * * and against any person upon whom the estate of the debtor devolves in trust for the benefit of others than the debtor."

[5] In Julia's will she described the property devised and bequeathed to her nieces as the "unexpended portion" of the estate remaining at the death of her husband. Appellant insists that the contraction of obligations to pay money, such as the incurrence of an indebtedness, in itself amounts to an expenditure, and that in accordance therewith, notwithstanding Prather received but a life estate in that of Julia, there must be deducted from the portion thereof remaining at his death sufficient property to meet all his outstanding indebtedness. This argument, while ingenious, denies to the word "unexpended" its proper signification and meaning, thus violating section 1324 of the Civil Code, which provides that in the absence of a clear intention to use them otherwise, "words * * * are to be taken in their ordinary and grammatical sense." The word "expended" is defined: "to pay out, or lay out, use up, disburse." It is synonymous with "consume," and it cannot be said that one has paid out, spent, disbursed, or consumed that which remains unappropriated in his possession and control. The part of the estate which during his lifetime he had not disbursed and paid out in the liquidation of his debts constituted the "unexpended portion" of Julia's estate which, under the view hereinbefore expressed, was devised and bequeathed to the nieces.

[6] Notwithstanding the fact that the question at issue depended for its determination upon the construction of Julia's will, offered by defendant as the sole evidence in support of his affirmative allegation that at the time deceased made the gifts he was not insolvent, but owned and left at his death property of the value of $600,000, appellant insists that the trial court was without jurisdiction to construe the will. In other words, he is in the anomalous position of predicating error upon his own action in asking the court to construe the will. However this may be, and conceding that a court of equity will not entertain a suit, the sole or chief purpose of which is to obtain the construction of a will, jurisdiction so to do being vested in the probate court, it is nevertheless true that a court of equity is, when necessary to the determination of a question properly before the court, vested with jurisdiction to construe a will as incidental to the equitable relief sought. 40 Cyc. 1839; Pingrey v. Rulon, 246 Ill. 109, 92 N. E. 597; Evins v. Cawthon, 132 Ala. 184, 31 South. 442; Rowley v. Rowley, 143 Wis. 325, 127 N. W. 1003; Martin v. Martin, 52 W. Va. 381, 44 S. E. 204. In the instant case the subject of litigation was the validity of the gifts which were made by Thomas Prather, the solution of which question depended upon whether or not, in the making thereof, he impoverished his estate to an extent that rendered it insolvent, which in turn, by reason of the issue tendered by the answer, and as incidental to the main question, depended upon the interpretation of the will. To the extent necessary in determining the rights of the parties the court was authorized to construe the will. Such interpretation, however, is of value only in so far as determinative of the rights of the parties in this case. It cannot be deemed as ousting the jurisdiction of the probate court which, save in so far as the decision is advisory, is left untrammeled in the

exercise of its power to construe the will and distribute the property in accordance therewith.

Since the creditors of Thomas Prather are not seeking to subject the property in the estate of his deceased wife to the payment of their claims, we are unable to perceive any force in appellant's contention that they should, before extending him credit, have informed themselves of the condition of his title thereto. For aught that appears to the contrary, they did. But, assuming they did not, their rights asserted in this action are unaffected by such fact.

That the judgment is against the interest of the creditors is no concern of the appellant. Suffice it to say that they are not here complaining.

[7] The contention that the action is premature for the reason that plaintiff had not obtained from the probate court an order of sale of property is without merit. The existence of debts in the sum of upwards of $234,000 was stipulated by defendant, and the evidence conclusively established the fact that the assets, aside from (or for that matter with) the gifts to the defendant, are insufficient to pay them. These facts warranted the executor in instituting the action. Sections 1589, 1590, 1591, Code Civ. Proc.; Field v. Andrada, 106 Cal. 107, 39 Pac. 323. Moreover, not only by virtue of the law, but as provided in the judgment rendered, the executor can only sell such part of the property as may be necessary to pay the debts upon obtaining an order so to do from the probate court, and the surplus of any funds derived from such sale must be returned to the defendant.

To answer in detail the numerous points with which appellant's argument is punctuated would, in view of what has been said, serve no purpose, and unnecessarily prolong the discussion. In a general way they are sufficiently covered in the consideration given to what we deem matters determinative of the appeal.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOSS, J.; HENSHAW, J.; MELVIN, J.

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176 Cal. 24

PACIFIC COAST CASUALTY CO. v. INDUSTRIAL ACC. COMMISSION.

(S. F. 8112.)

(Supreme Court of California. Aug. 30, 1917.)

1. Insurance 🔑435—Indemnity Insurance—Right to Recover—Policy—Construction.

An employer's accident indemnity policy covering miners, hoistmen, surface tram men, timekeeper, and roustabout, millmen, blacksmith and helper, and cook and waiter, does not cover the mine superintendent, though he was killed while actually doing manual labor.

2. Insurance 🔑141(4)—Indemnity Insurance—Right to Recover—Waiver of Condition.

Where an employer's indemnity policy provided that no erasure or change should be valid unless indorsed by certain officers, and an erasure on the policy accepted by insured was not so indorsed, if insurer stands on the policy, insured cannot question validity of contract accepted by it.

3. Stipulations 🔑14(9)—Construction—Documentary Evidence.

Where the parties stipulated that an instrument offered was a true copy of the policy, the stipulation must be taken to refer to the copy as it read on its face, and therefore to contemplate an erasure actually appearing therein.

In Bank. Certiorari by the Pacific Coast Casualty Company, to review an award of the Industrial Accident Commission of workmen's compensation in favor of William Angus, against petitioner and the White Gulch Mining Company. Award annulled as to petitioner.

T. T. C. Gregory and D. Hadsell, both of San Francisco, and Jos. G. Sweet, of Berkeley, for petitioner. Christopher M. Bradley, of San Francisco (Warren H. Pillsbury, of Oakland, of counsel), for respondent.

SLOSS, J. Certiorari to review an award of the Accident Commission. William Angus was president of White Gulch Mining Company. While acting as superintendent of its mine he entered the mine and met his death through asphyxiation. Application for compensation was made by his widow, Pacific Coast Casualty Company, as insurance carrier, being joined with the mining company. The commission made an award against both defendants. The petition for review was presented by the Casualty Company alone. In addition to other points, the petitioner contends that Angus, if shown to be in the employ of the mining company, was not within the class of employés whose injuries were covered by the policy of insurance issued by it. If this position be well taken, the award against the Casualty Company cannot, of course, stand.

[1] At the hearing before the commission it was stipulated between all the parties to the proceeding that the mining company had "a workmen's compensation policy with the Pacific Coast Casualty Company covering the employés operating in its mining properties at Coulterville covering miners, hoistmen, surface tram men, timekeeper, and roustabout, millmen, blacksmith and helper, and cook and waiter." The commission's award is based upon a finding that Angus was killed while in the employment of the mining company as a mine superintendent. It seems perfectly clear that the occupation of a mine superintendent is not included within any of the employments specifically designated in the stipulation. The respondents do not, indeed, dispute this. But it is

argued that the policy itself, a copy of which is attached to the return, was intended to have a broader scope, and to cover the superintendent, as well as the miners performing manual labor in the mine. It is questionable whether the effect of a stipulation can be altered by pointing to evidence which may conflict with it. But waiving this point we think the policy itself was clearly intended to cover only employès engaged in the specified employments. The opening clause of the policy states that:

> "In consideration of the estimated premium herein provided and of the statements set forth in the schedule of statements appended hereto and made a part and the basis hereof (herein called the schedule), which statements * * * the assured makes and warrants to be true, * * * the Pacific Coast Casualty Company * * * does hereby agree (1) to assume all liability of the assured for the payment of the medical, surgical, and hospital services * * * and for the compensation required by the Workmen's Compensation, Insurance and Safety Act, known as chapter 176 of the Laws of 1913 of the state of California."

The respondents argue that by this general language the insurer undertook to meet any liability for which the mining company might, under the Workmen's Compensation Act, become liable to any of its employès, of whatever class or kind. But the policy, like any other contract, must be read as a whole, and as including the "appended" application, or "schedule of statements," expressly made a "part and the basis of" the policy. People's Ice Co. v. Employers', etc., Corp., 161 Mass. 122, 36 N. E. 754; Carson v. Jersey City Ins. Co., 43 N. J. Law, 300, 39 Am. Rep. 584; Jennings v. Chenango County Mut. Ins. Co., 2 Denio (N. Y.) 75; Bobbitt v. Insurance Co., 66 N. C. 70, 8 Am. Rep. 494; Chrisman v. State Ins. Co., 16 Or. 283, 18 Pac. 466; Philbrook v. New Eng. Mut. Fire Ins. Co., 37 Me. 137. One of the provisions of the policy shows that the premium is based "upon the entire compensation earned during the period of this policy by all employès of the assured engaged in the business or occupations set forth in the schedule and not specifically excepted." It is further provided that if, at the end of the policy period, it shall appear that such compensation exceeds the amount estimated at the time of the issuance of the policy, the assured shall pay a further premium calculated on said excess; while if the actual compensation is less than the amount estimated, the company shall refund a proportional part of the premium. One of the statements in the schedule describes, under the head "The kind of trade, business, profession or occupation (manual classification)," the following occupations: "Miners, hoistman, surface tram men, timekeeper, and roustabout, millmen, blacksmith and helper, and cook and waiter." There is no other statement indicating either the business of the employer, or the occupations of its workmen.

It is apparent, therefore, that the premium for which the Casualty Company undertook to insure the mining company was based upon the pay received by the specified employès. The fair construction of the policy is that which the parties adopted when they made their stipulation of facts, namely, that the insurance was designed to cover employès of the designated classes, they being the ones whose compensation furnished the measure of the premium, in consideration of which the Casualty Company assumed the risk.

[2, 3] The copy of the policy, as it appears in the return, shows a certain statement in the "schedule" to have been stricken out by the running of lines through it. This statement, if permitted to stand, would make the policy cover superintendents. The respondents argue that the cancellation must be disregarded under a clause in the policy providing that "no erasure or change appearing on this policy as originally printed, and no change or waiver of any of its terms" shall be valid unless set forth in an indorsement signed by certain designated officers of the company. This clause was manifestly intended for the protection of the insurer against unauthorized acts of its agents. If the Casualty Company is willing to stand on the policy as issued to the insured, the latter is in no position to question the binding force of the contract accepted by it. Furthermore, the original policy was not introduced in evidence, and there was presented to the commission no question of the form in which it was written. The Casualty Company presented a copy, and it was stipulated that this was a "true and correct copy" of the policy issued and in force. The stipulation must be taken to refer to the copy as it read on its face, i. e., with the statement in question eliminated.

The award against the Casualty Company was therefore not justified. This conclusion does not, however, affect the position of the White Gulch Mining Company, which has not attacked the award against it. The award is annulled in so far as it is directed against Pacific Coast Casualty Company.

We concur: ANGELLOTTI, C. J.; SHAW, J.; HENSHAW, J.; LAWLOR, J.

34 Cal. App. 379

TRANSCONTINENTAL TELEGRAPH CO. v. NEYLAN et al., State Board of Control.

(Civ. 2109.)

(District Court of Appeal, First District, California. July 30, 1917. Rehearing Denied by Supreme Court Sept. 27, 1917.)

1. TAXATION ⚷155 — OCCUPATION TAXES — TELEGRAPHS AND TELEPHONES — OPERATIVE COMPANIES.

Under Const. art. 13, § 14, as amended November 8, 1910, providing that taxes of telegraph companies shall be exclusively for state purposes and be placed upon the gross receipts from operation of the companies, and shall be in lieu of all other taxes upon the property enumerated, and the Corporation Franchise Act (St. 1911, p. 530), a paper corporation, not rendering service to the public, is not within the law, and its property is nonoperative, and subject to all of the taxes that may be imposed upon nonoperative property, as well as any state license charge exacted by the Legislature.

2. TAXATION ⚷155 — OCCUPATION TAXES — TELEGRAPHS AND TELEPHONES — OPERATIVE COMPANIES.

The provision of Corporation Franchise Act, § 8, subsecs. 2, 3, that property owned by a telegraph company constructing, but not operating, shall be deemed nonoperative property, and subject to assessment, does not, by mentioning the kinds of taxes to which such property is subject, preclude the assessment thereof for other purposes, in view of Const. art. 13, § 1, providing that all property shall be taxed in proportion to its value.

Appeal from Superior Court, City and County of San Francisco; Geo. C. Crothers, Judge.

Application by the Transcontinental Telegraph Company against John F. Neylan and others, individually and as members of the State Board of Control. From a judgment on demurrer sustained to the application for a writ of mandate, the plaintiff appeals. Affirmed.

Willard P. Smith and B. B. Blake, both of San Francisco, for appellant. U. S. Webb, Atty. Gen., and John T. Nourse, of San Francisco, for respondents.

PER CURIAM. This is an appeal from a judgment of the superior court, rendered upon demurrer sustained to an application by the plaintiff for a writ of mandate, to compel the defendants, constituting the state board of control, to allow a claim against the state for the return to it of certain license taxes, pursuant to chapter 278 of the Statutes of 1915, providing for the repayment of license taxes erroneously collected. The license taxes paid by plaintiff and sought to be recovered were paid in and for the years ending June 30, 1912, June 30, 1913, and June 30, 1914. Plaintiff paid the corporation license taxes for each of the above periods, and during the same period filed with the state board of equalization reports, as required by the so-called Corporation Franchise Act of April, 1911. Acting under such reports, the board of equalization fixed the value of plaintiff's franchise, and plaintiff paid the franchise tax for that period as so fixed. Such tax was fixed upon the value of the franchise, and not upon the gross receipts of plaintiff, as it appears that plaintiff was not during any of said periods operating any telegraph lines, and that it showed no gross receipts for any of those periods.

In the year 1905 the Legislature of the state enacted a law, which was known as the Corporation State License Tax Act of that year, and which fixed an annual license tax upon every corporation, domestic or foreign, doing business in this state; the amount of such license tax being based upon the capital stock of the corporation. This act, in its relation to foreign corporations engaged in interstate commerce, was held to be unconstitutional and void in the case of Mulford Co. v. Curry, 163 Cal. 276, 125 Pac. 236. Thereafter, and before the decision in the case of Pick & Co. v. Jordan, reported in 169 Cal. 1, 145 Pac. 506, Ann. Cas. 1916C, 1237, reversing the Mulford decision and holding the act to be valid, the Legislature, in the year 1913, repealed the Corporation State License Act of 1903, the repeal becoming effective in June, 1914. Stats. 1913, p. 680. The license taxes, however, sought to be recovered in this proceeding, were paid before such repeal became effective. In the year 1910 a constitutional amendment was adopted, which worked a radical change in the system of taxation in the state, and the object of which was to separate state from local taxation, and to enable the state to impose upon persons, firms, or corporations engaged in certain kinds of business—such as public service corporations and insurance, banking, and trust companies—the obligation to pay certain taxes to be applied exclusively to state purposes; the concerns thus engaged and the property employed in such undertakings to be to a greater or less degree free from the burden of local taxation. San Francisco v. Pac. Tel. & Tel. Co., 166 Cal. 244, 135 Pac. 971. The provisions of this constitutional amendment bearing on the present case are found in section 14 of article 13, as amended November 8, 1910, which section, so far as material here, provides:

> "Taxes levied, assessed and collected as hereinafter provided upon railroads * * * telegraph companies * * * shall be entirely and exclusively for state purposes. * * * Said tax shall be equal to the percentages hereinafter fixed upon the gross receipts from *operation* of such companies and each thereof within this state. * * * The percentages above mentioned shall be as follows: * * * telegraph and telephone companies, three and one-half per cent. * * * Such taxes shall be in lieu of all other taxes and licenses, state, county and municipal, upon the property above enumerated of such companies except as otherwise in this section provided." (Italics ours.)

Acting under the provisions of the foregoing section of the Constitution, the Legislature in 1911 adopted what is known as the Corporation Franchise Act. Stats. 1911, c. 335. In this act are incorporated provisions similar to those found in the Constitution relating to the method of assessment of taxes for state purposes, and in section 8, subsection 1, subdivision D thereof, the term "operative property," as used in the act, is defined as including:

> "In the case of telegraph and telephone companies doing business in this state: The franchises, rights of way, poles, wires, pipes, * * * cables, switchboards, telegraph and telephone instruments, batteries, generators and other electrical appliances and exchange and other buildings used in the telegraph and telephone business, and so much of the land on which said buildings are situate as may be required for the convenient use and occupation of said buildings."

Subsection 2 of the same section provides that:

> "Any property of the classes mentioned in this section owned by a company constructing * * * telegraph or telephone system * * * shall not be considered operative property, and shall be subject to assessment and taxation for county, municipal and district purposes. The property of any company mentioned in this section shall be deemed to be in operation as to such part of the new road, line, plant, or system as may be in use as soon as it offers and renders service to the public for compensation: Provided, however, that the state board of equalization shall finally determine the fact of such operation and the liability of any such company to be taxed upon its gross receipts as provided in section 2 of this act."

Subsection 3 of the same section then provides:

> "When any property in this state belonging to a company of the classes named in this section is rendering no service to the public in this state, even though it may be rendering service to the public in some other state or states, such property shall not be considered as operative property, and shall be subject to assessment and taxation for county, municipal, and district purposes."

[1] It is the clear intention of the constitutional section above quoted and of the Franchise Tax Act to include within its terms the corporations therein designated only when such corporations are rendering a service to the public. A corporation which is merely a paper corporation, and not rendering service to the public, but possibly engaged in some other business, though it may be organized for the purpose of rendering public service, is not to be deemed a corporation coming within the terms of the constitutional section until it has in fact become a public service corporation. It is only when such a corporation is operating within this state, and rendering public service within this state, because of which operation and business it earns gross proceeds upon which the percentage tax can be based, that such a tax so paid "is in lieu of all other taxes and licenses, state, county and municipal." The mere creation of such a corporation by filing articles of incorporation, or a certificate of such articles, in the case of a foreign corporation, is not sufficient to bring such corporation within the exemptions found in section 14 of article 13 of the Constitution.

Plaintiff here alleges that it has not paid any tax upon its gross receipts, and that it was not operating any telegraph lines during said period. It is conceded that it has not engaged in any public service, and until it does so engage all of the property owned by the company is nonoperative property, and subject to all of the taxes that may be imposed upon nonoperative property, as well as any state license charge exacted by legislative enactment. That a corporation organized to engage in a public service does not, by the mere filing of its articles, become entitled to be treated as a public service corporation, is clearly decided in Del Mar Water, etc., Co. v. Eshleman, 167 Cal. 666, 672, 140 Pac. 591, 593, where our Supreme Court said:

> "It is true that these provisions are broad, and that the company might, under its charter, engage in business as a public utility. The mere chartered authority does not, however, mark the nature of the operating corporation, any more than the language of a notice of appropriation binds the appropriator to furnish all of the territory mentioned therein. Palmer v. Railroad Commission, 167 Cal. 163, 138 Pac. 997. It is the naked authority to do business; but, unless it be pursued in a certain way, it does not make the corporation a public utility."

[2] It is true that in subsections 2 and 3 of section 8 of the Corporation Franchise Act it is provided that property owned by a telegraph or other company mentioned, constructing but not operating its system, and property belonging to companies of the class mentioned in section 8 having property within the state rendering no public service in the state, but which may be rendering a public service without the limits of the state, shall be deemed nonoperative property, and subject to assessment and taxation for county, municipal, and district purposes. But we think it does not follow that, having mentioned the kinds of taxes to which such property is subject, the nonoperative properties of corporations of the class under consideration here is subject to no other tax; for the Constitution of this state (section 1, art. 13), which, of course, is supreme, provides that all property, except as otherwise provided, not exempt under the laws of the United States, shall be taxed in proportion to its value. If we were to accept as correct the position of plaintiff, we would be required to hold that corporations of the classes here under consideration would not be subject to pay any state taxes or licenses on their nonoperative property, no matter how much such property might be worth.

The judgment is affirmed.

34 Cal. App. 400

SCOTT v. WOODWORTH et al. (Civ. 1619.)

(District Court of Appeal, Third District, California. Aug. 1, 1917. Rehearing Denied by Supreme Court Sept. 27, 1917.)

1. Deeds 🔑38(1) — Mortgages 🔑48(2) — Description of Property—Sufficiency.

An instrument was ineffective as a deed or mortgage where the property involved was described as bounded on the north and east by the lands of R. and B. avenue, on the east by the land of M., and on the south by C. avenue, and containing 5½ acres, without giving any western boundary, and without showing what particular lands or portions of the lands of the different owners constituted the easterly boundary, especially where the land sought to be described was not bounded by C. avenue, but was bounded on the east by C.'s addition to a town, on the west by the lands of M., on the north by a part of B. avenue, and by the lands of M., and the lands of R. bounded it on the west, and not on the north and east as stated.

2. Frauds, Statute of 🔑110(1)—Description of Property—Sufficiency.

To be valid on its face, a deed must contain such a description of the real property intended to be conveyed as will enable it to be readily located by reference to the description, and while the deed may be sufficient, though the description by boundaries be ambiguous or indefinite, if it otherwise provides means whereby the description can be made certain and the land identified and located, if the description is so vague and uncertain that the property cannot be identified and located, and the writing does not furnish the means whereby it may be made sufficiently definite, the instrument is void, as the imperfections cannot be supplied through evidence extrinsic to the writing, in view of the rule that a conveyance of real property must be in writing.

3. Quieting Title 🔑10(1)—Necessity of Title in Plaintiff.

In an action to quiet title, plaintiff must show title in himself to be entitled to relief.

4. Quieting Title 🔑10(5)—Sufficiency of Plaintiff's Title — Rights of Mortgagees.

A mortgagee's remedy is not by an action to quiet title, but by one to foreclose the mortgage and sell the property under Code Civ. Proc. § 726, providing that there can be but one action for the recovery of any debt or the enforcement of any right secured by action, which action must be in accordance with the provisions of that chapter.

Appeal from Superior Court, Sonoma County; Emmet Seawell, Judge.

Suit by L. G. Scott against C. W. Woodworth and others. From a judgment for defendants, plaintiff appeals. Affirmed.

L. G. Scott, of Sebastopol, and T. J. Butts, of Santa Rosa, for appellant. D. R. Gale and J. R. Leppo, both of Santa Rosa, for respondents.

HART, J. It is agreed by counsel for the respective parties hereto that this is an action to quiet title. The amended complaint alleges:

"That on or about the 3d day of January, 1908, plaintiff's grantors, August A. Lueger, sometimes called A. Lueger, and Hedwig Voightlander née Lueger, were the owners in fee of all that certain lot, piece and parcel of land situated, lying, and being in the township of Analy, county of Sonoma and state of California, and bounded and particularly described as follows, to wit."

There follows a description of certain land, to which reference will hereafter in this opinion be made. It is next alleged that:

On said 3d day of January the "property stood of record in the name of Ernest Lueger, and that on or about said date without the knowledge or consent of August A. Lueger or the said Hedwig Voightlander, née Lueger, the said Ernest Lueger made, executed, and delivered to one Chris Mugge a certain mortgage upon all of the aforesaid property, to secure the payment to the said Chris Mugge of the sum of $2,000, that after the execution of the said mortgage to the said Chris Mugge as aforesaid, the said Ernest Lueger made, executed, and delivered to the said August A. Lueger and Hedwig Voightlander, née Lueger, a deed conveying all his right, title, interest, and estate in and to said premises, which said deed was dated on the 27th day of June, 1911, and that the same was recorded on the 1st day of July, 1911, in Book O of Bonds and Agreements of said Sonoma County Records."

It is then alleged that, on or about July 14, 1913, "the said premises were sold by virtue of an execution issued on a judgment of foreclosure of the aforesaid mortgage"; that defendant C. W. Woodworth and O. L. Murphy purchased said property for the sum of $2,500; that thereafter said Woodworth acquired all the rights and title of said Murphy in and to said premises, and holds the certificate of purchase, "which said certificate has not been satisfied and is undischarged, and the time for a redemption of said premises has not yet expired." It is alleged that, on or about February 14, 1914, the said August A. Lueger and Hedwig Voightlander tendered said Woodworth the sum of $2,685 and demanded of defendants "a proper and lawful satisfaction and discharge of said mortgage, and said certificate of sale of said premises"; that defendants refused to accept said money, and did not state "wherein there was a deficiency or error in the amount." A deed from August A. Lueger and Hedwig Voightlander to plaintiff, executed and delivered before the commencement of the action, is alleged, the rental value of the property is stated, and the prayer is that plaintiff be decreed the owner of said premises, for damages for the withholding of possession, etc.

In their answer, defendants deny that, on or about the 3d day of January, 1908, August A. Lueger and Hedwig Voightlander were the owners of said premises, but allege that, since December 22, 1906, and until July 18, 1913, Ernest Lueger was the owner and in possession thereof; deny the execution or delivery by Ernest Lueger to August A. Lueger and Hedwig Voightlander of "a deed, or any instrument in writing, conveying to them" the title of said Ernest Lueger to said land. "Defendants allege that on the 18th day of July, 1913, and while the said Ernest Lueger was so the owner and in the possession of the said lands and premises described in said amended complaint, he made, executed, and delivered to defendant C. W. Woodworth and O. L. Murphy" a deed conveying all his interest in said land; "and thereupon the said O. L. Murphy and said defendant C. W. Woodworth entered into the possession of the same"; that on July 21, 1913, said Murphy conveyed his interest to defendant Woodworth, who has since been in possession of the premises. "That prior to October 21, 1913, the said C. W. Woodworth and O. L. Murphy had no actual knowledge or notice, and had no constructive notice, of any grant, deed, or conveyance by the said Ernest Lueger, or by any other person, to the said August Lueger and Hedwig Voightlander, or to either of them, of the said lands and premises, or of any part thereof, or that the said August Lueger or Hedwig Voightlander, or either of them, claimed any title thereto." It is alleged that the time for redemption of said premises expired July 18, 1914, and that no redemption has been made. The tender and demand alleged in the complaint are denied, and it is alleged that defendants, J. K. Smith, as sheriff, and J. K. Smith, make no claim to the premises.

The findings of the court practically follow the answer, and the judgment was in favor of defendant Woodworth, that, from the commencement of the action, he has been the owner in fee simple of said premises. From this judgment plaintiff appeals.

The general facts of the controversy, which are either admitted by the pleadings or established by uncontradicted evidence, are correctly stated as follows in the brief of the respondents:

> "In November, 1906, Peter Christensen was the owner of the lands involved, and his title is the common source. In November, 1906, said Christensen and wife executed a deed in due form to said Ernest Lueger and one Zinkernagel. In December, 1906, said Zinkernagel conveyed all of his one-half interest in said lands to said Ernest Lueger. On January 3, 1908, said Ernest Lueger and wife executed to said Mugge the mortgage mentioned in plaintiff's amended complaint to secure a promissory note for $2,000. This mortgage was later regularly foreclosed by action in the superior court of Sonoma county, in which the said August A. Lueger and Hedwig Voightlander were made parties defendant. They appeared in said action, pleading that certain moneys were owing by said Ernest Lueger to them under the instrument of June 27, 1911, and secured by the same, later withdrawing such pleadings and suffering default; and which foreclosure action went regularly to judgment and foreclosure sale, and resulted in a sale of the mortgaged premises to one Murphy and the defendant Woodworth, the latter later acquiring Murphy's interest in the certificate of sale. On July 18, 1913, being four days after the foreclosure sale, the said Ernest Lueger conveyed the said lands to the said purchasers at the said foreclosure sale, O. L. Murphy and C. W. Woodworth, by regular grant, bargain, and sale deed. On July 21, 1913, said O. L. Murphy duly conveyed his one-half interest in said lands to his cotenant, the defendant Woodworth."

The written instrument, which is the foundation of the plaintiff's case, as made by his amended complaint, and which, as seen, he characterizes in his said complaint as a "deed," reads as follows:

> "This indenture, made and entered into this 27th day of June, 1911, by and between Ernest Lueger, of Sebastopol, Sonoma county, California, party of the first part and A. Lueger and Hedwig Voightlander née Lueger, parties of the second part, witnesseth: That whereas said first party has heretofore acted as trustee for certain funds belonging to second parties the exact amount of which is unknown by second parties and they rely upon the statements of first party at this time that the same is and were a certain amount 2800 marks German money, and this agreement is made upon said basis as a settlement, of said amount coming into the hands of first party two-thirds of which belongs to second parties herein, and whereas said first party has an equity in and to 5½ acres of land in and near Sebastopol, California of the value of about $4000.00 on which first party has a mortgage of about $2000.00, now in consideration of the premises and money in the hands of first party, not counting money now in Germany but all being a part of the estate of Louise Ohel, deceased, in settlement of demands of money had and received by first party to which there has been no accounting to second parties, first party does hereby sell and convey unto said second parties The equitable interest in and to said hereinafter described land figured at a valuation of $2000.-00 if on the other hand said property shall sell for more than that amount it shall be and belong to first party, and first party shall have the right to sell said premises and pay to second parties $2000.00 cash money in lieu of their interest, first party agrees that he will proceed to sell said premises as soon as possible for a reasonable market price meanwhile he shall have possession thereof and the income therefrom without further consideration, and the said $2000.00 when procured to be paid to second parties shall be placed in the First National Bank of Sebastopol to the credit of second parties, but in case of a sale by first party it shall be by the consent of second parties, said money and property to be controlled by the provisions of the will of said Louise Ohel, and this settlement shall be in lieu of all demands that have been transferred to America in said estate upon the representation of said first party, the land herein conveyed is described as follows, being all of that lot piece or parcel of land situated being and lying in the township of Analy, county of Sonoma, and state of California, and bounded and described as follows to wit,: Bounded on the north and east by the lands of Robinson and Bodega avenue of the town of Sebastopol, on the east by the land of Jimmy McChristain and on the south by Calder avenue extended, and containing 5½ acres. That it is further agreed and understood that when said land shall have been sold that if the same can be loaned at interest that first party shall be entitled to the same interest that the same was drawing in Germany, and that second parties shall have the remainder of their interest payable to them as it may accrue.
>
> "Witness our hands and seals the 30th day of June 1911.
>
> "Ernest Lueger.
> "Hedwig Voightlander, née Lueger.
> "August E. Lueger."

Attached to said instrument is a certificate of acknowledgment by the parties thereto.

The alleged offer by August A. Lueger and Hedwig Voightlander to redeem from the foreclosure sale, dated February 14, 1914, together with the affidavit of the service of the same on the defendant, Woodworth, were put in evidence, and a deed executed by said

August A. Lueger and Hedwig Voightlander and delivered to the plaintiff, purporting to convey to the latter the premises described in the amended complaint, were also offered and received in evidence.

The position of the plaintiff is that, by virtue of the writing or "deed," which is the basis of this action, August A. Lueger and Hedwig Voightlander became the successors in interest to the title of Ernest Lueger, and that, therefore, they were entitled to redeem from the foreclosure sale, and that, furthermore, they did in fact redeem; that, by reason of said transaction and of the conveyance by them of March 6, 1914, to the plaintiff, the latter became the owner of the legal title, and is therefore entitled to a judgment quieting the same in this action.

On the other hand, the defendants contended at the trial, as they contend here (and the trial court held), that the said instrument is not a deed or other conveyance of real property, and that it was never intended to operate as a deed of conveyance. It is further contended that said instrument, whatever its legal character or the purpose for which it was intended, is void for the reason that it does not contain a description of the premises which constitute the subject-matter thereof. It is also contended that there was no redemption or even offer to redeem.

Before proceeding to a consideration of the several contentions above mentioned, it may be remarked that the elaborate discussion in the brief of the appellant of the rights of trustees and beneficiaries, fraudulent transfers and conspiracies, and other like questions, is wholly foreign to any issue made by the pleadings. The complaint nowhere alleges that either the mortgage by the elder Lueger to Mugge or the transfer of the legal title of the mortgaged premises to Murphy and Woodworth, the purchasers at the foreclosure sale, involved a fraudulent transaction, or that either of those transactions was the result of a fraudulent conspiracy upon the part of the parties thereto wrongfully to deprive August A. Lueger and Voightlander of any rights which they might have claimed in said premises.

The agreement upon which this action is founded, whatever may be its legal effect, is by no means in the form of a deed of conveyance, and does not appear, from its language or provisions, to have been intended as such.

In the first place, it is to be noticed that it is signed by the second parties as well as by the first party. A deed is required to be signed by the grantor only, and the fact that all the parties signed it, and that it was designated in the instrument as an "agreement" by the parties themselves, is clearly indicative of an intention in them that it should be something other than a deed. Moreover, the instrument was not recorded in the book containing the record of deeds in the recorder's office, but was inserted in a book kept in said office for the recordation of bonds and mortgages. This is another strong circumstance indicating that the parties did not intend that it should or understand that it could operate as a deed. Furthermore, the agreement sets forth that the first party is "trustee for certain funds belonging to the second parties," amounting to 2,800 marks, a mark, as a monetary unit used in Germany, being approximately $23^8/_{10}$ cents of our money, or approximately $700, and further declares that:

> "This agreement is made upon said basis as a settlement of said amount coming into the hands of said first party, two-thirds of which belong to said second parties herein."

Manifestly, two-thirds of $700 amounts to $466, which is the sum for which the first party agreed to transfer to the second parties an equity of the value, according to said agreement, of $2,000. That a person would part with an interest in property of the value of $2,000 for the small sum of $466 is hardly in consonance with reason or the probable intention of the owner or the understanding of the other contracting parties. But a circumstance indicating that the instrument was not intended to operate as a deed of conveyance stronger than any which has yet been suggested is to be found in the provisions of the instrument that said first party "shall have the right to sell said premises," and that if such sale be for more than the sum of $2,000, the excess may be retained by said first party; that said "first party agrees that he will proceed to sell said premises as soon as possible for a reasonable market price; meanwhile he shall have possession thereof and the income therefrom without further consideration," etc. As is well said by counsel for the respondents, the right to sell the property and to retain the proceeds of sale, or any part thereof, constitute acts which are entirely inconsistent with the parting of title or an intention to vest title to the property by the owner thereof in others. Obviously "an instrument which confers no right of either present or future possession possesses little of the character of a conveyance, and can hardly be deemed to pass any estate in the land." McMillan v. Richards, 9 Cal. 365, 410, 70 Am. Dec. 655; Fogarty v. Sawyer, 17 Cal. 589.

What the instrument or the effect thereof was intended by the parties to be, it is, indeed, difficult to conjecture from the provisions themselves of the writing. In fact, the author of the instrument, the plaintiff himself, seems to have been much puzzled as to how to classify it; for, as attorney for the parties of the second part, he prepared, verified, and filed in the action to foreclose the Mugge mortgage an answer in which he referred to the instrument as a writing whose purpose was to secure to his then clients, but present assignors, the payment of the money claimed to be due them from the first party to the agreement, and prayed the court so to construe the instrument and enter a decree accordingly, and thus safeguard the interests of August A. Lueger and Hedwig Voightlander, alleged to be so secured.

[1] But, whatever may be the legal effect of the instrument, or whether it purports or was intended to be either a deed or a mortgage, it is clear that it is without force as either, because the property which constitutes the subject-matter thereof is not so described as to facilitate an identification of the particular land or premises to which it relates. It will be noted that the land as it is described in the instrument is not given a westerly boundary, and, so far as the instrument shows to the contrary, there is no limit to the extension of the tract westerly. Again, as so described, the tract is bounded on the north and *east* by the lands of "Robinson and Bodega avenue," and "on the *east* by the land of McChristian." Thus, it will be observed, the description is indefinite and uncertain. While it is not inconceivable that the tract might be bounded on one side by two different and distinct parcels of land—that is, by lands owned by different parties—or bounded on the north and partly on the east by the lands of one individual, still in such case the description must necessarily be indefinite and uncertain where it does not show what particular lands or portions of the lands, respectively, of the two different owners constitute together the easterly boundary line of the tract sought thus to be described. But the omission to describe the westerly boundary line is itself sufficient to vitiate the deed or mortgage, if it be either, since, as is true here, the land is not designated by any particular name or described by reference to some particular object or thing which might itself lead to a ready identification of the particular tract which constitutes the subject-matter of the instrument. And, as showing to some extent the undependableness of the description of the land as given in said instrument, it may be pointed out that in the amended complaint the tract is described as being "bounded on the north and *west* by the lands of Robinson and Bodega avenue," which is obviously inconsistent with the description given in the instrument.

[2] To be valid on its face, a deed must contain such a description of the real property thereby intended to be conveyed as will enable the property to be readily located by reference to the description. It is true that the description by boundaries may be ambiguous or indefinite, and still the deed sufficient if it otherwise provides means whereby the description can be made certain and the land identified and located. Where, however, the description is so vague or uncertain that the property cannot be identified and located therefrom, and the writing itself does not furnish the means whereby the description may be made sufficiently definite and certain readily to locate the property, then the instrument must be held void, since the imperfections of the description cannot be supplied through evidence extrinsic to the writing itself without running up against the positive mandate of the rule that a conveyance of real property must be in writing.

The propositions above stated are quite elementary, and need the citation of no authorities to confirm them; still we cite the following authorities as embodying a clear elucidation of the principles involved therein: Brandon v. Leddy, 67 Cal. 43, 7 Pac. 33; Best v. Wohlford, 144 Cal. 737, 78 Pac. 293; Donnelly v. Tregaskis, 154 Cal. 261, 97 Pac. 421; People v. Klumpke, 41 Cal. 263; Moss v. Shearer, 30 Cal. 467, 468; Barker v. Southern R. W. Co., 125 N. C. 596, 34 S. E. 701, 74 Am. St. Rep. 658, 660; 2 Devlin on Deeds, § 1910; 13 Cyc. 543.

Referring now to the evidence relative to the description of the property, it is to be observed that thereby it is shown that the instrument relied upon here by the plaintiff is not only void upon its face because of the vagueness and uncertainty of the description, but that in point of fact the description of the property as it is set out therein is erroneous. From the official map of the town of Sebastopol, which was received in evidence, and the testimony of the city surveyor and engineer and the city attorney of said town, it appears as undisputed facts that there is a "Calder avenue" in the town of Sebastopol and a "Calder addition" to said town; that Calder avenue does not anywhere constitute a boundary line of the premises in question; but that the property is bounded on the east by Calder's addition to said town and west by the lands of McChristian; that it is bounded on the north by a part of Bodega avenue and by the lands of McChristian, and that the lands of Robinson bound it on the west and not on the north and east, as set forth in the agreement which constitutes the basis of this action.

Enough of the testimony as to the correct description of the property has now been adverted to to show and emphasize the proposition that the description of the property as given in the instrument or agreement by virtue of which plaintiff claims to have acquired an interest in the property in question is not only so ambiguous and uncertain as to make it impossible to locate therefrom the property it purports to refer to, but that the description so given is at variance in almost every essential particular with the true description of the premises.

[3] It results (assuming it to be or to have been intended as a deed) that the said instrument is wholly inoperative as a deed of conveyance of real property, and, since the plaintiff's asserted title is entirely founded on said writing, and, inasmuch as in an action

to quiet title, the plaintiff is required to show title in himself before he will be entitled to the relief sought in such an action, the trial court was left to no other alternative but to enter judgment against him.

[4] It is not claimed in the complaint that the instrument is or was intended to operate as a mortgage, and we think it could not properly be given a construction imparting to it the characteristics and the effect of a mortgage. And if it were a mortgage, the remedy of the plaintiff would not be in an action to quiet title, but in one to foreclose it and sell the property thereunder (Code Civ. Proc. § 726), in which case only, if at all, could he obtain possession of the property (Code Civ. Proc., § 744). But, as stated, even as a mortgage, the instrument would still be inoperative because of the infirmities which impart invalidity to it as a deed.

The above considerations are decisive of the case as it is presented here; hence we need not consider the question raised by the defendants, whether the purported offer of the plaintiff's assignors to redeem the property constituted a legal offer; that is to say, whether the offer or tender as made was in compliance with the requisites essential to the extinguishment of an obligation by offer of performance.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

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34 Cal. App. 384

PEOPLE v. MALJAN. (Cr. 681.)

(District Court of Appeal, First District, California. July 31, 1917. Rehearing Denied Aug. 30, 1917. Rehearing Denied by Supreme Court Sept. 27, 1917.)

1. EMBEZZLEMENT 🔑47—QUESTION FOR JURY—STATEMENT BY DEFENDANT'S EMPLOYÉ.

Whether a broker accused of embezzling proceeds from a sale of fruit heard his employé's statement that the fruit was to be handled on consignment so as to be bound thereby was for the jury.

2. EMBEZZLEMENT 🔑44(5) — SUFFICIENCY OF EVIDENCE—CHARACTER OF POSSESSION.

Evidence *held* sufficient to show that defendant, accused of embezzling proceeds from sale of fruit, received the fruit on consignment.

3. EMBEZZLEMENT 🔑10—BY PARTNER.

A partner feloniously converting another's funds coming into his control as a member of a partnership with which the prosecuting witness was doing business in the relation of principal and agent may be guilty of embezzlement.

4. PARTNERSHIP 🔑125—RELATION TO THIRD PERSONS—PRINCIPAL AND AGENT.

The relations of individual partners to persons who occupy toward the partnership the relation of principal by employing the partnership as their agent are those of principal and agent, in view of Civ. Code, § 2443, making the liability of general partners for each other's acts that of agents.

5. PARTNERSHIP 🔑175 — LIABILITY FOR EMBEZZLEMENT.

A partnership as an entity cannot be charged with embezzlement, and the party charged therewith must be the partner who converted the funds.

6. EMBEZZLEMENT 🔑47 — BY PARTNER — QUESTION FOR JURY.

The question whether managing partner was the person who embezzled money deposited to the partnership account of which he had control was for the jury.

7. PARTNERSHIP 🔑63—DISTINCT ENTITY.

A partnership is not a person separate from its component members in the sense that a corporation is a separate entity.

8. CRIMINAL LAW 🔑1167(1) — PREJUDICIAL ERROR—INDICTMENT—VARIANCE.

Variance between an indictment for embezzlement charging a direct agency and proof of indirect agency through the medium of a partnership was not prejudicial, the record disclosing that the defendant knew the charge he was called upon to answer, and since an acquittal thereon would have barred a similar prosecution for the same offense.

9. INDICTMENT AND INFORMATION 🔑171 — VARIANCE—WHAT CONSTITUTES.

A material variance between proof and information arises when an acquittal thereunder would be no bar to a further prosecution for the same offense, but where the discrepancy does not affect the validity of the information, or the defendant's substantial rights in his defense, the variance is immaterial.

10. CRIMINAL LAW 🔑617—TIME OF TRIAL—WAIVER OF OBJECTION.

Defendant cannot complain that his trial was finished during a Saturday half holiday in violation of Code Civ. Proc. §§ 133, 134, providing that no court shall be held nor judicial business transacted on legal holidays, his counsel having in open court waived the right to object to the trial proceeding into the afternoon, such waiver being binding upon the defendant.

11. CRIMINAL LAW 🔑781(1) — INSTRUCTIONS —ORAL DECLARATIONS.

Refusal to instruct that evidence of defendant's oral declarations should be viewed with caution is not error; such instruction being a mere commonplace which all jurors ought to be expected to know.

12. CRIMINAL LAW 🔑1137(5)—REVIEW—ESTOPPEL TO ALLEGE ERROR—CROSS-EXAMINATION.

Defendant cannot object that cross-examination was improper where his counsel then admitted the truth of facts sought to be established thereby.

13. EMBEZZLEMENT 🔑42—ADMISSION OF EVIDENCE—INSOLVENCY PETITION.

In a prosecution for embezzlement, an insolvency petition filed by defendant was relevant; it containing an admission in the list of creditors that the defendant was indebted to the complaining witness.

14. EMBEZZLEMENT 🔑42—ADMISSION OF EVIDENCE—INCRIMINATING CIRCUMSTANCES.

In a prosecution for embezzlement, evidence that there was no money in the partnership account at the time the embezzling partner departed was material, the embezzled funds having been deposited in this account, and the defendant being the managing agent of the partnership, such evidence tending to show that defendant himself used the money.

15. EMBEZZLEMENT 🔑38—ADMISSION OF EVIDENCE—BOOKS OF SERVANT COMPANY.

The books of the company which was in fact the defendant's servant were admissible in his prosecution; the fruit having been delivered to accused by such firm for the owner.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Peter Maljan was convicted of embezzlement, and appeals from judgment, and from order denying motion for new trial. Affirmed.

Hahn & Hahn, of Los Angeles, Everts & Ewing, of Fresno, and W. J. Ford, of Los Angeles, for appellant. U. S. Webb, Atty. Gen., for the People.

BEASLY, Judge pro tem. The defendant, Peter Maljan, was convicted of embezzlement in the superior court of Fresno county, and appeals from the judgment and order denying his motion for a new trial.

There was evidence from which the jury were justified in finding the following facts among others in this case: The defendant, Peter Maljan, was a member of a copartnership composed of himself, his brother, and another person, doing business in Fresno as packers, brokers, and shippers of fruit. The prosecuting witness, Homsy, delivered his crop of grapes to the Maljan firm for shipment to, and sale in, the Eastern market. The grapes were delivered to the firm and accepted by them upon consignment, to be shipped East, and the proceeds were to be paid to Homsy; the defendant's firm acting in the matter as commission brokers and agents for Homsy. The copartnership received the returns from these grapes, amounting to $900, over and above an advance of $200 made to Beach & Co., another copartnership, through whom the grapes were delivered to Maljan's firm. The returns from these grapes were never paid to Homsy.

As is usual in such cases as this, the testimony is complicated and difficult to compass, but the jury was authorized to find the foregoing facts from the evidence, as will be illustrated by stating some of the testimony.

[1, 2] Homsy's fruit was delivered to the copartnership of Maljan Bros. & Co. through one Beach. Beach told Thayer, an employé of Maljan Bros., in the defendant Peter Maljan's presence, that Homsy wanted his crop handled on consignment, and Beach asked if they wanted to handle the fruit in that manner. Either Peter Maljan or Thayer, who was an employé of Maljan Bros. & Co., answered that they did want to handle the grapes in that way. No witness testified categorically that Peter Maljan himself made this statement, but he was present at the time the statement was made, and the overwhelming weight of evidence is that defendant either made the statement himself, or that Thayer made it for his firm in his presence. Peter Maljan was the managing partner of his firm in Fresno at least, and Thayer was a salaried employé thereof, working under the immediate supervision of the defendant himself. The circumstances surrounding the above-recited conversation between Beach, on the one hand, and Thayer and Maljan, on the other, are such that the question whether Maljan heard this statement, so as to be bound by it in a criminal prosecution, was one for the jury to decide, and the above-stated evidence, answers the contention of the defendant that there was not sufficient evidence to show that the grapes were received by Maljan Bros. & Co. on consignment. In addition to this, however, Russell, Beach's bookkeeper, testified that Peter Maljan instructed him that Homsy's grapes were to be handled on consignment. The grapes were shipped East and handled the same as other crops. When Thayer received the bills of lading, he drew against them, attached the draft to the bill of lading, made out the deposit slip with the draft indorsed, and, attaching these papers together, handed them to the receiving teller of the bank with which defendant's firm did business, who, on receiving instructions by wire from the East that everything was regular, credited the amount of the draft to Maljan Bros. & Co. The amount of money coming due to Homsy from his crop was about $1,100, $200 of which was, as has been stated, advanced by Maljan to Beach for his services. Peter Maljan was almost constantly in Fresno until December 7th, when he departed from that city, leaving no money in the bank there to the credit of Maljan Bros. & Co. There is a mass of other evidence in the record, some direct, but much of it circumstantial in character, all tending to support the verdict on all points.

The principal ground upon which a retrial of this case is urged is one of criminal pleading. The indictment charges that the defendant, Peter Maljan, was the agent of Homsy, and that by reason of such agency there came into his care, custody, and control $900, the personal property of Homsy, and that the defendant thereupon, and on or about December 20, 1915, embezzled and appropriated these funds to his own use. Except in acting as a member of the partnership of Maljan Bros. & Co., the defendant never received into his possession or control any money of Homsy, and he never acted for Homsy except as a member of the partnership. Upon this record the defendant claims that the evidence does not sustain the verdict, in this, that, to use his language:

> "The information in this case does not attempt to charge the defendant with embezzlement by reason of the fact that he was the managing partner of the firm which was in receipt of consignment of these grapes, but, without charging these facts, charges him individually with being the agent; charges him individually with the receipt of the money; charges him individually with the appropriation of the money, when the evidence totally and absolutely fails to show any individual liability whatsoever which would support any such conclusion."

And defendant also contends that on these facts there arises a variance between the indictment charging that Maljan, the defendant, received this money as Homsy's agent and the proof that he received it as a member of the partnership of Maljan Bros. & Co., who were acting as agents for Homsy in this transaction.

[3] A partner who feloniously converts to his individual use funds of another person which have come into his custody or under his control as a member of the partnership with which the prosecuting witness was doing business in the relation of principal and agent may be guilty of embezzlement. State v. Crosswhite, 130 Mo. 359, 32 S. W. 991, 51 Am. St. Rep. 571.

[4] Perhaps it would have been better criminal pleading for the district attorney to have charged that Maljan embezzled this money as a member of a partnership which was the agent of Homsy. But the relations of individual partners to persons who occupy toward the partnership the relation of principal by employing the partnership as their agent are those of principal and agent. Indeed, the liability of general partners for each others' acts are those of agents. Civ. Code, § 2443.

[5-7] The district attorney could not have charged the partnership as an entity with having embezzled these funds. The party charged with embezzlement in such case must be the individual partner who converts the funds.

In this case Peter Maljan was in absolute control of the entire business of the partnership in Fresno. The money was deposited in the bank to the account of the partnership, which he thus controlled, and the question whether he was the person who had fraudulently converted this money was a question for the jury to determine from all the evidence in the case. The partnership is not a person separate from its component members in the sense that a corporation is a separate entity.

[8] The variance, if any, between the indictment charging a direct agency and the proof of the indirect agency through the medium of the partnership was not of such a nature as to prejudice the defendant for an examination of the record discloses that the defendant knew perfectly from the beginning of this prosecution what charge he was called upon to answer.

[9] "A material variance between the proof and the information arises when an acquittal of the defendant under the information would be no bar to a further prosecution for the same offense; but where the discrepancy does not affect the validity of the information, or prejudice or affect the substantial rights of the defendant in his defense, the variance is immaterial." People v. Arras, 89 Cal. 223, 26 Pac. 766. There can be no question but that an acquittal here would have barred a similar prosecution for this same offense, and the defendant was not and could not have been surprised by the evidence adduced against him in this case.

Therefore the contention that the evidence does not justify a finding by the jury that Peter Maljan was Homsy's agent, and also the contention that there was a variance between the indictment and the proof which really raises the same point, must both be decided against the defendant.

[10] The defendant asserts that he should be given a new trial because a portion of the trial, namely, the instructions of the court and argument of counsel, took place after 12 o'clock noon of a Saturday, a legal holiday. Defendant relies upon sections 10, 133, and 134 of the Code of Civil Procedure and cases construing those sections to support this contention. Conceding, but not deciding, that the court erred in proceeding with the trial into Saturday afternoon, still the defendant cannot be heard to complain of this, for his attorney, on his attention being called to the fact that the hour of noon had arrived, distinctly and in open court waived the right to object to the trial proceeding into the afternoon, and this is a matter in which the defendant's waiver is binding upon him. It falls within the same class of rights, upon the subject of waiver, as a right to be present at a view of the premises by the jury, the right to have the judge present at such view, and other similar rights, and in such cases it has been held that the right may be waived. People v. Mathews, 139 Cal. 527, 73 Pac. 416; People v. White, 5 Cal. App. 329, 90 Pac. 471; People v. Bird, 132 Cal. 261, 64 Pac. 259.

[11] Many instructions which were requested by the defendant were rejected by the trial court, and the rulings excepted to, but it would serve no purpose to review these instructions, because all instructions asked by the defendant and so refused, except one, were given by the court in substance and in language quite as favorable to the defendant as that of the instructions on the same subject submitted by him. The one such instruction not so given in substance was to the effect that evidence of the oral declarations of the defendant ought to be viewed with caution. The refusal to give this instruction has been held not to be error on the ground that it is a mere commonplace which all jurors ought to be expected to know. People v. Wardrip, 141 Cal. 229, 74 Pac. 744; People v. Ruiz, 144 Cal. 251, 77 Pac. 907.

[12] Exception is taken to the question asked of the witness Thayer as to whether he did not, at a meeting of the creditors of Maljan Bros., state that all he and the defendant ever heard that Homsy claimed about his grapes being consigned was in a letter received by Homsy a short time before. The objection to this question was on the ground that it was not cross-examination, and this was admitted to be the case by defendant's counsel. The defendant cannot now take advantage of this ruling in face of this admission.

[13-15] The petition in insolvency filed by Peter Maljan was offered and received in evidence. It was relevant for the reason that it contained an admission in the list of creditors that the defendant was indebted to Homsy in the sum of $900; that is to say, that there was $900 due Homsy for his grapes. Evidence that there was no money in the account of Maljan Bros. & Co. at the time the defendant left Fresno was material. The returns from the fruit delivered by Beach, including Homsy's grapes, were deposited in this account. The circumstance that the defendant left Fresno with no money in this account, taken in connection with the fact that he was the sole managing agent of the company at Fresno, tended at least to show that he had himself used this money. Nor was any error committed in receiving in evidence the books of Beach & Co. for the reason that the latter firm was in fact the servant of the defendant, as appears from the evidence. It was through Beach & Co. that the fruit was received and much of the business transacted. The details of the packing and shipping of the fruit were taken care of by Beach & Co., and the business of his company was practically a part of the defendant's business. These are the only matters which seem to us to require notice.

The judgment and order are affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

(34 Cal. App. 357)

STINEMAN v. GOTTSCHALK et al.
(Civ. 1828.)

(District Court of Appeal, Second District, California. July 27, 1917. Rehearing Denied by Supreme Court Sept. 24, 1917.)

1. **Brokers** ⇨65(5)—**Recovery of Compensation—Individual Interest.**

The fact that a broker with a third person proposed to enter into a contract of lease covering his client's property, but did not complete the transaction, will not prohibit him from recovering commission for negotiating a later lease for his client with the same party and other persons; the principle that a broker cannot recover commissions for services when his position is inconsistent with his duty as agent owing to his individual interest not applying.

2. **Brokers** ⇨57(1)—**Recovery of Compensation—Sufficiency of Services.**

The fact that a lessee secured by a broker executed the lease with other persons as colessees whom the broker did not secure will not defeat the broker's right to commissions.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by F. L. Stineman against W. M. Gottschalk and another. Judgment for defendants, and plaintiff appeals. Reversed, and judgment directed for plaintiff.

Frank Stewart, Stewart & Weil, and J. W. Howell, all of Los Angeles, for appellant. Fredericks & Hanna, Byron C. Hanna, Joseph Musgrove, and Charles W. Lyon, all of Los Angeles, for respondents.

SHAW, J. This is an appeal by plaintiff, prosecuted upon the judgment roll alone, from a judgment in favor of defendants. The contention of appellant is that upon the findings he, and not defendants, is entitled to judgment.

The action is based upon an alleged contract made in January, 1914, whereby defendants, who were the owners of a building then in course of construction and designed for business and hotel purposes, employed plaintiff to secure a tenant therefor for a term of ten years at a term rental of $111,360, and promised to pay the reasonable value of his services under said employment, which facts are admitted or found by the court to be true. The court further found that subsequent to the date of said contract of employment plaintiff and one Charles J. Lick entered into a contract whereby they agreed to lease the property for which plaintiff had undertaken to secure a tenant, provided that they or defendants should be successful in securing a license for the sale of liquor on the premises; otherwise such agreement to have no force. The condition was not performed. Thereafter, about March 7, 1914, defendants leased said property for a period of ten years for the aggregate rental of $111,696.00 to said Charles J. Lick and Earl Gilman, Grant Gilman, and Forrest Gilman. As to this lease and the fact that plaintiff was instrumental in securing the execution thereof, the court found:

> "That the plaintiff under his said agency and employment from the defendants did introduce said Charles J. Lick to the defendants, and that thereafter the said Charles J. Lick did continuously negotiate with the defendants for said lease either in connection with the plaintiff or in connection with Earl Gilman, Grant Gilman, and Forrest Gilman, and that the act of said Charles J. Lick in executing the said lease as above stated in connection with the said parties last mentioned was the result of the efforts of the plaintiff; that the plaintiff did not procure for defendants tenants in the persons of Earl Gilman, Grant Gilman, and Forrest Gilman otherwise than as follows: That the plaintiff did, on or about the 10th day of January, 1914, propose to said Earl Gilman, Grant Gilman, and Forrest Gilman that they lease the said premises, but that said parties last mentioned informed the plaintiff that they could not lease the said premises, and at that time declined to enter into any negotiations for that purpose." That no further discussion or negotiation was had by plaintiff with the Gilmans in reference to the matter.

The court further found:

> "That the reasonable value of plaintiff's services under said employment was and is the sum of $1,728.96."

[1] The contention of respondents is that plaintiff's employment as agent was terminated by the contract subsequently made, whereby he and Lick proposed to lease the property subject to the condition named. Without so deciding, we may for the purposes of this case concede, as claimed by respondents, that where one employed as an agent to sell property or secure a tenant therefor buys the

property himself or leases the same, he, upon grounds of public policy, due to the fact that as such purchaser or lessee his position is inconsistent with his duty as agent, cannot claim a commission for such service. Nevertheless plaintiff, as shown by the findings, did not lease the property from the defendants, but merely proposed to enter into a contract of lease subject to conditions which were not performed. In other words, the negotiations never ripened into a contract of lease; hence the principle suggested by respondents has no application to this case.

[2] As to the other point, the findings are silent as to whether or not plaintiff ever introduced the Gilmans to defendants or informed them that he had tried to interest them in the proposition. Omitting consideration of the Gilmans, it conclusively appears that the securing of Lick as a tenant for the property was "the result of the efforts of plaintiff" under his contract made with defendants, and that the act of Lick in leasing the property and assuming the obligation to pay defendants the term rental of $111,696.00 was due to the services rendered by plaintiff in the course of his employment. The fact that the Gilmans, at Lick's request or otherwise, joined with him in leasing the property, is a factor of no more importance than had they merely guaranteed performance on the part of Lick whose obligation, in case of inability of his colessees to perform the covenants of the lease, would as to defendants be that of sole lessee. That plaintiff did procure Lick as a tenant who, jointly with the Gilmans, executed the lease conclusively appears from the findings; that Lick, influenced perhaps by the fact that the Gilmans were willing to join with him in the undertaking, was ready and willing to assume the obligations imposed by the terms of the lease appears from the fact that he executed the same; that defendants agreed to pay plaintiff the reasonable value of the services rendered likewise appears from the findings, and this value was found by the court to be $1.728.96, which sum, upon the findings, plaintiff is entitled to recover.

The judgment is reversed, and the trial court directed to enter judgment upon the findings made in favor of plaintiff as of the date thereof for $1,728.96.

We concur: CONREY, P. J.; JAMES, J.

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34 Cal. App. 390

KELLER v. CLIVER et al. (Civ. 1895.)

(District Court of Appeal, Second District, California. July 31, 1917.)

1. APPEAL AND ERROR 🔑867(4)—REVIEW—SCOPE—APPEAL FROM ORDER DENYING NEW TRIAL.

Objection to a lessor's judgment that an action at law could not be maintained for moneys due under the lease on account of the lessor's mortgage security, but that the remedy was by foreclosure, as required by Code Civ. Proc. § 726, providing that there can be but one action for the recovery of any debt or the enforcement of any right secured by mortgage, which action must be in accordance with provisions of that chapter, was not available on appeal from denial of new trial, where the court made full findings of fact supported by the evidence; the only errors chargeable against such decision being those pertaining to its conclusions of law and judgment thereon.

2. APPEAL AND ERROR 🔑867(5)—REVIEW—SCOPE—APPEAL FROM ORDER DENYING NEW TRIAL.

Conclusions of law are always merged in and superseded by the judgment, and can be reviewed only on appeal from the judgment, or from an order made, under Code Civ. Proc. §§ 663, 663½, authorizing the vacation of a judgment, which is inconsistent with the findings of fact.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by H. W. Keller against Roy M. Cliver and others. Judgment for plaintiff, and defendants A. K. Grafton and another appeal from order denying motion for new trial. Affirmed.

Wm. T. Blakely, of Los Angeles, for appellants. Tanner, Odell & Taft, of Los Angeles, for respondent.

CONREY, P. J. In this action judgment was entered in favor of the plaintiff for certain amounts found due to the plaintiff as lessor under a certain instrument of lease executed by the plaintiff to the Black Diamond Supply Company, a corporation. This lease was, with plaintiff's consent, assigned to the defendants, who bound themselves to perform the covenants of the lease. The amount of the recovery includes rental for certain months of the lease term, together with specified sums levied as taxes against the leased property which the lessees were bound to pay, but which they allowed to become delinquent, and which were thereafter paid by the plaintiff. There is no appeal from the judgment. The defendants Grafton and Adams appeal from the order denying their motion for a new trial.

In their answer to the complaint defendants alleged that, when they accepted the assignment of the lease to them, they were not acting for themselves, but were acting as trustees for a corporation then being formed under the name of Los Angeles Coal & Supply Company, and that plaintiff had full knowledge thereof. The court found that said allegations of the answer were untrue. In their specifications of insufficiency of the evidence to justify the decision, appellants claim that the evidence is insufficient to support such findings. We have examined the evidence, and it fully justifies the findings in question. It is true that, a few days after they obtained their assignment of the lease, appellants and their codefendant Cliver did form a corporation under the name Los Angeles Coal & Supply Company, and placed it in possession of the leased premises. But it further appears that they transferred the lease to the corporation as a part of the consideration for stock in the corporation which was issued to them. This and other circumstances shown in evidence justified the court in determining that they had acquired the lease as their own property, and not as trustees for the proposed corporation.

[1, 2] The only other point argued in support of the appeal raises a question which might be considered on an appeal from the judgment, but which is not available to defendants on their motion for a new trial. The lease contained the following stipulation:

> "All buildings placed on this property by the tenant shall belong to it, and it is granted the privilege of removing the same at the expiration of this lease: Provided, however, that, should any default be made by party of the second part in any of the terms or covenants of this lease, all said buildings and improvements shall be forfeited to party of first part, to apply on damages by reason of such default; and all improvements placed upon said premises by second party are hereby pledged as security to first party for the rents accruing hereunder, and for the faithful performance by second party of all the covenants herein contained."

The court found that the lease was made in the terms pleaded, including the foregoing paragraph thereof; also that the lessee "erected certain buildings upon the said premises, and that the same rested upon sills set upon the ground, and that the posts and main supports and pillars thereof were set into the ground"; also that afterwards the defendants were in default for nonpayment of rent and for nonpayment of taxes, and that, defendants remaining further in default after three days' notice requiring them to pay the rent or deliver up possession of the described premises, the plaintiff took possession of the premises by reason of such default, and possession thereof and all rights under the said lease were surrendered to plaintiff. All of the foregoing facts found are supported by the evidence. Nevertheless appellants claim that the decision of the court is contrary to law in the following particular, among others: That under the above-quoted stipulation of the lease the lessor had mortgage security for the performance by defendant of the obligations of the lease, and therefore that an action at law could not be maintained for moneys due under the lease, but that the sole remedy was by foreclosure of the mortgage, as required by the provisions of section 726 of the Code of Civil Procedure.

As the court did make full findings of fact duly supported by the evidence, the only errors chargeable against the decision must be errors pertaining to its conclusions of law and its judgment thereon. Such errors are not reviewable on a motion for a new trial. "The conclusions of law are always merged in and superseded by the judgment, * * * and, even if necessary thereto, they can be reviewed only on appeal from the judgment, or from an order made under sections 663 and 663½ of the Code of Civil Procedure." Mentone Irrigation Co. v. Redlands, etc., Co., 155 Cal. 323, 100 Pac. 1082, 22 L. R. A. (N. S.) 382, 17 Ann. Cas. 1222, and cases there cited. On the merits of the question argued, as to whether or not the plaintiff was limited in his remedy to an action as for the foreclosure of a mortgage, we find it unnecessary to express an opinion.

The order is affirmed.

We concur: JAMES, J.; SHAW, J.

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34 Cal. App. 360

PEOPLE v. LYTLE. (Cr. 542.)

(District Court of Appeal, Second District, California. July 27, 1917.)

1. CRIMINAL LAW 🔑1166½(8) — HARMLESS ERROR—OVERRULING CHALLENGE.

Where defendant had not exercised his peremptory challenges, he cannot complain of a denial of a challenge for cause.

2. COURTS 🔑80(1)—RULES OF COURT—PEREMPTORY CHALLENGE.

No warrant exists for a rule of court requiring peremptory challenges to be made by writing the juror's name upon a slip of paper and passing it up to the trial judge, no record thereof being made, since the accused cannot be deprived of a record upon which to have alleged erroneous rulings reviewed.

3. CRIMINAL LAW 🔑1086(11)—APPEAL—NECESSITY OF RECORD.

Upon appeal, the accused must present a record legally authenticated affirmatively, showing the want of the public trial accorded by the Constitution; and, in the absence of such showing, irregularities in the trial will not be considered.

4. CRIMINAL LAW 🔑472 — EXPERT TESTIMONY—HANDWRITING.

Either party in a proper case may introduce expert testimony as to the identity of disputed handwriting.

5. CRIMINAL LAW 🔑785(7)—INSTRUCTIONS—CREDIBILITY OF HANDWRITING EXPERT.

An instruction that individuals generally acquire a system of forming letters which distinguishes their handwriting from that of other persons, and that handwriting is an art concerning which correctness of opinion is susceptible of demonstration, *held* not to be upon the credibility of handwriting experts; there being two such witnesses whose testimony was conflicting.

6. CRIMINAL LAW 🔑494—WEIGHT OF EXPERT TESTIMONY.

The jury should apply the same rules to expert testimony that are applicable to other testimony in determining its weight.

7. CRIMINAL LAW 🔑829(1)—REFUSAL OF REQUEST COVERED BY CHARGE—NECESSITY OF PROVING SEPARATE COUNTS.

Given instructions fully covering a request on the necessity of proving material allegations of different counts, the accused could not complain of the refusal of the request.

8. CRIMINAL LAW 🔑1119(4)—APPEAL—MATTER TO BE SHOWN BY RECORD—IMPROPER ARGUMENT.

Assignments of error relating to district attorney's improper statements will not be considered, where the record does not disclose such argument.

9. Criminal Law ⟹1152(1) — Appeal—Discretion of Court—View by Jury.

An order permitting the jury to view the premises where the offense was committed will not be disturbed, where the record shows no abuse of discretion.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

B. C. Lytle was convicted of assault with caustic chemical under Pen. Code, § 244, and appeals. Affirmed.

J. F. Seymour, Jr., of El Centro, for appellant. U. S. Webb, Atty. Gen., and Robert M. Clarke, Deputy Atty. Gen., for the People.

SHAW, J. The information contained two counts. The first charged the defendant with the crime of assault with caustic chemical, as defined in section 244, Penal Code, in that he did, on or about December 8, 1915, throw upon the person of Thomas C. Potts a certain vitriol, corrosive acid, nitric acid and caustic chemical, with intent to injure and disfigure the body and person of said Potts. The second count charges defendant with a like offense committed upon the same person, to wit, Thomas C. Potts, on June 12, 1916. Defendant was found guilty as charged in each of said counts so contained in the information, and prosecutes this appeal from the judgment pronounced upon him following his conviction.

[1] One of the chief errors assigned by counsel for appellant, and to which he devotes a large part of a voluminous brief, is that the court erred in denying his challenge for cause to certain jurors called to try the case. The condition of the record, however, is such that this court cannot review the alleged error. Under the law defendant was entitled to ten peremptory challenges, by the use of which, unless his right was exhausted by the exercise thereof, he might have excluded the objectionable persons from the jury. There is absolutely nothing in the record showing that defendant exercised any of the peremptory challenges to which he was entitled. This being true, and conceding the court erred, it cannot be said that he was prejudiced by the erroneous rulings. People v. Durrant, 116 Cal. 179, 48 Pac. 75; People v. Winthrop, 118 Cal. 85, 50 Pac. 390.

[2] In justice to counsel it should be said that he claims to have exercised all of his peremptory challenges by writing the names of jurors made the subject of such challenges upon slips of paper and passed them to the trial judge, in accordance with an alleged rule of court. No record of such action was made, as shown either by the minutes of the court or in the stenographic notes of the reporter. No protest or objection appears to have been made by counsel for appellant to compliance with this novel procedure which deprives his client of the right to have the alleged erroneous rulings of the court in denying challenges of jurors for cause reviewed on appeal. In our opinion, no warrant exists in law for a rule or procedure which deprives an accused of a record upon which he is entitled to have alleged erroneous rulings made in the course of his trial reviewed.

[3] While the Constitution accords to an accused the right to a public trial, nevertheless, if denied him, he must, on appeal, present a record authenticated as the law directs, affirmatively showing the fact. Since the record fails to show that appellant had exhausted his peremptory challenges, he could not have been prejudiced by the ruling of the court in denying his challenges for cause, for the reason that by the exercise of such unused peremptory challenges he could have prevented the obnoxious jurors from serving.

At the close of the oral argument made by counsel for appellant at the hearing of the cause, this court directed his attention to the fact that in his brief, covering several hundred pages, he specified 60 separate alleged erroneous rulings of the court as grounds for reversal of the judgment; that a cursory examination of the record disclosed that many of the points so made were utterly groundless, in response to which counsel stated that the material points upon which he relied were those which he had presented in his oral argument. Hence, in examining the voluminous record and lengthy brief, we have given consideration only to those points to which our attention was thus directed by counsel in the oral presentation of the case.

Thomas Potts, the victim of the alleged unlawful assault, conducted a drug store in Holtville, Imperial county, employing defendant as his chief clerk. At about 1 or 2 o'clock a. m. on December 8, 1915, while Potts was asleep on a screened porch of his house, nitric acid was thrown upon his face and head, inflicting severe burns. A second and like offense was committed at about 1 o'clock a. m. on June 12, 1916, while Potts was sleeping in an inside room of a house which he occupied. The theory of the prosecution was that both offenses were committed by defendant, and in support of such theory much circumstantial evidence tending to prove that he had committed both offenses as charged was introduced. Indeed, it may be said that his conviction rests solely upon circumstantial evidence; there being no direct testimony tending to show that he committed either offense. Nevertheless there was ample evidence which, if believed by the jury, was sufficient to establish circumstances from which they were justified in drawing the inference that defendant had committed the offenses.

[4, 5] There was introduced in evidence certain notes and writings which, if written by defendant as claimed by the prosecution, tended to connect him with the commission of the crimes. For the purpose of proving they were so written, experts in handwriting

were called, one of whom on behalf of the prosecution testified that in comparing the notes and writings with the admitted genuine chirography of defendant, he found them to be in the same handwriting, which testimony was contradicted by an expert called on behalf of defendant. In connection with this evidence the court instructed the jury to the effect that individuals as a general rule acquire a system of forming letters which gives to their handwriting a fixed character and distinguishes it from the handwriting of every other person, and that handwriting is an art concerning which correctness of opinion is susceptible of demonstration. The right of either party, in a proper case, to introduce opinion evidence of experts as to the identity of disputed handwriting, which right in this case was exercised by both, cannot be questioned; hence there was no occasion for the statements made in the instruction. Nevertheless they are not subject to appellant's objection that the court thereby instructed the jury as to the weight which they should give such evidence. However read, since there were two such witnesses whose testimony was conflicting, it could not be understood by the jury as an expression on the part of the court as to the credibility of either.

[6] Moreover, the court properly told the jury that while such witnesses might give their reasons for the opinions expressed, the jury should "apply the same general rules to the testimony of experts that are applicable to the testimony of other witnesses in determining its weight."

[7] The court instructed the jury that:

> "It is the duty of the prosecution to prove each and every material allegation in each of the two counts of the information, and that if the prosecution fails to prove each and every material allegation in the first count, you must acquit the defendant on the first count, and if the prosecution fails to prove each and every material allegation of the second count of the information, you must acquit the defendant on the second count."

Notwithstanding the fact that the court so instructed the jury, appellant assigns as error the fact that the court, at his request, refused to give to the jury the following instruction:

> "You, the jury, are instructed that in determining the guilt or innocence of this defendant, on the two counts set forth in the information, you shall confine the testimony offered as to the first count to that count, and the testimony offered as to the second count to that count. In other words, you are instructed that each count in the information must be separately proved to your satisfaction beyond a reasonable doubt before you can convict the defendant of either or both of the counts of the information."

That the rights of defendant in this regard were fully covered by the first instruction above quoted must be apparent; hence, conceding the requested instruction correct, it was, in view of the one given, properly refused.

The contention that a sufficient foundation was not laid for introducing in evidence certain articles, consisting of a note found under a glass in the house occupied by Potts, and also an acid bottle, jelly glass, piece of screen, and notes and parts of envelopes containing the same, concerning which much testimony was offered, is without merit. The identity of the articles so found was clearly established. Were it otherwise, and conceding the claim of appellant, it is apparent upon the record that he could not possibly have been prejudiced by reason of the introduction of such evidence marked as exhibits in the case.

[8] The record does not disclose what was said by the district attorney in the course of his argument to the jury, and hence there is nothing upon which to base appellant's assignment of error on account of misconduct of the district attorney in making improper statements to the jury.

[9] Neither is there anything in the record showing an abuse of discretion on the part of the court in refusing, at defendant's request, to make an order permitting the jury to view the premises where the offense charged was alleged to have been committed. Indeed, as said in People v. Howard, 28 Cal. App. 181, 151 Pac. 754:

> "It is difficult to conceive of a case in which the facts would justify a reversal for an abuse of such discretion."

Our attention has not been directed to any prejudicial error disclosed by the record.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

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34 Cal. App. 365

SHERWOOD v. LOWELL. (Civ. 1649.)

(District Court of Appeal, Third District, California. July 27, 1917.)

1. MORTGAGES 🔑280(5)—ASSUMPTION OF SECURED DEBT—SUFFICIENCY OF EVIDENCE.

In an action on a note, made by defendant's brother and secured by a mortgage on land conveyed to a corporation in which defendant was the principal, but not the sole, stockholder, evidence *held* insufficient to support a finding that defendant and his brother represented that the brother would transfer all the property to defendant, and that defendant agreed with plaintiff to pay the note.

2. LIMITATION OF ACTIONS 🔑197(3)—EVIDENCE—ACKNOWLEDGMENT OR NEW PROMISE.

Where a memorandum on the billhead of a corporation of which defendant was the principal stockholder, containing a credit for the interest on a note, was relied on as an acknowledgment or new promise by defendant, taking the note out of the statute of limitations, plaintiff's testimony regarding the corporation that, as he understood it, defendant was the whole thing, manager, owner, and everything else, did not support a finding that defendant represented to plaintiff that he was the corporation.

3. FRAUDS, STATUTE OF 🔑23(1)—GUARANTY 🔑16(3)—PROMISE TO PAY ANOTHER'S DEBT—CONSIDERATION.

Under Civ. Code, § 1624, subd. 2, making special promises to answer for the debt of another invalid, unless some memorandum thereof is in writing and subscribed by the party to be charged, except in the cases provided for in section 2794, and section 2794, providing that a promise to answer for another's obligation is deemed an original obligation of the promisor, and need not be in writing when the promise is made by one who has received property of another upon an undertaking to apply it pursuant to such promise, etc., where mortgaged property was conveyed to a corporation, an oral agreement by the principal stockholder, several months later, with the holder of the mortgage note, that he would pay the note, was void, because not in writing and wholly without consideration.

4. FRAUDS, STATUTE OF 🔑115(2)—SUFFICIENCY OF WRITING—PROMISE TO PAY ANOTHER'S DEBT.

Where mortgaged property was conveyed to a corporation, and the principal stockholder subsequently made a payment of interest on the mortgage note, which payment was evidenced by a credit for the amount of the interest in a memorandum in defendant's handwriting, on the corporation's billhead, containing charges against the holder of the note for merchandise purchased from the corporation, this was not a sufficient memorandum to satisfy the statute of frauds (Civ. Code, § 1624, subd. 2), on the theory that defendant treated the name of the corporation printed on the billhead as his own, or adopted it as his signature, since the writing must not only contain an unequivocal assumption of the obligation, but must be subscribed by the party to be charged, and a mere inference arising from circumstances reasonably amenable to different meanings, or leading to either one of two opposite or inconsistent conclusions, does not measure up to the requirements of the statute.

5. LIMITATION OF ACTIONS 🔑146(3) — ACKNOWLEDGMENT OR NEW PROMISE—SUFFICIENCY OF WRITING.

The writing was not sufficient to take the note out of the operation of the statute of limitations, under Code Civ. Proc. § 360, providing that no acknowledgment or new promise is sufficient evidence of a new or continuing contract to take the case out of the operation of such statute, unless contained in some writing signed by the party to be charged, especially where the memorandum was made after the debt was barred, since an acknowledgment of a debt, from which a promise to pay may be implied, must be a direct, distinct, unqualified, and unconditional admission of a previous subsisting debt, which the party is liable and willing to pay.

6. LIMITATION OF ACTIONS 🔑163(4) — PART PAYMENT—NECESSITY OF WRITING.

Under Code Civ. Proc. § 360, a part payment is not sufficient in itself to take a debt out of the statute of limitations, unless there is a writing, signed by the party to be charged, showing an acknowledgment of, or an express promise to pay, the debt.

7. MORTGAGES 🔑280(4) — ASSUMPTION OF DEBT BY PURCHASER — NATURE OF LIABILITY.

If a corporation to which mortgaged property was conveyed, or its principal stockholder, assumed and agreed to pay the mortgage, the corporation or the stockholder became nothing more than a guarantor of or indemnifier against any deficiency that might arise upon a sale of the mortgaged premises, in view of Code Civ. Proc. § 726, providing, relative to the foreclosure of mortgages, that there can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage, which action must be in accordance with the provisions of that chapter.

8. MORTGAGES 🔑280(1) — ASSUMPTION OF DEBT BY PURCHASER—LIABILITY.

Where mortgaged property was conveyed by a mortgagor to his wife, without any assumption of the mortgage or agreement by her to pay it, and was then conveyed by her to a corporation, any agreement by the corporation or its principal stockholder to pay the mortgage debt was not binding, as, the corporation's grantor not being liable, there was no privity of contract.

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by O. W. Sherwood against A. J. Lowell. From a judgment for plaintiff, and an order denying a motion to set it aside and enter a judgment for defendant, defendant appeals. Reversed.

Robert Duncan, of Ukiah, for appellant. Preston & Preston, of Ukiah, and C. H. McConaughy, of Ft. Bragg, for respondent.

HART, J. The action is on a promissory note executed March 30, 1908, to plaintiff, by J. W. Lowell, brother of defendant, and payable one year after date. It is alleged in the complaint that, in consideration of the maker of the note transferring to defendant "certain property and business," defendant agreed to pay said note; that "on March 30, 1909, the 30th day of March, 1912, and the 30th day of March, 1913, pursuant to said agreement, defendant did on said dates pay to plaintiff the interest due on said promissory note"; that "thereafter, on May 5, 1913, at the said town of Westport, defendant agreed in writing to and with plaintiff to pay said promissory note, and did then and there, in writing, make a payment on said promissory note to said plaintiff in the sum of $80." Judgment is prayed for the sum of $1,000 and interest from March 30, 1913.

Defendant, in his answer, denied entering into the alleged agreement, and denied that any such agreement was made; denied the alleged transfer of property by J. W. Lowell to defendant, and denied the alleged payment of money as interest or otherwise; denied the alleged agreement of May 5, 1913; and denied, on information and belief, that the said sum of $1,000 or any other sum is due or unpaid on said note. For further answer, defendant pleaded sections 337, 339, and 343 of the Code of Civil Procedure in bar of the action.

The cause was tried by the court without a jury, and plaintiff had judgment as prayed for in the complaint. Defendant moved the court to set aside the judgment, and enter a new and different judgment in favor of defendant and against plaintiff. The case is here on appeal from the judgment and order denying said motion.

The execution of the note by J. W. Lowell is not denied. The court made the following findings:

"II. That it is true that thereafter, and on the 30th day of March, 1911, at the town of Westport, county of Mendocino, state of California, the said J. W. Lowell and said defendant, A. J. Lowell, with the consent of the said plaintiff, [did] represent to said plaintiff that he, the said J. W. Lowell, would transfer all of his property and said business to the defendant, and the defendant, A. J. Lowell, then and there did agree to and with the said plaintiff to pay and discharge the payment of said promissory note and interest due thereon, and that may become due thereon; but that the said J. W. Lowell, instead of transferring said property and business to the said defendant, A. J. Lowell, transferred the same to the Westport Mercantile Company, of which the defendant, A. J. Lowell, is the largest stockholder, and that the said J. W. Lowell and the defendant, A. J. Lowell, did represent to the said plaintiff that he, the said A. J. Lowell, was and is the owner of said property and business, but that said agreement by said A. J. Lowell to pay said note was not in writing, but was oral.

"III. That it is true that, pursuant to said agreement, the said A. J. Lowell did assume and agree to pay said promissory note and interest thereon, and that on the 30th day of March, 1911, the said A. J. Lowell did pay the interest on said promissory note, which payment is evidenced by a memorandum in writing on the back of said promissory note in the handwriting of said defendant, A. J. Lowell, which said memoranda is as follows: 'Recd to Mar. 30th, 1911.' But that the name of A. J. Lowell does not appear on said memorandum or in connection with it.

"IV. That it is true that on the 5th day of May, 1913, at the town of Westport, county of Mendocino, state of California, the said defendant, A. J. Lowell, did pay to plaintiff on account of interest on said promissory note the sum of $80, which payment is evidenced by a written memorandum in the handwriting of said defendant, A. J. Lowell, on the billhead of the Westport Mercantile Company, and that the said defendant, A. J. Lowell, represented to the said plaintiff that he, the said A. J. Lowell, was the Westport Mercantile Company, and that the payment so made was made by the said defendant, A. J. Lowell, personally; that the said written memorandum of said payment is as follows: 'By interest, $140;' that the said written memorandum is not, nor is the said statement on the billhead of the Westport Mercantile Company, signed or subscribed by the said A. J. Lowell; that the name of the Westport Mercantile Company does not appear thereon, except in printing."

The uncontradicted evidence shows: That the Westport Mercantile Company is, and has been since its organization on June 29, 1907, a corporation, duly established as such under the laws of the state of California; that its principal place of business was and is at the town of Westport, in Mendocino county, and that at said town it has carried on during the whole of the period of its existence a general merchandise business and the business of purchasing and selling timber, for which specific purposes, among others, as declared in its articles of incorporation, it was organized; that the stockholders of said corporation were and are the defendant, A. J. Lowell, F. C. Hunter, and C. E. Gordon, the defendant being the owner of three-fifths of the stock therein; that the plaintiff did business with said corporation. It is likewise further shown that the corporation had, prior to the particular transaction giving rise to this action, borrowed the sum of $1,000 from the plaintiff. and that the latter held its promissory note therefor, which note had been paid at the time of the trial of this action; that, on March 30, 1908, one J. W. Lowell borrowed the sum of $1,000 from the plaintiff, and executed and delivered to the latter his promissory note for said sum, made payable one year after date, and, as security for the payment of said note, executed and delivered to the plaintiff a mortgage on a certain piece of land situated in Mendocino county and upon which there was then standing a two-story building.

The parties to the action stipulated that these facts were true: That J. W. Lowell, at the time of the making of the note last referred to and the execution of the mortgage to secure the payment of said note, was the owner of the land so mortgaged; that after the said land was so mortgaged J. W. Lowell conveyed the same to his wife, Mrs. E. J. Lowell; that on the 8th day of August, 1910, Mrs. Lowell conveyed the land, by a grant, bargain, and sale deed, to the Westport Mercantile Company. While this deed was, as was, of course, the deed to Mrs. Lowell, subject to the mortgage, it, like the latter deed, contained no agreement that the grantee would assume the mortgage debt; and at the time of the conveyance by Mrs. Lowell to the corporation the note and mortgage were still subsisting obligations—that is, the statute of limitations had not run against them. In the connection it may parenthetically be stated, although a matter of no special consequence, so far as the decision here is concerned, further than that it tends to show that the conveyance to Mrs. Lowell involved a bona fide transaction, the record shows that Mrs. Lowell obtained the mortgaged premises from her husband as the result of an award made by certain arbitrators "in the matter of settlement of community property of J. W. Lowell and E. J. Lowell." It is not made to appear what occasioned the arbitration, or the reason for the settlement and the division between them of the community property rights of said parties. However, after the mortgaged land had been conveyed to the corporation, and after action on the note and mortgage given to the plaintiff by J. W. Lowell had become barred by the statute of limitations, the defendant, A. J. Lowell, paid the plaintiff the sum of $140, of which $60 was in payment of interest then due on the note from the corporation to the plaintiff and $80 in payment on the J. W. Lowell note. These payments were noted as a credit on a written statement of an account due from the plaintiff to the corporation, which statement is referred to by the court in finding 4 of its findings as a "written memorandum of the payment" of the interest due on the note in suit. As stated, said "memorandum" was an ordinary statement or bill rendered against the plaintiff for merchandise purchased by him of the corporation, and the printed part thereof read as follows:

> "Statement Westport Mercantile Co. Westport, Cal. ......, 191.. Sold to ......"

The date, "May 5," and the figure "3" after the figures "191," and all items after the words "Sold to," were in the defendant's handwriting; but his own name nowhere appears therein. It is upon this writing that the plaintiff relies for a recovery against the defendant; his claim being that said "memorandum" created a new promise, within the intent of section 360 of the Code of Civil Procedure, against which the statute has not run, since the action founded upon the promise so created was brought within four years after the date of the "memorandum." It is argued, in purported support of this position, that, although the defendant's name is nowhere attached to said "memorandum," the document is, nevertheless, within the meaning of said section 360, an "acknowledgment" from which a new promise is implied and created, and that "a printed name is sufficient to satisfy the statute where the paper is delivered under circumstances showing an intention to regard the printed name as a person's own, and so in effect to adopt it as his signature." Thus it will be observed that since, concededly, the note was barred by the statute of limitations after March 30, 1913, the right to maintain this action must depend upon whether the finding of a new promise to assume and pay the indebtedness evidenced by the note in question is supported by the evidence.

Section 360 of the Code of Civil Procedure, supra, provides:

> "No acknowledgment or promise is sufficient evidence of a new or continuing contract, by which to take the case out of the operation of this title, unless the same is contained in some writing, signed by the party to be charged."

The defendant contends that the "written memorandum" referred to is not such a writing as will take the case out of the operation of the above section; that it is insufficient under the terms of the statute of frauds to charge either the defendant or the corporation with liability for payment of the debt; that in no event can either the defendant or the corporation be held liable to the plaintiff, since the uncontroverted evidence shows that there was no privity of contract between either and the plaintiff.

[1] In the first place, we express the opinion that the evidence, as it is presented by the record here, is wholly insufficient to sustain that part of finding No. 2 which reads as follows:

> "That it is true that thereafter, and on the 30th day of March, 1911, at the town of Westport, * * * the said J. W. Lowell and said defendant, A. J. Lowell, with the consent of the said plaintiff, [did] represent to said plaintiff that he, the said J. W. Lowell, would transfer all of his property and said business to the defendant, and the defendant, A. J. Lowell, then and there did agree to and with the said plaintiff to pay and discharge the payment of said promissory note and interest due thereon, and that may become due thereon."

The only testimony that we have been able to find in the record from which a possible inference might arise that the agreement referred to in said finding was made, other than the written statement of account rendered to the plaintiff by the corporation and above described, is the following given by the plaintiff:

> That when A. J. Lowell paid the interest on the note on the 30th day of March, 1911, a conversation took place between him and A. J. Lowell concerning said payment. "Q. State what was said and where, and who was present at the time the payment was made? A. I can't give the exact words. Q. Well, in substance, what you understood what was said? A. We were talking about the note, and Mr. A. J. Lowell was to pay the note, and he paid me that interest the first year. Q. You mean in 1911? A. Yes, sir. Q. That was the first interest paid by A. J. Lowell? A. Yes, sir. Q. At that time was there anything said about releasing J. W. Lowell? A. Yes, sir. Q. Since that time, who have you looked to for the payment of this note? A. Mr. A. J. Lowell. Q. Now, since 1911, were any other payments made by Mr. A. J. Lowell? A. Yes, sir. Q. When was the next payment made? A. Some time in 1912."

He testified that a further payment was made in 1913, and said he had a writing to show said payment, referring to the statement (above referred to) showing the account between plaintiff and the corporation for merchandise furnished the former by the latter, and which contained the credit item of $140 for interest then due on the two notes—the note in suit and the note of the corporation to the plaintiff. On redirect examination, the plaintiff testified that, near the time at which J. W. Lowell and his wife accepted the award made by the arbitrators who had been selected to adjust and settle their respective rights in their community property, A. J. Lowell told him that J. W. Lowell had assigned the mortgaged premises to him, and that he (A. J.) had received said property.

It will be observed that in the above testimony the plaintiff does not say that A. J. and J. W. Lowell entered into the agreement referred to in finding No. 2. Nor is there to be found anywhere in the record any testimony that A. J. and J. W. Lowell entered into any such agreement. The most that can be said of the above testimony of the plaintiff, or the effect thereof, is that A. J. Lowell, whether for himself, or for J. W. Lowell, or for the corporation, is not made to appear therefrom, paid, as it accrued, the interest on the note on three several occasions, and that the plaintiff had looked to A. J. Lowell for the payment of the note. The testimony obviously falls far short of upholding the part of finding 2 above quoted herein.

Nor is there any proof to sustain the remaining vital portion of said finding, viz.:

> "That the said J. W. Lowell, instead of transferring said property and business to the

said defendant, A. J. Lowell, transferred the same to the Westport Mercantile Company, of which the defendant, A. J. Lowell, is the largest stockholder, and that the said J. W. Lowell and the defendant, A. J. Lowell, did represent to the said plaintiff that he, the said A. J. Lowell, was and is the owner of said property and business," etc.

The uncontradicted evidence is, as has heretofore been shown, that it was not J. W. Lowell, but his wife, E. J. Lowell, who, having previously been awarded the mortgaged premises as her share of the community property in the settlement by the arbitrators of the community rights of herself and husband, transferred and conveyed the said premises to the Westport Company.

[2] The only other finding which is of a fact material or vital to the judgment is the finding that the payment of the interest on the note in the sum of $80, on May 5, 1913, is "evidenced by a written memorandum, in the handwriting of the defendant * * * on the billhead of the Westport Mercantile Company," and that the "said written memorandum of said payment is as follows: 'By interest, $140;' that the said written memorandum is not, nor is the said statement on the billhead of the Westport Mercantile Company, signed or subscribed by the said A. J. Lowell; that the name of the Westport Mercantile Company does not appear thereon except in printing"; and that "the said defendant represented to the said plaintiff that he, the said A. J. Lowell, was the Westport Mercantile Company, and that the payment so made was made by the said defendant, A. J. Lowell, personally."

There is no evidence in the record which sustains or warrants the finding that A. J. Lowell represented to the plaintiff that he (the said Lowell) "was the Westport Mercantile Company." As to the fact so found, the only testimony disclosed by the record which might be said to have any bearing whatever thereon is that of the plaintiff, who merely stated, referring to the corporation, that, as he understood it, A. J. Lowell was "the whole thing—manager, owner, and everything else." Obviously, that statement involves only the conclusion of the witness, and is wholly insufficient to support the finding referred to. In this connection it may be observed that the articles of incorporation of the corporation and the uncontradicted testimony of A. J. Lowell show or tend to show that, while the said Lowell was the principal stockholder therein, there were others who owned considerable stock in the concern.

[3, 4] Even conceding that the evidence shows that the defendant, on the 30th day of March, 1911, promised to pay the note, which we hold is not so, the promise so found to have been made, not having been made under or upon any of the conditions specified in subdivisions 1, 2, and 3 of section 2794 of the Civil Code, is wholly void because not in writing. Civ. Code, § 1624, subd. 2. The uncontradicted evidence shows, and the court finds, as has been already pointed out, that the mortgaged premises were conveyed to the corporation, and not to the defendant, and that such conveyance was made some seven months prior to the making of the alleged promise. Nor is there any evidence, or even pretense, that the defendant received any other property of J. W. Lowell to be devoted to any of the purposes mentioned in section 2794 of the Civil Code. Hence, furthermore, there was no consideration moving to the defendant for the agreement. If made at all, it was a mere nudum pactum. It follows, of course, that the finding that such a promise was made by the defendant, at the time mentioned in the findings, is without any force in the determination of this appeal, and there is, therefore, no necessity for further consideration of it. But the basis of the present action is not the alleged agreement of March 30, 1911, which was made, if at all, before the plaintiff's right of action on the note or original obligation had been lost by lapse of the time limited by the statute within which he might have sued on said note. His action is, as seen, founded entirely on the alleged written memorandum mentioned in finding 4, which was made after the statute had barred his right to sue on the note. It is upon this alleged new promise that the plaintiff relies for a recovery.

But it is clear to us that the alleged memorandum is wholly insufficient, under the terms of the second subdivision of section 1624 of the Civil Code and those of section 360 of the Code of Civil Procedure, either to charge the defendant with liability for the payment of the debt or to take the case out of the operation of the statute of limitations. Indeed, the first proposition is clearly settled by the finding that the memorandum was not signed by the defendant. Section 1624, subd. 2, supra, provides that a special promise to answer for the debt, default, or miscarriage of another, to be valid, must be in writing and subscribed by the party to be charged, or by his agent. As has been shown, there is no evidence to support the finding that the defendant was himself the corporation, and there is no evidence or direct finding that the defendant treated the name, "Westport Mercantile Company," as printed on the statement or memorandum, as his own, or in effect adopted it as his signature. If, as has been suggested, said memorandum was delivered by the defendant under circumstances justifying the inference that the defendant's intention was to treat the printed name as his own and to adopt it as his signature, then we reply that a mere inference arising from circumstances reasonably amenable to different meanings, or which will, with equal force, lead to either one of two opposite or inconsistent conclusions, does not measure up to the requirements of the statute. The circumstance that the written part of the statement was in the handwriting of the defendant, together with the circumstance that the latter had at a previous time orally said to the plaintiff that he would pay the debt, may well be said to justify the inference that the defendant intended to adopt the printed name of the corporation as his own. On the other hand, the circumstances that the memorandum was on a billhead of the corporation, that all the debit items in the statement were for merchandise purchased from the corporation by the plaintiff, that the name of the defendant was neither printed nor written on the statement, and that the mortgaged property was not conveyed to the defendant but to the corporation, certainly justify the inference that the transaction was intended and understood to be that of the corporation, and not the personal transaction of the defendant.

The statute plainly contemplates that, to charge a third party with liability for the debt of another, the writing so relied upon must not only contain a direct and unequivocal assumption of the obligation, but it must be subscribed by the party to be charged. As seen, the only feature of the memorandum here which relates in any way to the note in suit or the indebtedness evidenced thereby is the item of credit for interest in the words: "By interest, $140." There is not another word or line contained therein which tends to show any contract by which the defendant or any other person agreed to stand for the debt which is primarily responsible for this action. The writing is not a memorandum of a promise or agreement to do anything, much less one to assume the debt which is the foundation of this suit. The object of the statute of frauds is to preserve, in the most certain, definite, and enduring form, evidence of the terms to which persons who have entered into contractual relations as to certain specified kinds of transactions have mutually agreed, and thus to prevent the imposition of fraud and the practicing of perjury in such transactions, and certainly it cannot be said that the object of the statute may be accomplished, or fraud or perjury prevented, or the practice of either minimized, where, as here, no promise or agreement can be shown, or the purpose or significance of the writing relied on even understood, in the absence of parol evidence explanatory thereof.

[5, 6] Nor is the writing sufficient to take the case out of the operation of the statute of limitations. While it is true that in an early case, Barron v. Kennedy, 17 Cal. 577, it was held that "part payment has always been held sufficient to take the debt, on which it is made, out of the statute," the language so used must be considered in the light of the situation presented to the court —that is to say, the language quoted states the rule correctly where it is considered in connection with the fact, if it be a fact, that there is a writing, signed by the party to be charged, showing an acknowledgment of or an express promise to pay the debt. If there be no such writing of any kind or character, then part payment is insufficient to take the debt out of the statute. If the rule were otherwise, then to section 360 of the Code of Civil Procedure would be added a qualification which it does not contain, and which is not within the fair and reasonable import of its language.

As we have shown and as is obvious, there is no direct and distinct promise to pay the debt contained in the memorandum, and an acknowledgment of a debt from which a promise to pay may be implied must be a direct, distinct, unqualified, and unconditional admission of a previous subsisting debt which the party is liable and willing to pay. "If there be accompanying circumstances, which repel the promise or intention to pay; if the expressions be equivocal, vague, and indeterminate, leading to no certain conclusion, but at best to probable inferences, which may affect different minds in different ways—we think they ought not to go to the jury as evidence of a new promise to revive the cause of action." Mr. Justice Story, in Bell v. Morrison, 1 Pet. (U. S.) 362, 7 L. Ed. 174. See, also, Biddel v. Brizzolara, 56 Cal. 382; McCormick v. Brown, 36 Cal. 180, 185, 95 Am. Dec. 170; Pierce v. Merrill, 128 Cal. 476, 61 Pac. 67, 79 Am. St. Rep. 63; Rodgers v. Byers, 127 Cal. 528, 60 Pac. 42; Visher v. Wilbur, 5 Cal. App. 562, 570, 571, 90 Pac. 1065, 91 Pac. 412. The rule as thus stated involves the test determinative of whether an acknowledgment by the debtor himself is such as to justify the implication of a promise to pay, and in this state it has been repeatedly held that the rule will be the more rigidly applied where the acknowledgment, even by the debtor himself, is after the statute has run, and thus a new promise sought to be established, than where the acknowledgment sufficient to continue the life of the obligation is made before the statute has run. This being the rule as to the debtor himself, it seems to us that an acknowledgment by a third party, particularly after the debt has been barred, should be so clear, distinct, direct, and unequivocal as necessarily to raise the implication of a promise by him to pay the debt. Indeed, it seems to us that in such a case, where, of course, none of the conditions specified in section 2794 of the Civil Code exists, to bind a third party, a distinct, direct, and unconditional express promise in writing should be required. In this case, however, the circumstances accompanying the making of the alleged "memorandum in writing" furnish the only ground upon which the claim may rest that the defendant either promised to pay or made an acknowledgment of the debt, and as we have shown, and as must readily be apparent upon an examination of those circumstances, they "lead to no certain conclusion, but at best to probable inferences which may affect different minds in different ways."

[7] The foregoing views and the conclu-

sion necessarily following therefrom are decisive of this case; but, while not necessary to do so, we will, nevertheless, consider briefly another proposition advanced by the appellant in impeachment of the judgment, viz.:

> "That if the appellant here, or even the Westport Mercantile Company, had assumed and agreed to pay the mortgage of this plaintiff, neither would become anything more than a guarantor of or indemnifier against any deficiency that might arise upon a sale of the mortgaged premises."

This proposition follows from the fact that the sole remedy of the mortgagee is in an action to foreclose the mortgage (Code Civ. Proc. § 726), and therefore the liability of the mortgagor wholly contingent on the fact that a sale of the mortgaged premises shall fail to satisfy the debts and costs. It is, so it is contended, against this contingency that the purchaser indemnifies him. "True, the statute authorizes a single decree which provides for a sale of the mortgaged premises, and a subsequent judgment over against the mortgagor, to which, upon the equitable principle of subrogation, may be added a judgment over against the purchaser (where the latter has indemnified his vendor) for any deficiency which may appear from the sheriff's return." Biddell v. Brizzolara, 64 Cal. 354, 30 Pac. 609. See, also, Roberts v. Fitzallen, 120 Cal. 482, 52 Pac. 818; Ward v. De Oca, 120 Cal. 102, 52 Pac. 130; Andrews v. Robertson, 169 Pac. ——. We think, assuming that an agreement either by the defendant or the corporation to assume the mortgage debt was made, this case comes clearly within the doctrine of those cases.

[8] But a further proposition, which is supported by the record and must be sustained, may briefly be considered, viz.: That, since the conveyance of the property to Mrs. Lowell by her husband occurred after the premises had been mortgaged to the plaintiff without an agreement by her, contained in the deed or otherwise, that she would assume or pay the mortgage debt, and she under these circumstances later transferred the property to the corporation, the appellant, conceding that he is or then was the Westport Mercantile Company, and personally bound by its acts, is not bound or liable at all to the respondent, for the reason that there is no privity of contract between them. Nor (for the same reason) would the corporation be so bound. In other words, if it be true that a purchaser of an equity of redemption or the mortgaged premises may bind himself to pay the mortgage debt as a part of the consideration of the transfer, still in this case neither the defendant nor the corporation would be liable to the plaintiff, even as a guarantor of or indemnifier against any deficiency judgment against the mortgagor, for the reason that his or its grantor was not personally liable for the debt or deficiency arising upon a sale of the property under foreclosure. This proposition is plainly sustainable upon reason and principle, but it has been declared by numerous cases to be the correct doctrine. In Biddell v. Brizzolara, 64 Cal. 361, 30 Pac. 609, 612, supra, it is said:

> "Even where the rule has been established that the purchaser is bound by his promise as a promise made for the benefit of the mortgagee, it is still necessary that the grantor should be personally liable upon the mortgage in order to render the grantee liable upon his covenant to the holder of the mortgage assumed."

See, also, Ward v. De Oca, 120 Cal. 102, 52 Pac. 130; Andrews v. Robertson et al., 169 Pac. ——.

In King v. Whitely, 10 Paige (N. Y.) 465, the grantor of an equity of redemption in mortgaged premises, neither legally nor equitably interested in the payment of the bond or mortgage, except so far as the same were a charge upon his lands, conveyed the mortgaged property subject to the mortgage, and the conveyance recited that the grantees therein assumed the mortgage and agreed to pay the same as a part of the consideration for the conveyance. It was held that:

> "As the grantor in that conveyance was not personally liable to the holder of the mortgage to pay the same, the grantees were not liable to the holder of such mortgage for the deficiency."

That case was approved in the year 1877 in Vrooman v. Turner, 69 N. Y. 280, 25 Am. Rep. 195, and later in the case of Biddell v. Brizzolara, supra, Ward v. De Oca, supra, and Andrews v. Robertson et al., supra.

At all events, since the case for the plaintiff derives its only support from the writing or statement in writing of May 5, 1913, and as we hold it insufficient to bind the defendant or legally charge him with the debt sued for, and is, furthermore, insufficient to take the debt out of the operation of the statute of limitations, the judgment and the order appealed from must be reversed; and it is so ordered.

We concur: CHIPMAN, P. J.; BURNETT, J.

34 Cal. App. 545

PEOPLE v. NOLAN. (Cr. 398.)

(District Court of Appeal, Third District, California. Sept. 5, 1917.)

1. Criminal Law 🔑130—Change of Venue—Oral Motion—Statute.

Under Pen. Code, § 1034, requiring that application for change of venue be in writing, defendant's oral motion for such change was properly denied.

2. Criminal Law 🔑134(2) — Change of Venue — Affidavit Supporting Motion — Insufficiency.

Defendant's affidavit, supporting his motion for change of venue, merely stating that he firmly believed, and in fact knew, that it was impossible for him to secure a fair and impartial trial at the hands of a jury drawn from the particular community, was insufficient, since affidavits for such a motion must state the facts and circumstances from which the conclusion is deduced that a fair and impartial trial cannot be had.

3. Criminal Law 🔑656(9)—Trial—Remark of Court to Counsel.

In a prosecution for keeping in no-license territory a place where alcoholic liquor was sold, etc., where a witness testified on cross-examination that a peddler had warned defendant that the sheriff was in town, and the witness was asked whether he knew what the peddler meant when he said to defendant: "Look out; the sheriff is in town"—and counsel for the people objected to the testimony as incompetent, irrelevant, and immaterial, the thing speaking for itself, and the court remarked that he thought it spoke for itself, and carried its own meaning with it pretty conclusively, such remark of the court, addressed to the attorneys, and not to the jury, was not improper as influencing the jury's verdict, particularly where any possible prejudice must have been dispelled by the peddler and defendant himself, who both testified that the warning was made in a jocular manner and as a joke.

4. Criminal Law 🔑372(2) — Violation of Liquor Law—Evidence of Prior Sales.

In a prosecution under an indictment charging that defendant willfully and unlawfully kept and conducted a place where alcoholic liquor was sold, served, and distributed on April 18th, evidence of sales of liquor made April 15th, 16th, and 17th was competent; such evidence of prior sales not being too remote.

5. Intoxicating Liquors 🔑236(9)—Illegal Sale—Sufficiency of Evidence.

In such prosecution evidence *held* sufficient to support verdict of guilty.

6. Stipulations 🔑14(4)—As to City Being No-License Territory—Construction.

In a prosecution under indictment charging that defendant willfully and unlawfully kept and conducted a place where alcoholic liquor was sold, etc., on April 18th, where, at the close of the case, counsel for the people asked defendant's counsel, receiving an affirmative answer, whether he would stipulate the required proof as to the territory and the liquor, and stated it was stipulated that Mendocino City was in the Fourth supervisor district of Mendocino county, that the Fourth supervisor district was no-license territory, that Mendocino was not an incorporated town, and that the liquor introduced in evidence was alcoholic liquor as defined by the Wylie Local Option Law, the stipulation referred to the date charged in the indictment, and was offered in support of the allegation that Mendocino City was "then and there" (April 18th) no-license territory, and proof that Mendocino City was no-license territory on the date charged was unnecessary.

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

M. D. Nolan was convicted of keeping and conducting in no-license territory a place where alcoholic liquor was sold and distributed, etc., and from the judgment and an order denying his motion for new trial he appeals. Judgment and order affirmed.

See, also, 165 Pac. 715.

J. C. Hurley and Lilburn I. Gibson, both of Ukiah, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Dep. Atty. Gen., for the People.

BURNETT, J. It being suspected that defendant, Nolan, was "blind-pigging," one Baroni was employed by the sheriff of Mendocino county to purchase liquor from defendant, and succeeded in doing so. Defendant was thereupon charged, by indictment of the grand jury of the county of Mendocino, with the offense of keeping and conducting, in no-license territory, a place where alcoholic liquor was sold and distributed, and keeping and conducting, in no-license territory, a place where alcoholic liquors were kept for the purpose of sale and distribution. He was thereupon duly tried and convicted of the offense charged in the indictment. Defendant moved for a new trial, which motion was denied, and he was thereupon sentenced to pay a fine of $500, and to six months' imprisonment in the county jail. Defendant prosecutes this appeal from the order and the judgment.

The several points urged by appellant for reversal are as follows: (1) That the court erred in refusing to grant defendant's motion for a change of venue; (2) that the court committed prejudicial error, in that it made certain statements which improperly affected the verdict of the jury; (3) that it was error to admit evidence of sales of liquor on dates immediately prior to that charged in the indictment; and (4) that the verdict was not supported by the evidence.

[1] As to the point that the court erred in refusing to grant defendant's motion for a change of venue made on the ground that a fair and impartial trial could not be had in the county, it need only be said that defendant

failed to properly raise that point. Section 1034 of the Penal Code requires that the application for change of venue be in writing. See, also, People v. McGarvey, 56 Cal. 327. The motion of the defendant here was made orally.

[2] In addition, the affidavit of defendant in support of his motion is insufficient. It merely states:

> "That said affiant firmly believes and in fact knows that it is impossible for him to secure a fair and impartial trial at the hands of a jury drawn from this particular community."

But it is settled that:

> "Affidavits for such a motion must state the facts and circumstances from which the conclusion is deduced that a fair and impartial trial cannot be had. The conclusion is to be drawn by the court and not by the defendant and his witnesses, and the court must be satisfied from the facts and circumstances positively sworn to in the affidavits, and not from the general conclusions to which the defendant may swear, or which his witnesses may depose that they firmly believe to be true." People v. McCauley, 1 Cal. 379.

[3] Upon witness Baroni testifying on cross-examination that a peddler had warned defendant that the sheriff was in town, the following took place:

> "Q. Do you know what the object was? Do you know what the peddler meant when he said to Nolan, 'Look out; the sheriff is in town'?
> "Mr. McCowen: Object to that as incompetent, irrelevant, and immaterial, and the thing speaks for itself.
> "Court: Well, I think it speaks for itself. I think it carries its own meaning with it pretty conclusively."

It is claimed that the utterance of the court improperly influenced the verdict of the jury. While we cannot too forcefully urge trial courts to exercise great care in making such statements in the jury's presence, we are not satisfied that defendant was prejudiced here. It is apparent that the court was addressing its remarks to the attorneys and not to the jury. And any possible prejudice that might have resulted must have been dispelled by the peddler and defendant himself, who both testified that the words of warning were made merely in a jocular manner and as a joke on Nolan. We cannot say that there is anything in the words which would impress the jury that the court was of the opinion that they ought to convict upon the evidence.

[4] The objections that the court erred in admitting evidence of sales of liquor made April 15th, 16th and 17th, and that the evidence was insufficient to support the verdict, may be briefly disposed of. The indictment charges that the defendant did "willfully and unlawfully keep and conduct" a place where alcoholic liquor was sold, served, and distributed on April 18, 1916. As bearing upon this issue the evidence of prior sales, not too remote, was competent. People v. Cavallini, 29 Cal. App. 526, 156 Pac. 73.

[5] And there is sufficient evidence in the record to support the verdict. Witness Baroni testified positively to having purchased beer from the defendant on several different occasions. The foregoing shows the inconsequence of appellant's contention that crtain gifts of liquor were made to guests, and, therefore, not to be considered as evidence of guilt. As before stated, there was a sufficient showing of sales to make out the case charged in the indictment. The circumstance as to said donations might therefore be eliminated from consideration. However, as to this there was room for a rational conclusion that the parties were not guests, and hence within the inhibition of the Wylie law, and if the verdict was in any manner based upon such theory it finds support in the record. Nor is there any weight in the contention that it was not proved that Mendocino City was in no-license territory on April 18, 1916, the date of the offense charged. At the close of the case the following proceedings took place:

> "Mr. McCowen: Will you stipulate the required proof as to the territory and as to the liquor?
> "Mr. Hurley: We will stipulate that.
> "Mr. McCowen: It is stipulated that Mendocino City is in the Fourth supervisor district of Mendocino county, that the Fourth supervisor district is no-license territory, and that Mendocino is not an incorporated town, and it is also stipulated that the liquor introduced in evidence here is alcoholic liquor as defined by the Wylie Local Option Law."

[6] There can be no doubt that the above referred to the date charged in the indictment, and was offered in support of the allegation in the indictment that Mendocino City was "then and there" (April 18, 1916) no-license territory. It cannot reasonably be supposed that the prosecuting attorney would offer proof as to no-license territory as of the date of the trial in support of an allegation referring to a date six months previous. People v. Nolan, 165 Pac. 715.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

176 Cal. 105

PEOPLE v. MOONEY. (Cr. 2079.)

(Supreme Court of California. Sept. 11, 1917.)

1. Criminal Law 🔑1139—Appeal—Matter not Shown by the Record.

Under Const. art. 6, § 4, limiting the Supreme Court's jurisdiction on appeal from the superior courts to questions of law alone, where judgment of death has been rendered, evidence discovered after appeal by the defendant from a conviction of murder cannot be considered by the Supreme Court.

2. Criminal Law 🔑1139 — Reversal — Effect of Error—"Entire Cause."

Const. art. 6, § 4½, providing that the Supreme Court may not set aside a judgment or grant a new trial for any error of law, "unless, after an examination of the entire cause, * * * the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice," further limits the power of the Supreme Court; the words "entire cause" meaning only the cause as presented by the record.

3. Criminal Law 🔑1139—Appeal—Review—Scope—Stipulations.

Stipulations of the Attorney General with one appealing from a conviction of murder do not give this court authority to consider evidence discovered after the appeal, or any matter outside the record.

In Bank. Thomas J. Mooney was convicted of murder, and he appeals. Pending appeal, defendant moves that the judgment and order be reversed on stipulation of the Attorney General. Motion denied.

See, also, 166 Pac. 999.

Maxwell McNutt and John G. Lawlor, both of San Francisco, for appellant. U. S. Webb, Atty. Gen., and C. M. Fickert, Dist. Atty., of San Francisco, for the People.

PER CURIAM. The defendant was convicted in the superior court of the city and county of San Francisco of the crime of murder, and the superior court, having denied his motion for a new trial, pronounced judgment. An appeal from such judgment and order denying a new trial was regularly taken to this court, and is now pending herein; the record on appeal having been duly made up in the superior court and filed in this court. In advance of the hearing of the appeal on the merits, the defendant has made a motion that the judgment and order be reversed, solely on the ground that the Attorney General of the state has filed in this court a stipulation and consent that, for reasons stated therein, such action should be had by this court, and that defendant joins in said stipulation.

The sole reason for this action on the part of the Attorney General, as is shown by the writing filed herein by him, is that, since the motion for new trial was denied, the judgment pronounced, and the appeal taken, certain evidence has been discovered which leads him and the judge of the trial court to believe that, in the interests of justice, a new trial should be had. None of this evidence is shown by the record on appeal, and could not be shown thereby. The Attorney General does not suggest that there was any substantial error in the proceedings of the trial court. In fact, he states that, in so far as he has examined the record, he finds no substantial error, and therefore cannot confess error. The motion must be determined on the theory that there is no error shown by the record. The motion necessarily assumes that this court has the lawful right to reverse a judgment pronounced upon the conviction in a criminal case, on account of matters not shown by the record on appeal, and in the absence of any error in law in the proceedings of the trial court, especially when the attorney general of the state consents that such action be had. The motion is opposed by the district attorney of the city and county of San Francisco.

[1] We are satisfied that the application and consent mistake the lawful power and functions of appellate courts of this state in criminal cases. By express provision of our Constitution, the jurisdiction of both the Supreme Court and the District Courts of Appeal in criminal cases is specially limited. As to the Supreme Court, "appellate jurisdiction on appeal from the superior courts" is given "on questions of law alone, in all criminal cases where judgment of death has been rendered." Const. § 4, art. 6. This is our only jurisdiction. The provision means that an appeal in such cases is allowed solely for the purpose of obtaining the determination of this court as to whether there has been any error of law in the proceedings of the trial court. We have no other questions to determine, and may lawfully determine no other question. If we find no substantial error of law, we must affirm the judgment of the lower court. It is clear, too, that in the consideration of such an appeal, for this limited purpose, we are confined to the record sent to us from the court below. This was very clearly stated by this court in the first decision of the case of People v. Bowers, 18 Pac. 660, where it was sought to have this court take into consideration what purported to be the written confession of another that he was the guilty party, made after the taking of the appeal. The court said that, if the events occurred as stated in the brief of the appellant's counsel, the facts would entitle the defendant to a new trial on the ground of newly discovered evidence, if presented in time to the court below, but that they were not so presented, and could not be so presented, because they occurred pending appeal. Because it so clearly states what is obviously the law on this subject, we quote from the opinion:

> "While it is admitted by counsel for appellant that ordinarily no argument could be made here upon facts occurring after appeal taken, it is urged that the evidence which has been discov-

ered in this case 'is of so grave a character, and points so strongly to the innocence of this defendant, that, however informally it may have come to the attention of the court, this or any other court of competent jurisdiction should say that he shall not be executed until it shall have been submitted, in common with other evidence in the case, to a jury of his country." But, manifestly, the court has no authority to consider these matters as thus presented. There are no part of the record sent to us from the court below, and there is no provision of law by which newly discovered evidence may be presented to this court in the first instance. The remedy in such cases rests with the executive. He alone can afford relief."

The judgment was affirmed on a consideration of the matters presented by the record on appeal. While a rehearing was granted and the judgment was subsequently reversed, the reversal was solely on account of matters shown by the record on appeal (People v. Bowers, 79 Cal. 415, 21 Pac. 752), and clearly the correctness of the views expressed in the portion of the first opinion that we have quoted above was never doubted, and could not reasonably be doubted.

[2] It is to be noted that, by the enactment of section 4½ of article 6 of our Constitution in the year 1911, our power to interfere with the judgment of a superior court in a criminal case was still further limited; the provision being substantially that we may not set aside such a judgment or grant a new trial for any error of law, "unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." The words "an examination of the entire cause, including the evidence," contained in said provision, mean of course an examination of the cause as the same is presented by the record on appeal made up in the lower court.

[3] As we understand the claim of counsel for defendant, special reliance is placed on the fact that the Attorney General of the state has stipulated and consented that the desired action be had by this court. As to this it is necessary only to say that the Attorney General cannot, by stipulation or consent, confer upon this court a power denied to it by the Constitution of the state. The power to set aside or modify a judgment in a criminal case, except for legal grounds appearing on a record duly presented, is not judicial. It is a branch of the pardoning power, committed to the Governor of the state by article 7 of the Constitution, and cannot be exercised by the Attorney General, either directly or through the medium of this court.

We have not considered the reasons stated by the Attorney General for his conclusion that a new trial should be had, and are not to be understood as expressing any opinion as to their sufficiency. That, as we have endeavored to show, is a matter not within our province.

The motion is denied.

(176 Cal. 96)

SILVER LAKE POWER & IRRIGATION CO. v. CITY OF LOS ANGELES et al. (Sac. 2332.)

(Supreme Court of California. Sept. 11, 1917.)

WATERS AND WATER COURSES ⟹18—WATER RIGHTS — ACQUISITION — WITHDRAWAL — GRANTS DURING WITHDRAWAL.

Under Rev. St. U. S. § 2339 (U. S. Comp. St. 1916, § 4647), providing that whenever, by priority of possession, rights to use of water have vested and accrued and are recognized by the local customs, laws, and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same, and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed, a locator for water rights acquires no title against the United States till the work is completed; so that before that time, the lands affected being temporarily withdrawn by executive order of the Secretary of the Interior, and Congress having before the vacation of the orders of withdrawal granted the lands and rights to a city, all rights thereto of the appropriator were lost.

In Bank. Appeal from Superior Court, Mono County; J. D. Murphy, Judge.

Action by the Silver Lake Power & Irrigation Company against the City of Los Angeles and others. From an adverse judgment and order, defendants appeal. Reversed.

See, also, 32 Cal. App. 123, 162 Pac. 432.

Albert Lee Stephens, City Atty., and W. B. Mathews, both of Los Angeles, Richard S. Miner, and S. B. Robinson, of Los Angeles, for appellants. John R. Dixon, of Denver, Colo., and Newman Jones, of Riverside, for respondent.

HENSHAW, J. Respondent's predecessors in interest first conceived the plan of utilizing the waters of Owens river and of Rock creek, one of its tributaries, for irrigation and for the development of hydroelectric energy. They made locations upon the river and creek for these purposes. They began their work under these locations, and they prosecuted this work until it was interrupted and suspended by withdrawal orders of the government of the United States. Under the compulsion of these withdrawal orders the predecessors in interest of respondent ceased work. These withdrawal orders were temporary in character and made in conformity with the law, in contemplation that the United States government might itself impound these waters and devote them to purposes of irrigation for the benefit of the valley lands lying under them. This contemplated reclamation scheme of the federal government was abandoned. Before the formal order of abandonment was actually made it became apparent that the government would not proceed with its plan, and respondent's predecessors in interest resumed work. The work which they did before the withdrawal of these lands by the government was performed at least two years before the city of Los Angeles ever contemplated using the water of Owens river or of its tributary, Rock creek, for any purpose whatsoever. During the period of time when the lands lay under the orders of withdrawal, Congress passed a certain act, giving the city of Los Angeles, upon conditions, a preferential right to purchase some of the withdrawn lands. The orders of withdrawal, to which reference has been made, were, first, the order of July 24 and 27, 1903, under which all of the lands on which the notices of appropriation by respondent's predecessors in interest had been posted were temporarily withdrawn, together with large tracts of land for use as a reservoir site in connection with the contemplated government project. On August 24 and 25, 1903, all the lands upon which it was proposed by respondent's predecessors in interest to put the water for agricultural purposes were temporarily withdrawn from all forms of entry except homesteads. On January 1, 1905, all lands in the Owens river gorge, which lands lie below the proposed reservoir site, were likewise withdrawn for use in connection with the government project. These orders of withdrawal were formally vacated on July 12, 1907.

Before June 30, 1906, but long after the initiation by posting and recording of the rights of plaintiff's predecessors in interest, and long after their first work under those rights had actually been prosecuted, the city of Los Angeles conceived the idea of devoting to its own uses for municipal purposes the waters of Owens river. On the last-mentioned date, and during the period of the operation of the orders of withdrawal above referred to, Congress passed an act (Act Cong. June 30, 1906, c. 3926, 34 U. S. Stats. at Large, p. 801), granting to the city of Los Angeles necessary rights of way over the public lands in certain named counties "for the purpose of constructing, operating and maintaining canals," etc.; in short, for all legitimate purposes in connection with the proposed conduct of the water of Owens river to the city of Los Angeles, and for the additional purpose of maintaining power and electric plants. This grant was to take effect "whenever said city shall have filed, as hereinafter provided, and the same shall have been approved by the Secretary of the Interior, a map or maps showing the boundaries, locations, and extent of said proposed rights of way." Section 1. It was required that the city should file such maps within one year after the passage of the act, and should do no work until the maps had been filed and approved. The rights of way thus tendered by grant were declared not to be effective "over any land upon which homestead, mining, or other existing valid claims shall have been filed, or made until the city of Los Angeles shall have * * * acquired title" thereto and made just compensation therefor. Still further and with particularity it was declared that the act should not "affect the adjudication of any pending applications for rights of way by the owner or owners of existing water rights, and that no private right, title, interest, or claim of any person, persons, or corporation, in or to any of the lands traversed by or embraced in said right of way shall be interfered with or abridged." Section 3. Also the act declared:

> "That in the event that the Secretary of the Interior shall abandon the project known as the Owens river project for the irrigation of lands in Inyo county, California, under the act of June seventeenth, nineteen hundred and two, the city of Los Angeles, in said state, is to pay to the Secretary of the Interior, for the account of the reclamation fund established by said act, the amount expended for preliminary surveys, examinations, and river measurements, not exceeding fourteen thousand dollars, and in consideration of said payment the said city of Los Angeles is to have the benefit of the use of the maps and field notes resulting from said surveys, examinations, and river measurements, and the preference right to acquire at any time within three years from the approval of this act any lands now reserved by the United States under the terms of said reclamation act in connection with said project, necessary for storage or right of way purposes, upon filing with the register and receiver of the land office in the land district where any such lands sought to be acquired are situated a map showing the lands desired to be acquired, and upon the approval of said map or maps by the Secretary of the Interior and upon the payment of one dollar and twenty-five cents per acre to the receiver of said land office title to said land so reserved and filed on shall vest in said city of Los Angeles." Section 4.

It was the language of this act, with other circumstances not necessary to particularize, which conveyed the knowledge that the government would abandon its proposed reclamation project. Thereupon respondent's predecessors in interest in June, 1906, resumed work under their notices and continued this work (interrupted only by the snows of winter) until shortly after the commencement of this action on July 15, 1907. At that time there was in the Codes of this state a section (Civ. Code, § 1416) providing in effect that where litigation becomes necessary under such enterprises as this to acquire land or rights "then the party so appropriating, or his assigns, shall have sixty days after the determination of legal proceedings by final judgment in which to commence to excavate or construct the works in which he intends to divert the water." Respondent and its representatives ceased work under the guaranty of protection extended by this law. Its provisions in this regard, however, were repealed, at least by implication, by section 4 of the Water Power Act of April 8, 1911 (Stats. 1911, p. 813). Following the passage of this act, on or about August 1, 1911, respondent resumed work and continued this work until the date of the trial of this action. This latter work was in part actual construction work and in part was surveying.

In the action which it brought, this respondent set up its asserted rights to the waters of these streams for the purpose of irrigation as well as for the purpose of developing hydroelectric energy. In this another corporation was interested. There resulted a tripartite agreement between these appellants and respondent and the third corporation, under which the asserted right to the use of the water for purposes of irrigation was abandoned and those rights conveyed to the city of Los Angeles, leaving in issue the question whose was the right to use these waters for the generation of electricity. With the litigation thus restricted trial was had before a jury, to which 12 special questions were submitted. One and all the jury's answers favored plaintiff's contentions. The court adopted them and incorporated them into the findings which it made. Upon these findings and the legal conclusions drawn therefrom it gave judgment for plaintiff, and the defendants have appealed from that judgment and from the order denying their motion for a new trial.

This statement, incomplete in itself, is designed only as an aid to an understanding of the single question necessary to be considered on this appeal. That question may be thus stated: What effect upon the original appropriators' rights was worked by the executive orders of withdrawal and the act of Congress operating with the laws of this state?

As its answer necessitates the construction of federal laws, the interpretation which the United States has put upon those laws is of all-controlling force. The federal law under which the original locators were admittedly acting is that found in section 2339 of the Revised Statutes of the United States, approved July 26, 1866 (U. S. Comp. St. 1916, § 4647). Notwithstanding its familiarity, it may be well to quote it in part:

> "Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing or other purposes have vested and accrued and the same are recognized and acknowledged by the local customs, laws and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed."

It is to be noted that the "rights" which are dealt with are, first, rights which have "vested and accrued," and, second, rights which are recognized as such "by the local customs, laws, and the decisions of courts." Conceding that the work done up to the time of the suspension of it under the withdrawal orders was sufficient to fulfill the requirements of our state law (Civ. Code, §§ 1415, 1416), it is undisputed that this work was not completed. The first legal question, then, is what is the nature of the rights which the original locators had acquired up to and at the time of the enforced suspension of work under the withdrawal orders? Our cases fully answer this question. As against all the world but the United States there was acquired a possessory right to continue with diligence the prosecution of the work until completion. "Such visible act (of possession accompanied by work) and avowed intent (to prosecute the work adequately and diligently) gave him a conditional right to the future use of the water, prior to its actual use, the condition being that he should thereafter diligently continue the work to completion and then divert the water and apply it to a useful purpose, failing which his right would cease. Upon the performance of this condition, his title to such use would become complete and perfect. In the meantime, however, he had an existing conditional right, manifested by actual visible possession of the works. It would be clearly a property right, and it being incidental and appurtenant to land, it was real property. Civ. Code, § 658." Inyo Cons. Water Co. v. Jess, 161 Cal. 516, 119 Pac. 934. To precisely the same import is the later case of Merritt v. City of Los Angeles, 162 Cal. 47, 120 Pac. 1064. In both of these cases this court was discussing the attempted interference with one who was or claimed to be in possession of the public domain under notices of appropriation, and who was or claimed to be in diligent prosecution of the work as against the hostile claim and interference of a private third person. That the law thus declared by these decisions is unimpeachable in point of soundness may not, we think, be successfully questioned. The property right is not dissimilar to that which this court declares belongs to the locator of oil lands, in peaceable and in diligent prosecution of work seeking a discovery of oil, before the discovery is actually made. Such a locator, we have held, has a possessory right which is property, and which he can maintain in the courts against trespassers or hostile private claimants. Miller v. Chrisman, 140 Cal. 440, 73 Pac. 1083, 74 Pac. 444, 98 Am. St. Rep. 63; Weed v. Snook, 144 Cal. 439, 77 Pac. 1023. But none of these cases considered, for their exigencies did not call upon them to consider, the character of the rights thus obtained as against the paramount authority, the government of the United States. But we are not without positive pronouncement from the Supreme Court of the United States upon this precise question. In Bear Lake Irrigation Co. v. Garland, 164 U. S. 1, 17 Sup. Ct. 7, 41 L. Ed. 327, the section from which we have quoted came before the court and received careful analysis. From the opinion of that case we quote at length, as follows:

> "So far as the public land is concerned, over or through which these ditches for the canal were dug, the statutes above cited create no title, legal or equitable, in the individual or company that simply takes possession of such land. The government enacts that any one may go upon its public lands for the purpose of procuring water, digging ditches for canals, etc., and when rights have become vested and accrued which are recognized and acknowledged by the local customs, laws, and decisions of courts, such rights are acknowledged and confirmed. Under this statute no right or title to the land,

or to a right of way over or through it, or to the use of water from a well thereafter to be dug, vests, as against the government, in the party entering upon possession from the mere fact of such possession, unaccompanied by the performance of any labor thereon. Undoubtedly rights as against third persons are acquired by priority of possession, and the government will and does recognize such rights as between those parties. This is the principle running through the cases cited by the counsel for appellants. In Sullivan v. Northern Spy Mining Co., 11 Utah, 438, 40 Pac. 709, 30 L. R. A. 186, which is one of those cases, the priority of possession of the person who entered upon the public land and dug the well was recognized as thereby making a superior title to the use of the water from the well over that acquired by a person who was the subsequent purchaser of the land from the government. In that case the well had been dug and the condition fulfilled. If no well had ever been dug, and a reasonable time for digging it had passed, the mere priority of possession would have given no superior title to the land over that acquired by the grantee from the government. It is the doing of the work, the completion of the well, or the digging of the ditch, within a reasonable time from the taking possession, that gives the right to use the water in the well or the right of way for the ditches of the canal upon or through the public land. Until the completion of this work, or, in other words, until the performance of the condition upon which the right to forever maintain possession is based, the person taking possession has no title, legal or equitable, as against the government. What, if any, equitable claims a party might have upon the government who did a large amount of work, but finally failed to complete the necessary amount to secure the water or right of way, it is not necessary to determine or discuss. Those equities would not, in any event, amount to an equitable title to the right of way or to the use of the water, and so need not be here considered."

In United States v. Rickey Land & Cattle Co. (C. C.) 164 Fed. 496, Rickey had taken appropriate steps to secure a reservoir site on the public domain, had purchased works of considerable value for the purpose of diverting waters into the reservoir site and was actually engaged in the construction of a tunnel to lead the waters from the reservoir for useful distribution, when the lands affected by his work were temporarily withdrawn, as here, by the Secretary of the Interior for reservoir purposes. Rickey proceeded with the work under the contention that against the United States government he had acquired the vested right so to do. The government sought injunction under its bill, setting forth the facts, and the defendant, successor in interest to Rickey, demurred. The demurrer was overruled, the Circuit Court in so doing and in discussing the question saying:

> "It is very clear that no one can under these sections acquire as against the government a vested easement in and to public lands for a reservoir site until the actual completion of the reservoir, so that the waters to be impounded therein could be applied to the beneficial uses contemplated by the irrigation system of which it forms a part. This was the construction placed upon these sections by the Supreme Court in Bear Lake Irrigation Co. v. Garland, 164 U. S. 1, 18, 19, 17 Sup. Ct. 7, 12, 41 L. Ed. 327."

There can be no argument so sharp as to whittle down the obvious and controlling meaning of the language of these decisions which we have quoted. That language imports this, and nothing but this, that until the completion of the work no title, legal or equitable, vests in the appropriator, no right vests which the government of the United States is compelled to recognize. The property rights which do accrue are such as to protect the appropriator from the acts of all persons saving the paramount authority. So far as the United States itself is concerned, it is under no justiciable duty in law or equity to such an appropriator until his work shall have been completed. Before completion what may the United States do? It may do as in the case of oil lands it has done, by withdrawals arrest all work before discovery, without compensation to the locator for his expenditures. U. S. v. Mid West Oil Co., 236 U. S. 459, 35 Sup. Ct. 309, 59 L. Ed. 673. Congress, it is to be remembered, under the Constitution of the United States, has the sole power of disposition and control of the public lands. Const. U. S. art. 4, § 3, subd. 2. In contemplation of this power, the respondent's argument that the orders of withdrawal in this case were temporary orders, that they operated only to suspend and not to destroy the rights of the original locators, and that those rights were revived in all their fullness upon the formal vacation of the orders of withdrawal loses all force in view of the congressional exercise of the power to which we have adverted. Congress, had it chosen to do so, without any order of withdrawal having been made by the executive department, could have granted the lands and rights to the city of Los Angeles, as in fact it did, during the existence of the orders of withdrawal. It may be conceded that to have done so would have been a harsh exercise of the power, but this concession can have no effect upon the legality of the exercise. So here the legal situation presented is, and this statement of it is made in the light most favorable to respondent, that before respondent's predecessors in interest had acquired any vested right in the matter against the United States, Congress, in the exercise of its supreme authority, made conveyance to the city of Los Angeles of the lands and of the waters in connection therewith for all the purposes for which they were designed to be used by the original appropriators. It must be held that these appropriators and all others upon the public domain act with the knowledge and under the peril to their ventures that this may be done. The property rights which they acquire while working and before those rights have become vested as against the government of the United States, are held, as it were, upon condition subsequent, in that they are liable to extinguishment at any time by an act of Congress directed to that end.

This conclusion, without regard to any other questions presented, is determinative of this case, and the judgment and order appealed from are therefore reversed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOSS, J.; MELVIN, J.; LAWLOR, J.

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34 Cal. App. 426

BARCLAY et al. v. SUPREME LODGE OF FRATERNAL BROTHERHOOD.

(Civ. 2128.)

(District Court of Appeal, First District, California. Aug. 14, 1917. Rehearing Denied by Supreme Court, Oct. 11, 1917.)

1. Venue 🔑61—Motion for Change—Time—Affidavit of Merits—Statute.

Where defendant's motion for change of venue was made and granted pursuant to Code Civ. Proc. § 397, subd. 3, providing that a change of venue may be had when the convenience of witnesses and the cause of justice will be promoted thereby, the motion, accompanied by an affidavit of merits, was not required to be filed when defendant filed its answer, though section 396 requires that a demand for change of venue, based on the ground that the action was not commenced in the proper county, must be made, accompanied with an affidavit of merits, when defendant demurs or answers; the motion could be rightfully made within a reasonable time after the case was at issue upon the facts.

2. Venue 🔑65—Motion for Change—Affidavit of Merits—Statute.

An affidavit of merits is not essential to an application for change of venue grounded upon the convenience of witnesses pursuant to Code Civ. Proc. § 397, subd. 3.

3. Venue 🔑61—Application for Change—Delay.

Though applications for change of venue are generally classed as dilatory moves which should be presented and prosecuted with diligence to secure favorable consideration, the mere fact that motion for change was not made until nearly a year after issue was joined on the facts did not of itself deprive the court of power to grant the motion; despite the delay, it was the court's duty to determine the good faith of the motion, and then to ascertain whether or not the delay complained of was oppressive, and likely to result in detriment to the adverse party.

4. Venue 🔑52(1)—Change—Discretion of Court.

In an action wherein plaintiffs, as beneficiaries of a fraternal insurance order, sought to enjoin the collection of assessments levied under an alleged illegal by-law, defendant moved, for convenience of witnesses, to change place of trial from the county of San Francisco to the county of Los Angeles, and offered an affidavit that the home office of defendant was in Los Angeles; that all defendant's records were kept in the office in Los Angeles; that many of the records contained matters necessary as evidence in establishing defendant's defense; and that it was impossible to ascertain in advance of trial just what particular books, etc., might be needed. The counter affidavits relied on by plaintiff to show that the convenience of witnesses would be promoted by trial in San Francisco related only to the production of evidence on matters admitted by defendant. *Held*, that the order granting defendant's motion for change of venue was a proper exercise of the court's discretion.

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by R. S. Barclay and others against the Supreme Lodge of the Fraternal Brotherhood, a corporation. From an order changing the place of trial, plaintiffs appeal. Affirmed.

W. C. Cavitt, of San Francisco, for appellants. Davis, Kemp & Post and Carlos S. Hardy, all of Los Angeles, for respondent.

LENNON, P. J. This is an appeal from an order changing the place of trial from the city and county of San Francisco to the county of Los Angeles, grounded solely upon the convenience of the witnesses in an action wherein the plaintiffs, as beneficiary members of the corporation defendant, sought a decree enjoining the collection of certain assessments, which were levied against the plaintiffs and other members of the defendant, pursuant to an amended by-law revising and raising the rate of assessment which the plaintiffs and other members were originally subjected to, and which the plaintiffs alleged was illegally adopted by the defendant and without the consent of the plaintiffs.

The defendant by its answer admitted the adoption of the by-law in question and the attempted enforcement of the new rate of assessment, but defended the action by averring that the contracts of insurance issued to and held by the plaintiffs expressly provided that they were made and held subject, not only to the by-law in force at the time of their execution, but also to any amendments thereto, which from time to time might be adopted by the defendant; that the plaintiffs, through their authorized representatives elected to the Supreme Lodge of the defendant, consented to the adoption of the by-law in question; that an actuarial examination of the defendant society revealed the fact that the rate of assessment originally fixed by the by-laws did not provide a fund sufficient to pay the benefits promised plaintiffs; that the new rate fixed by the amended by-law was necessary to cover a deficiency existing in the insurance fund of the defendant, which resulted because of the insufficiency of the original rate of assessment; that the statutes of the state relating to the regulation and control of fraternal societies (Stats. 1911, p. 1320) provided and required that every fraternal benefit society doing business in the state, the valuation of whose certificate made December 31, 1917, shows that the present value of the future net contributions together with the admitted net assets was less than 90 per cent. of the present value of the promised benefits and accrued liabilities, would be required to reduce such deficiency not less than 5 per cent. of the total deficiency on December 31, 1917, at each succeeding triennial valuation, and that under the rate collected prior to the raise of rates by the defendant, pursuant to the amended by-law in question, such a deficiency did exist, and that the improvements therein required by this law could not be made except by an increase of the original rates.

The action was instituted in the court below February 15, 1913. The defendant's answer was filed July 10, 1913, and the plaintiffs' demurrer thereto was disallowed January 3, 1914. On January 27, 1915, plaintiffs gave notice of a motion to set the cause for trial, and on January 30, 1915, defendant filed its notice of motion to change the place of trial, grounded upon the convenience of the witnesses and the promotion of the ends of justice.

[1] The motion for a change of venue was made and granted pursuant to the provisions of subdivision 3 of section 397 of the Code of Civil Procedure, and consequently the motion accompanied by an affidavit of merits was not required to be filed at the time the defendant filed its answer.

The Code section under consideration provides that the court may on motion change the place of trial of an action for any one of several enumerated causes, and while it is true that section 396 of the same Code requires that a demand for a change of venue based upon the ground that the action was not commenced in the proper county must be made accompanied with an affidavit of merits at the time the defendant demurs or answers, nevertheless this section must be read in conjunction with section 397. Bohn v. Bohn, 164 Cal. 532, 129 Pac. 981. Manifestly the provisions of subdivision 1 of the latter section to the effect that a change of the place of a trial may be had upon a showing that the county designated in the complaint is not the proper county for the trial are entirely separate and distinct from subdivision 3 of the same section (section 397, Code Civ. Proc.), which provides that a change of the place of trial may be had when the convenience of witnesses and the cause of justice will be thereby promoted. In other words, granting that the action was commenced in the proper county, nevertheless the defendant was entitled to a change of venue upon the ground of the convenience of witnesses, etc., and in the absence of any statutory limitation of the time within which the motion may be made upon that ground, it could be rightfully made within a reasonable time after the case was at issue upon the facts. Cook v. Pendergast, 61 Cal. 72, 78.

[2] The affidavit of merits filed upon behalf of the defendant in support of the motion is in the usual form, and apparently meets all of the requirements of the rule relating to such affidavits, but even if it were deficient in the particulars claimed by counsel for the plaintiffs, it would not follow that the motion was improperly granted, because an affidavit of merits is not essential to an application for a change of venue, grounded upon the convenience of witnesses. Cook v. Pendergast, supra; Pascoe v. Baker, 158 Cal. 232, 110 Pac. 815.

[3] While it is true that applications for a change of venue are generally classed and considered as dilatory moves, and therefore should be presented, and prosecuted with diligence in order to secure favorable consideration, nevertheless the mere fact that the motion in the present case was not made until nearly a year after issue was joined on the facts did not, in and of itself, operate to deprive the court of the power to pass upon and grant the motion. Despite such delay, it was the duty of the court to determine from all of the attending facts and circumstances the bona fides of the motion, and then to ascertain whether or not the delay complained of was oppressive, and did, or would be likely to, result in detriment to the plaintiffs. Doubtless in determining these questions the court below considered the fact that the plaintiffs had delayed for nearly a year before moving to set the cause for trial.

The determination of these questions necessarily rested in the sound discretion of the court below, and while it may be conceded that the motion for a change of venue might have been properly denied upon the ground of undue delay in presenting it, still we are not prepared to say that, under all of the circumstances, the order granting it was an abuse of discretion.

[4] Upon the hearing of the motion, and in support thereof, there was offered and received in evidence the affidavit of C. A. Post, the supreme counselor of the defendant, to the effect that the home office and principal place of business of the defendant was at all times in the city of Los Angeles; that all the books, papers, and records of the defendant were kept at the office of the supreme secretary at the home office in Los Angeles; that many of said books, etc., contain matters and things (detailing them) material and necessary as evidence in the establishment of the defendant's defense to the action; that on account of many matters and things which may be developed in evidence during the course of the trial it was impossible to ascertain in advance of the trial just what particular books, records, etc., may be needed as evidence, and therefore it was desirable and necessary in order that the trial be facilitated and the ends of justice promoted that the trial be held in the county of the defendant's principal place of business, where its books, records, etc., would be readily accessible.

The affidavit referred to further deposed that in conjunction with an inspection and consideration of the defendant's books, records, etc., the testimony of its supreme president, secretary, chief clerk and head bookkeeper concerning certain designated and material matters would be required to establish the defense interposed, and that each of the officials named reside in the county of Los Angeles.

The fact that the affidavit in question referred to all of the books, records, and papers of the defendant is a sufficient answer to the contention that it did not allege that the original books, records, etc., of the defendant were at and kept in the city of Los Angeles; and manifestly the counter affidavit of one Rae Plummer made upon behalf of the plaintiffs, wherein she averred that she kept in the city of San Francisco certain original books of entry of the local subordinate lodge known as San Francisco Lodge, No. 69, had no tendency to show that the original books, records, etc., of the Supreme Lodge of the defendant were kept elsewhere than in Los Angeles, as alleged in the defendant's affidavit.

The Plummer and other counter affidavits, relied upon by the plaintiffs to show that the convenience of witnesses would be promoted by a trial of the case in the city of San Francisco, relate only to the production of evidence which would have been limited to showing the plaintiffs' good standing in the local lodge, but inasmuch as that fact was admitted to be true, either in the answer of defendant or by stipulation filed in open court, the plaintiffs obviously would not have been put to the necessity of producing witnesses upon that phase of the case. In fact, every material allegation of the plaintiffs' complaint, save the alleged illegality of the adoption of the by-law in question, was likewise, in effect, admitted. Therefore only the evidence and witnesses designated in the affidavit of the defendant would be required upon the trial of the case, and as that evidence and those witnesses were permanently located in Los Angeles, we have no doubt but that the order granting the motion was a proper exercise of discretion.

We are unable to discover any material or circumstantial conflict in the entire evidence adduced upon the hearing of the motion, but even if such a conflict existed, as counsel for plaintiffs seem to contend, we would not interfere with the order of the court in the absence of a showing of an abuse of discretion.

The order appealed from is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

34 Cal. App. 411

PEOPLE v. CHARLIE. (Cr. 405.)

(District Court of Appeal, Third District, California. Aug. 6, 1917.)

1. Criminal Law 🔑1159(3)—Appeal—Verdict on Conflicting Evidence.

On appeal in a criminal case, where a pronounced conflict in the evidence existed, the verdict of the jury is conclusive.

2. Criminal Law 🔑1037(1)—Appeal—Reservation of Grounds of Review—Objection to Remarks of Counsel.

Where objection to remarks of the district attorney, of such character that any damaging effect on defendant's rights might have been obviated by timely and proper instruction to the jury that they were not at liberty to consider such remarks, was not taken by defendant at trial, and their impropriety, when the remarks were made, was not called to the attention of the trial court, the appellate court cannot inquire into the merits of the objection made to the remarks.

3. Criminal Law 🔑1171(6)—Argument of District Attorney.

In prosecution of an Indian for assault with a deadly weapon, where the district attorney declared in argument that the Indians in Modoc county were bright people, and that if the jury were to acquit they would believe that they could repeat the same kind of conduct with impunity, his further remarks that the Indians were a little bit shrewder than was thought, and that it was habitual with them to claim that their boys were over 21, the children themselves doing so in order to avoid going to the Indian school, were not so far afield as to have seriously prejudiced defendant's rights.

4. Assault and Battery 🔑96(8)—Trial — Instruction.

In a prosecution for assault with a deadly weapon under information alleging the assault was willfully, unlawfully, and feloniously committed, an instruction that, if the jury believed that defendant, "as charged in the information," committed an assault, etc., they should find defendant guilty, was not improper as obligating the jury to find defendant guilty irrespective of his defense of self-defense.

5. Criminal Law 🔑823(6)—Appeal—Harmless Error—Instruction.

In a prosecution for assault with a deadly weapon, though an instruction on self-defense was awkwardly phrased, and did not accurately state the law according to Pen. Code, § 198, where the court elsewhere submitted a full and complete statement of the law of self-defense, the error in the charge was harmless to defendant.

6. Criminal Law 🔑823(6)—Appeal—Harmless Error—Instructions.

In such prosecution, where the court correctly charged on the subject of self-defense, the error in instructing that, if defendant sought a quarrel with the assaulted party with a deadly weapon, the jury should find defendant guilty, whether or not the assaulted party attempted to assault defendant with a deadly weapon in the quarrel, was harmless to defendant.

Appeal from Superior Court, Modoc County; Clarence A. Raker, Judge.

Robert Charlie was convicted of assault with a deadly weapon, and he appeals. Affirmed.

J. T. Sharp, of Alturas, and J. Sidney Henderson, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

HART, J. The information in this case charges that the defendant, on the 18th day of March, 1917, in the county of Modoc, committed upon the person of one West Steele an assault with a deadly weapon. The jury found the defendant guilty of the assault as so charged, and he appeals to this court from the judgment of conviction.

Both the defendant and the prosecuting witness, West Steele, are Indians. It appears that the defendant claimed an indebtedness due him from Steele in the sum of $2, the former claiming that the latter, prior to the date of the trouble resulting in the assault, had borrowed that amount from him. On the day of the assault the defendant had intended going to the town of Likely, in Modoc county, but, before starting to said town, and accompanied by two or three other Indians, he called at the home of West Steele, a short distance from Alturas, for the purpose of collecting the money he claimed Steele owed him. On entering the house, the defendant asked Steele for the money, whereupon the latter declared that he owed the defendant nothing. An altercation followed, resulting in a fist fight, the defendant being the aggressor in the assault, having struck the first blow. After for a brief time fighting in the house, during the progress of which an old Indian woman, named Katie Pete, attempted to separate the men and so put an end to the fight, the defendant stepped out of the house onto the front porch, saying to Steele as he did so that there was not room enough in the house in which to fight, and "you come outside and we will fight it out." Steele took off his overcoat and started to follow the defendant to the outside, but the old woman above named still held on to him and so attempted to prevent him from going outside. Steele, however, succeeded in getting out of the door and onto the porch. Just as he stepped out of the door, the defendant struck him with a knife on the side of the head, near the left eye, inflicting an ugly wound, of an inch or more in length, and which penetrated to the bone. Steele was attended by a physician, who took several stitches in the wound and otherwise treated it. The defendant was on the day of the assault arrested by the sheriff. A large pocketknife, which, when open, was seven inches in length from the end of the handle to that of the blade, was taken by the officer from the person of the defendant. Upon the blade of the knife were blood stains. The defendant admitted to the sheriff that he cut Steele with said knife. The defendant was to some extent intoxicated at the time of the affray.

The above recital of the facts is founded upon the testimony introduced by the people.

The defendant and his witnesses gave an entirely different version of the difficulty, so far as the vital facts were concerned. The accused testified that Steele was the aggressor; that he (Steele) struck the first blow in the house; that, while he (defendant) himself saw nothing in the hand of Steele as the latter emerged from the house and appeared on the porch, an Indian named Griffith, who followed Steele out on the porch, yelled to defendant that Steele had a knife in his hand; that Steele, almost simultaneously with the warning so given, struck at the defendant, but the blow failed of its mark; that thereupon, believing that Steele had a knife in his hand, he (defendant) struck the former with a knife, which he had hastily taken from his pocket and opened when warned that Steele was likewise armed.

[1] It is, of course, apparent that a pronounced conflict in the evidence exists, and obviously the familiar rule as to such conflicts must govern this court in considering the questions of fact thus arising. The jury, as is well understood, had the right to accept the testimony of the people and reject that of the defendant. This they obviously did, and their conclusion is conclusive upon us. While it is not for this court, under such a state of the record as to the proof as is presented here, to analyze, or otherwise consider the testimony for the purpose of justifying the jury's verdict, it may nevertheless be suggested that it is not to be wondered that the jury should have rejected the testimony of the defendant, since it appears that, on having his attention called at the trial to a radical variance between his testimony given there and that given at his preliminary hearing upon vitally important facts, he admitted that he lied and gave false testimony when testifying before the magistrate.

But the points which the defendant the more seriously and earnestly urges upon us involve the alleged misconduct of the district attorney in his address to the jury and certain instructions embraced within the court's charge to the jury. These propositions will now be considered.

1. While the defendant testified at the preliminary hearing of the charge that, as Steele stepped out of the door onto the porch, the witness Griffith addressing the defendant, exclaimed, "Look out," he did not at said hearing testify that Griffith at the time mentioned also warned him that Steele had a knife in his hand. The district attorney, on cross-examination of the defendant at the trial, asked him why, if it were true, as he declared it to be at the trial, that Griffith warned him, at the time Steele stepped out on the porch, that the latter had a knife in his hand, he did not testify to that fact at the preliminary examination, to which the defendant returned the explanation:

> "I know I didn't have a lawyer in the justice's court. And I made a mistake there."

The district attorney, in commenting upon the disparity between the defendant's testimony before the magistrate and that given by him at the trial regarding the matter mentioned, said:

> "That was defendant's testimony down before the magistrate, and if it was not the truth it came pretty near being. That was before he had any attorneys to tell him it was not true. When he got attorneys, they said to him, 'We can make a fine self-defense case out of this, so you say that you saw the knife; you must tell that all the time, and we will put Oakley (meaning the witness Griffith), on the stand to corroborate you, and we have got a good case.'"

[2] The defendant here contends that the above language was entirely without justification from the record, and that its effect

was to inspire in the jury great prejudice against the defense set up by him. The remarks were not warranted by anything found in the record, and, of course, the plain implication from said language is that the defendant's counsel had manufactured for him a spurious case of self-defense, an imputation which should never be made before a jury in any case, much less in a criminal case, in which a person's liberty is at stake, unless there is clear evidence brought properly into the record justifying it. But we are not authorized to inquire into the merits of the objection made to said remarks, because the record does not disclose that such objection was taken at the trial, or that the matter was, at the time the remarks were made, called to the attention of the trial court. Since the remarks complained of were wholly beyond justification by the record, and, indeed, so plainly so that the jury themselves must have at once perceived it, we think that any possible prejudice which might have followed therefrom could have been corrected or destroyed by an order of the court striking them out and an admonition to the jury to disregard them. It has been repeatedly held in this as well as in other jurisdictions that an objection to unwarranted and objectionable remarks by the district attorney, in the course of his argument to the jury in a criminal case, where such remarks are of a character that any damaging effect thereof on the rights of the accused may be obviated by timely and proper instruction by the court to the jury that they were not at liberty to consider such remarks in their deliberations upon their verdict, will not be reviewed or considered by the appellate court unless the remarks so complained of have been objected to at the time they were made and the power of the court to correct the abuse then invoked. People v. Ah Fook, 64 Cal. 380, 383, 1 Pac. 347; People v. Beaver, 83 Cal. 420, 23 Pac. 321; People v. Frigerio, 107 Cal. 153, 40 Pac. 107; People v. Kramer, 117 Cal. 647, 651, 49 Pac. 842; People v. Brittan, 118 Cal. 409, 412, 50 Pac. 664; People v. Owens, 132 Cal. 469, 471, 64 Pac. 770; People v. Shears, 133 Cal. 154, 159, 65 Pac. 295; People v. Ruef, 14 Cal. App. 576, 619, 114 Pac. 48, 54; People v. Amer, 8 Cal. App. 137, 143, 96 Pac. 401; People v. Stein, 23 Cal. App. 108, 118, 137 Pac. 271; People v. Ye Foo, 4 Cal. App. 730, 89 Pac. 450; Horn v. State, 12 Wyo. 162, 73 Pac. 705.

[3] But the defendant complains that the district attorney, in the course of his argument, further transcended the record, and in so doing prejudiced the jury against him when he made the following observations:

> "These Indians are a little bit shrewder than we think. For example, they cannot compel Indians over 21 years of age to go to the Bidwell School, and there is not an Indian boy running around here but what claims he is over 21 years of age, even when you know positively they cannot be over 10. You would be surprised, but if you ask some Indian with a little bit of a boy how old the boy is you would get the reply, 'Why he is 22 years old.' It is always 22 years old, to keep from sending the boy over to school. I have taken particular notice, and where I have a pretty good idea of their age, it is often amusing to have them claim to be 22 years old when they were only about 12 or 14. Another thing is that they never get any older than 22. Wild Bill here will get on that stand and swear that he is about 22 or 23 years old. It has been done here in court so many times that I know just how it is."

Counsel for the defendant objected to said remarks, and requested the court to instruct the district attorney to confine himself to the record. The court in reply stated that it was of the opinion "that it is proper argument; it is an illustration is all."

The remarks thus objected to and above quoted were made by the prosecutor in substantiation of a declaration previously made by him in his argument that the Indians in Modoc county were bright people, and that, if the jury were to acquit the defendant under the evidence, "these Indians" will then believe that they can repeat the same kind of conduct and "get by with it." In other words, the prosecutor, by the observations in question, appears to have adopted that method of impressing upon the jury the importance of the verdict in its effect, in the one way or the other, upon the Indians generally of Modoc county; that, being people of more than ordinary shrewdness for red men of their tribal characteristics, they would receive a verdict of guilty as a severe warning against the use of intoxicating liquor, to which nearly all their internecine difficulties are primarily attributable, while, on the other hand, a verdict of acquittal would probably have the effect of encouraging them in the reckless use of intoxicants, with the result that serious affrays of the character of the one culminating in this prosecution might become common among them. While there was no evidential justification for the remarks, particularly the statement as to the disposition of the Indians to falsify or misrepresent their ages to avoid compulsory attendance at the school maintained for the education of their youth, we cannot say that, in making them, as an illustration of the point he was then pressing upon the attention of the jury, the district attorney went so far afield in legitimate argument as to have thus seriously prejudiced the rights of the accused.

The Indians of the California tribes are an inferior race, generally live by themselves, and as to whose doings entirely among and wholly affecting themselves, however serious at times may be the consequences, there is not infrequently a considerable degree of indifference manifested by the white men. It it probable, therefore, that the remarks complained of were made solely for the purpose of impressing upon the jury the proposition that the charge preferred and the evidence presented by the people in support thereof should receive as serious and earnest consideration as they would be given if the defendant and his victim were not Indians. Moreover, in themselves or taken alone, the remarks were harmless; indeed, viewed without regard to the connection in which they were used, they were meaningless, so far as this case was concerned, and could have exerted no influence one way or the other in bringing about a verdict. Besides, they were general in their application, having reference to all the Indians of that locality, and not to the defendant alone. At all events, in view of the evidence, we cannot persuade ourselves that the jury were unduly influenced by them.

[4] 2. Complaint is made of the following given instruction:

> "The court instructs you that, if you believe from the evidence in this case, beyond a reasonable doubt, that the defendant, Robert Charlie, on or about the 18th day of March, 1917, as charged in the information in this case, committed an assault upon the person of West Steele with a deadly weapon, you should find the defendant guilty."

Challenging the legal soundness of said instruction, as applied to this case, counsel say:

> "The instruction is so framed that the jury was bound to find the defendant guilty if they followed it, and which in our opinion they did do, for the reason that there was no contention on the part of the defense that the defendant did not assault the complaining witness, but that the defense was that he was justified, and therefore, for the instruction to be fair to the defendant, and in conformity to the law as applied to the evidence of the case, the instruction should have been so framed as to make the qualification that 'unless the act was done in self-defense.' "

A simple reply to the criticism thus aimed at the instruction is that it states that, if the jury believed from the evidence that the defendant committed the assault, etc., "as charged in the information," and that the information alleges that the assault therein charged was "willfully, unlawfully, and feloniously" committed. Obviously, if the evidence was such as to convince the jury beyond a reasonable doubt that the assault was committed as so charged, then there was nothing left for the jury to do but to convict the accused, notwithstanding his plea of self-defense and the evidence produced by him in support thereof. If, in other words, the defendant willfully, unlawfully, and feloniously committed the assault, as the information charges, then manifestly there could be no support for the plea of self-defense. Moreover, the court elsewhere in its charge instructed the jury fully and clearly upon the law of self-defense as it is laid down in the Code.

[5] 3. The following instruction, given by the court, is criticized as not involving a correct exposition of the principle of law sought to be stated thereby:

> "To justify the using of a deadly weapon in self-defense, it must appear that the danger which such person was in was so urgent and pressing that, in order to save his own life, or to prevent his receiving great bodily harm, the use of such weapon was absolutely necessary, and it must appear that the person on whom he used such weapon was the assailant, or that the person resorting to the use of such weapon had really and in good faith declined further struggle before he made use of said weapon."

It is said of that instruction that it contains an erroneous statement of the law of self-defense in that it delares that the danger to the person using the weapon was so urgent and pressing that, in order to save his own life, or to prevent his receiving great bodily harm, "the use of such weapon was absolutely necessary," whereas, the law is that the circumstances upon which the person using the weapon is justified in acting are such only as are "sufficient to excite the fears of a reasonable person," and the party making the assault or doing the killing "must have acted under the influence of such fears alone." Pen. Code, § 198.

The instruction is awkwardly phrased, and does not accurately state the law of self-defense, although it is clear therefrom that the court thereby intended to say to the jury that the assailant would be justified in acting upon appearances or apparent danger of losing his life or suffering great bodily injury at the hands of the assaulted party. But, as before stated, the court, elsewhere in its charge, submitted to the jury a full and complete statement of our law of self-defense, and we cannot under such circumstances justly declare that the shortcomings of the above instruction resulted in prejudice to the accused.

[6] 4. The next assignment of error involves an attack upon the legal soundness of the following given instruction:

> "The court instructs you that one who has sought a quarrel with another with a design to force a deadly issue cannot avail himself of a plea of self-defense in using a deadly weapon in such quarrel. And if you believe from the evidence in this case beyond a reasonable doubt that the defendant sought a quarrel with West Steele with a deadly weapon, you should find the defendant guilty, regardless of whether or not you believe that said West Steele attempted to assault said defendant with a deadly weapon in such quarrel."

The only objection urged against said instruction is to that portion thereof which reads, "* * * * that the defendant sought a quarrel with West Steele with a deadly weapon," the criticism thereof in effect being that the mere seeking of a quarrel with another with a deadly weapon does not constitute an assault with a deadly weapon. A literal view of the instruction well justifies the criticism. This fault in the phraseology of the instruction, however, might be reconciled with the rational view that thus the court intended to refer to one who has sought a quarrel, and in the quarrel assaulted another with a deadly weapon. But, in view of the clear statement by the court elsewhere in its charge of the law of self-defense, we do not believe the accused could have suffered injury or prejudice from the instruction, particularly the portion which is specifically criticized by the defendant. In fact, as to all the instructions, the accuracy of which in stating the principles of law thus sought to be given to the jury is challenged by the defendant, we cannot justly hold, after a review and consideration of the entire record, that from the errors so occurring a miscarriage of justice will follow an affirmance of the judgment. Const. art. 6, § 4½.

Obediently to the foregoing views, the judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

176 Cal. 183

PACIFIC GAS & ELECTRIC CO. v. ROBERTS, State Treasurer.

COAST COUNTIES LIGHT & POWER CO. v. SAME.

(S. F. 6895, 6896.)

(Supreme Court of California. Sept. 21, 1917.)

1. Statutes 🔑72—Uniformity of Operation—Public Service Corporations—Taxation.

Where a light and power corporation owned stock of another company, purchased some electricity from a third company, sold some to its subsidiary, and the balance of that purchased and manufactured to private consumers, taxing it on the entire gross receipts from operation under Const. art. 13, § 14, subd. "a," did not violate article 1, § 11, requiring all laws of a general nature to have uniform operation.

2. Taxation 🔑382—Corporation Taxes—"Gross Receipts from Operation."

The words "gross receipts from operation," as used in Const. art. 13, § 14, subd. "a," providing a tax upon such receipts of public service corporations, mean the entire operative income without deductions of any sort, and do not contemplate a tax upon gross profits.

3. Statutes 🔑218—Construction—Extraneous Matter.

The mere fact that a commission on taxation recommended a system of tax on gross earnings, and that the amendments to the constitutional section on corporation taxation were voted for by the people influenced by such recommendation, did not require the phrase "gross receipts from operation," as used in the amendments, to be interpreted according to the commission's idea.

In Bank. Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Two proceedings by the Pacific Gas & Electric Company and by the Coast Counties Light & Power Company against E. D. Roberts, as Treasurer of the State, for abatement of alleged excessive taxes. From a judgment adverse to them, plaintiffs appeal in each case. Affirmed.

Wm. B. Bosley, of San Francisco, for appellants. U. S. Webb and Raymond Benjamin, both of San Francisco, for respondent.

MELVIN, J. As the questions involved in both appeals are identical, we shall discuss them in an opinion applicable alike to each case. Each appeal is from a judgment.

The plaintiff Pacific Gas & Electric Company sued to recover $41,000.45, the amount of certain taxes assessed to that corporation for the fiscal year beginning July 1, 1911, and paid under protest. The judgment of the superior court was in favor of the defendant. The action of the other plaintiff was for the recovery of $1,693.99 paid under the same circumstances. The judgment except in amount was exactly the same as in the other case. We will present in detail the facts of the first case only.

This appeal is on the judgment roll. The findings are based upon defendant's admissions contained in the answer or made at the trial, and the main question presented is whether or not the findings support the judgment. The essential findings were that plaintiff was at all times relevant to this discussion a Californian corporation engaged in the sale of gas and electricity; that on the first Monday in March, 1911, said company exclusively owned and operated certain properties used in its said business; that it was also at that time operating in its business other properties owned by subsidiary companies, among them the Suburban Light & Power Company; that during the entire calendar year ending December 31, 1910, the properties of the Suburban Light & Power Company were operated by it as an independent company, and the rest of the properties aforesaid were operated by the plaintiff in conducting the business of transmitting and selling gas and electricity; that the gross receipts of the Suburban Light & Power Company from the sale of gas and electricity during the year 1910 amounted to $188,401.60, but of such gas and electricity large quantities were purchased from plaintiff for the sum of $52,717.99; that the gross receipts of plaintiff derived from the sale of electricity during that year amounted to $7,816,313.12, but of such electricity large quantities were bought from other and independent corporations for $972,293.52; that the state board of equalization assessed to plaintiff as taxes for the fiscal year beginning July 1, 1911, upon the properties of the Suburban Light & Power Company, $7,536.06, or 4 per cent. of the gross receipts, and as taxes upon that part of plaintiff's properties used by it in transmitting and selling electricity $312,652.53, or 4 per cent., and at the same time assessed to plaintiff as part of the taxes upon its own property $2,108.71 (being 4 per cent. of the sum of $52,717.99 paid to plaintiff by the Suburban Light & Power Company), and to plaintiff's vendors as part of the taxes upon their properties $38,891.74, being 4 per cent. of $972,293.52 paid by plaintiff to its vendors for electricity purchased from them. There were findings to the effect that plaintiff had tried in vain by the methods prescribed by law to have the alleged errors corrected; that such efforts were unsuccessful; and that the moneys had been paid under protest. The conclusions of law were that the gross receipts of the plaintiff and of the Suburban Company were as found by the state board and that the assessments were legal and valid.

Plaintiff's contention is that the "gross receipts from operation," within the true meaning of subdivision "a" of section 14 of article 13 of the Constitution of California are obtained by subtracting from the entire amount realized from the sale of the commodities distributed by any one of the public service corporations therein contemplated the cost of such of said commodities as have been pur-

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

chased from other companies. It is asserted that this interpretation of the cited constitutional provision is correct because: (1) The taxes there specified are upon the operative properties of the corporations; (2) such interpretation would be in harmony with section 1 of article 13 of the Constitution, providing for taxation in proportion to value of property, and with section 11 of article 1, requiring all laws of a general nature to have uniform operation; and (3) plaintiff's interpretation of the term "gross receipts from operation" is the ordinary and usual one.

It is argued that if the Pacific Gas & Electric Company, during the year 1910, had owned and operated the distributing systems owned and operated by the Suburban Light & Power Company during that period, and had manufactured and sold to ultimate consumers, at the same price, the same quantity of gas and electricity which was sold to the Suburban Light & Power Company, the entire amount of tax which would have been assessed upon all of the property which was in fact owned during that year by the Suburban Light & Power Company and a part of the property owned by the Pacific Gas & Electric Company would have been 4 per cent. of $188,401.60 instead of 4 per cent. on that sum plus 4 per cent. of $52,717.99. In other words, appellant insists that the method followed by the state board of equalization and upheld by the court resulted in double taxation, which, according to its view, is forbidden by the constitutional provisions to which reference is made, namely, section 1 of article 13 and section 11 of article 1. The effect of section 1 upon section 14 of article 13 was discussed by Mr. Justice Sloss in the unanimous opinion of this court in Bank of California, National Association, v. Roberts, 173 Cal. 398, 160 Pac. 225. That was a case in which double taxation was the subject of complaint, such double taxation arising from the inclusion of the value of shares of stock in other banks owned by the bank which was taxed in reaching the value of its assessable assets notwithstanding the fact that such other shares were subject to separate assessment and taxation. At page 403 of 173 Cal., at page 227 of 160 Pac., the following language is used:

> "Does the Constitution of California prohibit such double taxation as may be involved in the assessment here complained of? No doubt, our Constitution, as it stood prior to the amendments of 1910, did contain such prohibition. Section 1 of article 13, as it originally read, provided that: 'All property in the state, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law.' This is the language which was held, in the cases above cited, to forbid double taxation. 'All property' is not taxed in proportion to its value if some of it is taxed once and some of it more than once upon the ascertained value. Burke v. Badlam, 57 Cal. 594. But when the new system of taxing certain corporations for state purposes was embodied in the Constitution, section 1 was also amended. That section was made to read as follows: 'All property in the state *except as otherwise in this Constitution provided,* not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law, *or as hereinafter provided.*' The change consisted in the addition of the italicised words. Here is an express declaration that the general rule requiring property to be taxed in proportion to its value shall be subject to the qualification that such proportionate method of taxation shall not apply where the Constitution makes other provision. It has, as we have seen, made other provision for the assessment of bank property. The respondent claims that the words 'except as otherwise in this Constitution provided' qualify merely the subject of the sentence, to wit, 'All property in the state.' In other words, the contention is that this qualifying clause was meant to cover only the exemptions specifically provided for in section 1 and subsequent sections of article 13. This is a strained interpretation of the language. The amendments to section 1 and to section 14 were proposed and adopted at the same time, and there can be no doubt that the changes formed parts of a single comprehensive scheme. The plan of section 14 is in various respects inconsistent with the idea that the property therein described shall be assessed in proportion to its value. The taxes levied, while described as taxes upon the property of corporations, are not based upon any mode of ascertaining either the proportionate or the absolute value of such property. Thus in subdivision 'a' railroad, telegraph, telephone, gas, or electric and certain other companies are subjected to a tax of a certain percentage of their gross receipts from operations within this state. Subdivision 'b' imposes upon insurance companies a tax of 1½ per cent. upon the amount of the gross premiums received. Such taxes cannot upon any fair construction be said to comply with a requirement that all property shall be taxed in proportion to its value. Surely it was not believed, when section 14 was adopted, that the method of taxation therein provided for should be limited or controlled by any general provision such as that theretofore contained in section 1. The amendment of section 1 was designed to avoid any possible conflict with section 14. Even if, however, there should be any opposition between the general terms of section 1 and the provisions of section 14, the latter, as the more specific and particular enactment, would prevail."

There is little to add to this exposition of the subject which entirely disposes of appellant's objection to the supposed disharmony between sections 1 and 14 of article 13.

[1] The method followed in taxing appellant's operative property is not opposed to section 11 of article 1, because obviously it is uniform in its application to all corporations of the same class.

[2] But it is argued that the expression "gross receipts from operation," used in subdivision "a" of section 14 of article 13 of the Constitution of California, is equivalent to "gross earnings" or "gross income." This argument is based in part upon the assumption that the method of taxation of public service corporations is a substitute for the levy of ad valorem taxes upon their property, and that a just result may only be reached by applying the percentage fixed by law to the income from the property used exclusively in the production and distribution of the commodity sold. It is not necessary to determine whether this method of taxation which we

have been discussing is solely a substitute for the exaction of ad valorem taxes or for those and also for occupation license, excise, and other privilege taxes, although the provision that they shall be "in lieu of all other taxes and licenses" might seem to lend some force to the latter view. In Pacific Gas & Electric Co. v. Roberts, 168 Cal. 420–424, 143 Pac. 700, 701, Mr. Justice Henshaw, who delivered the opinion of this court, after commenting upon Mr. Justice Peckham's suggestion in McHenry v. Alford, 168 U. S. 651–671, 18 Sup. Ct. 242, 42 L. Ed. 614, that such a tax is not in reality upon the gross earnings, but upon the lands and other property of the company, used this language:

> "Without pausing here to review the decisions of the Supreme Court bearing upon the question, but contenting ourselves with a subsequent reference to some of them, it may be said that the conclusions of the Supreme Court were that property used in the public service frequently acquired a value in the use, which value was something greater than the value of the property not engaged in such use; that by the systemization and unification of such properties in use they in the aggregate acquired a special value by virtue of this unity of use; that this special value was in the nature of property; that a fair tax upon gross earnings bore such a relation to the values of these properties under their unity of use as to justify such a tax upon revenue as being a legal and commutated or substituted tax for other taxes which were or might have been levied."

It thus appears, and has been definitely decided by this court, that the tax, whatever its scientific essence, is levied upon property created in part by the unity of use of other property. There is a unity of use in the distribution of gas and electricity sold to its consumers by such a corporation as the Pacific Gas & Electric Company, whether those commodities be produced in its own retorts and by its own generators or purchased ready made from other corporations. The tax might be levied upon the gross earnings (as indeed it is in some states), but we see nothing to prevent its ascertainment by calculating a certain per cent. of the "gross receipts from operation." Either method would be a "commutated or substituted" tax upon properties which have acquired peculiar and special worth because of their "unity of use." Therefore, unless the words of our Constitution either in themselves or interpreted in the light of custom and precedent compel us to hold that the taxes to be paid by appellants should have been calculated upon the basis of gross earnings, we shall be bound to uphold the judgment of the superior court.

That the words of the Constitution did not contemplate deduction from the "gross receipts from operation" we do not doubt. The expression first occurs in subdivision "a" of section 14 of article 13 as follows:

> "Said tax shall be equal to the percentages hereinafter fixed upon the gross receipts from operation of such companies, and each thereof within the state."

The same form of expression is again used in the same subdivision and in the very next sentence, which is as follows:

> "When such companies are operating partly within and partly without this state, the gross receipts within this state shall be deemed to be all receipts on business beginning and ending within this state, and a proportion, based upon the proportion of the mileage within this state to the entire mileage over which such business is done, of receipts on all business passing through, into, or out of this state."

This is perfectly plain, unequivocal language, and it will be noticed that the deductions from receipts upon business done partly within the state are based, not upon the cost to the company assessed of the proportion of the service rendered or the commodity distributed within the state, but upon the mileage covered. The addition of the words "from operation" to the words "gross receipts" does not change their meaning to an equivalent of "gross profits." On the contrary, those words but emphasize the fact that the tax contemplated by the Constitution was to be levied upon the property and franchises of corporations used exclusively in public service. Many such corporations have investments which have no relation to the operation of their business of supplying gas, hauling freight and passengers, and the like. The clear intent was to base the tax upon the income derived from the exercise by the corporation of functions reasonably within their charter powers. The authorities sustain this view. In State v. Minnesota & International Ry. Co., 106 Minn. 176, 118 N. W. 679, 1007, 16 Ann. Cas. 426, in discussing a statute requiring the payment of 3 per cent. on the "gross earnings" of a railroad, the Supreme Court of Minnesota said:

> "We believe the proper meaning of the act under consideration to be that, when a railroad company is engaged in work reasonably within its charter powers, the receipts from such sources constitute gross earnings in the operation of the railroad."

In the same opinion this language is used:

> "There is good authority for holding that under the statute involved in the present appeal all income, or earnings of whatever nature, received by the railway company should be included within the term 'gross earnings.' Such was the view apparently taken by the Supreme Court of Wisconsin in State v. McFetridge, 64 Wis. 130, 24 N. W. 140. The Wisconsin statute provided that railroads should pay, in lieu of all other taxes, a certain per centum of their gross earnings, and it was held that rental paid for a leased railroad was included within the meaning of that term. The Appellate Division of the Supreme Court of New York (People v. Roberts, 32 App. Div. 113, 114, 52 N. Y. Supp. 859) decided that 'gross earnings from its transportation or transmission business,' as used in the statute, was intended to mean that all corporations embraced within the provisions of the act should pay to the state a tax upon all receipts arising from or growing out of the employment of its capital, whether that capital was employed in the transportation or transmission business, or otherwise. In Detroit v. Commissioner, 119 Mich. 132, 77 N. W. 631, the Supreme Court was of opinion that sums received by a railroad company for switching, rental of tracks and terminals, and interest on loans and deposits, were a part of its 'gross income,' and taxable as such."

In Commonwealth v. United States Express Co., 157 Pa. 579, 27 Atl. 396, it was held that a tax upon the whole of the gross receipts of an express company is not double taxation, although the amounts paid by the express company to railroad companies for transportation are included in and taxed as part of the gross receipts of such companies. It was held that the sums paid by the defendant to railroad companies were paid for services rendered to the express company, while the latter's gross receipts were the result of services rendered by it to its customers. So in the case now before us the money paid by the Suburban Company for gas in bulk was paid to appellant and received in its capacity as a wholesale dealer, while the amounts received by the Suburban from its customers were paid for delivering gas to them—an entirely different service. There is no more reason to make a deduction because the two corporations were engaged in the same sort of business than there would be to subtract from the grand total of plaintiff's gross receipts the amounts paid for oil used in the manufacture of gas by said corporation. This principle is well expressed in the concurring opinion of Mr. Chief Justice Sterrett in the case last cited. After quoting from the statute imposing a tax of a certain percentage on the "gross receipts of said company received from express business done wholly within this state," he said:

> "The tax is thus laid, not upon net earnings or upon gross earnings less the amount paid other companies for transportation services, but upon the entire gross receipts of the defendant's express business done wholly within this commonwealth. As construed in Railroad Co. v. Commonwealth, 104 Pa. 86, the term 'gross receipts' has been regarded as equivalent to 'gross increase' or 'gross earnings.' The defendant might, with almost equal propriety, claim the right to deduct office expenses and cost of local delivery service."

In State v. Illinois Central Railroad Co., 246 Ill. 188, 92 N. E. 814, the court was considering a provision in a charter of a railroad company requiring it to pay a percentage of "the gross receipts," and it was held that the quoted expression meant the entire income without deduction. In the illuminating discussion of this subject the court cited German Alliance Ins. Co. v. Van Cleave, 191 Ill. 410, 61 N. E. 94, wherein "gross income" was held to be the gross receipts of the business, the court saying that the word "gross," as used in the statute, is opposed to "net," and in its ordinary signification is applied to all of the receipts of the business, while net receipts are those remaining after deductions for the expenses of conducting the business. See, also, Goldsmith, Comptroller General, v. Augusta & Savannah Railroad Co., 62 Ga. 468; Railway v. Shinn, 52 Ark. 93, 12 S. W. 183; Philadelphia & Reading Railroad Co. v. Commonwealth, 104 Pa. 80; People ex rel. The Brooklyn Union Gas Co., v. Morgan, 114 App. Div. 266, 99 N. Y. Supp. 711; Commonwealth v. Brush Electric Light Co., 204 Pa. St. 249, 53 Atl. 1096. In People ex rel. The New York Central & Hudson River Railroad Co. v. Roberts, as Comptroller, 32 App. Div. 113, 52 N. Y. Supp. 859, cited supra, the New York statute imposing an excise tax of a given percentum upon the gross earnings of railroads was held to include earnings of every kind excepting those derived from interstate commerce. In that case the inclusion of the income derived by the relator from stocks and bonds of other corporations which had paid their corporation tax was sustained. The court said that the rule against double taxation is a rule of legislation, and not of law, and while the courts will uphold an unforced construction of a statute which will result in relieving property from double taxation, nevertheless the power of the Legislature to require payment of such tax is undoubted. The Court of Appeals affirmed the judgment on the opinion of the Appellate Division. People v. Roberts, 157 N. Y. 677, 51 N. E. 1093.

[3] We are referred to the report of the commission on revenue and taxation made in December, 1906, which outlined a system of taxing "gross earnings," and it is argued that, as the people in voting for the amendments to article 13 of the Constitution were largely influenced by that report, it should be considered by this court as a construction of the words "gross receipts from operation" so powerful as to compel the conclusion that those words are the equivalent of "gross earnings." While the report is very valuable and enlightening upon the subject treated, we cannot read it into the Constitution for the purpose of defining words of plain meaning. If we were to be governed by contemporaneous construction, we would have to consider also that given by the Legislature to the fourteenth section of article 13 shortly after its adoption, as evidenced by section 7 of chapter 335 of the Statutes of 1911, p. 533, which is in part as follows:

> "The term 'gross receipts from operation' as used in section two of this act is hereby defined to include all sums received from business done within this state, during the year ending the thirty-first day of December last preceding, including the company's proportion of gross receipts from any and all sources on account of business done by it within this state, in connection with other companies described in section 2 of this act."

Since this case was submitted a new statute has been passed by the Legislature. It is contained in chapter 214 of the statutes enacted at the last session. Section 8 of said chapter 214 adds a new section to the Political Code, numbered 3665a, which is substantially the same as section 7 of chapter 335 of the statutes of 1911, but with the addition of the following paragraph:

> "Any company claiming that the levy of the percentage fixed by section three thousand six hundred sixty-four a of this Code on the total gross receipts of such company results in double taxation of the property of such company, may make application to the state board of equalization for a hearing on such matter. Said board

shall have power to take evidence and determine the facts with respect to such claim, and in event said board finds the claim of such company to be true, said board may authorize such company to deduct from its reported gross receipts that amount of such receipts which, if included in such total gross receipts, would cause such double taxation."

Doubtless this measure was adopted for the purpose of providing machinery for the use of the taxing board in the event that appellants should succeed in these cases on appeal and that this court should hold in accordance with the views of counsel for the appealing corporations. In view of this decision the board will not stand in need of the authority sought to be conferred.

It follows from the foregoing discussion that the superior court correctly found against the plaintiffs in both cases.

The judgments are affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; HENSHAW, J.; LAWLOR, J.; LORIGAN, J.

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176 Cal. 194

CITY OF LOS ANGELES v. ZELLER et al. (L. A. 3700.)

(Supreme Court of California. Sept. 21, 1917.)

1. Constitutional Law 🔑278(2)—Jury 🔑28(2) — Waiver — Condemnation Proceedings—Statute.

Street Opening Act (St. 1903, p. 378) § 8, as amended by St. 1909, p. 1037, providing that a notice of motion to set a cause for trial may be given by any of the parties, and that, if upon the hearing of such motion a trial by the jury or by the court without a jury is not demanded by the defendants, or by the plaintiff, such trial shall be deemed waived, etc., is not violative of Const. art. 1, § 14, providing that private property shall not be taken or damaged for public use without just compensation, which shall be ascertained by a jury unless a jury be waived as in other civil cases in a court of record, since the Legislature had the same power in treating of the special matter of street improvements to provide that a waiver of the right to trial by jury shall occur when the parties affected fail to appear at the time the motion to set a day for the hearing of the cause is noticed to be made as it had to provide in general, by Code Civ. Proc. § 631, that a waiver of the right to trial by jury is made by consent, oral or written; the clause of Const. art. 1, § 14, "as in other civil cases," not being a limitation of the clause "unless a jury be waived."

2. Jury 🔑25(2)—Waiver.

Where parties appear and go to trial without objection before a court, they will be deemed to have waived a trial by jury.

3. Eminent Domain 🔑169 — Opening of Street by City on Railroad Property — Statute.

The city of Los Angeles had power to proceed with its suit to condemn railroad property for street purposes, although the Railroad Commission had not determined where the intersecting street should cross the tracks of the railroad, since Public Utilities Act (St. [Sp. Sess.] 1911, p. 40) § 43, making the permission of the Railroad Commission a prerequisite to the establishment of grade crossings of any railroad by a street, has no application to street openings and railroad crossings in the city of Los Angeles.

4. Eminent Domain 🔑47(6)—Statutes 🔑97(2)—Special Legislation—Authority to Condemn Property.

Code Civ. Proc. § 1240, subd. 4, providing that property devoted to one public use may be appropriated for another where the latter is more necessary than the former, and declaring that use as a public street or highway is deemed more necessary than any public use to which the property may already be devoted, is not violative of the Constitution amounting to special legislation.

5. Eminent Domain 🔑47(5) — Condemnation of Railroad Property for Street—Statute.

Under Code Civ. Proc. § 1240, subd. 4, the city of Los Angeles was authorized to take by condemnation the right of way of a street or other railroad for use as a highway or street.

6. Eminent Domain 🔑150—Damages—Condemnation of Railroad Right of Way.

In proceedings by the city of Los Angeles to condemn for street purposes a strip of land owned by an electric railroad 1,600 feet long and 35 feet wide used as the railroad's right of way, the court's action in allowing only the nominal sum of $10 as damages for the taking was improper; the award being inadequate.

Shaw and Sloss, JJ., dissenting.

In Bank. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by the City of Los Angeles against J. T. Zeller and others, the Pacific Electric Railway Company, and the Union Trust Company of San Francisco, as such and as trustees. From the judgment, defendants appealed to the District Court of Appeal, and the case was transferred to the Supreme Court on order made after decision in the District Court. Judgment was reversed, with direction to the superior court to enter its judgment in conformity with the findings of fact. On rehearing, judgment and order reversed.

J. W. McKinley, Frank Karr, A. W. Ashburn, and R. C. Gortner, all of Los Angeles, for appellants. Albert Lee Stephens and Charles S. Burnell, both of Los Angeles, for respondent.

MELVIN, J. In this case an opinion was prepared by the District Court of Appeal, but subsequently an order was made transferring the case to this court, where an opinion was prepared and announced, but a rehearing was granted in order that a further consideration might be had of the action of the superior court in upholding a compensation merely nominal for the taking for use as a public street of a strip of land owned by a street railway and occupied by it for the purposes of its business. Upon further study of the matter a majority of the justices are of the opinion that the superior court erred in sustaining an award of damages in so small an amount. Upon the other questions discussed we reaffirm our former opinion which was in part the adoption of the views of the District Court of Appeal. As given below the portions in single quotation marks are from that part of the former opinion prepared by Mr. Justice Sloss, and those in double quotation marks are from the opinion written by Mr. Justice James and originally filed in the District Court of Appeal:

"'Appeal from a judgment and from an order denying the motion of appellants for a new trial. This action was brought by the city of Los Angeles to condemn for street purposes ground used as a right of way by appellant Pacific Electric Railway Company and to which ground said appellant held fee-simple title. The ground consisted of a strip of land approximately 30 feet in width and of more than 1,000 feet in length, upon which was located rails, poles, wires, and the usual equipment of an electric railway. This strip of land was continuous, except that it was intersected and crossed by one street which was 90 feet in width. Other streets numbering four abutted the right of way at right angles from the south, and one abutted the north line of the right of way at its westerly end. Sixteenth street in the city of Los Angeles formed a continuance of the strip mentioned at the east, and along this street the tracks of the railway company extended, leading toward the center of the city of Los Angeles. The result of the condemnation proceedings, if successful, would be to open Sixteenth street westerly throughout the length of the strip mentioned and form means of access from Sixteenth street into and out of the several streets which were closed against the south line of the right of way strip. After preliminary proceedings had agreeable to the provisions of the Street Opening Act of 1903 (Stats. 1903, p. 376), suit was commenced and notice of motion to set the cause for trial given. At the time set for the hearing of this motion appellants did not appear and the court thereupon appointed three referees to ascertain the compensation proper to be paid to the parties interested. This board of referees made its report and objections were filed thereto, both upon the part of the city, plaintiff, and appellants here. Before hearing was had upon the report, these appellants withdrew the objections made, and the court took up the matter on the objections raised on the part of the city. Before this latter hearing was had appellants made a demand for a jury trial, which was denied. The court at the hearing modified the report of the referees and made its order allowing to the appellants the sum of $10 for the taking of the parcels of land sought to be condemned, and allowing the sum of $26,900 as damage to the property not taken of the appellants. Judgment followed accordingly.

[1, 2] "'It is first claimed that a jury trial should have been awarded appellants upon their demand made prior to the hearing of the objections to the referees' report. In section 8 of the Street Opening Act mentioned, as amended in 1909 (Stat. 1909, p. 1035), it is provided that a notice of motion to set a cause for trial may be given by any of the parties, and that 'if, upon the hearing of such motion, a trial by jury or by the court without a jury is not demanded by the defendants, or any of them, or by the plaintiff, such trial shall be deemed to be waived, and the court must appoint three disinterested persons referees, to ascertain the compensation to be paid to such defendants so waiving a trial by a jury, or by the court without a jury.' There was a clear waiver of the right to trial by a jury made by the appellants if the provisions of the Street Opening Act as just quoted are to be given any effect. Counsel contend, however, that the Constitution of this state (section 14, article 1) does not permit the waiver of a jury to be worked, except it be done in the manner which affects all civil actions alike. Section 14 of article 1 provides in part as follows: 'Private property shall not be taken or damaged for public use without just compensation having been made to, or paid into court for, the owner, and no right of way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in a court of record, as shall be prescribed by law. * * *' It is insisted that the clause 'as in other civil cases' is a limitation of the clause 'unless a jury be waived.' We do not so construe the provision, but so construe it rather to the effect that the phrase 'as in other civil cases' refers to the matter of fixing the compensation by a jury which is provided for in the sentence immediately preceding that referring to the waiver of a jury. As we would construe the provision, it would read in this way: 'Which compensation shall be ascertained by a jury, as in other civil cases in a court of record.' Section 7, article 1, of the Constitution provides that the trial by jury may be waived 'in civil actions by the consent of the parties, signified in such manner as may be prescribed by law.' It follows, considering this section alone, that it is left to the Legislature to determine as to what may amount to a waiver of the right to a jury trial in civil action. The Legislature in general has, by section 631 of the Code of Civil Procedure, provided that a waiver of the right to trial by jury is made by consent, oral or written, and by the failure of the party to appear at the trial. No reason appears why the Legislature has not the same power in treating of the special matter of street improvements to provide that a waiver of the right to trial by jury shall occur when the parties affected fail to appear at the time the motion to set a day for the hearing of the cause is noticed to be made. Proceedings for the opening, widening, and improving of streets in municipalities form a subject for special treatment and procedure, and the provision relating to the appointment of referees is one consistent with the proper nature and subject of such acts. It is appropriate that the matter of the appointment of referees shall be determined in advance of the date of a proposed trial, for if it is not demanded by the parties that the work assigned to be performed by the referees shall be performed by the court or by a jury, then there is no occasion for such trial to be had. If there is to be a trial by court or jury there can be no referees. Hence the effect under the provisions of the act of a motion to set a cause for trial is to give notice that referees are then to be appointed, unless the parties appear and object thereto and require a trial by the court or jury. If they fail to so appear, their right to such a trial is waived, and properly so. The demand of the appellants for a jury trial made before the hearing on the objections of the city to the referees' report came too late. The trial had already been had; that is, the evidence had been taken by the referees and findings reported. It only remained for the court to consider the objections made to the report and to modify or confirm the same or set the report aside and appoint a new board of referees. At that stage of the proceedings there was no hearing pending at which it would have been appropriate to make use of the services of a jury. The record shows a complete acquiescence on the part of appellants in all of the proceedings taken in the condemnation matter up to the time the report of the referees came before the court for confirmation. In so far as objections to those proceedings might be waived, the circumstances are such as to show conclusively that the appellants are bound, because of their failure to seasonably raise objection thereto. In the bill of exceptions it is set out that the board of referees proceeded to take testimony to show the value of the land sought to be taken and the damages which would accrue, and nothing is therein shown which would indicate that the defendants were not present at

such hearing. It would therefore appear that not only did they fail to make any objection to the hearing before the referees, which was in effect the trial, but that after filing objections to the report of the referees they withdrew these objections and left such report to stand, presumably approving thereof. Aside from any question as to the right of the Legislature to make a special provision respecting the waiver of a jury trial in street opening cases, there is a general rule which is applicable where the parties have failed seasonably to make a demand for a jury trial. It is held that where parties appear and go to trial without objection before a court, they will be deemed to have waived a trial by jury. Boston Tunnel Co. v. McKenzie et al., 67 Cal. 485, 8 Pac. 22; Ferrea v. Chabot, 121 Cal. 233, 53 Pac. 689, 1092." '

[3] "The second point urged is that the city was without power to proceed with the condemnation suit until the Railroad Commission had acted and determined where the intersecting streets should cross the tracks of the railway company. It is sufficient, in answer to this point, to refer to our recent decision in City of Los Angeles v. Central Trust Co., 173 Cal. 323, 159 Pac. 1169, where we held that, at the time these proceedings were had, the provision of section 43 of the Public Utilities Act of 1911, making the permission of the Railroad Commission a prerequisite to the establishment of grade crossings of any railroad by a street, had no application to street openings and railroad crossings within the city of Los Angeles.

[4, 5] " 'The further contention is advanced that there is no authority in a municipal corporation to take by condemnation the right of way of a street or other railroad, for the reason that property already devoted to a public use cannot be taken for the purpose of serving another public use. It is admitted that subdivision 4 of section 1240 of the Code of Civil Procedure in terms provides that property devoted to one public use may be appropriated for another public use where the latter is more necessary than the former. The subdivision mentioned further declares that the use as a public street or highway is deemed more necessary than any public use to which the property may already be devoted. It is claimed, however, that this latter provision violates the provisions of the Constitution in that it amounts to special legislation. It would seem unnecessary to discuss the argument under this head to the last point mentioned. It was not proposed by the city in this case to annihilate or destroy the value of the property for the uses to which the railroad company was putting it; in fact, the use of the right of way was specially reserved to the railroad company, together with its tracks, wires, and equipment. There was no purpose manifested to destroy the utility of the right of way as a right of way for railroad purposes. The city sought only to share the use of the ground by permitting the public to use it in common as a highway.' "

[6] We now come to a consideration of that part of the court's action in allowing only the sum of $10 as damages for the taking of the parcel of land, 1,600 feet long and about 35 feet wide, which was sought to be condemned. Admittedly, this land is worth vastly more than $10 or any such trivial sum, but it was argued in the superior court and here that since the city wished to preserve, not to take away, the railroad company's use of the strip of land for transportation purposes the injury resulting from the sharing of such purposes by the general public would be merely nominal. It is, of course, admitted that the corporation would be put to greater expense by the surrender of its exclusive use of the strip of land, but we are asked to assume that such detriment is covered by the large item of damages allowed by the court. Taking the latter contention first we cannot see how an award of damages could possibly meet the condition because the detriment caused by the appropriation of the land for a street would be so great and of a nature so diverse that no rational basis for the calculation of mere damages could be found. Some of the phases of such detriment would be: (1) Interruption of the service by compulsory obedience to the law regulating speed on public streets; (2) added danger of accidents of the sort that could not ordinarily happen on a private right of way; (3) increased expense due to the corporation's duty to keep a part of the street in repair; and (4) the taking from the railway corporation of the right to affix waiting stations, switches, and the like to the land. We cannot assume that these and other injuries to the owner of the property either were or could be met by the award of damages for property not taken. The trouble with the argument of respondent upon this and the other branch of the case is that it ignores the possibility of the use of the real property for any other purpose than the operation of a railway.

Concerning the supposed adequacy of $10 as an amount of compensation for the fee to the strip of land belonging to the corporation, Mr. Justice Henshaw wrote as follows when the case was previously under consideration:

"I cannot bring myself to believe that an award such as is here made, of $10, for a strip of land 1,600 feet long by 35 feet wide, for which land unquestionably the appellant paid a large amount of money, is anything other than a cloak for confiscation. If 1,600 feet may thus be taken, why not 160 miles, and why may not the counties of the state adopt this method of condemnation of parts of steam railway rights of way, for which those companies have paid vast sums of money, and thus obtain highways for the use of the public without cost? I can perceive no parallelism between this case and a mere right of way for a highway across a steam railroad right of way. In the present case the fee is taken. In the crossing case but an insignificant easement is condemned. Moreover, steam railroads, so far as present knowledge goes, have a permanency which does not apply to suburban electric roads. It is foretold as to the latter that automobile transportation will soon drive out of existence most if not all of such lines, and indeed, as a matter of statistics, it is declared that more passengers are carried in the United States to-day by public service automobiles than are carried by all of the steam and electric railroads of the country, and that the percentage is increasing. To permit a highway to be thus carved out of the privately owned right of way of a suburban electric road upon which highway the service of the electric road will to its injury be put in competition with automobile service, presents an added feature establishing the grotesque inadequacy of the award here made. And finally should the railroad corporation owning this land ever feel impelled to abandon its railroad and devote this right of way to private use and sale it will have been deprived of a strip containing considerably more than an acre for the sum of $10, while there is no hazard in saying that its value to-day in the open market is easily as many thousand dollars."

There is little to add to this expression of our views. Respondent has cited numerous authorities announcing the rule that an easement for a street across the right of way of a steam railroad may be granted for merely nominal compensation. Typical of such decisions is the leading case, C., B. & Q. R. R. Co. v. Chicago, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 979, wherein the Supreme Court of the United States upheld a judgment of the Supreme Court of Illinois allowing nominal damages for the condemning of a right of way for a street across the tracks of the railway company. That decision, which was by a divided court, carefully distinguished between the right to cross a railroad company's right of way and any further invasion of its property. In that case, at page 248 of 166 U. S., at page 589 of 17 Sup. Ct., 41 L. Ed. 979, we find the following language used in the opinion:

> "In its opinion in this case the Supreme Court of Illinois says that when a city council, under the authority of the act of April 10, 1872, extends the street across railroad tracks or right of way, 'it does not condemn the land of the railroad company nor prevent the use of the tracks and right of way.' [Chicago, B. & Q. Ry. Co. v. Chicago] 149 Ill. 457 [37 N. E. 78]. We take this to be a correct interpretation of the local statute, and as indicating not only the interest acquired by the public through proceedings instituted for the extension of a street across the tracks and right of way of the railroad company, but also the extent to which the company was deprived, by the proceedings for condemnation, of any right in respect of the land. Such being the law of the state, it would necessarily follow that the jury, in ascertaining the amount of compensation, could not properly take as a basis of calculation the market value of the land as land. The land as such was not taken, the railroad company was not prevented from using it and its use for all the purposes for which it was held by the railroad company was interfered with only so far as its exclusive enjoyment for purposes of railroad tracks was diminished in value by subjecting the land within the crossing to public use as a street."

At page 256 of 166 U. S., at page 592 of 17 Sup. Ct., 41 L. Ed. 979, we find this significant language:

> "The right of the company to use the land or its right of way for as many tracks as it reasonably required for its business—if such right it had when the present proceedings were instituted—is not affected by the opening of the street in question. The opening of the street across the company's land—the city not acquiring the fee-simple title—was necessarily subject to the right, if any, of the company to lay down additional tracks if necessary in the proper conduct of its business."

It will thus be seen that the case from which these quotations are made and others of similar type are not authority for the taking for street purposes without material compensation of longitudinal strips over which electric railroads are operated in cities. Mr. Elliott in his work on Roads and Streets (3d Ed.) thus announces the rule:

> "A right to cross an existing public way with a street or road may often be implied where a right to longitudinally take the way would not be deemed to exist." Section 248.

And in section 249 of the same work the learned author uses the following language:

> "A private corporation which acquires a right to construct a turnpike or a railroad acquires it subject to the dominant right of the state to cross its turnpike or railroad whenever the public necessity demands that new roads or streets shall be opened. In accepting a grant from the state, the private corporation impliedly agrees that the sovereign right to provide the citizens with necessary highways shall not be impaired."

From the foregoing discussion it follows that the judgment and order must be reversed, and it is so ordered.

We concur: HENSHAW, J.; LORIGAN, J.

ANGELLOTTI, C. J. (concurring). I concur in the judgment and also in the opinion except in so far as the last point discussed is concerned. As to that I also concur generally in the views expressed, and in the conclusion reached to the effect that the railroad company was entitled to a substantial sum as and for the taking of its property. As I understand the record, the whole of the strip of land, approximately 30 feet in width and 1,600 feet in length, owned in fee by the company, is condemned for the purposes of a public street. Simply because the company is to be allowed to use this street for the same purpose that it is now using the property as owner, as a railroad right of way, nothing is allowed as for a taking of property, and this although such use will henceforth be the ordinary use in common with the public of a public street, subject to all conditions and restrictions imposed on railroad companies granted a right to use a public street as a right of way.

The more I consider this matter, the more strongly I feel that this view is not only manifestly unjust and inequitable, but also unwarranted in law. The relative situation as regards this property prior and subsequent to the condemnation is well set forth by counsel for the company as follows:

> "The defendant is the owner of the fee and had, before the condemnation, the right to excavate and carry away any portion of the soil or to change the grade of its road at will, or to store ties, poles or other materials along the right of way, or to build sidetracks, to store cars thereon or to build waiting stations, platforms, depots, warehouses, repair shops or other structures upon said strip of land (which is not entirely occupied by the existing tracks), to fence the same against trespassers and to exclude all of the public from travel thereon except when transported in the defendant's cars, and to use it in any other way that the owner of property may use it, either on, above or below the surface of the earth, so long as the use is not such as to become a nuisance. But by the condemnation in the case at bar, by the paving of the street, which will follow, the city has taken from the defendant all of the substantial value of its ownership of the land and has left it, as we said before, only the right to use the surface as one of the general public, subject, of course, to increased hazard of accident, increased expense of operation and maintenance, impaired running time and very substantially im-

paired enjoyment of the property in general. The control over the surface of the ground is now vested in the city, instead of the defendant, and the use of the subsoil has become nil."

To my mind there is here an actual taking of property within the meaning of our law relative to eminent domain, and the company is entitled, as a prerequisite to such taking, to a substantial sum as and for the value of the property thus taken. The crossing cases are sufficiently distinguished, to my mind, in the opinion.

As already noted, the property sought to be condemned does not constitute "only a part of a larger parcel." Section 10, Act 1903; Stat. 1903, p. 379. The whole of a parcel of land owned and used by the railroad company is thus taken for street purposes. I doubt, therefore, if there is any basis for an award to the company except as and for the value of the "property sought to be condemned, and all improvements pertaining to the realty."

I concur: LAWLOR, J.

SHAW, J. (dissenting). I dissent from the judgment of reversal and from that part of the opinion holding that the sum of $15 is an inadequate allowance for the value of the estate to be taken by plaintiff from the Pacific Electric Railway Company in the strips of land used by it for its railway between Los Angeles and Santa Monica. The amount allowed was $15 and not $10 as stated in the main opinion. The railway company originally acquired these strips of land as a place whereon to lay its railway tracks and place its poles, wires, and other appliances appurtenant thereto along that part of its line. Thereafter it built its tracks, established its line, and has ever since maintained and operated its railway system upon and over said strips. It acquired the fee-simple title to the land. The estate therein necessary for railway purposes, however, was not a fee, but only an easement. The record shows that the city did not seek nor ask to condemn or take this easement, this right of use by the Pacific Electric Railway Company for its railway, but that, on the contrary, the court below, in pursuance of a stipulation between the parties stated in its conclusions of law that this easement for railway purposes, with all its appurtenant structures and appliances, should be reserved to and was to remain in the railway company, and that the city was to acquire only an easement in the land for public use as a street, but subordinate to the right or easement of the railway company aforesaid.

An estate in fee is divisible in various ways not involving a division of the surface of the land. It may be divided into a number of qualified estates. Different easements or subordinate estates may be carved out of the fee, and such easements or estates may be sold separately and to different persons by the owner of the fee. The railway company, if it had so desired, could have conveyed its railway, with the easement necessary for its maintenance and operation, to one person, a subordinate easement for the servient use of the land as a public street to another person, and the fee burdened with these two easements to still another. Being separable interests or estates in the land, they are susceptible of a separate valuation.

The only property proposed to be taken by the city was the subordinate easement for a public street. For this taking the railway company was entitled to the just value of the estate taken. This value was to be, and was, ascertained and found by the court below from the evidence. There was abundant evidence to the effect that the value thereof did not exceed the $15 allowed. This is admitted. The testimony was that the strips of land subject to a perpetual easement for railway purposes had no substantial value. A mere subordinate easement would, of course, have even less value.

There remains as an element of value only the remote possibility that at some unknown time in the future in the uncertain course of future events and developments, the railway company may cease or abandon the operation of its line, or, that its right to do so may be forfeited, in which case the servient fee, relieved of the depreciative burden of railway use, would again become of value as unburdened land, if not appropriated to public use as a street. If this could be assumed to occur at a definite time in the future, it would afford a basis for estimating a present value equal to the present worth of the value when the event occurred and payable at that time. The time, of course, cannot be predicted. No attempt was made at the trial to do so, or to elicit from any witness a valuation based on the uncertain contingency of a cessation of the railway use or the forfeiture of the right. The possibility of an abandonment or forfeiture, or of a present value arising from such future possibility, was not even suggested. The only evidence of value consisted of varying estimates based on the hypothesis that the land was burdened with a perpetual easement for railway use.

In these circumstances all that this court can properly say as to the value of this subordinate easement to be taken by the city is that the court below has made a finding that its value is $15, and that this finding is fully supported by legal evidence given at the trial. There are no facts of which the court can take judicial notice that would defeat the effect of this evidence.

There is another branch of the case, the question of damages to property not taken, caused by the public use to which the city proposes to devote the easement which is to be taken. This appears to have produced some confusion of ideas on the question of the value of the estate actually taken. The owner of land taken for a public use is entitled not only to the value of the land actually taken, or of the estate or interest that is actually taken from him in such land, but also to the damages which such taking will directly cause to property belonging to him which is not taken. The Constitution declares that "private property shall not be taken or damaged for public use without just compensation." The act of 1903, under which this action was begun, provides that the court shall find, separately: First, the value of each parcel of land to be taken "and each separate estate or interest therein"; second, if the part taken is part of a larger parcel, the damages which will accrue to the part not taken "and to each separate estate or interest therein," by reason of its severance from the part taken and the construction of the improvement in the manner proposed by the plaintiff. Section 10, Stats. 1903, p. 376. The Code, which that act adopts for the mode of procedure by action, contains substantially the same provisions on the subject. Code Civ. Proc. § 1248, subds. 1, 2. The damage caused to an easement by the taking of a subordinate easement for public use may not be well described either in the Code or in the act of 1903, but it is covered by the constitutional guarantee, and therefore it was properly allowed and its payment imposed by the court as a condition precedent to the taking.

There was evidence to the effect that the appropriation of the surface of these strips of land to use as a street, though subordinate and subject to the use for railway purposes, would nevertheless entail greater expense upon the railway in the maintenance and operation of its railway system, because of the necessity of adjusting its tracks to the grade established for the street and because of the greater dangers to persons rightfully using the street for ordinary travel. This would require greater care to avoid injuring them and subject the railway company to increased liability to damages growing out of the negligence of its employés in that respect. This element of damage forms no part of the value of the easement actually taken. It affects only the estate which is not taken, but which is to remain in and belong to the railway company as before, that is, its paramount right to the continuous use of said strips of land for railway purposes. It is, properly speaking, damages caused to the property not taken, damages thereto caused by the use to be made of the property actually taken. This damage was also the subject of testimony given at the trial, and upon that evidence the court below allowed the railway company, as compensation, the sum of $26,900. It is further claimed that the use as a street will prevent the railway company from storing ties or other railway material on the parts of the strips adjoining the tracks, temporarily, for the convenient making of repairs or other operations in the maintenance of the railway use, and from building waiting stations, side tracks, or other structures convenient for railway operation and maintenance, on the parts not occupied by the tracks nor necessary for the passing of cars over them. These rights constitute a part of the easement for railway purposes which is to be reserved to the company, and with which, according to the stipulation, the use as a street must not interfere, and are not to be considered as elements of damage or value. The incidental interference with these operations arising from the public use as a street constitutes a damage to the railway easement not taken, and is included in the aforesaid damage allowance. The right to store ties or other material on the adjacent ground for purposes not necessary for immediate repair or maintenance was not shown to be of value and was not the subject of separate investigation at the trial. The court cannot know judicially that it has a substantial value. The right to take away the soil and to use it in other ways not inconsistent with the railway use was taken into consideration by the witnesses who testified to the value of the property taken, and the findings based on that testimony are conclusive upon this court on appeal.

In my opinion the findings of value and damages are supported by the evidence, and the conclusions of law thereon are correct. By inadvertence the judgment as drawn does not conform to the findings and conclusions of law, in that it does not contain the reservation to the railway company of its paramount easement for railway purposes. But this is plainly a mistake, and could be remedied by modifying the judgment.

I concur: SLOSS, J.

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176 Cal. 166

In re YORBA'S ESTATE.

ARNAZ v. BOTILLER et al.

(L. A. 5027.)

(Supreme Court of California. Sept. 19, 1917. Rehearing Denied Oct. 18, 1917.)

1. Executors and Administrators 🔑23—Further Appointment after Distribution of Estate.

Where the estate of a decedent has been finally settled and distribution made, further letters of administration should not be issued, unless there still remains property of the estate not fully disposed of, or some act to be done relating thereto which only an administrator can do.

2. Descent and Distribution 🔑75—Wills 🔑722—Title of Heirs or Devisees.

The property of a decedent passes upon his death to his heirs or devisees by inheritance or by the terms of the will, and their title does not originate in the decree of distribution, though such decree, when it has become final, constitutes a muniment of title which will prevail over contrary provisions of the will or of the statutes of descent.

3. EXECUTORS AND ADMINISTRATORS ⚿=23—FURTHER APPOINTMENT AFTER DISTRIBUTION OF ESTATE.

Where a will had been admitted to probate, due notice to creditors given, all debts and expenses of administration paid, and the accounts of the executor settled, and the heirs and devisees without a proper decree of distribution divided the estate among themselves, and their division was acquiesced in and acted upon for many years, they were estopped to question the validity of the disposition thus made, and the court was not required to grant letters of administration for the mere purpose of determining anew the proper distribution of the estate on application of one claiming under a party to the voluntary distribution.

4. EXECUTORS AND ADMINISTRATORS ⚿=315(6)—DECREE DENYING DISTRIBUTION—CONCLUSIVENESS—"OPINION."

In the administration of an estate an order of distribution was made which it was claimed was invalid because not based upon a petition or preceded by notice. A number of years later a son of the decedent was appointed administrator with the will annexed, and subsequently filed a petition for final distribution. B., claiming to be entitled to one-third of the estate, filed a petition for distribution of such share to him. The court filed and entered a paper indorsed "Opinion—Order," stating that the various orders approving and settling the accounts, and directing and confirming distribution of the estate, had become final and conclusive; that B.'s petition was denied, that findings and decree would be signed accordingly; that no decree of distribution would be made other than one confirming the distribution already made; and that such decree was unnecessary, but might be effectual to dispose of the questions raised by the applications. *Held*, that while an "opinion" is the informal expression of the views of the court and cannot prevail against its final order or decision, the paper was intended, not only as an opinion, but as an order denying the application for distribution, and, not having been appealed from as authorized by Code Civ. Proc. § 963, it became a final adjudication that the estate had been fully distributed, and that no further distribution should be had.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Opinion.]

Department 1. Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

Proceeding by Beatrice Arnaz y de Johnson against Frederick Botiller and others, for the appointment of an administrator with the will annexed of the estate of Bernardo Yorba, deceased. From an order denying the application, the petitioner appeals. Affirmed.

J. Mack Love, Joseph F. Devin, A. F. Campbell, Hahn & Hahn, and J. E. Hannon, all of Los Angeles, for appellant. G. R. Freeman, of Corona, for respondents. E. W. Freeman, of Los Angeles, amicus curiæ.

SLOSS, J. [1] Beatrice Arnaz y de Johnson appeals from an order of the superior court of Los Angeles county denying her application for the appointment of an administrator, with the will annexed, of the estate of Bernardo Yorba, deceased. The order in question recites that all the debts of the deceased, and all the costs of administration, have been paid; that the accounts of the executors have been approved and allowed; "that the residue of the property belonging to said estate has been partitioned, and distributed to those entitled thereto, according to law; that there is no necessity for any further administration." If these recitals (or findings, as they may be termed) were warranted by the evidence, the application was rightly denied. Where an estate has been finally settled and distribution made, further letters of administration should not be issued "unless there still remains property of the estate not fully disposed of, or some act to be done relating thereto which only an administrator can do." O'Brien v. Nelson, 164 Cal. 573, 129 Pac. 985.

Bernardo Yorba, the decedent, had departed this life more than 65 years before the appellant's petition for letters was filed. He died, testate, in November, 1858. His will was duly admitted to probate in the probate court of Los Angeles county on December 20, 1858. The very voluminous record before us shows numerous proceedings had in the matter of the estate. These culminated, on November 17, 1873, in an order of the said probate court settling the accounts of the executors, and granting them a discharge. This order recited, among other things, "that all the property of said estate has been distributed to the persons entitled, from time to time under the orders of this court, and that no property of said estate now remains in the hands of said executors, and * * * that all the debts and expenses of administration of said estate have been paid." It appears that, upon the death of Bernardo Yorba, those claiming under his will went into possession of the real and personal property left by him. Whether by voluntary agreement or in pursuance of decrees made in partition suits which affected different portions of the property, the devisees and legatees received in separate use and enjoyment the whole of said estate. Either in person or through their successors in interest they have ever since remained in such possession and enjoyment.

The ground upon which the appellant bases her demand that an administrator should, after the lapse of all these years, be appointed is that there has never been any valid proceeding closing and distributing the estate. It is contended that the order of 1873 was not such a proceeding, for the reasons, among others, that it was not based upon a petition for distribution, nor was it preceded by the notice which, under the statutes then in force, was necessary to vest in the probate court jurisdiction to order the distribution of an estate.

[2, 3] The appellant herein is the daughter of one of the sons of Bernardo Yorba, and claims under her father. He, it appears, was one of the devisees who took a portion of the estate in severalty, and enjoyed its possession and use until he granted it to others. Under

our system of law, the property of a decedent passes, upon his death, to his heirs or devisees. They take at once by inheritance, or by the terms of the will. Their title does not originate in the decree of distribution, although such decree, when it has become final, constitutes a muniment of title which will prevail over contrary provisions of the will or of the statutes of descent. Where, as here, the heirs and devisees have assumed to divide the estate among themselves, and their division has been acquiesced in and acted upon for many years by all parties in interest, we think they and their successors should be held estopped to question the validity of the disposition thus made, or to surround with doubt and confusion the claims of ownership based upon their own voluntary acts, long unquestioned and relied upon. In the present case, everything necessary to the complete administration of the estate had been regularly done, with the exception of the formal decree of distribution. The will had been admitted to probate, due notice to creditors had been given, all debts and expenses of administration had been paid, and the accounts of the executors had been settled. We think the court was not required to grant letters for the mere purpose of determining anew the proper distribution of the estate, when the request was made by one claiming under a devisee who had, many years before, been a party to a voluntary distribution of the estate, and who had, without objection, received and retained the benefits of such distribution.

[4] But if this position be open to question, the order appealed from may be sustained upon more technical grounds. The record shows that in July, 1896, Vicente Yorba, a son of the decedent, filed his petition to be appointed administrator with the will annexed. On August 4, 1896, the court made its order granting letters to said petitioner, who duly qualified and acted as such administrator until his death, which occurred in 1903 or 1904. In July, 1897, the administrator filed a petition for final distribution of the estate, and notice of the time set for the hearing of said petition was duly given. One A. Bila, claiming to be entitled to one-third of the estate, filed a petition asking for the distribution of such share to him. Various parties claiming the ownership of portions of the estate filed answers, opposing any distribution upon the ground that the estate had been finally closed by the proceedings of November, 1873, above referred to. These petitions, with the oppositions thereto, came on duly for hearing, and on March 12, 1900, the judge of the superior court filed, and caused to be entered in the minutes, the following paper, thus indorsed:

"Opinion—Order."

"This is an application for a general distribution of said estate. A. Bila petitions for a distribution of one-third thereof to him.

"I think that the various orders approving and settling accounts, and directing and confirming distribution of the estate made from time to time in the course of the proceedings had therein have become final and conclusive, and that final and complete distribution of the estate has been made to those entitled thereto.

"The petition of A. Bila is denied, as is also the application for attorney's fees. Findings and decree will be signed accordingly. But no decree of distribution will be made other than one confirming the distribution already made herein.

"Such a decree is unnecessary, but may be effectual to dispose of the questions that have been raised upon these applications."

The appellant contends that this paper is a mere opinion, showing upon its face that the court contemplated some further action, which should constitute its formal decision or order. If this be the right construction of the document, it did not, of course, constitute a judicial determination binding either upon the court or the parties. An "opinion" is the informal expression of the views of the court, and cannot prevail against its final order or decision. Montecito Valley Co. v. Santa Barbara, 144 Cal. 578, 595, 77 Pac. 1113; Estate of Spreckels, 165 Cal. 597, 606, 133 Pac. 289. But the paper above quoted is quite different from those under consideration in the cases just cited. While it possesses some of the characteristics of an opinion, it was evidently intended by the court to be more than that. It was framed in such manner as to express, not only the views of the court on the legal questions presented, but a judicial determination of those questions. The manner in which it was indorsed ("Opinion—Order") is one indication of its dual purpose. Taking the paper as a whole, it should, we think, be construed as an order denying the application for distribution, together with a statement of the ground for such denial, viz., "that final and complete distribution of the estate has been made to those entitled thereto." The several sentences referring to the signing of findings and decree, while not entirely clear, convey the idea that the judge deemed no decree of any kind to be required, but that he was willing, if the parties should consider it necessary for the protection of their interests, to make a confirmatory decree. No such decree was ever made, and the parties apparently treated the paper thus signed and entered upon the minutes as a final disposition of the proceeding for distribution. This view is confirmed by the circumstance that the record contains a copy of a notice, given by the attorneys for the administrator, that they would move the court "to modify its decision heretofore announced. * * *" Nothing further appears to have been done with this motion.

We have, then, a proceeding duly brought before the court by notice binding every one interested in the estate, and having for its object a distribution of the estate. This proceeding was terminated by an order denying distribution upon the ground that the estate has been fully distributed. An order "refusing the distribution of an estate" is, and was at the time this order was made, the subject of an appeal. Code Civ. Proc. § 963. No appeal was taken, and the order of March 12, 1900, refusing distribution of the estate, has become final and conclusive upon all parties in interest. As to those parties, it constitutes a final adjudication that the estate has been fully distributed, and that no further distribution should be had. It follows that there was, in contemplation of law, no estate to be administered, and that the petition for the appointment of an administrator with the will annexed was properly denied.

The order is affirmed.

We concur: SHAW, J.; VICTOR E. SHAW, Judge pro tem.

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176 Cal. 128

INGALLS v. MONTE CRISTO OIL & DEVELOPMENT CO. (L. A. 3727.)

(Supreme Court of California. Sept. 15, 1917.)

1. WITNESSES 🔑268(1)—CROSS-EXAMINATION—SCOPE.

In servant's action for injuries by the falling of a derrick, it was proper to cross-examine defendant's witness as to whether other derricks had fallen, as tending to show that, though there may have been no patent defect, defendant's experience would have suggested frequent inspections.

2. APPEAL AND ERROR 🔑1048(5)—HARMLESS ERROR.

In a servant's action for injuries, where a witness was asked if he had ever been warned by defendant of the unsafe condition of the derrick on which plaintiff was at work, assuming that the question was erroneous, as assuming the unsafe condition, defendant was not prejudiced where the witness replied in the negative.

3. MASTER AND SERVANT 🔑258(11)—INJURIES TO SERVANT—PLEADING—SUFFICIENCY.

A servant's complaint, alleging that in order to perform his work he was obliged to stand on a walking beam of a derrick over which the roof, by reason of its imperfection, defectiveness, and inadequacy of construction, became loose, and without warning fell and injured plaintiff, and that the defect was due to the negligence of defendant, is sufficient against demurrer.

4. NEGLIGENCE 🔑111(3)—PLEADING—SUFFICIENCY.

Negligence may be charged in general terms, but it must appear from the facts averred that the negligence caused or contributed to the injury.

5. APPEAL AND ERROR 🔑1040(10)—SCOPE OF REVIEW.

Where the case is fully, fairly, and understandingly tried, there is no reason for reversing the judgment, though the court erroneously overruled demurrer to complaint.

In Bank. Appeal from Superior Court, Kern County; W. M. Conley, Judge.

Action by Leslie Ingalls against the Monte Cristo Oil & Development Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Henry Ach, of San Francisco, Hunsaker & Britt, of Los Angeles, and George E. Whitaker, of Bakersfield, for appellant. Mathew S. Platz and R. H. Wilson, both of Bakersfield, for respondent.

MELVIN, J. Plaintiff was awarded judgment in damages for personal injuries. Defendant appealed from the said judgment more than 60 days after entry thereof, and its counsel frankly admit that they may not question the sufficiency of the evidence to justify the verdict. However, they insist that the judgment should be reversed for one or more of the following reasons: (1) The complaint does not state a cause of action. (2) The trial court gave erroneous and misleading instructions. (3) The court erred in overruling defendant's objections to certain questions asked of witnesses Tooker and Senter.

There was an earlier appeal in this case from an order granting a new trial. That appeal was decided by the learned District Court of Appeal after assignment of the cause to that tribunal, the order was reversed, and a petition for a hearing in this court was denied. Ingalls v. Monte Cristo Oil & Development Co., 23 Cal. App. 652, 139 Pac. 97. Respondent is of the opinion that appellant's second and third assignments of error have been finally determined adversely to its contentions, in the decision on the former appeal; but appellant takes the position that, as no further action was required in the retrial of issues when the cause was remanded after the first appeal, the rule and doctrine of the "law of the case" is not applicable (citing Sharon v. Sharon, 79 Cal. 633–653, 22 Pac. 26, 131). It is not necessary to apply that rule to the decision of the District Court of Appeal in the matter of the instructions here attacked. Appellant's counsel concede that the question whether or not the instructions were misleading and erroneous, which is now presented, was decided by the District Court on the appeal from the order granting a new trial. We have again examined the opinion of that learned court upon this subject, and, as we did upon consideration of the petition for transfer, we again approve of and adopt the reasoning and the conclusion of the District Court of Appeal that there was no material error in giving the instructions of which appellant complains. We do this, not because we regard that opinion as the "law of the case," but because we are convinced that it is correct.

[1] The District Court of Appeal did not decide the questions raised by the attack upon the rulings touching the testimony of witnesses Tooker and Senter. Witness Tooker was permitted, over objection by defendant, to testify regarding the falling of other roofs of derricks. He was a witness called by defendant, and he had testified that there had been 50 derricks built on the property of defendant, and that the one on which the accident occurred was like all of those constructed at about the same time. These derricks were on the oil fields belonging to the defendant. The only purpose of such testi-

mony was to place before the jury the fact that there was nothing about this particular derrick and its roof to attract the foreman's attention to it. Upon cross-examination, the witness was interrogated with reference to the falling of the roofs of other derricks. Finally the court framed a question which was as follows:

> "The question has reference to the derricks located in the Kern River oil fields belonging to the Monte Cristo Oil & Development Company; do you know of any of them falling down?"

To this the witness answered:

> "I can't designate any particular derrick. I have known of such, when there was no one working in the derrick. I do not know the cause of its coming down. I can recollect one, because when I saw it in the morning it was riding the walking beam, a portion of it fastened to the derrick, and another portion lying down on the walking beam, and the walking beam still moving up and down—still working, and the well still pumping, and the roof riding up and down on the walking beam."

This was legitimate cross-examination, as it tended to show that, although there may have been no patent defect in the roof, the experience of defendant's agents with similarly constructed derricks would have suggested frequent inspections to guard against accidents which might be caused by latent structural faults. The occurrence of accidents similar to the one under investigation is of value sometimes in determining the amount of care reasonably to be exacted in a particular case, and the jury is entitled to have evidence of such happenings presented to it. Dyas v. Southern Pacific Co., 140 Cal. 296–304, 73 Pac. 972.

[2] Plaintiff's counsel asked one of plaintiff's witnesses, Verde Senter, if he had ever been warned by any of defendant's representatives of the "unsafe, faulty condition or construction" of the roof on that derrick upon which plaintiff was at work at the time of the accident. Over objection, the witness was required to answer the question. His reply was in the negative. If the question was erroneous, as assuming the unsafe condition of the roof, the defendant was not injured. But it did not assume anything. The questioner merely sought to discover whether or not the roof had ever been denounced to the witness by defendant's agents. If Senter had replied in the affirmative, defendant might have been injured; but his answer in the negative was harmless, because it indicated that, so far as the witness was concerned, he was aware of no knowledge of defendant regarding the hidden defects in the roof, if any there were, which had not been described to Ingalls when he was put to work. It was the duty of the employer to maintain the derrick in a safe condition, and it was therefore competent for plaintiff to prove, if he could, that it had become insecure and unsafe, and that the defendant knew and admitted that fact. His effort to make such a showing by witness Senter's testimony was unsuccessful; but it was not error for him to make the attempt.

[3-5] There was no error in the action of the court in overruling the demurrer to the complaint. In that pleading the relationship of employer and employé was set forth. It was averred that, in order to perform the work assigned to him, Ingalls was obliged to stand upon the walking beam of the derrick, and that, while he was so standing on the walking beam the roof on and over the derrick, "by reason of its imperfection, defectiveness, unsafeness, and inadequacy of construction became loose, unfastened, caved in, and suddenly and without warning fell, and in so falling struck the said plaintiff with such force that it knocked him off and from the said walking beam, and caused him to fall, be thrown, and cast to the floor of the said derrick with great force; that the imperfection, defectiveness, unsafeness, and inadequacy of construction of said roof as above alleged was due and caused by the negligence and want of proper or any care on the part of the defendant." The demurrer was both general and special. The special objections were, in brief, that the alleged uncertainty, ambiguity, and unintelligibility were due to the failure to set forth how the unsafeness, inadequacy of construction, etc., were caused by defendant's negligence or want of proper care; to the further failure to aver whether or not plaintiff knew, or might have known, of the impending danger by due diligence and inquiry; and to the additional failure to specify whether the defective condition of the roof was due to latent or patent faults in its construction. It is the rule in this state that negligence may be charged in general terms; but it must appear from the facts averred that the negligence caused or contributed to the injury. Measured by these requirements, the complaint is sufficient, and it properly passed demurrer. Stein v. United Railroads of San Francisco, 159 Cal. 370, 113 Pac. 663.

Besides, the case was fully, fairly, and understandingly tried, and there would be no reason for reversing the judgment, even if the ruling on the demurrer by the superior court had been erroneous. Stein v. United Railroads, supra; Bank of Lemoore v. Fulgham, 151 Cal. 234–237, 90 Pac. 936; Dow v. City of Oroville, 22 Cal. App. 215–221, 134 Pac. 197.

The judgment is affirmed.

We concur: **ANGELLOTTI, C. J.**; **LORIGAN, J.**; **SHAW, J.**; **HENSHAW, J.**; **LAWLOR, J.**

176 Cal. 133

SOLOMON v. FEDERAL INS. CO.

(L. A. No. 3844.)

(Supreme Court of California. Sept. 15, 1917. Rehearing Denied Oct. 15, 1917.)

1. Insurance 🔑281 — Fire Insurance — Breach of Warranty—Materiality.

Under Civ. Code, § 2611, as to breach of warranties in insurance policies, a policy providing that, if any warranty is breached, the policy shall be null and void, issued on an automobile the value of which is misstated, precludes any consideration of materiality of the breach.

2. Insurance 🔑280 — Fire Insurance — Breach of Warranties—Liability.

To describe an automobile in a valued policy as having been made in 1909, when in fact it was made in 1907, is such a material misdescription of the thing insured as to constitute a breach of the express warranty provided for in Civ. Code, § 2607.

3. Insurance 🔑281 — Fire Insurance — Breach of Warranty and Policy.

In view of Civ. Code, § 2565, providing that materiality is to be determined, not by the event, but solely by the probable and reasonable influence of the facts upon the party to whom the communication is due, in forming his estimate of the disadvantages of the proposed contract or in making his inquiries, the mere fact that the jury found the automobile to be worth what it was stated to be worth in the application did not disprove the defense of breach of warranty; plaintiff having stated that he paid $1,000 more for the car than he did pay.

4. Insurance 🔑379(7)—Agency for Insured—Misrepresentations.

Where an insurance agent requests insurance from a company which he does not represent, he is acting for the insured, who is responsible for misrepresentations in the application made out by the broker.

5. Insurance 🔑379(6)—Misstatements in Application—Effect.

The insured is responsible for misrepresentations in the application when it is drawn by a regular soliciting agent of the insurance company, where such an agent has no authority to waive the provision contained therein that the policy is to be avoided if any misrepresentation has been made concerning a material fact.

6. Insurance 🔑96—Agency for Insurer—Retention of Commission—Effect.

Retention of a commission on a policy by an independent insurance broker does not constitute him the agent of the insurer.

7. Insurance 🔑145(1) — Misrepresentations in Application—Effect on Renewal Policy.

That the misrepresentations complained of were made in the application for the original policy and that the policy sued upon was a renewal policy is immaterial.

Department 1. Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by N. R. Solomon against the Federal Insurance Company. Judgment for plaintiff, and defendant appeals. Reversed.

McCutchen, Olney & Willard and J. M. Mannon, Jr., all of San Francisco, for appellant. Geo. E. Whitaker, of Bakersfield, for respondent.

LAWLOR, J. This is an action to recover $3,000 upon a valued fire insurance policy upon plaintiff's automobile. From a judgment for plaintiff, defendant appeals.

Appellant's contention is twofold: First, that the automobile for the loss of which plaintiff brought suit does not answer the description in the policy, thus constituting a breach of warranty and preventing the risk from attaching; second, that it issued the policy on the strength of certain statements in the application for insurance which are untrue, and therefore relieve the defendant from liability.

It appears that in October, 1910, plaintiff resided in Bakersfield, and was the owner of a 4-cylinder, 40 horse power Pierce-Arrow automobile manufactured in 1907; that one Otis Bishop was at that time manager of the insurance department of the Bakersfield Abstract Company; that in October, 1910, plaintiff made oral application to Bishop for insurance upon his automobile, asking for a valued policy in the sum of $3,500, properly describing the car as to horse power, number of cylinders, and year of manufacture; that Bishop turned this information over to his San Francisco correspondents, Gordon & Hoadley, with the request that they secure the insurance, but not mentioning any particular company; that Gordon & Hoadley made out a formal application which described the car as a 1909 Pierce-Arrow of 45 horse power, and stated that plaintiff had purchased the car secondhand for $3,500; that Gordon & Hoadley were general agents for several insurance companies, but did not represent defendant, Federal Insurance Company, with which they filed the application in this case, nor had they ever had any dealings with defendant, before or after this particular transaction; that defendant, acting upon the application, issued a valued policy in the sum of $3,500; that said policy described the car as a Pierce-Arrow, 6-cylinder, 48 horse power automobile; that plaintiff duly paid the premium, out of which Bishop and Gordon & Hoadley retained the usual brokers' commissions; that in October, 1911, upon the notification of Bishop that the policy was about to expire, Gordon & Hoadley secured a renewal for another year for the reduced sum of $3,000; that before plaintiff had paid the premium upon the new policy the car was destroyed by fire, and thereafter defendant refused to accept the premium, disclaiming liability on the ground that the car destroyed did not correspond with the one described in the policy. It is upon this renewed policy that plaintiff brought suit and recovered judgment.

[1] Taking up the first point made by appellant, the question arises whether the misdescription of the automobile in the policy amounts to a breach of warranty such as will relieve the insurer. Our Civil Code (section 2607) provides that:

> "A statement in a policy, of a matter relating to the person or thing insured, or to the risk, as a fact, is an express warranty thereof"

—and that (section 2612):

> "A breach of warranty, without fraud, merely exonerates the insurer from the time that it occurs, or where it is broken in its inception prevents the policy from attaching to the risk."

The effect of this section is limited by section 2610:

> "The violation of a material provision of a policy, on the part of either party thereto, entitles the other to rescind."

But section 2611 goes on to say that:

> "A policy may declare that a violation of specified provisions thereof shall avoid it, otherwise a breach of an immaterial provision does not avoid the policy."

The policy contains the following clause:

> "In the event of any violation of any warranty hereunder this policy shall immediately become null and void."

If the misdescription of the automobile amounts to a breach of warranty, this clause in the policy, taken in connection with section 2611 of the Civil Code, precludes any consideration of the materiality of the breach. See Fountain v. Conn. Fire Ins. Co., 158 Cal. 760, 764, 112 Pac. 546; Bastian v. British American, etc., Ins. Co., 143 Cal. 287, 291, 77 Pac. 63, 66 L. R. A. 255. See, also, Victoria S. S. Co. v. Western Assur. Co., 167 Cal. 348, 357, 139 Pac. 807.

The only question under this head is whether in describing an automobile for insurance purposes in a valued policy the year of manufacture is such a material part of the description that a misstatement in this particular constitutes a breach of the warranty that the thing insured has been properly described. There was no dispute on the point that, other things being equal, a car two years older has a lesser value. This becomes particularly important in a valued policy, where the insurance company agrees in advance that the property insured is worth the amount for which it is insured, in this case, $3,000. Civ. Code, § 2756. Such a valued policy was under consideration in Harris v. St. Paul Fire & Marine Insurance Co. (Sup.) 126 N. Y. Supp. 118, where a 1906 automobile had been described as a 1907 model. The court there said:

> "It is perfectly clear that a used car, constructed in 1906, and insured in November, 1909, is not of the same insurable value as a car constructed in 1907, and the statement of the plaintiff that the car was of the 1907 model was a material representation, upon which the defendant had a right to rely, in issuing a valued policy in the sum of $2,000."

To the same effect are Reed v. St. Paul Fire & Marine Ins. Co., 165 App. Div. 660, 151 N. Y. Supp. 274, and Smith v. American Automobile Ins. Co., 188 Mo. App. 297, 175 S. W. 113, 114. In the latter case the court said:

> "It would seem to be in accord with common knowledge that a five year old automobile would be less valuable than, and not so safe a risk as, one two years old, and that the effects of wear and tear would be more likely to manifest themselves in the older car. If the fact that the machine is five years old instead of two is not material to the risk, we cannot well see what would be."

In the case at bar no testimony was introduced to show the effect of age upon the risk of loss by fire, although in Smith v. American Automobile Ins. Co., supra:

> "It was also shown in evidence * * * that as cars grow older the chances of self-ignition increase on account of the wear and vibration whereby the quantity of gasoline used is greater and fire is more apt to occur."

[2] Respondent does not deny that the description of his automobile in the policy as a 1909 model is in accordance with the statement in the application made out by Gordon & Hoadley, but relies upon the showing made at the trial that appellant had itself supplemented the description in the application by adding that the car had 6 cylinders and 48 horse power. It is not at all clear that the insured, after retaining the policy for a year, can then insist that a misdescription of the thing insured, sufficient to constitute a breach of warranty, was the act of the insurance company and entirely unknown to the insured. See Madsen v. Maryland Casualty Co., 168 Cal. 204, 206, 142 Pac. 51, and cases there cited. We do not, however, pass upon this point, since it is clear that to describe an automobile in a valued policy as having been made in 1909, when in fact it was made in 1907, is such a material misdescription of the thing insured as to constitute a breach of the express warranty provided for in section 2607 of the Civil Code.

[3] The second point made by appellant is that the policy was issued under mistakes of fact caused by respondent's misrepresentations in the application concerning the year in which the car was built and the amount paid therefor. The application for the policy stated that the car was built in 1909, and that plaintiff paid therefor $3,500. In fact, the car was built in the year 1907 and the plaintiff paid $1,500 for it and some merchandise, which, he testified, made the car cost him $2,500. Respondent contends that these misrepresentations are immaterial, in view of the finding that the car was worth $3,000, the amount for which it was insured. But, according to section 2565 of the Civil Code:

> "Materiality is to be determined not by the event, but solely by the probable and reasonable influence of the facts upon the party to whom the communication is due, in forming his estimate of the disadvantages of the proposed contract or in making his inquiries."

See McEwen v. N. Y. Life Ins. Co., 23 Cal. App. 694, 697, 139 Pac. 242; Columbian Insurance Co. v. Lawrence, 10 Pet. 507, 515, 9 L. Ed. 512.

Such a test of materiality makes the purchase price of a second hand automobile particularly important in a valued policy, as it must be manifest that an insurance company will not agree to pay $3,000 for the loss of an automobile which cost the insured but $2,500. This is not a case of overestimating the value of the thing insured, which in an open policy is not necessarily fatal. Here we have the statement of a fact, the price the insured paid for his car. No question of mistaken opinion is involved. Where a valued policy is issued upon the basis of the application alone, as in this case, it is difficult to see what could be more important to the insurer in determining the amount of the policy than positive statements of the year in which the car was built and the price paid for it by the insured.

[4] Respondent seeks to avoid the effect of this conclusion by insisting that the misstatements as to purchase price and year of manufacture appearing in the application were not made by him, but were made by Gordon & Hoadley, whom the court found to be agents of the Federal Insurance Company. But this finding is not sustained by the evidence. As already indicated, the evidence shows that Gordon & Hoadley were not the regular agents of appellant, that they had never represented appellant before or since, and that this particular transaction was the only one in which Gordon & Hoadley and appellant ever had any dealings. Moreover, it was established that Bishop represented the plaintiff, and that Gordon & Hoadley were Bishop's San Francisco correspondents, who made out the application solely at his request, and that appellant knew nothing of the entire transaction until the application was placed in its hands by Gordon & Hoadley. It is well settled that, where, in circumstances such as are presented here, an insurance agent requests insurance from a company which he does not represent, he is acting for the insured, who is responsible for misrepresentations in the application made out by the broker. Parrish v. Rosebud M. & M. Co., 140 Cal. 635, 645, 74 Pac. 312; Mahon v. Royal Union Mut. Life Ins. Co., 134 Fed. 732, 67 C. C. A. 636; McGraw Wooden Ware Co. v. German Fire Ins. Co., 126 La. 32, 38, 52 South. 183, L. R. A. [N. S.] 614, 20 Ann. Cas. 1229, and cases cited.

[5] The law in this state goes further and holds the insured responsible for misrepresentations in the application when it is drawn by a regular soliciting agent of the insurance company, where, as in the policy here, such an agent has no authority to waive the provision contained therein that the policy is to be avoided if any misrepresentation has been made concerning a material fact. Elliott v. Frankfort Marine, etc., Ins. Co., 172 Cal. 261, 156 Pac. 481, L. R. A. 1916F, 1026; Madsen v. Maryland Casualty Co., supra; Sharman v. Continental Ins. Co., 167 Cal. 117, 125, 138 Pac. 708, 52 L. R. A. (N. S.) 670; Iverson v. Metropolitan Life Ins. Co., 151 Cal. 746, 749, 91 Pac. 609, 13 L. R. A. (N. S.) 866.

[6, 7] It does not alter the case that Gordon & Hoadley retained a commission for placing the insurance. Bishop, who admittedly was not appellant's agent, also shared in the commission, and it conclusively appeared at the trial that all independent brokers in San Francisco receive similar commissions. This does not constitute the broker an agent of the insurance company. United Firemen's Ins. Co. v. Thomas, 92 Fed. 127, 34 C. C. A. 240, 47 L. R. A. 450; McGraw Wooden Ware Co. v. German Fire Ins. Co., supra. Nor does it matter that the misrepresentations were made in securing the original policy, of which the one in suit is a renewal; for the latter was issued upon the original application wherein the misrepresentations appeared. McKibban v. Des Moines Ins. Co., 114 Iowa, 41, 86 N. W. 38; 2 Clement, Fire Insurance, 518.

Judgment reversed.

We concur: SHAW, J.; SLOSS, J.

176 Cal. 142

WILBUR v. EVERHARDY et ux.

(L. A. 3975.)

(Supreme Court of California. Sept. 17, 1917.)

1. MINES AND MINERALS ⟹34 — DEED OF PLACER CLAIMS—EFFECT.

Under U. S. Rev. St. § 2320 (Comp. St. 1916, § 4615), a conveyance of a placer claim includes as a matter of law all known veins and lodes of quartz.

2. CONTINUANCE ⟹29—GROUNDS—SURPRISE —SUFFICIENCY OF SHOWING.

Defendant in action to quiet title was not entitled to continuance on the ground of surprise by introduction of a recorded deed, notice of which he is presumed to have had.

3. CONTINUANCE ⟹25—GROUNDS—SURPRISE —SUFFICIENCY OF SHOWING.

It is not error to refuse a continuance for the purpose of securing an absent witness in the absence of showing that her testimony would have had any material bearing nor what the nature thereof would have been.

Department 2. Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by Curtis D. Wilbur against Joseph Everhardy and wife. From an order denying defendants' motion for new trial, defendants appeal. Affirmed.

Adolphe Danziger, of Los Angeles, for appellants. W. Maxwell Burke, of Los Angeles, for respondent.

HENSHAW, J. This appeal is from the order of the court denying defendants' motion for a new trial. Plaintiff brought his action to quiet title to 20 acres of land, property known as "the Plain View placer claim" and as the "Sunset placer claim." In establishing title plaintiff first connected defendant Joseph Everhardy with the property by introducing a copy of his location notice, then his deed to plaintiff of one-half of his interest in the mining claims, and, finally, a later deed of grant to the whole 20 acres described by metes and bounds. "Defendants thereupon expressed surprise at said deed, claiming that the same was made by mistake and that it was intended by the defendant Joseph Everhardy to include by the conveyance thereunder only placer mining rights in the property described therein, and not to include any quartz mining claim rights in said property, and moved for a continuance on said grounds of surprise and mistake." Much evidence was introduced upon this subject-matter, and from that evidence it appeared that there could have been no surprise, either at plaintiff's introduction of this deed, or at his contention that the defendant meant what in it he declared. It was shown that defendants' attorney knew, as he was charged with notice, of the existence of the deed because it was of record. It was shown that after having made the deed for a valuable consideration defendant Joseph Everhardy sought the rescission of the contract with a tender, or an offer of tender back, of the money he received for his deed because his wife objected. It was shown by his advisor who took his acknowledgment to the deed that defendant Joseph Everhardy knew the nature and contents of it at the time he executed it. It was shown (of course, under conflicting evidence) that the bed rock tunnel which it was urged by defendants was work done upon the quartz claims was but a drainage tunnel to relieve the placer claim from water.

[1] But in addition to this the conveyance of the placer claim, as matter of law, included all known veins and lodes of quartz. U. S. Rev. St. 2320 (Comp. St. 1916, § 4615).

[2, 3] Under these circumstances, since there could have been no surprise, the court would have been justified in refusing a continuance, which continuance was sought for the purpose of securing the attendance of the other defendant, the wife of Joseph. But in addition to this it is not made to appear that the evidence of the wife would have had any material bearing upon the controversy, nor yet even is it made to appear what the nature of her evidence would have been.

The order appealed from is therefore affirmed.

We concur: MELVIN, J.; SHAW, J.

176 Cal. 140

WICKS v. RAMPART BOULEVARD CO. et al. (L. A. 3964.)

(Supreme Court of California. Sept. 15, 1917.)

FRAUD ⚷58(2)—MISREPRESENTATION—SUFFICIENCY OF EVIDENCE.

In suit for having sold plaintiff a lot in a tract, on the false representation, evidenced by a map, that a street had been dedicated as a public highway and would in time be opened as such, evidence *held* insufficient to support plaintiff's contention.

Department 2. Appeal from Superior Court, Los Angeles County; Chas. Wellborn, Judge.

Action by M. L. Wicks, Jr., against the Rampart Boulevard Company, a corporation, and the Union Trust & Realty Company, a corporation. From judgment for defendants, and an order denying his motion for new trial, plaintiff appeals. Judgment and order affirmed.

Geo. S. Hupp and Frank C. Hill, both of Los Angeles, for appellant. Lewis W. Andrews, Thomas O. Toland, Andrews, Toland & Andrews and Cedric E. Johnson, all of Los Angeles, for respondents.

HENSHAW, J. Plaintiff sued, alleging that defendant, Rampart Boulevard Company, had sold to him a lot in a tract upon the representation, evidenced by a map, that a street (Second street) between Coronado street and Rampart boulevard, in the city of Los Angeles, had been dedicated as a public highway, and would in time be opened to the use of the public as such highway. After trial the court found against plaintiff's contentions, and he appeals from the judgment and from the order denying his motion for a new trial.

Plaintiff upon the trial testified that after visiting the tract of land he found thereon one Nolan who represented himself as the agent of the selling agents of the tract, and that Nolan gave him a map showing the division of the tract into lots and the streets which were to traverse the tract. On this map was delimited Second street. He made his payment on the purchase price of the lot and entered into a contract for the purchase, which afterward he fulfilled; that years passed and the defendant manifested no intention to open the street, wherefore he brought this action to have his rights in it defined. The defendant Boulevard Company by its evidence showed that it owned this tract; that the real estate firm of Strong & Dickinson was engaged by it to secure purchasers after it had prepared its official map (official in the sense that it was adopted by the corporation defendant, the owner of the land, and filed for record), which official map was to show the lots and their prices, and the public streets. Strong & Dickinson were also interested as owners or part owners in an adjoining tract known as "Rampart Heights Division B." Without authority from defendant, Rampart Boulevard Company, or its officers, and even without their knowledge, Strong & Dickinson prepared an advertising map, combining the tract in which they were interested with an unauthorized plat of the lands of the defendant corporation. This unauthorized map purported to show Second street to be a public street as contended for by plaintiff. It was a copy of this unauthorized map which was delivered by Nolan to plaintiff. Nolan, however, had no authority to bind either Strong & Dickinson or the defendant, Rampart Boulevard Company. Strong & Dickinson never gave to Nolan any copies of this unauthorized map. He secured them without their knowledge from their office, and when they knew that he had possession of some of them they went to his place of business, gathered up all that could be found, and destroyed them. Moreover, the writing which Wicks received from Nolan when he made his deposit on account of the purchase price declared expressly that it was not a contract of sale. The evidence shows that to enter into such a contract it became necessary for the plaintiff to call upon Strong & Dickinson, and he did so. In the negotiations with Mr. Dickinson which resulted in the executory contract of sale into which Mr. Wicks finally entered, the official map of the tract was before the parties. This official map showed that there was no such street as Second street, and the contract which was entered into made express reference to this official map. Thereafter the plaintiff with the consent of the defendant owner of the land abandoned this executory contract, and negotiated with the defendant for a new purchase, a purchase embracing less land than that called for by his original contract. Under this arrangement the earlier contracts were surrendered, and he took a deed to one lot as delineated upon the official map, the plaintiff upon this matter himself testifying that the original contracts were all surrendered at the time he accepted his deed, and that before he got his deed he knew that the recorded map referred to in his contract and in his deed did not show that the disputed strip was a street, and did show it as being two lots; that at the time he took his deed he made no objection to having the property deeded by reference to the map; "I was not counting on a street; all I counted on myself was a crosswalk."

Though the evidence discloses more than this, here is enough to support the finding which the court made against plaintiff's contention. This finding is of determinative consequence and renders unnecessary the consideration of any other proposition the appellant advances.

The judgment and order appealed from are therefore affirmed.

We concur: MELVIN, J.; SHAW, J.

176 Cal. 177

Ex parte BRITT. (Cr. 2066.)

(Supreme Court of California. Sept. 20, 1917.)

1. Habeas Corpus 🔑99(1)—Detention of Infants—Sufficiency of Evidence.

A writ of habeas corpus by a father to obtain custody of his minor child in the care of her grandaunt denied, owing to special circumstances of father's character and ability, child's inclination, and her present surroundings.

2. Habeas Corpus 🔑3—Detention of Infants—Nature of Controversy.

A controversy over the custody of a minor child in the care of her aunt arising on the father's petition for habeas corpus should have been settled in a guardianship proceeding or on application for adoption.

In Bank. Petition for writ of habeas corpus by Andrew J. Britt to obtain custody of his daughter, Ruby Britt. Petition denied and writ discharged.

Cecil H. Phillips, of San Bernardino, for petitioner. McNabb & Hodge, for respondent.

MELVIN, J. Andrew J. Britt, father of Ruby Britt, a minor child of the age of seven years, sought to obtain the custody of his daughter, who is now in the care of her grandaunt, Amanda Starkweather, a resident of this state. Upon his petition a writ of habeas corpus was issued, and the matter has been heard upon record evidence, stipulated facts, and depositions.

It appears that Britt and his wife and child resided at Kansas City, Mo., where he was employed as a night watchman and a painter. On the 7th of July, 1910, Mrs. Britt, who had been in failing health, went to Colorado in the hope that the change would benefit her. Andrew Britt, according to his own testimony accompanied her to the train, having given her the money necessary for the journey, and he kissed her good-bye. Within a very few weeks after her departure he filed a verified complaint charging her with adultery and also with deserting him on the 7th of July, 1910, the day upon which she had departed with his full approbation. We cite this incident as one of the indices to the character of Andrew Britt which this record furnishes. Mrs Britt did not know of the existence of this complaint until September, 1911, as she deposed in her verified answer and cross-bill.

Notwithstanding the filing of his complaint, shortly after it was filed, and very soon after Mrs. Britt's return to Kansas City, Mo., a reconciliation took place, and the Britts lived together for some months; she being still ignorant of the pendency of the action for divorce. Britt, in his testimony before our commissioner, places the time during which they then lived together at a year or "a little over." He then went to California, where he remained for six months. During that time he contributed nothing to the support of the child or the mother, although he says he sent $30 for taxes and interest due on his property and the mortgage thereon.

During his absence Mrs. Britt filed an answer and cross-bill in the action for divorce, and on January 8, 1912, her prayer was granted, and the custody of the minor child was awarded to her. She was also given alimony in the sum of $800—an obligation subsequently met by Britt by the transfer to her of his interest in the equity in their home. The decree of divorce was given by the circuit court of Jackson county, Mo.

After his sojourn in California petitioner returned to Kansas City, but did not contribute to the support of his child, because, as he said, he was not given opportunity to see her whenever he wanted to do so. The testimony of Mrs. Martin, the child's grandmother, shows that at that time Mrs. Britt was having a hard struggle to support herself, and Mrs. Martin, although a poor woman, was aiding her in the care of the little girl. Of course, petitioner was not legally bound to care for the child at that time, but his conduct in the premises indicates that his feeling for the infant was not warmly paternal.

After some months of struggle Mrs. Britt, who had become a victim of tuberculosis, went to Colorado Springs. Britt paid her fare, and shortly after her departure with their child he followed her, with the understanding that they were to remarry. Not obtaining work in Colorado Springs, Britt went to Los Angeles, and after securing employment there sent for his former wife, who went to Los Angeles, where they lived ostensibly as man and wife for 2½ months. This relation, which Britt characterizes as "a try-out proposition," was severed because he objected to Mrs. Britt's association with some woman who was their neighbor and Mrs. Britt refused to give up the friendship. He left her without money in a strange city, far from her friends, and although he declares that she refused his offers of money made a few days later when he returned to their apartment, which she still occupied, the fact remains that Mrs. Starkweather, Mrs. Britt's aunt, who is the respondent here, paid the expenses of the journey to Kansas City, Kan. (just over the state line from Kansas City, Mo.), where Mrs. Martin resided. Mrs. Britt, who had visited for a short time with Mrs. Starkweather at San Bernardino, reached Kansas City, Kan., in April, 1913. She went to work, but left the child with Mrs. Martin, who had the little one until Mrs. Starkweather took Ruby to California under circumstances which we shall presently discuss.

Mrs. Britt died in April, 1914. Two weeks before that time Mr. Britt gave the grandmother $10 and promised her $10 a month for the support of the child. According to Mrs. Martin's testimony, his entire subsequent contributions for care and clothing for Ruby amounted to not more than $30 or $40. He asserts that he gave more money than that, but admits that his payments ceased in June, 1914, because he was not given full opportunity to visit his daughter.

Mrs. Martin, who, according to her testimony, had become desperately poor by reason of the loss of the support formerly afforded her by her husband and son, both of whom had died, began proceedings in the juvenile court of Wyandotte county, Kan., alleging in her affidavit that Ruby Britt was an abandoned child, her mother being dead and her father "having practically abandoned her for several years." A hearing was had, and Harriet B. Cole was appointed guardian of the person of the little girl. This order was made on June 28, 1915. Ten days later Andrew J. Britt applied for a hearing in the matter on the ground of falsity in the averments of Mrs. Martin's application and on the ground that he was entitled to the custody of the child, Ruby Britt. After citation to the child two hearings were had, and the court overruled the motion with costs taxed against Britt.

In October, 1915, Amanda E. Starkweather applied for an order of adoption, and, the guardian consenting, the probate court of Wyandotte county, Kan., declared Ruby Britt duly adopted by Mrs. Starkweather. Immediately after this order was made, Mrs. Starkweather brought Ruby to California, and since that time, as the evidence abundantly shows, has given her all the care, affection, and nurture that a mother might bestow. The little girl has been somewhat afflicted, suffering at times with a weakness of the ankles requiring that braces be worn on them. Mrs Starkweather is a woman of means, and has surrounded the child with the comforts as well as the good moral influences of an excellent home.

Petitioner learned of the adoption proceedings soon after the order was made, but he took no steps to get possession of his child, and made no demand upon Mrs. Starkweather until he came to California about a year later. He testifies that the delay was due to the fact that he was saving money for the fight for the recovery of possession of his child.

It appears without contradiction that the little girl has a great love for Mrs. Starkweather and a distinct aversion to petitioner.

[1, 2] We have thus recited the facts, perhaps at unnecessary length, for the purpose of indicating that this is a controversy which should have been settled in a guardianship proceeding or on an application for adoption of the minor. It is conceded by counsel for respondent that the order of the probate court in Kansas was made without jurisdiction because Mrs. Starkweather was not a resident of that state and could not under its laws adopt the minor. But it does not follow that upon proceedings under a writ of habeas corpus this court will award the custody of the child to the father. Where, under appropriate proceedings, a parent has been declared a fit and proper custodian of the person of a child, this court has been inflexible in the enforcement of the parental right, and has never allowed its judgments to be swayed by the poverty of the parent as compared with the affluence of the person from whom the child is demanded. Likewise the court has frequently ignored the affection of the child for the custodian and the manifest dislike of the minor for the parent. But in every instance we have done this under the plain mandate of our guardianship laws. We might cite many authorities upon this

point, but the rule both in guardianship proceedings and in those taken under writs of habeas corpus is well illustrated by such cases as Guardianship of Mathews, 169 Cal. 26, 145 Pac. 503, Guardianship of Mathews, 164 Pac. 8, and In re Mathews, 167 Pac. 873, Crim. No. 1997, in which the opinion was filed September 17, 1917. But here we are not impelled to put into operation the decree of a court establishing the fitness of a parent for the custody and control of a child. It is very unlikely that any court, upon application for letters of guardianship, would pronounce this petitioner, in view of such evidence as that which has been presented to this court, a suitable person for the control, education, and rearing of the little girl, his daughter, Ruby Britt. The court of proper jurisdiction in Missouri deprived him of the custody of his child in the suit for divorce. The juvenile court in Kansas to which he applied for the further hearing in the guardianship matter refused to set aside its order previously given and made; such refusal following two hearings held after the case was reopened. Every time his fitness has been the subject of judicial inquiry the court has determined that he was not the proper person to possess and control his child. While he may be able to give the child the necessaries of life, he declares his purpose to be, if given custody of her, to place her with a man and his wife whose duties call them away from home every night until a late hour. He purposes to dwell in the same house, but his duties as a janitor would take him away from the child frequently at night. The words of the late Chief Justice Beatty in denying a petition for a writ in a case similar to this (In re Gates, 95 Cal. 461, 30 Pac. 596) are entirely appropriate here. He said:

> "In view of the special circumstances of the case, I do not feel called upon to make any coercive order by which the mere legal right of the petitioner may be enforced against the child's manifest inclination and reasonable choice to remain where she is."

The same doctrine has been announced by the District Court of Appeal. In the Matter of the Application of Bell, 28 Cal. App. 547, 153 Pac. 240. These cases are to be carefully distinguished from those in which, after hearings held for the very purpose of determining the fitness or unfitness of a parent, courts have awarded the custody of a child. They are also quite different from those cases in which the demand for the possession of a child is supported by a showing of ability, willingness, and sincere effort to perform parental duty. In the matter before us it appears that the petitioner's fitness has been denied in judicial proceedings more than once; that for a long time he showed no desire for the society of his child; that he withheld from her assistance when a really affectionate parent would have offered it; and that after Mrs. Starkweather, doubtless in the utmost good faith and in the full belief that she was within the sanction of the law, had taken the child into her household, he waited long months before he asserted his supposed right as a parent to provide a home for his little daughter. These are some of the "special circumstances" which operate in favor of our refusal to make the "coercive order" which petitioner seeks.

The prayer of the petitioner is denied, and the writ is discharged.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; HENSHAW, J.; SHAW, J.; LAWLOR, J.

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176 Cal. 209

REINHARDT v. REITZ. (Sac. 2357.)

(Supreme Court of California. Sept. 22, 1917.)

1. MALICIOUS PROSECUTION ⟹32—MALICE—EVIDENCE.

Want of probable cause does not raise a presumption of malice; but malice must be proved like any other fact in the case.

2. MALICIOUS PROSECUTION ⟹71(3) — ABSENCE OF MALICE—QUESTION FOR JURY.

Evidence in malicious prosecution *held* sufficient to go to the jury on the want of malice.

3. APPEAL AND ERROR ⟹1064(1)—HARMLESS ERROR—INSTRUCTIONS.

The evidence warranting the jury in finding want of malice, error in instructing that the law presumes malice from want of probable cause is not harmless.

Department 1. Appeal from Superior Court, Glenn County; Wm. M. Finch, Judge.

Action by Walter Reinhardt against John Reitz. Judgment for plaintiff, and defendant appeals. Reversed.

Frank Freeman, of Willow, for appellant. Ben F. Geis and Claude F. Purkitt, both of Willow, for respondent.

LAWLOR, J. From a judgment rendered in an action brought for malicious prosecution defendant presents this appeal. The plaintiff was arrested and lodged in jail upon the filing of a complaint by defendant in a justice's court charging him with the crime of burglary. When the preliminary examination was had, the plaintiff was discharged, whereupon he brought this action to recover damages for injury to his reputation and good name and for money expended for counsel fees in defending himself against the charge. The action was tried before a jury, and a verdict rendered for $575 and costs.

It appears from the evidence that the defendant is a German who was at the time of the arrest of the plaintiff not familiar with the law or with the practice of the courts touching matters involved. For several years prior to and at the time of the alleged burglary in the commission of which it was claimed certain money belonging to defendant was taken, he was conducting a saloon

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⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

in the town of Willows. His money was always kept hidden in various places in the saloon. Besides some change kept in a cash register, it was his practice to place about $30 in gold under a bottle on what was called the back bar. His bartenders used this money when necessary for the making of extra change. The balance of the gold the defendant concealed among the barrels, boxes, and other articles stored in the cellar of his saloon, the sole entrance to which was through a trap door in the floor of the main barroom. At the time of the burglary he had thus secreted in the cellar about $800 in gold. He usually attended to his business alone, and did his own janitor work, but occasionally employed others to assist in tending bar. These bartenders did not have occasion to go into the cellar, for the defendant always brought up the liquors himself and personally replenished the bottles on the bar for the daily consumption. For nearly five weeks the plaintiff had been thus employed to tend bar. He was a fellow countryman, was married, had several children, and according to the defendant's testimony, had told him that his trade in Germany was that of a locksmith. The plaintiff denies having made any such statement. Although the defendant testified that he often sent the plaintiff into the cellar in the course of his employment, the latter declared that the only time he went there was with a customer who was looking for a barrel, and that he did not then see any money. The evidence does not show that the plaintiff ever had knowledge of any money being kept in the cellar. Part of his duties consisted in opening the saloon in the morning. For this purpose he had been supplied with keys to the front and rear doors which remained in his possession during the period of his employment.

Plaintiff was compelled to find other employment because the defendant told him that he would do the work himself. Plaintiff found work with one Dave Proulx, a rival saloon keeper, who had a place of business on the same street, and also did janitor work for various persons, including one W. H. Markham. As tending to show defendant's ill will toward plaintiff, testimony was introduced to the effect that many of his former customers had followed plaintiff and given their trade to the Proulx saloon. The defendant was heard to complain that "Walter," meaning the plaintiff, "ran my business down." However, after dispensing with plaintiff's services, defendant continued to do his own work.

It further appears that on Monday morning, the day of the burglary, defendant entered his saloon by the back door, as was his custom, the other doors all being securely locked and bolted from the inside, and discovered gravel on the floor leading to the cellar entrance and to the back of the bar. He had thoroughly cleaned the saloon the night before. His suspicions being aroused he immediately looked for his money, which he had last seen on the preceding Saturday evening, and discovered that all of it had been taken. There was evidence tending to show that the place had been burglarized, and that the burglar had gained admission by unlocking the rear door. The door was secured by two locks, and required two keys to open it. The defendant testified that he called the city marshal. With him came Markham, who told defendant that plaintiff had not appeared at his place of business to do the janitor work, nor at Proulx's saloon, where he was then employed. Defendant also testified that he then recalled what plaintiff had told him about his trade as a locksmith, and stated to the marshal that he suspected the plaintiff had stolen the money. Markham suggested that a warrant be sworn out, and the marshal assured defendant it was the proper thing to do. But at the trial defendant testified:

> "I didn't want to arrest him. I wanted the house [Reinhardt's home] searched. I didn't know the difference between a warrant and a search warrant."

At all events it appears that he applied at the justice's court for a warrant against the plaintiff, and was afterwards informed that the plaintiff had been arrested and lodged in jail. Not being able to raise the required bail, plaintiff was kept imprisoned for three days. In the meanwhile the district attorney, without consulting defendant, prepared a search warrant and requested him to sign an affidavit for the purpose of having it issued, which defendant did. Plaintiff's house was searched, but no part of the missing money was found, nor any evidence secured against him. And at the preliminary examination the magistrate found that there was not sufficient cause to believe plaintiff guilty of the offense charged.

[1] The principal point urged by appellant is that the evidence is insufficient to justify the verdict in so far as it implies a finding of want of probable cause for plaintiff's arrest, and the existence of malice. But we are not called upon to consider the sufficiency of the evidence, for the judgment must be reversed upon another ground. The court below erroneously instructed the jury that:

> "If there was no probable cause for the prosecution, the law presumes malice on the part of John Reitz. Prosecution without sufficient grounds and without probable cause, the result of which is the discharge of the prosecuted, raises the presumption of malice."

This statement of the law is not correct. The proper rule is as stated by the court in another instruction:

> "Malice must be proven the same as any other fact in the case. The want of probable cause does not raise a legal presumption of malice." Runo v. Williams, 162 Cal. 444, 122 Pac. 1082.

[2, 3] We have set out the evidence somewhat at length in order to determine whether

the giving of the erroneous instruction was prejudicial error. In our opinion the state of the evidence will not warrant the conclusion that the jury could not, under proper instructions, have found a want of malice.

Judgment reversed.

We concur: SHAW, J.; SLOSS, J.

(176 Cal. 164)

ADAMS v. PRATHER et al. (S. F. 8054.)

(Supreme Court of California. Sept. 18, 1917.)

APPEAL AND ERROR ⇐843(2)—BOND ON APPEAL—SUBSEQUENT APPEAL.

On appeal from order staying execution of judgment directing delivery of real property, the court will not review trial court's alleged noncompliance with Code Civ. Proc. § 945, requiring undertaking on appeal covering value and use of property pending appeal, where judgment has already been affirmed upon a former appeal; the question being merely an abstract proposition of law, and plaintiff's remedy being to apply for a writ of mandate if necessary to compel the trial court to conform its statutory duty in regard to the bond.

In Bank. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Edson F. Adams, as executor of will of Thomas Prather, against Samuel D. Prather and others. Plaintiff appeals from order approving undertaking on appeal to stay execution and from order staying execution of judgment in his favor. Appeal dismissed.

See, also, 167 Pac. 534.

Corbet & Selby, of San Francisco, Snook & Church, of Oakland, and J. P. O'Brien, of San Francisco, for appellant. Chapman & Trefethan, of Oakland, and R. H. Countryman, of San Francisco, for respondent.

VICTOR E. SHAW, Judge pro tem. The action was brought by plaintiff as executor on behalf of creditors of Thomas Prather, deceased, to have certain conveyances of real property made by him without consideration to defendant Samuel D. Prather declared fraudulent and void. Judgment was entered as prayed for, declaring the conveyances and transfers of the property "fraudulent and void as against the creditors of Thomas Prather, deceased," and authorizing plaintiff, upon obtaining an order so to do from the superior court sitting in probate, to sell so much of the property as might be necessary to pay said creditors "in the same manner as if the said Thomas Prather had died seised thereof." By the decree "it is further ordered that the defendant Samuel D. Prather deliver to said plaintiff, as such executor, for the purposes aforesaid, all of said properties, real and personal, hereinbefore set forth and described, to be sold and applied in the manner aforesaid." On March 20, 1916, defendant Samuel D. Prather perfected an appeal from this judgment, and, desiring to stay execution thereof, presented and filed a duly executed undertaking, the sole condition of which was that during his possession of the real estate described in the decree he would protect it from waste. Thereupon the court, on June 1, 1916, made an order that execution of the judgment from which the appeal was prosecuted be stayed pending a determination thereof. From the order so made plaintiff has appealed, his contention being that the judgment directs the delivery of possession of real property as to which defendant was not, under the provisions of section 945 of the Code of Civil Procedure, entitled to a stay of execution, save and except upon filing an undertaking to the effect that he would, if the judgment was affirmed or the appeal dismissed, pay the value of the use and occupation of the property during the possession thereof and until delivery of the same pursuant to the judgment.

The judgment from which Samuel D. Prather prosecuted his appeal was affirmed by an opinion of this court (167 Pac. 534), filed on August 31, 1917. Hence, should we hold in accordance with appellant's contention that the trial judgment should have required an undertaking covering the value of the use and occupation of the property pending the appeal, it would be an idle act and serve no purpose, since the judgment, the stay of execution of which was sought, having been affirmed, there is nothing upon which such order for an undertaking, if made, could operate. The issue presented by the appeal is a mere abstract proposition of law, as it must be in all such cases where the court refuses to require the giving of the statutory undertaking to stay execution of judgment. The nature of the case is such that the only adequate remedy of an aggrieved party is, as was said by this court in Doudell v. Shoo, 158 Cal. 50, 109 Pac. 615:

> "If the judge of the court below refuses to perform his plain statutory duty in this respect, the remedy of the appellant is to apply to this court for a writ of mandate to compel him to do so."

For the reasons given, the appeal is dismissed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOSS, J.; MELVIN, J.; HENSHAW, J.

(176 Cal. 148)

ATCHISON, T. & S. F. RY. CO. v. WEST.

(L. A. 4024.)

(Supreme Court of California. Sept. 17, 1917.)

1. Work and Labor ⚷10—Payment—Recovery — Necessity of Recording Contract.

Where written contracts, under which a railroad contractor did work, were not recorded, the road could nevertheless recover against the contractor for excessive payments over and above the contract price paid the contractor by mistake, the contract price measuring the amount the contractor was entitled to retain notwithstanding the law's declaration that for nonrecordation such a contract is void.

2. Payment ⚷89(5)—Payment by Mistake—Sufficiency of Evidence.

In a railroad's action against its contractor for work on its right of way to recover excessive payments made by mistake, evidence *held* sufficient to show mistake.

3. Contracts ⚷292—Decision of Umpire—Fraud.

Where, by the contract between a railroad and one doing work for it, the action of the road's chief engineer in approving vouchers in payment for work done was final and conclusive upon the parties, the binding effect of his decision was vitiated by fraud of the grand division engineer and of the voucher clerk, inducing mistake by the chief engineer.

Department 2. Appeal from Superior Court, San Bernardino County; Benjamin F. Bledsoe, Judge.

Action by the Atchison, Topeka & Santa Fé Railway Company, a corporation, against George W. West. From a judgment for plaintiff and an order refusing motion for new trial, defendant appeals. Judgment and order affirmed.

Anderson & Anderson, of Los Angeles, and Chas. L. Allison, of San Bernardino, for appellant. E. W. Camp, U. T. Clotfelter, M. W. Reed, and A. H. Van Cott, all of Los Angeles, and Leonard & Surr, of San Bernardino, for respondent.

HENSHAW, J. Plaintiff charged that it entered into a contract with defendant for the doing of certain work on its railroad right of way. This work, in general terms, was to widen cuts and fills. The doing of it necessitated upon the part of the contractor the movement of materials of different character—earth, cemented material, and solid rock. These materials were measured by the cubic yard. The contractor was to receive different prices for the handling of the different materials. Thus the softer earth of the embankment was to be paid for at 20 cents, and the hardpan of the embankment at 32 cents per cubic yard. "Extra cement material" was to be paid for at 62 cents per cubic yard. Solid rock was to be paid for at 75 cents per cubic yard. In different causes of action plaintiff charged overpayments to its contractor on account of the work which he had performed. In some of these causes of action the charge of overpayment was based upon mutual mistake; in others upon fraud perpetrated upon plaintiff by the defendant and by the engineer employed by plaintiff to make estimates of the amount and character of the work done by defendant. The total amount thus overpaid defendant by plaintiff was alleged to be $22,797. The cause was tried before a jury which returned its verdict in favor of the plaintiff in the sum of $10,000. On this verdict judgment was entered in favor of plaintiff, and from that judgment and from the order of the court refusing to grant his motion for a new trial defendant appeals.

Broadly speaking, the evidence of plaintiff established its system of work and payments therefor. The plaintiff employed division engineers, and in the division of one of them, Bradley, the work here in question was performed. This division engineer (and others) reported to Mr. Arey, engineer of grand division, who, in turn, reported to Mr. Phillips, chief engineer. It was the duty of the division engineer, Mr. Bradley, to forward to Mr. Arey at the end of each month a statement of the amount and character of the work performed. If Mr. Arey was dissatisfied with this report in any particular and saw fit to revise or change it in any material respect, it became his duty to advise the chief engineer, Mr. Phillips, of this difference of view between himself and his division engineer. Differences did arise between Mr. Bradley and Mr. Arey. These differences resulted in changes made in Mr. Bradley's estimates of the character of the material moved, with the result, generally speaking, that Mr. Arey decreased the number of cubic yards of the earthy material which was to be paid for at 20 cents per cubic yard, and largely increased the estimates of rock, cemented material, and hardpan. Mr. Arey was the brother-in-law of the contractor, defendant West, and they were in communication with each other upon the subject of this work. Mr. Arey did not adopt the uniform and required practice of consulting with his chief engineer, Mr. Phillips, over these differences between himself and Mr. Bradley, but forwarded his estimates to the voucher clerk, who through fraudulent collusion or through gross mistake himself did not call the chief engineer's attention to any differences or discrepancies, but presented in the form of regular vouchers Mr. Arey's estimates thus made, for the chief engineer's approval. Thus they were approved. The further evidence of the plaintiff went to establish, and to the satisfaction of the jury did establish, plaintiff's contention and Mr. Bradley's estimates as to the character of the material moved by the contractor.

[1] We have, for the purposes of the legal considerations, thus sufficiently outlined the nature of the evidence. Appellant's first contention is that as the written contracts under which he did the work were not recorded, they were void in law and cannot be made the basis of any recovery. This contention,

however, is in direct opposition to all adjudications. Laidlaw v. Marye, 133 Cal. 170, 65 Pac. 391; Sullivan v. Cal. R. Co., 142 Cal. 201, 75 Pac. 767; Condon v. Donohue, 160 Cal. 749, 118 Pac. 113; Mannix v. R. L., etc., Co., 166 Cal. 333, 136 Pac. 52. The gravamen of this action lies in the mistake whereby the contractor was paid over and above the contract price. It has ever been held that notwithstanding the declaration of the law that for nonrecordation such a contract is void, yet the contract price measures the contractor's right of recovery. Here we have the reverse of the proposition. The contract price equally measures the amount which the contractor is entitled to retain. Appellant next contends that the contracts were incomplete, inchoate, and therefore of no legal efficacy. The contracts are of considerable length. A setting of them forth would establish their completeness and the unsoundness of appellant's contention in this regard. He signed them; he did his work under them; no other question is presented save whether or not he was overpaid under the plain and unambiguous terms of the contract. This should suffice without exemplification of the contracts in full.

[2] Next, appellant contends that the evidence is insufficient to show any mistake. We have sufficiently outlined the character of the mistake. Indeed, it is but kindness to call it a mistake, since the evidence very clearly establishes a fraud upon the part of Arey and the voucher clerk, which fraud, however, was not with sufficient directness made chargeable against the defendant. Appellant's argument in this respect is that the contracts made the chief engineer "the final umpire in all questions which may arise relative to work done under this contract." Then follow aspersions upon the competency and credibility of this chief engineer, the like of which this court regrets to say are of all too frequent occurrence in the briefs presented by appellant's counsel. Thus it is said that the chief engineer "seeks to evade his responsibilities in the premises by a claim of gross carelessness and utter incompetence on his part—a claim fully justified in every possible particular if his testimony is worthy of any credence whatever by any tribunal of ordinary intelligence." It is then argued that by reason of this asserted incompetency the chief engineer delegated full authority to Mr. Arey to pass judgment upon these matters, and that Mr. Arey having done so, his judgment is final. The brief statement of facts which we have heretofore made wholly disposes of such a contention.

[3] Appellant complains of the refusal of the court to give instructions which were to the effect that as under the contracts the chief engineer of the company was the final umpire in all questions which might arise relative to the work done, and as he had approved the vouchers in payment for the work done, his action was final and conclusive upon the parties. It scarcely needs the citation of authority to support the declaration that the binding effect of such an umpire's decision is wholly vitiated by fraud, and that while the chief engineer actually approved these vouchers by mistake, that mistake was induced by the deliberate misconduct amounting to fraud of the engineer Arey and the voucher clerk Graham. The instructions were therefore properly refused.

For these reasons the judgment and order appealed from are affirmed.

We concur: MELVIN, J.; LORIGAN, J.

176 Cal. 159

BRAUN v. KAHN et al. (S. F. 8055.)

(Supreme Court of California. Sept. 18, 1917.)

1. Vendor and Purchaser 🔑266(7)—Vendor's Lien—Waiver.

The bringing of an action upon an obligation given by the vendee for the price of real estate and the recovery of a judgment and issuance and levy of an execution on the land subject to the vendor's lien is not a waiver or extinguishment of the lien, particularly where such land has been protected from ordinary executions by a homestead declaration.

2. Vendor and Purchaser 🔑280(1)—Vendor's Lien—Enforcement—Complaint.

Under Civ. Code, § 3046, providing that one who sells real property has a vendor's lien thereon for so much of the price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer, where a complaint in an action to enforce a vendor's lien set forth the fact that plaintiff claimed the lien for the balance of the price for which the purchaser's note had been given, it was sufficient against a general demurrer, though not expressly alleging that plaintiff had or was entitled to a lien "for so much of the price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer."

3. Vendor and Purchaser 🔑266(1)—Vendor's Lien—Waiver.

To constitute a waiver of a vendor's lien, there must be some act or omission on the part of the vendor inconsistent with his assertion of the lien and evincing his intention to waive it and such as would render it inequitable to thereafter attempt to assert the lien.

4. Vendor and Purchaser 🔑285(2)—Vendor's Lien—Enforcement—Judgment.

A judgment in an action to enforce a vendor's lien was not defective because it did not provide for the procedure or for redemption upon foreclosure of the lien; as the Code provides the procedure and its sections are to be read into the judgment.

In Bank. Appeal from Superior Court, Alameda County; Wm. H. Waste, Judge.

Action by William Braun against Emilie Kahn and another. From a judgment for plaintiff, defendants appeal. Affirmed.

W. H. Morrissey, of San Francisco, for appellants. Walter R. Dunn, of Oakland, for respondent.

SHAW, J. The appeal is from a judgment declaring and enforcing a vendor's lien in favor of the plaintiff upon certain property sold by the plaintiff to the defendant Emilie Kahn.

The appeal was taken to the District Court of Appeal, and in that court in due time the judgment was affirmed upon an opinion prepared by Mr. Justice Richards.

The petition for a rehearing was granted, not so much from dissatisfaction with that opinion, as from the fact that the appeal had been taken to the wrong court, and the District Court was without jurisdiction, and the further fact that our own decisions regarding the essentials of a waiver of a vendor's lien were in considerable confusion, and it was thought best that a decision be made by this court.

[1] The proposition that the bringing of an action upon an obligation given by the vendee for the purchase money of real estate, and the recovery of a judgment thereon for such purchase money, does not extinguish the vendor's lien, is established throughout the country with practical unanimity. In addition to the authorities cited in the opinion of Justice Richards, we cite the following: 39 Cyc. 1841; 29 Am. & Eng. Ency. of Law, 753, 768; 2 Sugden on Vendors, bottom page 679; 2 Warvelle on Vendors, § 701; 2 Jones on Liens, § 1076; Richardson v. Green, 46 Ark. 271; Yetter v. Fitts, 113 Ind. 34, 14 N. E. 707. The rule being, as stated in the opinion of the District Court, that the vendor's lien is not waived by a judgment unless the vendor has exhausted his remedy by execution upon the property, it follows that the mere issuance and levy of an execution on the land subject to the vendor's lien, particularly where such land has been protected from ordinary executions by a homestead declaration, does not amount to a waiver of the vendor's lien.

[2-4] We are satisfied with the discussion of the case in the opinion of the District Court, and hereby adopt the same as the opinion of this court. It reads as follows:

"Concerning the facts of the case there is no material dispute. In August, 1912, the defendant Emilie Kahn purchased from the plaintiff the premises in question, together with certain building materials stored thereon, for the lump sum of $3,450, paying the sum of $3,000 in cash, and giving the plaintiff her promissory note for the balance of the purchase price of said property in the sum of $450, payable six months after date. On January 3, 1914, Emilie Kahn married Hugo Sander, and on the same day made and executed a declaration of homestead in her new name upon the property, which was duly recorded on January 5, 1914. The declaration of homestead as thus made and recorded did not disclose the name under which she had acquired the property. On December 17, 1914, the note still remaining unpaid, the plaintiff brought suit upon it without alleging or proving the existence of his vendor's lien, and presently took a default judgment against the defendant therein (Emilie Kahn), upon which judgment he had issued and caused to be levied an execution upon the property sold by him to her, but took no further action looking to a sale of the property upon such execution. On February 24, 1915, the plaintiff commenced the present action, setting forth in his complaint the previous judgment, and alleging the same to have been recovered upon the note which had been taken for the unpaid portion of the purchase price of the property, claiming a vendor's lien thereon, and praying for a recovery upon said judgment and for a sale of the property to satisfy such lien. The defendants demurred to the complaint generally, and also moved for judgment on the pleadings upon the ground that the complaint did not state facts sufficient to constitute a cause of action, and also upon the ground that the plaintiff had waived his vendor's lien by his failure to claim the same in his previous suit. The demurrer was overruled, and the motion denied, whereupon the defendants answered, denying the existence of the vendor's lien, and also averring that the note had been given for the building materials which had gone with the sale of the real property, and not for any portion of the latter's purchase price. Upon the issues thus framed a jury found a verdict in plaintiff's favor as to the existence of the debt, which verdict the court adopted, and further decreed that a vendor's lien still existed in plaintiff's favor, and for the foreclosure of which it was directed that an execution issue and the property be sold. It is from this judgment that the appellants prosecute this appeal.

"The first contention of the appellants is that their demurrer to the plaintiff's complaint should have been sustained and their motion for judgment on the pleadings granted, upon the ground that the complaint failed to state a cause of action for the assertion and foreclosure of a vendor's lien for the reason that the complaint contained no express allegation that the plaintiff had or was entitled to a vendor's lien 'for so much of the price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer.' The appellants insist that the above-quoted words from section 3046 of the Civil Code should have been embodied in the complaint in order to state a cause of action. But an inspection of the complaint shows that it does set forth the fact that the plaintiff claims his vendor's lien for the balance of the purchase price of the property for which the defendant Emilie Kahn's personal note had been given, and we think these averments render the complaint sufficient as against a general demurrer.

"The appellants urge the further ground of error on the part of the court in overruling their demurrer and denying their motion for judgment on the pleadings and rendering judgment on the trial for the affixation and foreclosure of the lien, that the complaint not only shows upon its face, but the facts adduced at the trial prove, that the plaintiff had waived his vendor's lien by bringing a personal action and obtaining a personal judgment on the promissory note and by the issuance and levy of an execution thereon. This presents the only material question involved in the case.

"In support of this contention the appellants earnestly insist that, the plaintiff having chosen to take a personal judgment against the defendant Emilie Kahn which would operate as a judgment lien upon all her property, and having caused to be issued thereon an execution, which has been levied upon the particular property in question, he has thereby waived his vendor's lien. In support of this contention the appellants cite the case of Fitzell v. Leaky, 72 Cal. 478-483, 14 Pac. 198, as subsequently approved in the case of Longmaid v. Coulter, 123 Cal. 209, 55 Pac. 791. An examination of those cases, however, discloses that they do not go to the extent which the appellant claims for them, and that they are not otherwise sufficiently authoritative to form precedents for the principle for which the appellants contend. The case of Fitzell v. Leaky was not an action to establish or foreclose a vendor's lien; and, as shown by the opinion of the court, it is very questionable whether there was any such thing as a vendor's lien involved in the controversy in that case; but in any event the language used therein upon which the appellants herein rely was pointed out to be obiter dicta by the Supreme Court in the later case of Selna v. Selna, 125 Cal. 357, 58 Pac. 16, 73 Am. St. Rep. 47; while as to the case of Longmaid v. Coulter, supra, the court, while quoting from the case of Fitzell v. Leaky, supra, the language upon which the appellant herein relies, shows on the face of the opinion that the question involved in this case was not before the court.

"In the case of Selna v. Selna, supra, the question before the court was as to whether the filing and allowance of a creditor's claim against the estate of the vendee without including the claim or statement of an existing vendor's lien, which creditor's claim became by its approval in the nature of a judgment against the estate of the decedent vendee, was not sufficient in itself to amount to a waiver of the vendor's lien. In that case the court, in deciding in favor of the persistence of the vendor's lien, and in declaring the ruling of the court in Fitzell v. Leaky to be dicta, goes on to say: 'It is stated by the authorities that, if the vendor recover a judgment at law and has not exhausted his remedy by execution, he is not precluded thereby from proceeding to enforce his equitable lien for the purchase money'—citing Walker v. Sedgwick, 8 Cal. 398–404, and Overton on Liens, 691.

"The true doctrine as outlined by these authorities in this state, and as fully sustained by the great weight of authority in other states, would seem to be that in order to constitute a waiver of a vendor's lien there must be some act or omission on the part of the vendor inconsistent with his assertion of the lien and evincing his intention to waive it, and that it must be such an act or omission as would render it inequitable to thereafter attempt to assert it; and it has accordingly been held quite uniformly that, in order that a personal judgment obtained by the vendor for the unpaid portion of the purchase price of the property may be held to operate as a waiver of the vendor's lien thereon, it must be affirmatively shown by the defendant resisting the lien that the vendee has property to which the lien of the judgment can attach or upon which the execution may be levied and which might thus serve as security for the debt. Zeigler v. Valley Coal Co., 150 Mich. 82, 113 N. W. 775, 13 Ann. Cas. 90; Roberts v. Bruce, 91 Ky. 379, 15 S. W. 872; Dowdy v. Blake, 50 Ark. 211, 6 S. W. 897, 7 Am. St. Rep. 88; Borror v. Carrier, 34 Ind. App. 367, 73 N. E. 123.

"The contention of the appellant that the judgment is not in proper form because it does not provide for the procedure for the same and redemption of the property upon foreclosure of the lien, is without merit. The Code provides the procedure, and its sections are to be read into the judgment."

Judgment affirmed.

We concur: ANGELLOTTI, C. J.; MELVIN, J.; HENSHAW, J.; LORIGAN, J.; SLOSS, J.; LAWLOR, J.

(176 Cal. 172)

PARKER v. BEACH et al. (L. A. 3854.)

(Supreme Court of California. Sept. 19, 1917. Rehearing Denied Oct. 18, 1917.)

1. Limitation of Actions 🔑24(4)—Limitations Applicable—Contracts of Sale.

Where vendors agreed in writing to repurchase the land conveyed by them if the purchaser became dissatisfied, and the purchaser, after tendering a deed of reconveyance, sued for damages for breach of the agreement to repurchase instead of suing for specific performance, the action was in assumpsit and having been brought in four years was in time.

2. Vendor and Purchaser 🔑84 — Agreement to Repurchase—Consideration.

Where vendors agreed to repurchase if the purchaser became dissatisfied the amount paid by the purchaser for the land was a consideration for the agreement to repurchase.

3. Vendor and Purchaser 🔑84 — Repurchase—Options—Exercise—Effect.

Where vendors agreed to repurchase if the purchaser became dissatisfied, the purchaser's notice to the vendors that he elected to accept the option created at once a bilateral contract relating back to the time of the original sale and binding the vendors to buy back the property.

4. Vendor and Purchaser 🔑84 — Agreement to Repurchase—Want or Failure of Consideration.

Where vendors agreed to repurchase the land sold at the price paid them if the purchaser became dissatisfied, and the purchaser tendered a deed reconveying all the right, title, and interest in the land which he received from the vendors, the vendors were in no position to claim that the title was not reasonably worth the sum at which they agreed to repurchase, because the title was void and based on an entry canceled by the government subsequent to the tender, as the contract in effect operated as an agreement founded upon an adequate consideration to guarantee the title.

Department 1. Appeal from Superior Court, Los Angeles County; W. M. Conley, Judge.

Action by R. J. Parker against Thomas Beach and another. From a judgment for plaintiff and orders denying motions for a nonsuit and a new trial, defendants appeal. Affirmed.

Flint, Gray & Barker, Gray, Barker & Bowen, and Wm. A. Bowen, all of Los Angeles, for appellants. Hunsaker & Britt, of Los Angeles, for respondent.

LAWLOR, J. The appellants were partners in the real estate business, conducting it under the firm name of Beach & Dool. They dealt in government lands in Imperial valley, Cal. On July 9, 1908, in consideration of the sum of $4,000, they contracted to sell plaintiff 334.72 acres of desert land upon which one William De Legro had made entry on June 3, 1908, and, as part of the transaction and in order to close the deal, entered into a written contract with him. That contract, with the pertinent provisions italicized, reads in part as follows:

"Whereas, Thomas Beach and Edward Dool, a partnership, * * * are agents for William De Legro in the selling of certain government lands in Imperial Valley; and * * * are desirous of selling to R. J. Parker the *property belonging to said William De Legro* [describing it]; * * * and whereas, as a consideration for buying said property through the said agency of Beach & Dool, said Thomas Beach and Edward Dool, as an inducement to said R. J. Parker to buy said property, have agreed with said R. J. Parker that *should he be dissatisfied with the purchase* of the above described *property, they will buy back the same* for four thousand ($4,000) dollars at any time between February 1, 1909, and April 1st of the same year; together with seven per cent. (7%) interest on said amount, including the cost of improvements placed on said property by the sanction of Beach & Dool: Now therefore * * * said parties of the second part [the appellants], for and in consideration of the aforesaid understanding and agreement, agree with said party of the first part [the plaintiff] that if [he] *is dissatisfied with said property,* * * * *or does not care to retain the ownership of the same,* that they and each of them will purchase said *property* of the said party of the first part any time between the first of February, 1909, and April 1st of the same year, and will pay [plaintiff] the sum of four thousand ($4,000) dollars, together with seven (7%) per cent. interest per annum on said amount from the date of this agreement; [and] will further pay * * * any improvements placed upon said property hereinbefore described, to which they [defendants] have given their sanction in writing.

"* * * Should * * * [plaintiff] desire to avail himself of the privilege of having * * * [defendants] purchase said property from him between the dates hereinbefore specified, he will give [them] at least thirty (30) days' notice before said time expires of his intentions to ask them to purchase said property.

"(Dated) this 9th day of July 1908.

"[Signed] Thos. Beach.
"Edward Dool.
"R. J. Parker."

Plaintiff paid appellants the $4,000 asked for the desert land entry in several installments. On July 15th he received from defendants a deed of an assignment duly executed by De Legro transferring to him all his right, title, and interest therein. But when plaintiff, about three days later, sought to file in the land office the affidavit required by federal law of assignees of original entrymen, he was informed that the assignment was defective, as De Legro had filed the application upon land selected by the state as school land. An order to show cause why the entry should not be canceled was served on De Legro on July 21st. And appellants, on November 12, 1908, at plaintiff's suggestion, returned the check, amounting to $490, which he had given them in making the last payment on the purchase price of the land. With the check defendant Dool, one of the partners, sent a letter explaining:

> "We never felt like depositing it after we found the condition the filing was in on the land. I haven't had any talk with our attorneys regarding the condition of the case, but Mr. Beach saw Mr. Bowen a few days ago, and he said he thought you would get the land all right, and if any lawyers in the city can get it, I think they are the ones."

But on February 20, 1909, plaintiff served notice on appellants, stating that he was dissatisfied with the purchase of the property, and, in pursuance of the terms of their contract, desired them to buy it back for the sum agreed upon, less credit for the $490 which had been returned. At the same time plaintiff tendered appellants a grant, bargain, and sale deed, describing the property received from De Legro. Defendants refused to perform the agreement, or to refund any further part of the purchase price. It was not until October 7, 1909, that the entry originally made by De Legro was actually canceled. On June 7, 1912, plaintiff, renewing the tender of said grant deed, commenced this action for damages arising out of the breach of the contract. Judgment was recovered for $4,880.94 and costs. Defendants appeal therefrom, and also from the orders denying their motions for nonsuit and a new trial.

Appellants do not dispute the sale of the land to the plaintiff, the making of the contract here sued upon, their receipt of $4.000 in payment of the purchase price, or the total failure of the title. It is not in fact of any apparent concern to them that they took plaintiff's money, and that he received nothing of value in return. Yet they contend, with much vehemence of assertion extending throughout lengthy briefs, that they are not as matter of law liable for the damage caused him, nor in any wise bound to him under the contract. Their argument may be fairly epitomized as follows: The contract made with plaintiff is a unilateral agreement merely giving him an option to require defendants to buy land. The consideration named is solely for that purpose and for no other. Plaintiff, therefore, in consideration of having bought De Legro's land through them, received but their promise to enter into a second mutual agreement with him for the sale and purchase of a designated tract of land. This second obligation, which arose out of the exercise of the option by plaintiff, is not enforceable, in that it lacks mutuality. As shown by the facts, to enforce it would require defendants to forfeit to plaintiff nearly $5,000 for something he does not own. In other words, the agreement lacks consideration, for in return for the "appropriation" of defendants' money plaintiff offers merely a deed which admittedly conveys no title at all. This is equivalent to giving nothing. "The plain language of this contract directly opposes the idea of such a penalty." But if the agreement was enforceable it would avail plaintiff nothing, inasmuch as the law implies a warranty of title in every executory contract for the sale of land, and plaintiff, not having a title to convey, would not be entitled to retain such moneys as he might receive therefor. Even assuming that the defective claim to the property held by plaintiff constitutes a legal consideration, specific performance of defendants' agreement to pay him $4,000 and interest therefor cannot be enforced for the reason that such a consideration is grossly unjust, unreasonable, and inadequate. Nor can plaintiff give to the buyers a title free from reasonable doubt. "He must show an equitable, fair, mutual, and conscionable bargain founded upon an adequate consideration," and is unable to do so. Also the exercise of the option by plaintiff is based upon the performance by him of certain expressed conditions precedent, namely, "should he be dissatisfied with the purchase of the * * * property," or "dissatisfied with said property," or "does not care to retain the ownership of the same." These conditions must be interpreted in the sense of referring to "the practical, business and financial aspect of the trade, and not to its legal aspect." Particularly, it is to be noted that nothing is said about title. Hence, to substantially perform the conditions precedent it is essential that plaintiff first obtain the property, for what man can be dissatisfied with the purchase of, or decide not to retain the ownership of, what he has never received? Again, the contract provides that plaintiff give to defendants "at least thirty days notice" before April 1st of his intention to exercise the option to have defendants repurchase the property. Instead he gave notice 40 days before that time, and asked for immediate payment. Finally, as he has delayed bringing this action more than three years after the alleged expressed and positive repudiation of the contract, his claim is barred by inexcusable laches. From all this it must follow, so defendants argue, that plaintiff cannot hold them to their agreement.

[1-4] We have thus given at some length the ingenious arguments advanced by appellants. Manifestly, plaintiff's action is not founded in equity for specific performance, but in assumpsit for damages for breach of a written contract. His action brought within four years was in time. The $4,000 he paid defendants was as much consideration for their agreement to repurchase the property they had sold him as for the receipt of the assignment of the entry made by De Legro. The notice given defendants that he had elected to accept the option created at once a bilateral contract, relating back to the time of the original sale, binding them to buy back of him on or before April 1st for the sum specified the "property," which they had sold him. See Schulte v. Boulevard Gardens Land Co., 164 Cal. 467, 129 Pac. 582, 44 L. R. A. (N. S.) 156, Ann. Cas. 1914B, 1013. It was precisely of such property that plaintiff, in the performance of his obligation to convey back what he had originally purchased, tendered a deed. That the title was thereafter declared void, and the entry canceled by the government cannot alter the situation. Plaintiff's contract in no wise provides that he should perfect the title before defendants could be required to repurchase it. At the time of the tender, however, plaintiff still owned all the right, title, and interest in the desert land entry made by De Legro which he had received through the agency of the defendants. His deed to them was sufficient to reconvey such interest. Indeed, it might be held that as the contract refers to this property as "belonging to" De Legro, the truth of the recital must be deemed conclusive between the parties hereto. But irrespective of this the claim, such as it was, constituted salable property. It was conceivably of some value. And defendants, having in the deal culminating in the option contract, sold it to plaintiff for $4,000, are now in no position to contend, in defense of their failure to perform their agreement to repurchase it, that it is not reasonably worth that sum. Even if the property is not worth the amount of the purchase price, the clear import of defendants' agreement is that they undertook to save plaintiff entirely harmless from any loss. To that end they agreed to repurchase the "property" they had sold him at the purchase price agreed, together with interest thereon in the event he did not care, for any reason, to retain its ownership, or should become dissatisfied with it. The contract in effect operates as an agreement, founded upon an adequate consideration, to guarantee plaintiff's title, notwithstanding he may have made an attempt, upon their suggestion, prior to the sale, to examine the record thereof. This is obviously the legal effect which the parties contemplated. Any other conclusion would manifestly work an injustice upon plaintiff and render the express terms of the contract nugatory. The contentions of appellants are without merit.

Judgment and orders affirmed.

We concur: SHAW, J.; SLOSS, J.

176 Cal. 156

Ex parte MATHEWS. (Cr. 1997.)

(Supreme Court of California. Sept. 17, 1917. Rehearing Denied Oct. 15, 1917.)

1. HABEAS CORPUS ⚷99(6) — CUSTODY OF CHILD—MOTHER.

The fact that the affections of a minor child have become fixed on those having his custody so that he regards them as his parents and his mother as a stranger, and that it is to his best interest to remain with them, will not deprive her of the right to his custody, unless she has abandoned it or is found incompetent to perform the duties of guardianship.

2. HABEAS CORPUS ⚷99(1) — CUSTODY OF CHILD—STATUTE.

In the absence of any guardianship for a minor son, the mother, as the only parent making any claim, is entitled, under Civ. Code, § 197, to his custody.

3. HABEAS CORPUS ⚷99(1) — CUSTODY OF CHILD—PARENT.

Where the court decided in a guardianship proceeding in favor of the mother's right to the custody of her minor child, she was entitled to a writ of habeas corpus to recover its custody.

In Bank. In the matter of the application of Annie Mathews, on behalf of Gerald Mathews, a minor, for a writ of habeas corpus to determine the right to the minor's custody. Ordered that the minor be delivered into the custody of the petitioner.

See, also, 169 Cal. 26, 145 Pac. 503; 164 Pac. 8.

James L. Nagle and Olin L. Berry, both of San Francisco, for petitioner. W. B. Rinehart, of Oakland, for respondents.

SLOSS, J. This is a writ of habeas corpus to determine the right to the custody of the person of Gerald Mathews, the minor son of

Annie Mathews, the petitioner for the writ. The boy is now in the custody of Warren A. Rouse and Carrie E. Rouse, his wife, and has been living with them during nearly the whole of his life. The contest over his custody has twice been before this court in another form.

Some years ago Warren A. Rouse filed an application in the superior court of Alameda county praying to be appointed guardian of the person and estate of said minor. The mother, Annie Mathews, opposed this application, and the court, after a hearing, made its order appointing Rouse guardian. Upon the mother's appeal, this court held that the parent, unless found incompetent, was entitled to the guardianship of her child, and that the evidence was not sufficient to support the finding that Mrs. Mathews was incompetent. The order of appointment was accordingly reversed. Guardianship of Mathews, 169 Cal. 26, 145 Pac. 503.

The matter went back for a second trial, which resulted in an order denying the application of Mr. Rouse for letters of guardianship. From this order Rouse appealed. While matters were in this condition, the mother, Annie Mathews, filed her petition for the issuance of the present writ. Upon the return the court concluded that a decision in the habeas corpus proceeding should not be made pending the final determination of the guardianship contest, and the matter was accordingly postponed to await such determination. On March 22, 1917, this court affirmed the order of the superior court denying letters of guardianship to Rouse. Guardianship of Mathews, 164 Pac. 8.

Thereupon the habeas corpus proceeding was restored to the calendar. At the hearing no new evidence was introduced; the case being submitted upon the record presented on the two appeals in the guardianship matter.

[1, 2] Under the views declared by this court in the two appeals to which we have referred, we think it must now be held that the mother of the child is entitled to its custody, and that her right should be enforced in this proceeding. Upon the second trial the superior court, after finding that the mother was not incompetent to discharge the duties of guardianship, declared "that the best interest of said minor child in respect to its temporal, mental, and moral welfare is that said child remain in the custody of the petitioner [Rouse]." It found, further, that the affections of the child had become "fixed to the extent that said minor child has come to regard the petitioner and said Carrie E. Rouse as his parents, and that said Annie Mathews, the respondent, to that extent is practically a stranger to him." But, as was distinctly held on the second appeal, these considerations do not, under our law, justify a court in depriving a parent of the custody of the child, unless such parent has abandoned the child, or is found incompetent to perform the duties of guardianship. There is no need to repeat what was said in our former decisions. They determined definitely that, under the facts here disclosed, Warren A. Rouse was not entitled to letters of guardianship. They carried with them the further conclusion that, if there had been any occasion for the mother to apply for letters of guardianship, she would have been entitled to the issuance of such letters. In the absence of any guardianship, she, as the only parent making any claim, is entitled to the custody of the child. Civ. Code, § 197.

[3] But the respondent Rouse takes the position that the court should not, on habeas corpus, enforce the "mere legal right" of the mother, as against the material advantage and the personal preference of the minor. The late Chief Justice Beatty took this position in denying a similar application, saying that he considered his duty to be fulfilled "by seeing that the child is freed from all illegal restraint, and leaving her free to go to the home of her choice." In re Gates, 95 Cal. 461, 30 Pac. 596. A like ruling has been made by the District Court of Appeal for the Second Appellate District. In re Bell, 28 Cal. App. 547, 153 Pac. 240.

If it be sound doctrine that a court or judge may, on habeas corpus, disregard an established legal right which would control the judgment in any other form of proceeding, we are nevertheless satisfied that the rule can have no just application here. The mother and Mr. Rouse have for years been conducting a litigation whose sole purpose was to adjudicate which of them was entitled to have the custody of the child. The present writ, issued while that litigation was pending, was held in abeyance until the pending proceeding was concluded. Evidently this court felt that the right of custody should be decided in the guardianship proceeding. It has there been decided in favor of the mother. She has obtained a final adjudication that she is entitled to the custody of the child, and this writ affords the only remedy which she has for enforcing her right. After this court has, in effect, remitted her to the prosecution of the guardianship proceeding, and she has prosecuted that proceeding to a successful conclusion, there can be no justification for denying her the substantial benefit of the right which she has thus established. If we felt at liberty to award the child to one or the other of the contending parties, strong reason could, no doubt, be urged for leaving the custody where it has been for so long a time. But, as was pointed out by this court in deciding the second appeal in the guardianship matter, the mother is entitled to the custody of the child unless, by abandonment, or in some other way specified in the Code, she has forfeited that right. Such is the policy of our statutory law, and we are not authorized to alter that policy or to go counter to it. The natural right and feelings of the mother must be regarded as superior to the feelings of those who have become attached to the child, or the desire of the child himself.

It is ordered that the minor be delivered into the custody of the petitioner.

We concur: MELVIN, J.; HENSHAW, J.; LORIGAN, J.; SHAW, J.; VICTOR E. SHAW, Judge pro tem.

(176 Cal. 144)

SMITH v. McPHERSON. (L. A. 4019.)

(Supreme Court of California. Sept. 17, 1917. Rehearing Denied Oct. 15, 1917.)

1. Breach of Marriage Promise 🔑3—Right to Recover—Void Promise.

A promise of marriage by a man who is then married, contingent upon securing a divorce, is against the manifest policy of the law, and wholly void.

2. Breach of Marriage Promise 🔑3—Right to Recover—Void Promise.

But the mere fact that the original promise was made while defendant was married did not preclude recovery, where after his divorce through a long period of years he had taken plaintiff out of the state and had held her out as his wife, and, under repeated promises to marry her, had sustained illicit relations with her.

3. Breach of Marriage Promise 🔑18—Issues, Proof, and Variance.

In an action for breach of promise of marriage, where seduction is not alleged to enhance the damages, evidence thereof is not admissible.

4. Breach of Marriage Promise 🔑20—Inferential Promise.

When a man in effect announces to the world that he is married to a woman, a reasonable inference may be drawn that at least he has promised to marry her.

5. Limitation of Actions 🔑146(1) — Oral Promise to Marry.

In view of Civ. Code, § 1624, subd. 3, providing that a contract with mutual promises to marry may be oral, Code Civ. Proc. § 360, as to limitation of actions on new promise, requiring it to be in writing, does not apply to promises to marry especially where the original promise is often repeated, and defendant thereby secures sexual intercourse with plaintiff.

Department 2. Appeal from Superior Court, San Diego County; W. A. Sloane, Judge.

Action by Lorena Fay Smith against A. W. McPherson, as administrator of the estate of William E. McPherson, deceased. Judgment for plaintiff, and defendant appeals. Affirmed.

E. S. Torrance, James E. O'Keefe, and C. H. Van Winkle, all of San Diego, and Robert J. Adcock, of Los Angeles, for appellant. Adam Thompson, of San Diego, for respondent.

HENSHAW, J. This action was brought to recover damages for the breach of a promise of marriage. The complaint averred that on the 4th day of November, 1912, plaintiff and defendant, both being in all respects competent to enter in the marriage state, agreed to marry, and that defendant promised to marry plaintiff; that from time to time thereafter he renewed this promise, until finally, on the 13th day of August, 1913 he violated his promise, and refused either then or thereafter to marry plaintiff. Trial was had before a jury, which gave its verdict in the sum of $10,000 for plaintiff. From the judgment which followed, and from the order denying defendant's motion for a new trial, this appeal has been taken.

The evidence on behalf of plaintiff established that, when she was a girl a little over 15 years of age and defendant was conducting a hotel in Portland, Or., she was employed therein as housekeeper or manager. Defendant represented to her that he was unmarried, and on his promise to marry her she permitted him to have sexual intercourse with her. This was in 1902. She thereafter learned that he was married, but that his wife had begun an action for divorce against him. She permitted this relationship to continue under his repeated promises that he would marry her when his wife had secured a divorce and he was a free man. His wife did secure a divorce and married again. The defendant then came to California, bringing plaintiff with him, and engaged in the hotel business in San Diego and in other places. This relationship between them continued, saving that in California the defendant represented her to be his wife; they held themselves out to the world as husband and wife, and acted in all respects as husband and wife. From time to time he renewed his promise of marriage, naming in each instance the date when the marriage would take place. As the time arrived he would put her off by fixing another date. She had entered into this relationship with him in childhood; it had continued ever since; she felt unable to break away; she hoped each time he would fulfill his promise; but each time he had disappointed her. In 1912 he told her "not to worry; that everything would be all right; that they would get married in three months' time." Plaintiff's testimony to this effect is corroborated by a witness who was present at this conversation. Finally, in August, 1913, when plaintiff was confined to her bed, defendant said to her in the presence of the same witness:

> "Although I have promised to marry you several times, I have no such intentions of doing so, and I never will; you and my people can go to hell, as far as I am concerned. Mebel here is a friend to both of us, and I suppose she is wise enough to keep her mouth shut."

Thereafter plaintiff brought this action.

[1, 2] Appellant contends that, as the original promise of marriage was given by defendant at the time defendant was a married man, and must necessarily rest for its fulfillment upon the basic consideration of securing a divorce, the plaintiff's whole case must fall to the ground. It is unquestionably true that a promise given under such circumstances is against the manifest policy of the law, and therefore wholly void. Noice

v. Brown, 39 N. J. Law, 133, 23 Am. Rep. 213; Paddock v. Robinson, 63 Ill. 99, 14 Am. Rep. 112. Nor will this court in the slightest modify so salutary a principle. But the case here is broadly differentiated from the cases above cited and others so holding. It is differentiated in this: That defendant's promise was renewed years after the divorce, years after his former wife had married again, and when there was no obstacle, either in the law or in good morals, to prevent him from entering anew into the marriage state, and at a time when his course of conduct toward plaintiff, at least from the moral aspect, strongly demanded that he not only should make such a promise, but should keep it; for the evidence which was presented to the jury showed that this man had seduced this girl child of 15 years under promise of marriage, had taken her thereafter to California as his wife, had lived with her, and held her out as his wife, and had continued in this relationship and intercourse under frequent and repeated promises to make her an "honest woman" by marrying her.

[3, 4] In this connection may be noted appellant's next objection to the admission of the evidence of illicit sexual intercourse between plaintiff and defendant. It unquestionably is the rule that in an action for breach of promise of marriage, where the seduction of the plaintiff is not alleged to enhance the damages, evidence of illicit intercourse is not admissible. Lanigan v. Neely, 4 Cal. App. 766, 89 Pac. 441; Felger v. Etzell, 75 Ind. 417; Dupont v. McAdow, 6 Mont. 226, 9 Pac. 925; Lauer v. Banning, 140 Iowa, 319, 118 N. W. 446. But the very foundation of these decisions is removed from the case at bar. In those cases where the principle has been applied, the intercourse has been "consummated in the strictest privacy and secrecy and is known only to the parties themselves," and "evidence of such intercourse can have no possible tendency to prove the existence of a promise of marriage." But here, however secretly this intercourse began, defendant entered into an assumption of marital rights and duties and obligations, and held out this plaintiff as his wife. Where a man has held a woman out to be his wife, it certainly is no strained inference from the evidence establishing this to say that it has a tendency at least to show that he had promised to marry her. It is not even a modification of the rule which we have been discussing to declare that, when a man in effect announces to the world that he is married to a woman, a reasonable inference may be drawn that at least he has promised to marry her.

The defendant specially pleaded the defense of plaintiff's unchastity, as contemplated by section 62 of the Civil Code. Of course, her unchaste conduct with defendant himself was not a defense. Her asserted lack of continence, so far as defendant himself was concerned, rested upon evidence circumstantial in its nature, and upon testimony touching plaintiff's general reputation for lack of chastity; but the jury's determination was against this defense.

[5] Section 1624, subd. 3, Civil Code, provides that a contract with mutual promises to marry may be oral. Section 360 of the Code of Civil Procedure, providing that no acknowledgment or promise is sufficient evidence of a new or continuing contract by which to take the case out of the operation of the statute of limitations, unless "the same is contained in some writing, signed by the party to be charged thereby," has no reference to promises such as it is in evidence were made here. And for the same reason, since the promises upon breach by defendant were made anew by him, it will not be held either that the statute of limitations is applicable or that, as declared in Clark v. Pendleton, 20 Conn. 495, all of these subsequent, separate, and distinct promises after breach will be held to refer back to the original promise, made when plaintiff was a child, and when the defendant was under disability by reason of his marriage.

The judgment and order appealed from are affirmed.

We concur: MELVIN, J.; SHAW, J.

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176 Cal. 152

EWING v. RICHVALE LAND CO. et al.
(Sac. 2553.)

(Supreme Court of California. Sept. 17, 1917.)

APPEAL AND ERROR 🔑112—JUDGMENTS APPEALABLE—VOID JUDGMENTS.

Under Code Civ. Proc. § 726, providing relative to the foreclosure of mortgages that after the filing of the commissioner's report judgment must be docketed by the clerk for any balance remaining due, a docketed entry of a deficiency judgment by the clerk was a judgment from which an appeal could be taken even though it was void, because the judgment of foreclosure contained no provision for the docketing of any deficiency, as a void judgment may be appealed from.

In Bank. Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action by Samuel Ewing against the Richvale Land Company and others. From a judgment for plaintiffs, defendant named appeals. On motion to dismiss the appeal. Motion denied.

J. Oscar Goldstein, of Chico, for appellant. Mastick & Partridge, of San Francisco, and James A. McGregor, of Oronville, for respondent.

MELVIN, J. A judgment of foreclosure was entered on February 25, 1916, and an appeal was taken on April 29, 1916. That appeal has been dismissed on motion of appellant. The judgment was on two promissory notes each for $4,593, and by it a sale of the premises covered by the mortgage was ordered, but there was no express provision for the docketing of any deficiency. The property was sold for $5,000, a return showing this fact was filed, and on April 22, 1916, the clerk docketed a deficiency judgment against appellant in the sum of $6,617.30. On April 24, 1916, Richvale Land Company appealed from this deficiency judgment, and respondent has moved to dismiss the appeal upon the ground that such a judgment is not appealable.

Appellant insists that there is no doubt that the deficiency was entered without authority of law; that while the original judgment as given by the court directed the commissioner to conduct the sale of the premises and to apply the proceeds to the payment of the notes, interest, etc., there was no adjudication of a personal liability against appellant which would authorize the clerk under the terms of section 726, Code of Civil Procedure, to docket a judgment for any balance remaining due; and that in the absence of a judgment of personal liability, such a docketed entry is void (citing Scamman v. Bonslett, 118 Cal. 93, 50 Pac. 272, 62 Am. St. Rep. 226; Herd v. Tuohy, 133 Cal. 55, 65 Pac. 139, and other authorities). But if we concede this much of appellant's position, we are not aided in the solution of the only question presented by this motion which is this: Is the clerk's entry of a deficiency judgment separately appealable?

At the oral argument it was suggested that relief from the apparent lien created by the void entry should have been sought by appropriate motion in the lower court to set aside and cancel the clerk's entry made without authority, and that if such a motion were denied, an appeal might have been prosecuted from the order of the court, if one were made, refusing to expunge the clerk's unauthorized entry. In other words, the objection to entertaining such an appeal is that by so doing this court would recognize the mere clerical function of a ministerial officer as a judicial act. The answer to this argument is that the docketed entry of the clerk amounts to a void judgment, and that appellant is entitled to relief from such judgment on appeal, because this court has repeatedly recognized the right to appeal from a void judgment. In this behalf appellant cites In re Bullock, 75 Cal. 419, 17 Pac. 540; Merced Bank v. Rosenthal, 99 Cal. 39, 31 Pac. 849, 33 Pac. 732, and Page v. Superior Court, 76 Cal. 372, 18 Pac. 385.

The first of these was an appeal from an order directing an administrator to file his account and settling said account. To the contention that the order was void and therefore not appealable the court replied that void orders may be appealable, saying:

> "Whether an order is appealable is to be determined by what it purports to determine, not by what may be its actual operative effect."

The second was a case in which appellant made the contention that the judgment was void because it was delivered by one whose term as a judge of the superior court had expired. Respondent conceded that an appeal will lie from a void judgment, but insisted that an appeal may only be taken from a court to a court, and as appellant denied the existence of the purported court, he also questioned the right to appeal from its so-called judgment. This court held, however, that although an appeal might not be the only remedy it would lie.

In Page v. Superior Court, supra, the matter decided was that an entry of dismissal in the clerk's "register of actions" was not a judgment of dismissal in contemplation of law, and that subsequent orders of the court were made with full authority. In the course of the discussion, after pointing out the finality of a judgment entered in the judgment book by the clerk where power to enter such judgment is given him, the court said:

> "On the other hand, if the case be one in which the clerk has no power to make the entries because of a counterclaim or cross-complaint, the clerk's judgment may be set aside by the court, or may be appealed from. A void judgment is appealable, and it may be set aside as cumbering the records."

We think that these authorities, and particularly the one from which we quote the above paragraph, sustain appellant's position. The moving party in this proceeding has filed no brief, and our own industry has discovered no authorities conflicting with those cited by appellant. Under section 726, Code of Civil Procedure, it is provided that, in proper cases, "judgment must then be docketed by the clerk," after the filing of the commissioner's report "for such balance against the defendant or defendants personally liable for the debt, and it becomes a lien on the real estate of such judgment debtor." While the judgment as docketed by the clerk derives its judicial force, if any, from the original decision of the court, it is nevertheless a separate and distinct judgment from that of foreclosure—is so made by the statute. In a sense, the judgment of foreclosure is interlocutory, and the deficiency judgment is final, the clerk's function being to record the court's determination when made definite by the sale of the mortgaged property. If a deficiency judgment is entered without authority, it is nevertheless a judgment in form. In this case the clerk docketed such a judgment. If, under the authorities cited by appellant, his act was not supported by the decision of the court, nevertheless the void judgment would be appealable, just as an appeal might be taken from a judgment of dismissal entered by a clerk without power under the statute because of the existence of a counterclaim or cross-complaint. If his act was in all respects proper and done under full authority of law, the judgment is one from which an appeal will lie. The question regarding its validity will come properly before us when we shall be called upon to decide the appeal on the merits. This court may not in this proceeding make final disposition of the case as appellant wishes.

The motion is denied.

We concur: ANGELLOTTI, C. J.; HENSHAW, J.; SHAW, J.; SLOSS, J.

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176 Cal. 109

COLUSA & H. R. CO. v. LEONARD et al.
(Sac. 2570.)

(Supreme Court of California. Sept. 14, 1917. Rehearing Denied Oct. 11, 1917.)

1. Eminent Domain 🔑98—Condemnation—Damages—Interference with Flood Waters.

An element of damages in condemnation of part of a tract for railroad right of way is depreciation in value of the remainder of the tract from the enhanced danger from floods, because of the railroad interfering with escape of waters.

2. Evidence 🔑544 — Opinions — Flow of Flood Waters.

Opinions that proposed railroad construction would interfere with free passage of flood waters is not such expert testimony that farmers may not give it.

3. Eminent Domain 🔑98—Condemnation—Damages.

That the construction of a railroad will interfere with the function of drainage which a water course performed is an element of damages in condemnation for right of way; Civ. Code, § 465, subd. 5, while allowing a railroad to construct its road across, along, or on a water course, requiring it to restore the water course to its former state of usefulness as near as may be.

4. Eminent Domain 🔑95—Condemnation—Construction.

Where the plan on which the road is to be built is shown in condemnation for right of way, damages from construction according to such plan are, under Code Civ. Proc. § 1248, subd. 2, to be assessed in the condemnation proceeding.

5. Trial 🔑267(3)—Instructions—Modifying Request.

Striking part of a requested instruction is not error, where all that was eliminated was implied in that given.

6. Trial 🔑267(4)—Condemnation—Damages—Instructions.

It is enough in condemnation proceedings to instruct that the damage for which compensation is to be made is the damage to the property itself, without using the words of the requested instruction that the property itself must suffer some diminution in substance.

7. Eminent Domain 🔑203(1) — Condemnation—Damages—Evidence.

Relative to damages to the remaining lands of defendant from construction of railroad over the part condemned, by obstruction of flow of flood waters, the nature of the proposed construction over the land of another, bearing on the question of sufficient outlet, may be shown.

In Bank. Appeal from Superior Court, Glenn County; Wm. M. Finch, Judge.

Condemnation proceeding by the Colusa & Hamilton Railroad Company against Ella Glenn Leonard and another. From the judgment for damages, plaintiff appeals. Affirmed.

Frank Freeman and Geo. R. Freeman, both of Willow, for appellant. Ben F. Geis and Duard F. Geis, both of Willow, and Arthur C. Huston, of Woodland, for respondents. Sullivan & Sullivan and Theo. J. Roche, of San Francisco, and Devlin & Devlin, of Sacramento, amici curiæ.

HENSHAW, J. Plaintiff by this action in eminent domain sought to acquire as a roadway for its railroad a strip of land running north and south, in part dividing, and in part on the westerly boundary of, the farming lands of defendants. These lands, in all about 560 acres, are low-lying lands, in a natural state subject to overflow from the Sacramento river. They are situated in the county of Glenn, and the Sacramento river forms their easterly boundary. On this river frontage is built a high and strong levee, constructed in 1910, after the exceptionally high floods of 1909. Notwithstanding that in the years that have elapsed the flood waters have risen to the height attained in 1909, the levees have confined the waters of the river and there has been no overflow. In the earlier years before the erection of the levees, at flood seasons, the river overflowed its banks some 12 times in 45 years. Some distance to the west of the levee is an irrigating canal with banks not so high as the levee, but still several feet higher than the embankment proposed to be built on the railroad right of way, for it should here be said that this case was tried under plans and drawings showing the construction which the railroad proposed to make—in part a low fill, in part trestlework for the passage of flood or storm waters. Defendants set up two elements of special damage: First, that the construction of the railroad in the manner contemplated and the severance of the larger tract from the portion sought to be condemned, by reason of the flood waters of the Sacramento river, 100 acres of land lying west of the proposed right of way would be damaged to the extent of $25 per acre; the second, under like averment, was to the effect that the lands lying east of the proposed right of way—495 acres—would be damaged to the extent of $35 per acre. Evidence upon these matters was admitted by the court, and the jury, under this evidence, found the damage arising from these causes to be $15 an acre; or, in other words, the jury found that the market value of the land had been or would be depreciated by virtue of this railroad construction to the extent of $15 per acre.

This cause was first decided by the district court of appeals, and was taken over by this court for the further consideration of two propositions: The first, whether defendants were entitled to recover damages because of this asserted flood danger; and, second, if they were, whether or not the evidence offered by defendants upon the matter was not too remote, speculative, and uncertain to afford the basis for an award of damages.

[1] The law governing the consideration of the question of damage is, first, the familiar provision of section 14, art. 1, of the Constitution, to the effect that "private property shall not be taken or damaged for public use without just compensation;" and, second, subdivision 2 of section 1248 of the Code of Civil Procedure, which declares that, if the property sought to be condemned constitutes only a part of a larger parcel, the court or jury must ascertain and assess the damages which will accrue to the portion not sought to be condemned, by reason of its severance from the portion sought to be condemned, and the construction of the improvement in the manner proposed by the plaintiff. Appellant's position may be thus stated: Respondents' claim of special damage grows out of an asserted depreciation in the market value of their property, because the proposed work of appellant will impede the free passage of flood waters if a flood should come upon such land, and this retardation of the natural passage of the flood waters over the land will result in a destruction of growing crops and in other similar injuries to their property. (This is not controvertible, for such, in truth, is respondents' evidence.) Next, argues appellant, every owner of property in California may use all legitimate means to protect his land against flood waters, even though that protection shall result in actual and appreciable injury or damage to another's property, for that damage is under our law damnum absque injuria. Such, in truth, are our uniform decisions. Lamb v. Reclamation District, 73 Cal. 125, 14 Pac. 625, 2 Am. St. Rep. 775; McDaniel v. Cummings, 83 Cal. 515, 23 Pac. 795, 8 L. R. A. 575; Gray v. Reclamation Dist. No. 1500, 163 Pac. 1024.

Appellant admits that if its taking of the land, and the use which it proposes to make of the land taken, actually and physically interfered with the natural or artificial protection against flood possessed by the untaken portion of the tract, if, for example, the use to be made of the land involved a cutting of the levee or any other similar act, compensation for this would be justly allowable. But, so runs its argument, if it owned the strip of land sought to be taken, it would be within its legal rights in building the embankment in the legitimate use and protection of its property, even if the construction did increase the danger of damage by floods to the remaining land, and that as it could unquestionably do this as the owner of the land, without making compensation to the adjacent landowner for injuries which might result from its necessary and proper works, so here, in this condemnation suit, such prospective damage, even though it be said that it would be in truth a real damage, cannot legally be used to increase respondent's award.

This argument is not only persuasive but forceful. The fallacy of it, however, lies in this consideration, what a man may legally do in the exercise of his rights of ownership is not identical in fact or in principle with what he may justly be called upon to pay in the acquisition of such ownership. A simple illustration will, we think, plainly illustrate our meaning. A municipality owns a block of land in a highly desirable residence quarter of the city. It proceeds to build thereon a hospital for contagious diseases—in short, a pesthouse. The direct and immediate effect of this is to depreciate to a very substantial extent the value of the surrounding residence property. But, while the court might listen with sympathetic ear to the lamentations of the owners of those properties, it could not salve their grief by compensation in terms of money, because the city was exercising one of its unquestioned rights of ownership, and the injury which that exercise inflicted, though real, was damnum absque injuria. But, in the same residence section, the city by eminent domain seeks to condemn one-half of a block owned by an individual for the purpose of erecting thereon a pesthouse. The depreciation in the value of the remaining property is marked, and measurable in terms of money. If the city sought to buy from the owner at private purchase this same property, no one would question but that the owner would, and properly would, fix as a purchase price a sum which would compensate him for the inevitable reduction in value of the remaining part of his land. When the city goes into court to acquire this same property by judicial decree, the same elements fairly enter into the transaction and are admissible in evidence under the very terms of our law. Therefore the question before us is not what an owner may do with his own property without liability for the damage which his legal acts may inflict upon his neighbor's property, but it is what is the fair price for the purchaser to pay for that property, where avowedly he proposes to use it in such a way as will directly operate to depreciate the value of the untaken part of the realty?

This principle, it will be found, is recognized in all the adjudications. In this state we do not permit the owner of lower lands to interfere with the natural surface flow from the lands above, to the detriment of those latter lands. In other states the common-law rule to the contrary is adopted. In those other states, as a brief consideration of their authorities will show, it is uniformly held that, in eminent domain proceedings, the injury to the remaining lands, which may result from interference with the surface flow, is a proper element for the consideration of the jury in fixing its award of damages, and this, of course, notwithstanding the fact that under their law the same interference could be occasioned, without liability to damage, by one who was the owner of the property. Thus says Lewis (2 Lewis, Em. Dom. § 496):

> "It would be difficult to enumerate the various elements of damages proper to be considered when part of a tract is taken. * * * Any interference with the drainage of the land, or with the flow of surface water, or with the water supply, are recognized by all authorities as proper items to be taken into account in assessing the damages."

In support of the text may be cited Farnham, Waters and Water Rights, §§ 357, 904; Walker v. Old Colony & Newport R. R. Co., 103 Mass. 10, 4 Am. Rep. 509; Arkansas Valley, etc., Ry. Co. v. Witt, 19 Okl. 262, 91 Pac. 897, 13 L. R. A. (N. S.) 237, and note; W. W. Railroad Co. v. Kuhn, 38 Kan. 104, 16 Pac. 75; Churchill v. Beethe, 48 Neb. 87, 66 N. W. 992, 35 L. R. A. 442. It follows, therefore, that the court was right in recognizing the principle that a depreciation in the value of the remaining lands caused by the enhanced danger of floods was a proper element of damage to go before the jury.

[2] We come next to the character of the evidence which the court allowed to go before the jury in support of the claim for special damage. Herein respondents admit that the proposed works of appellant would impair the value of their remaining land only in the event of flood, and, conversely, if there was no possibility of flood there would be no depreciation in value because of the works. Upon this appellant argues that its proposed use of the land would not in the slightest increase the danger of the flood; that if a flood did result it would occur through no contributing act or fault of appellant; and that the evidence shows that, by virtue of the massive levee construction, any real danger of a flood has been eliminated. Second, appellant argues that, as established by the evidence of respondents, the damage which appellant's works would cause in the event of flood would arise only from the fact that those works retarded the free flow of the flood waters off of the remaining portion of respondents' land; that appellant's expert evidence demonstrated that these proposed works would not so retard the water, as ample passageways for the water were left in the embankment; and that the conflicting evidence was that of unqualified, inexpert farmers, whose testimony should not have been received.

Touching the first of these matters, it is sufficient to say that, unless it could be established that the danger of flood was absolutely eliminated, the improbability of such a flood occurring goes only to the weight of evidence as affecting a lessening of value, rather than to the admissibility of the evidence itself. It cannot be said, as matter of law, that plaintiff's proof of the strength and sufficiency of the levees demonstrated that no flood would ever again occur. Upon the second proposition in its objection to the admissibility of the evidence, appellant bears down too hard on but one phase of the testimony given by the farmer witnesses of respondents. In effect, they were called upon to testify to their knowledge of past floods and flood conditions, to their knowledge of the value of the farming real estate, and to their knowledge or belief as to the effect which appellant's proposed work would have in depreciating the value of respondents' real estate because of the retardation of flood waters which would result if the works were constructed as proposed. Upon this last branch of inquiry these witnesses, now generally speaking, did testify as to their belief that the proposed works would interfere with the free passage of the flood waters, would cause the waters to stand longer upon respondents' lands, and that this danger did appreciably reduce the market value of those lands. Only in the sense that they testified to the inadequacy of the proposed works as granting free and unimpeded passage to the flood waters can it be said that their testimony was at all in the nature of expert evidence, going to the character and adequacy of the proposed works to relieve from flood waters. But manifestly this is not the kind of expert testimony forbidden to be received, but is rather of the character held admissible in such cases as Sowden v. Idaho Quartz Mining Co., 55 Cal. 451; Frey v. Lowden, 70 Cal. 552, 11 Pac. 838; Posachane W. Co. v. Standart, 97 Cal. 480, 32 Pac. 532; Nolan v. Nolan, 155 Cal. 476, 101 Pac. 520, 132 Am. St. Rep. 99, 17 Ann. Cas. 1056; and Gallatin v. Corning Irrigation Co., 163 Cal. 419, 126 Pac. 864, Ann. Cas. 1914A, 74.

It is concluded, therefore, that the court of appeal was correct in its judgment, which judgment expresses the same conclusions as those here presented. The foregoing, therefore, may be considered as an amplification of the opinion of the court of appeal, to which reference has been made, which is hereby adopted, and which is as follows:

> "Plaintiff commenced the action to condemn a right of way for plaintiff's railroad over defendants' land, containing 11.93 acres. Defendants answered that the construction of the railroad as proposed by plaintiff would cause defendants great damage and expense for various alleged reasons and, among others, the following:
>
> "(9) That the amount of land within the said right of way sought to be taken and condemned herein by the said plaintiff for the said railroad right of way is 11.93 acres, and the value of the said land is the sum of $300 per acre, and the value of the interest of the said defendants is the sum of $3,579.
>
> "(10) That the construction of the railroad in the manner contemplated and proposed by the plaintiff, will sever the larger tract, not sought to be condemned, into two parts, to wit: One part lying west of the proposed right of way, containing 100.17 acres, and one part lying east of the proposed right of way containing 485.57 acres.
>
> "11. That all of the said lands of the said defendants are subject to overflow by and from the flood waters of the Sacramento river, and that the said flood waters do flow to, upon, over,

across, and away from the lands of the said defendants, and all of the said lands lie along, and are adjacent to, the said Sacramento river. That the construction of the proposed railroad across the said lands of the said defendants, in the manner proposed by the said plaintiff, will interfere with, obstruct, and prevent the free flow of the flood waters of and from the said Sacramento river, that will come upon the said lands of the said defendants from flowing over, across, and away from the said lands of the said defendants, and will cause the said flood waters to back up, accumulate, be held back, and stand upon the said lands of the said defendants lying on the east side of the proposed right of way.

"(12) That the construction of the railroad in the manner contemplated and proposed by plaintiff, and the severance of the larger tract, not sought to be condemned, from the portion sought to be condemned, and by reason of the flood waters of the Sacramento river that will come upon, back up, accumulate, be held back and upon the lands that lie west of the proposed right of way, to wit, the 100.17 acres, will be damaged to the extent of $25 per acre, making a total damage to the said lands lying on the west side of the proposed right of way of $2,504.25.

"(13) That the construction of the railroad in the manner contemplated and proposed by the plaintiff, and the severance of the larger tract, not sought to be condemned, from the portion sought to be condemned, and by reason of the flood waters of and from the Sacramento river, that will come upon, back up, accumulate, be held upon the said lands of the said defendants that lie east of the proposed right of way, to wit, the 485.37 acres, will be damaged to the extent of $35 per acre, making a total damage to the said lands lying on the east side of the proposed right of way of $16,987.95."

The issue of damages raised by the pleadings was submitted to and tried by a jury, and the questions given them by the court were answered as follows:

"(1) We, the jury, in the above-entitled action, ascertain to be and assess the market value of the land sought to be condemned by plaintiff, belonging to defendant, to wit: 11.93 acres for right of way at ——. Answer: $175 per acre.

"(2) We, the jury, ascertain to be and assess the depreciation in the market value of the land not taken by reason of the construction of the railroad in the manner proposed at ——. Answer: $15 per acre.

"(3) We, the jury, assess the value of the fencing on the right of way to be $507.

"(4) We, the jury, ascertain and assess the cost of the fencing for said right of way to be $480.

"(5) We, the jury, ascertain and assess the cost of the one 60 ft. crossing and one 40 ft. crossing with cattle guards to be $400."

Judgment passed for defendants accordingly, from which plaintiff appeals under the alternative method.

The located line of the railroad runs practically north and south, through the counties of Glenn and Colusa, parallel with the west bank of the Sacramento river, varying with its course, but, at the place involved, is over half a mile west of the river at the nearest point, that point being called Jacinto, where defendants reside. The located line follows along the west line of defendants' property, from its south boundary, for the first three-quarters of a mile, to a point where a county road, called Bayliss-Jacinto road, runs east and west through the land to Jacinto and the river. North of this road the located line continues north through the property a quarter of a mile, leaving about 100 acres on the west side of the track and about 87 acres on the east side. The tract on the south consists of about 400 acres. In the entire tract are 597.47 acres, and the Sacramento river is its east boundary. In 1910 a substantial levee was built along the west bank of the river, replacing the old one, to protect this land and other lands from river overflow. Some distance west of this levee is what is called the Sacramento Valley West Side Canal Company irrigating canal, 25 feet wide on the bottom, and 25 to 30 feet wide at the top, the excavation being thrown out on its banks on either side, but not so high as the levee. This canal is about half a mile east of the located line of the railroad.

The points urged on appeal are: (1) That all the evidence as to flood waters "was erroneously admitted as too remote, speculative and uncertain"; (2) that evidence was admitted as to the effect of the proposed railroad construction upon the flow of such waters "by witnesses without any knowledge whatever on that subject which should be handled only by men trained in such matters"; (3) that, conceding such evidence to have been properly admitted, "it is insufficient to warrant the verdict rendered as to depreciation upon the lands not taken, for the evidence and verdict show that the verdict was based wholly upon this floodwater 'bogeyman'"; (4) that "it clearly appears that there is a well-defined, natural, and regular channel or watercourse within which all this flood water, when it escapes from the river, at all times flows, which watercourse finally deposits this water in Colusa basin" and hence "subdivision 5 of section 465 of the Civil Code takes care of such a situation."

In the case of Colusa, etc., R. R. Co. v. Glenn, reported in 25 Cal. App. 634, 144 Pac. 993, the rule for computing damages was stated as given in Blunck v. Chicago & N. W. Ry. Co., 142 Iowa, 146, 120 N. W. 737, as follows:

> "The real question in such cases being how much has the market value of the property been diminished by taking the right of way therefrom, it is manifest that in determining and fixing such damages all matters and conditions which may reasonably be expected to follow the location and operation of the road and affect the value of the land should be considered."

In the opinion the court, by Mr. Justice Burnett, said:

> "If there is a reasonable probability that the construction of plaintiff's railroad as contemplated will augment the damage to the land caused by flood waters, of course this is a circumstance to be considered by the jury in arriving at a proper award. Whether there is such reasonable probability is a matter of opinion based upon certain physical facts which are detailed by some of the witnesses. From plaintiff's showing the inference would follow that no probable damage would ensue from this source and that the market value of the land would not be affected by this circumstance." (The testimony of an expert witness is quoted, in which the witness stated in effect that the velocity of the

increased quantity of water would cause it "to pass off in the same length of time as now. The trestles that we have located on this road will take care of all the water that comes on the Glenn place, no matter where it comes from.") Continuing, it was said in the opinion: "There was expert evidence, however, on behalf of defendant to the effect that the railroad as intended to be constructed would hold back the water on something like 480 acres of land. On this assumption the opinion was expressed that the market value would be greatly depreciated. We are not prepared to say that there was no basis for such opinion. The matter is, of course, somewhat speculative, depending upon various contingencies, but if, thereby, the market value of the land is diminished, defendant has the right to make proof of it, and there is no available method by which to show this fact except through the opinion of competent witnesses."

This case involved an inquiry into conditions similar in most respects to those existing in the present case. The land lies north of and adjoining the present defendants' land and is crossed by the proposed railroad, and would be affected by the construction of the road in much the same manner. The two cases are so nearly alike as to make the same principles of law equally applicable to both cases.

[3] The evidence showed in the instant case that, prior to the construction of the present levee in 1910, the river, in flood seasons, sometimes three or four times in one season, overflowed its banks and the levee formerly constructed at a depth of two or three feet, and the waters spread out over the back country at Jacinto to and beyond the west line of defendants' land, "a solid sea of water," as witnesses described it, three or four feet deep; that the banks of the canal, which was built prior to the levee of 1910, gave way in places and melted down under the pressure—in fact were practically submerged; that the trend of these flood waters was south and westerly, and as they subsided found their way into a depression or slough which carried off the remaining waters; and it is this so-called watercourse on which plaintiff relies in making its point 4. We may here, as well as elsewhere, dispose of this point. Section 465 of the Civil Code declares that a railroad corporation has power:

> "* * * (5) To construct their roads across, along, or upon any stream of water, watercourse, * * * which the route of its road intersects, crosses, or runs along, in such manner as to afford security for life and property; but the corporation shall restore the stream or watercourse * * * thus intersected to its former state of usefulness as near as may be, or so that the railroad shall not unnecessarily impair its usefulness or injure its franchise."

The evidence was that the proposed track of plaintiff's roadbed traversed substantially this depression on the west slope of it, although there was evidence that this so-called channel is at places west of the located track. A 90-foot trestle was provided for at a point not far from midway of the lower tract of land, and another of the same length at a point in the north tract, the purpose being to allow flood water to pass to and from each side of the track. One question was whether these openings sufficiently served their purpose, which will be given attention later.

The evidence was that this depression, or trough, or slough, as it is variously termed by witnesses, has its head near the Sacramento river upon the land north of defendants' land and was a drainway for the overflow water after the main body had subsided. It could hardly be properly termed such watercourse as is referred to in the Code. But, treating it as such, the plaintiff had no right so to construct its roadbed as to interfere with the free and unobstructed office which this slough or channel performed and, if it did so, such interference would constitute an element of damages to defendants. The principle involved was applied in Coates v. A., T. & S. F. Ry. Co., 1 Cal. App. 441, 82 Pac. 640; S. P. R. R. Co. v. Hart, 3 Cal. App. 11, 84 Pac. 218. In this connection plaintiff urges the doctrine which treats flood waters as a common enemy against which a landowner may protect himself, though to the detriment of an abutting landowner, citing Sanguinnetti v. Pock, 136 Cal. 446, 69 Pac. 98, 98 Am. St. Rep. 169, among other cases, where the doctrine was quite fully gone into in connection with Mormon slough in San Joaquin county.

We can hardly think plaintiff serious in its contention that, before it becomes an abutting landowner at all and is merely seeking a right of way by condemnation proceedings, it may defend against damages claimed for what may happen in the future should it become such abutting owner and should afterwards carry out its proposed improvement. We see no merit in this branch of appellant's argument. Nor do we think the defense made under section 465 of the Civil Code maintainable.

[4] It appeared that plaintiff's proposed road over this strip of land was to be constructed upon a definite plan, which was presented to the court and jury as part of its case, showing how the roadbed or embankment was to be built, its width being 18 feet on top; that 10 feet of the top was to be surfaced with gravel 15 inches thick into which ties were to be imbedded and tamped, and on top of these ties the rails to be fastened, making a solid embankment about 3½ feet high; that a trestle 90 feet wide in the embankment at a definite place in the lower piece of land and another of like dimensions in the upper tract, and culverts at the Bayliss-Jacinto road, were to be constructed. In short, the case was tried as though there was a completed structure of the dimensions given in the plan laid before the jury.

At this point we may dispose of another question raised in appellant's brief, namely, that whatever damage may be caused by some negligence in constructing the roadbed, or by some improper construction thereof, "may be recovered by appropriate actions by the parties damnified when such damages occur, and nothing should be allowed on the theory that such negligence may happen," citing Turpen v. Turlock Irrigation District, 141 Cal. 1, 74 Pac. 295. The action was tried, as we have stated, on a theory which conceded that the question of damages, whatever they might be, would be considered on the assumption that the roadbed was to be constructed upon the plan laid before the jury. In the Turpen Case the question was as to damages arising after the construction of the works. We are not to deal with the question as though it had first arisen after the completion of the road. We are dealing with the law under condemnation proceedings. Section 1248 of the Code of Civil Procedure furnishes the rule, which is:

> "* * * (2) If the property sought to be condemned constitutes only a part of a larger parcel, the damages which will accrue to the portion not sought to be condemned, * * * and the construction of the improvement in the manner proposed by plaintiff."

In the case of Conniff v. San Francisco, 67 Cal. 45, 50, 7 Pac. 41, the court quoted from Pumpelly v. Green Bay Co., 13 Wall. 166, 20 L. Ed. 557, as follows:

> "Where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by any artificial structure placed on it so as effectually to destroy or impair its usefulness, it is a taking within the meaning of the Constitution."

In Reardon v. San Francisco, 66 Cal. 492, 505, 6 Pac. 317, 320, 56 Am. Rep. 109, the court gave a direct answer to appellant's contention. It said:

> "We are of opinion that the right assured to the owner by this provision of the Constitution is not restricted to the case where he is entitled to recover as for a tort at common law. If he is consequently damaged by the work done, whether it is done carefully and with skill or not, he is * * * entitled to compensation for such damage under this provision. This provision was intended to assure compensation to the owner, as well where the damage is directly inflicted, or inflicted by want of care and skill as where the damages are consequential, and for which damages he had no right of recovery at the common law."

See a clear statement of the rule in Chicago v. Taylor, 125 U. S. 161, 8 Sup. Ct. 820, 31 L. Ed. 638.

It appeared from the statements of witnesses for defendants that they based their judgment as to the depreciation of defendants' property in considerable part upon the effect of plaintiff's road as it is to be constructed, would have in holding back the flood waters of the Sacramento river. This same class of evidence was held admissible in the Glenn Case, supra, and we see no reason to change our opinion on the subject. The testimony as to the effect which the proposed railroad would have is here, as it was in the Glenn Case, irreconcilably conflicting. Witnesses, a large number of them, testified that the trestles provided for in the roadway were wholly inadequate to allow the large volume of water coming over the land in flood times to pass through them; that the necessary effect of the railroad embankment would be to hold the water back a considerable length of time longer than it would be under conditions as they now exist, and would result in the destruction of crops which would otherwise escape by the water passing off much more quickly than it could when held back, as it must be, by the railroad. Disputing the fact, but recognizing the rule as to conflicting evidence, appellant contends that the danger of such damage occurring is too remote and uncertain to be a just element of damages. This contention is based chiefly on the protection now given the land by the levee, which has stood against the flood waters since 1910, and because of the further protection afforded by the canal embankments. This latter protection may be dismissed from consideration for the evidence was that, should the levee give way, the canal embankments would not withstand the pressure of flood waters. It is matter of common knowledge that levees are by no means impregnable or that they furnish an insurance against the assaults and ravages of flood waters. There is always possible increase in the height of the flood plane arising either from unusual rainfall or from other system of levees, which increase the demand upon previously constructed systems. There is danger from the encroachment of the river itself in undermining constructed levees by washing away the margin of the bank usually left between the levee and river, and it was in evidence that the river had washed away 40 feet in one place in its tendency to reach the levee. Gophers and squirrels are constant enemies whose attacks are not always visible. There is, too, an element of danger from the ease with which a personal enemy of oneself or some neighbor may with dynamite destroy the levee temporarily, in the height of a flood. These are some of the risks to which landowners living under levee systems are subjected. While it is true that levees enhance the value of land which they protect, it is also true that it would give still greater value to the land if the landowners could be assured that such levees would never give way to flood waters.

In the Glenn Case, under conditions of fact substantially the same as here, we said:

> "The matter is, of course, somewhat speculative, depending upon various contingencies, but if, thereby, the market value of the land is diminished, defendant has the right to make proof of it, and there is no available method by which to show this fact except through the opinion of competent witnesses."

There were other elements besides this one of danger from flood waters which were considered by the jury, but we think it must be conceded that the verdict cannot be justified by these other elements alone, for witnesses stated that their estimates of damages necessarily included consideration of damages from flood waters.

We are brought to the question: Were the witnesses competent to testify to the facts upon which the jury based their verdict? Most of defendants' witnesses were farmers who had been familiar with flood conditions in that neighborhood and the effect upon the lands of defendants for 20 or 30 years, and were also familiar with the market value of land in the vicinity. They were informed of the plan proposed for the construction of the railroad, as we have outlined it, and were asked whether or not it would depreciate the value of the land not taken. Answering that it would, they were asked to state how much per acre, and answered giving various estimates running from $15 to $30 per acre. Then followed their reasons, among which was the opinion that the trestles would not carry the water coming to them in flood overflows and that the water would be "held back," as they expressed it, and prevented from passing off freely and thus cause the damage which in part was included in their estimate. There was evidence that the damage to crops depended upon the length of time the water stood on them. Their testimony was corroborated by that of civil engineer Bayard Knock, who gave it as his opinion that the railroad embankment would back the water to the river; that it would keep water from getting west of the track and deepen it east; that the trestles would relieve it some, but how much he could not say; that it "would make a difference in the fastness with which the water got off"; but how much longer it would take the water to pass off than under present conditions he could not say. It seems to us, however, that an intelligent farmer who had observed the action of flood waters for many years would be competent to give an opinion that two openings, each 90 feet long and 3 feet high and half a mile apart, would not allow the flood waters 3 or 4 feet deep flowing with some velocity and spreading over four or five hundred acres to pass through them as rapidly as it would accumulate against the railroad embankment; and that the embankment would have a tendency to "back up" the water and keep it from passing off as freely as it otherwise would, especially as the road is located so as to obstruct the depression in the land, more or less, which otherwise would help to hasten the flow off the water. These physical facts, which the farmers must have confirmed from their everyday experience, would, it seems to us, need no expert civil engineer to verify. Such testimony may not be so convincing as that of persons trained in a school of practical hydraulic engineering, but we think it was competent.

[5] Plaintiff asked the following instruction:

"In ascertaining the damages to, or depreciation in, the market value of that part of the property of the defendants, Ella Glenn Leonard and Charles L. Leonard, not sought to be taken in this proceeding, you are not to indulge in speculation, surmise, or conjecture. The law does not require plaintiff to pay damages or compensate for depreciation of the market value of the property, not sought to be taken in this action, based upon speculation, surmise, or conjecture; [in other words, you are instructed that no damage to, or depreciation of, the market value of that portion of the property involved here, not sought to be taken in this proceeding, by reason of flood waters can be based upon speculation, surmise, or conjecture]."

The court struck out the concluding paragraph marked in brackets. The instruction, as given, implied all that was stated in the eliminated portion and it must be presumed that the jury applied it to evidence relating to flood waters as well as to other evidence.

[6] The court refused the following instruction:

"The law does not authorize a remedy for every diminution of the value of the property that is caused by a public improvement. The damage for which compensation is to be made is a damage to the property itself, and does not include a mere infringement of the owner's pleasure or enjoyment. Merely rendering private property less desirable for certain purposes, or even causing personal annoyance in its use, will not constitute the damage contemplated by law; but the property itself must suffer some diminution in substance or be rendered intrinsically less valuable by reason of the public use."

The court gave the following instruction:

"After you have determined the market value of the strip of land sought to be condemned for the right of way, you must then ascertain and assess the amount of depreciation of the market value, if any, which may accrue to the portion of the land not taken by reason of the construction of the railroad in the manner proposed. This damage, if any, will be determined by ascertaining, in the same manner as heretofore stated, the market value for cash of those portions of said tract not taken, as it was on the 23d day of December, 1913, and by deducting therefrom the market value for cash of said property after the severance and the proposed railroad is constructed. The difference between these values, if there shall be any, will be the amount of the depreciation of the market value of the land not taken. The law fixes this method of ascertaining the damages, and it is your duty to follow it."

The court also instructed the jury as follows:

"Unless you find by a preponderance of evidence that the owners of the land sought to be condemned in this proceeding will be disturbed in their enjoyment of some right to which they are entitled to make use of in connection with their land, you cannot find that they were damaged within the sense of the Constitution of the state of California, which provides that they shall receive full compensation for the taking or damage of the land in a proceeding of this character. You are instructed that the market value of the land sought to be condemned in this action is not to be determined by its value for any particular use, but, resulting from a consideration of all the uses for which it is adapted and to which it may be applied, it is only when the market value of the land is diminished by a public use that it can be said to have sustained such damage as will entitle the owner to receive compensation."

There were several instructions which in effect told the jury that the damage contemplated by the Constitution is the damage to the property itself, considered with reference to the uses to which it was adapted. The court did not in terms say that "the property itself must suffer some diminution in substance or be rendered intrinsically less valuable by reason of the public use," but the jury must have understood from the instructions that they were considering the damage to the property itself, which necessarily meant "some diminution in substance." Indeed, while lawyers may understand what those terms mean, it is doubtful whether a jury would be enlightened by hearing them given. "Diminution in substance" might, unexplained, be understood to mean the digging up and carrying away the soil, which, of course, is not intended by the term. We do not think the refusal to give the instruction was prejudicial.

Some other instructions are criticised, but we do not think it necessary to comment upon them particularly. The instructions given were clear and accurate statements of the law and if there was evidence relating to matters which might have influenced the jury improperly—for example, danger of loss of stock by breaking down the railroad company's fences, or danger to persons in crossing, or of personal annoyance or infringement of the owner's pleasure—such evidence, no doubt, if any there was, would have been limited by instructions if requested. We cannot see that the plaintiff was prejudiced to an extent requiring a reversal by any instructions given or refused.

[7] But one objection to rulings on evidence is complained of and this related to the admission of testimony as to the construction of the railroad across Charles Glenn's land immediately north of defendants' land. It appeared that the plans contemplated a roadway or embankment about the same as over defendants' land with one 60-foot trestle. As the flood waters of the river first entered upon the land from the Charles Glenn land and as the character of the railroad construction over his land had a certain effect lower down, the evidence was admissible. The court limited it to the Charles Glenn land.

The judgment and order appealed from are therefore affirmed.

We concur: ANGELLOTTI, C. J.; MELVIN, J.; SHAW, J.; SLOSS, J.; LAWLOR, J.

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175 Cal. 489

HART v. FRESNO TRACTION CO.

(S. F. 7288.)

(Supreme Court of California. June 18, 1917. Rehearing Denied July 18, 1917.)

1. CARRIERS 🔑238—INJURIES TO PASSENGERS—WHO IS A PASSENGER.

A person may become a passenger, without having come into the carrier's vehicle, if the surrounding circumstances show an intent on his part to become a passenger, and an acceptance of him by the carrier as a passenger.

2. CARRIERS 🔑320(2) — INJURIES TO PASSENGERS—EVIDENCE—SUFFICIENCY.

Evidence *held* to make a jury question whether plaintiff running for a car had become a passenger, so as to render the carrier liable for his injuries.

3. CARRIERS 🔑347(5) — INJURIES TO PASSENGERS — BOARDING MOVING CAR — QUESTION FOR JURY.

Intending passenger's contributory negligence in attempting to board a moving car is for the jury, since it is not negligence per se for one to board a moving street car.

4. TRIAL 🔑194(2)—INSTRUCTIONS—MATTERS OF FACT.

The mere fact that the court began an instruction "it is claimed by plaintiff" did not make the instruction one on matters of fact, where the instruction embodied a fair statement of the probative tendency of the evidence.

5. APPEAL AND ERROR 🔑1033(4)—ERROR FAVORABLE—INSTRUCTIONS.

Error, if any, in submitting the issues whether plaintiff could recover on the theory that he was a passenger or whether the company was liable for failure to exercise ordinary care, conceding plaintiff not to have been a passenger, is not prejudicial to the carrier, since the submission of ordinary care was unduly favorable to the carrier.

Department 1. Appeal from Superior Court, Fresno County; George E. Church, Judge.

Action by Harvey J. Hart against the Fresno Traction Company. From a judgment for plaintiff, and order denying new trial, defendant appeals. Affirmed.

Everts & Ewing and Short & Sutherland, all of Fresno (Carl E. Lindsay, of Fresno, of counsel), for appellant. E. S. Van Meter and C. K. Bonestell, both of Fresno, for respondent.

VICTOR E. SHAW, Judge pro tem. Action to recover damages for a personal injury alleged to have been sustained by plaintiff as a result of defendant's negligence. Judgment for $750 followed a verdict in favor of plaintiff. The appeal is by defendant from an order of court made upon a statement of the case denying its motion for a new trial.

At the time of the alleged injury to plaintiff, defendant owned an electric railway upon which it, as a common carrier, operated cars between the city of Fresno and a station at its eastern terminus known as Sunny Side Vineyard, over which, in connection with a street car system of said city, it transported passengers between said points. The cause of action, as sufficiently, although perhaps inartistically, stated in the complaint, is based upon the theory that plaintiff at the time in question, although he had not entered defendant's car, was nevertheless a passenger thereon by reason of the fact that defendant's employés, by their acts, had accepted his offer to become such, and that in boarding the car he was by reason of defendant's negligent operation thereof thrown to the ground and injured.

[1] That one, though not inside of a car-

rier's vehicle, may nevertheless as to the carrier occupy the position of a passenger entitled to the highest degree of care must be conceded. Jaquette v. Capital Traction Co., 34 App. D. C. 41, 25 L. R. A. (N. S.) 407. The rule is that:

> "A person may become a passenger, without having come into the carrier's vehicle, if the surrounding circumstances show an intent on his part to become a passenger and an acceptance of him by the carrier as a passenger." Hutchinson on Carriers (3d Ed.) § 1005; Nilson v. Oakland Traction Co., 10 Cal. App. 103, 109, 101 Pac. 413.

[2] The contention of appellant is that the evidence is insufficient to show that respondent brought himself within the rule stated. While not questioning the existing of circumstances clearly showing an intention on the part of plaintiff to become a passenger, it is insisted that such intention was not communicated to defendant, nor any circumstances shown from which an acceptance of plaintiff as a passenger by defendant could be implied.

In our opinion the contention possesses no merit. It appears that plaintiff, with four others with whom he was employed, went to Sunny Side station with the intention of boarding one of defendant's cars as a passenger for Fresno. When they got there it was raining, and as the car had not arrived they took shelter under a tree some 125 feet in the distance short of the point where the car usually stopped at the end of the track. Upon its arrival, which it appears was late, plaintiff and his companion started hurriedly from their shelter to the car, but before they reached it the conductor changed the trolley, and the car, contrary to the usual custom, was immediately started upon its reverse course at a speed of some four or five miles per hour, but slowed down a little, enabling plaintiff's companions who were ahead of him to board the same. Plaintiff followed the moving car at a fast walk or trot, and as it slowed down to the speed at which he was walking, and while the conductor and motorman were looking back at him, he grasped the upright handrail of the car and jumped on the step thereof, at which time the car was propelled forward with a sudden jerk, causing plaintiff to slip and lose his foothold upon the step and let go the handrail, as a result of which he was thrown to the ground and sustained the alleged injury. In our opinion, the uncontroverted evidence offered tended to show that plaintiff intended to board the car to be carried as a passenger; that defendant's servants in charge thereof knew of his intention so to do, and, as indicating their consent to receive him and his companions as passengers, reduced the speed of the car, and saw or ought to have seen what he was doing, and understood or ought to have understood his purpose in doing it. The circumstances shown clearly tended, as between the parties, to establish the relation of carrier and passenger. Berry v. St. Louis Transit Co., 211 Mo. 88, 109 S. W. 661; Burger v. Omaha & C. B. St. R. R. Co., 139 Iowa, 645, 117 N. W. 35, 130 Am. St. Rep. 343.

[3] Whether or not plaintiff was a passenger on defendant's car, and as such suffered injury through defendant's negligence, were questions for the determination of the jury, as likewise, since it is not negligence per se for one to get on a moving street car (Nilson v. Oakland Traction Co., supra; Nellis on Street Railroads, vol. 1, § 259; O'Mara v. St. Louis Transit Co., 102 Mo. App. 202, 76 S. W. 680), was the question of his alleged contributory negligence. Upon each of such questions the verdict implies a finding favorable to plaintiff.

[4] There is no ground for the contention that the court charged the jury with respect to matters of fact. The instruction which forms the subject of this complaint begins with the words, "it is claimed by the plaintiff," which assertion is followed by a fair statement of what his evidence tends to prove. Conceding that the requested instruction as to the burden of proof was a proper one and should have been given, nevertheless the failure to give it could not possibly have prejudiced any substantial right of defendant.

[5] Appellant also insists that it was prejudiced by reason of the court instructing the jury upon the right of plaintiff to recover upon two theories—one to the effect that, if found to be a passenger, as such he was entitled to the exercise of the highest degree of care by defendant, and the other to the effect that, if he was not a passenger, but attempting to become such, the law imposed upon defendant the exercise of ordinary care only. As hereinbefore stated, not only was the cause of action as stated in the complaint based upon the theory that plaintiff was a passenger, but the evidence clearly tended to establish such fact, hence defendant, as to plaintiff, was in duty bound to exercise the highest degree of care. Now, conceding (but not so holding, since it is not necessary to so decide) that the court erred in giving the instruction based upon facts requiring defendant to exercise ordinary care only, it could not have been prejudiced thereby. Indeed, as to defendant obviously the instruction was favorable rather than otherwise.

Objections to some of the questions propounded with the view of proving the extent of plaintiff's injuries should have been sustained. For instance, plaintiff's employer was asked whether or not there was any kind of carpenter work which, upon being requested, plaintiff refused to do, to which he answered, "Yes." Conceding questions of this nature improper since plaintiff may have arbitrarily refused, it is apparent, in view of ample evidence given as to the extent of the injury suffered, that no prejudice resulted therefrom. They were not calculated to influence the jury in arriving at its verdict.

Our attention is directed to no prejudicial error, and the order appealed from is affirmed.

We concur: SHAW, J.; SLOSS, J.

34 Cal. App. 76

McKINNELL v. HANSEN et al. (L. A. 3939.)

(Supreme Court of California. Aug. 4, 1917.)

1. Appeal and Error 🔑757(1, 3)—Briefs—Incorporating Evidence.

Where appeal is taken under Code Civ. Proc. §§ 953a–953c, judgment will not be reversed because of insufficiency of evidence to justify findings of fact, where briefs do not contain any portion of judgment roll, nor enough evidence to enable court to determine merits of objections urged, but show that the record contains testimony besides that quoted relating to findings in question.

2. Appeal and Error 🔑631 — Record — Printing.

Record on appeal may be prepared under Code Civ. Proc. §§ 953a–953c, as amended in 1915, even though appeal is on judgment roll alone, and such record need not be printed, but may be typewritten under Supreme Court rule 7 (119 Pac. xi).

In Bank. Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by Anna C. McKinnell against Hettie Hansen and another. From judgment for defendants, plaintiff appealed to the District Court of Appeal, where the judgment was affirmed. Application for hearing in Supreme Court denied.

The following is the opinion of Conrey, P. J., in the District Court of Appeal:

The attorney for appellants opens his brief with the statement that this is an appeal from a judgment denying the relief prayed for in the cross-complaint of appellants. He says that the cross-complaint alleged that the property described therein was the community property of appellants, and that appellant Hettie Hansen executed deeds thereof to the respondent; that appellants asked to have the deeds set aside and canceled, or that the respondent be declared a constructive trustee for appellants on certain grounds stated. The brief then proceeds to argue the following propositions: (1) That the finding that Hettie Hansen did not execute the deeds because of fear of arrest or immunity from arrest is not justified by the evidence; (2) that the finding that respondent did not have actual notice that the property was the community property of Hettie Hansen and H. P. Hansen is not supported by the evidence; (3) that there is no finding of fact nor does the evidence justify the finding that respondent was an incumbrancer in good faith and for a valuable consideration, as provided in section 164 of the Civil Code; (4) that the burden of proof is on the respondent to show that she is an incumbrancer in good faith; (5) that appellants are not estopped to assert that the property is community property; (6) that the finding that the consideration consisted of a prior existing indebtedness and additional advances of money at the time of the execution of said deeds is not justified by the evidence. Within the argument on the first proposition the point is presented that the trial court erred in refusing to admit certain offered testimony to which objections made by respondent were sustained by that court. The foregoing is a complete outline of the points presented for consideration here.

The typewritten transcripts, being a "Clerk's Transcript on Appeal," certified by the clerk of the superior court, and a "Reporter's Transcript" approved by the judge, are the only papers on file herein, except appellants' brief. Section 950 of the Code of Civil Procedure provides, among other things, that on appeal from a final judgment the appellant must furnish the court with a copy of the judgment roll. Section 953, Code of Civil Procedure, provides that the copy of the judgment roll must be certified to be correct by the clerk or the attorneys. These requirements have stood unchanged in the Code since 1874, although some other phraseology of section 950 was amended in 1915 (nearly a year after the transcripts in the case were filed). In 1907 sections 953a, 953b, and 953c of the Code of Civil Procedure were enacted. They provide for what is called the alternative method of preparing a record on appeal. This alternative method was designed to apply to a record made on the trial of an action or of some proceeding in an action. Thereby the appealing party is allowed to require that the stenographic reporter prepare a transcript of his phonographic report of the trial, in cases where there was such a report. After notice as prescribed, the transcript is settled and allowed by the judge. Thereupon it shall "become a portion of the judgment roll and may be considered on appeal in lieu of the bill of exceptions now provided for by law." Sections 953a, 953b, and 953c do not contain any provisions which modify the force or effect of sections 950 and 953, Code of Civil Procedure, or the rules of practice thereunder, on an appeal from a judgment.

Rule 7 (119 Pac. xi) of the Supreme Court, as in force in 1907 and long prior thereto, provided that all transcripts of record must be printed in the manner there stated. Thereafter rule 7 was modified by excepting from its operation criminal cases and civil cases coming under the provisions of section 953a, Code of Civil Procedure. It remains true now, just as it was prior to the enactment of sections 953a, 953b, and 953c, that a judgment roll prepared as required by section 950, Code of Civil Procedure, and its correctness certified by the clerk or attorneys as required by section 953, Code of Civil Procedure, must be printed as required by rule 7. Section 953c says of the record prepared in accordance with sections 953a and 953b: "Said record shall be filed with the clerk of the court to which the appeal is taken and no transcript thereof need be printed. In filing briefs on said appeal the parties must, however, print in their briefs, or in a supplement appended thereto, such portions of the record as they desire to call to the attention of the court." The typewritten "Clerk's Transcript" filed herein is plainly not the record prescribed in the foregoing quotation, and since it is not printed it cannot be considered. Without it this court does not know what were the issues and does not know what were the findings in the court below. If it be objected that this is a technical ruling, the answer must be that the law may be technical, as all laws or rules of practice are in a sense technical, but that the ruling in this case is not so. We are not here construing doubtful phrases. We are enforcing a long-established rule of practice, well known to the profession, which has been in force for many years, and which this court is not authorized to repeal or ignore.

But even if we were to accept the clerk's transcript of the judgment roll upon the assumption that it is properly before the court, appellants' case would not be very much improved thereby. Counsel for appellants have not printed in their brief or in any supplement appended thereto any portion of the judgment roll, nor have they printed therein a sufficient portion of the evidence to enable the court to determine the merits of the objections urged in their argument. As above noted, their principal points relate to claimed insufficiency of the evidence to justify certain findings of fact. Out of the reporter's transcript of more than 150 pages, they have quoted in their brief not more than 5 pages of testimony. These excerpts from the testimony are connected together by narrative statements related by counsel which show on their face (and counsel asserts nothing to the contrary) that the record contains much testimony other than that quoted in the brief, relating to the findings in question. Therefore we are not left in a position where we are able to assume that the quotations in the brief are complete as to the points argued, or to say that the record does not contain the evidence necessary to sustain the findings of fact. The situation is much like that in Pasadena Realty Co. v. Clune (Civil No. 1646) 166 Pac. 1025, decision filed in this court June 6, 1917, wherein we said: "In order to ascertain whether there is merit in the contentions of appellant, the court would be compelled to examine the typewritten transcript and look therein for the testimony and copies of the documents relied upon, instead of in the brief of appellant, where such testimony and records should have been printed. This the court is not required to do. Marcucci v. Vowinckel, 164 Cal. 693, 130 Pac. 430; Wills v. Woolner, 21 Cal. App. 528, 132 Pac. 283; Miller v. Oliver et al., 163 Pac. 357."

The judgment is affirmed.

In the foregoing decision James, J., concurred in the following opinion:

I concur in the judgment. I am not prepared to agree, however, with the conclusion announced by the presiding justice that on an appeal under the alternative method, to wit, under the provisions of section 953a, Code of Civil Procedure, it is necessary that the judgment roll shall be printed. It does seem clear under that section, however, that the judgment roll should be made a part of the transcript which is certified to by the trial judge. However, as to the printing of the judgment roll, I gather that our Supreme Court has taken the view that section 953a does not contemplate that the roll shall be presented in printed form, but that the same may be typewritten. I refer to subdivision 2 of rule 7, prescribing the form of transcripts which are to be presented under the so-called alternative method. In that part of the rule to which attention is directed the court has declared that transcripts on appeal prepared under the method referred to "must be typewritten and the paper and the backs for binding the same must not exceed ten inches in length and eight inches in width, * * * the papers constituting the ordinary judgment roll, are here designated as the 'Clerk's Transcript,' and the certified transcriptions of the phonographic reporter's notes * * * are here designated as the 'Reporter's Transcript.'" Neither by the statute nor rule of court is a party excused from printing in his brief such portions of the "record," which includes both the clerk's and the reporter's transcripts, as he may desire to call to the attention of the appellate court. As we have heretofore had occasion to suggest, the so-called alternative method is most unsatisfactory in practice, and we have been unable to perceive how under that method any expense is saved to the litigants, or that the court or the attorneys are thereunder relieved of any labor. Multiplying methods under which appeals may be taken can conduce only to confusion in the practice and produce results which in no wise aid in the administration of justice.

Henry J. Bischoff, of San Diego, for appellants. Lester D. Welch, of San Diego, for respondent.

PER CURIAM. [1] In denying the application for a hearing in this court after decision by the District Court of Appeal of the Second Appellate District, we deem it proper to say that we do so solely upon the second ground for affirmance stated in the opinion of Mr. Presiding Justice Conrey.

[2] We do not concur as to the first ground. Rule 7 (119 Pac. xi) of this court has never been considered by this court as requiring a printed transcript where the record on appeal is made up under the provision of section 953a et seq., Code of Civil Procedure. It is the settled construction of that rule that in any civil case in which a record on appeal is authorized to be prepared under those sections the case is a civil case "coming under the provisions of section 953a" within the meaning of the rule, and that under the express terms of the rule (subs. 1 and 2) the whole record on appeal, including the judgment roll, may be typewritten. Such has been the invariable practice. Prior to the amendment of section 953a in 1915 it was held that when the appeal was on the judgment roll alone no record on appeal could be prepared thereunder, but it is settled by decisions made since the amendment that the effect thereof is to authorize a record thereunder even when the appeal is on the judgment roll alone, with the consequent right to a typewritten record thereof.

The application for a hearing in this court is denied.

34 Cal. App. 197

EMMETT v. COONS. (Civ. 1813.)

(District Court of Appeal, Second District, California. June 26, 1917. Rehearing Denied July 25, 1917; Denied by Supreme Court Aug. 23, 1917.)

1. NOVATION 🔑3—NECESSITY FOR RELEASE.
In view of Civ. Code, § 1531, subd. 2, section 2794, subd. 3, there can be no novation substituting new debtor for old without release of the original debtor, where agreement with person substituted is not in writing.

2. APPEAL AND ERROR 🔑757(3)—BRIEFS—INCORPORATING EVIDENCE.
On appeal taken under Code Civ. Proc. § 953c, court will not reverse judgment on ground that evidence is insufficient to support findings, where appellant's brief contains some of the evidence bearing on questions argued, but shows that there was other evidence on the same subject which is not quoted.

3. NOVATION 🔑12—SUFFICIENCY OF EVIDENCE—RELEASE.
Evidence *held* sufficient to support finding of novation of debtors where it shows that at meeting of creditors and old and new debtors it was agreed that creditors should accept reduction and look to new debtor for their money, that one suit against old debtor was dismissed in accordance with agreement, and that other creditors transferred their accounts to name of new debtor.

Appeal from Superior Court, Kern County; Howard A. Peairs, Judge.

Action by Walter A. Emmett, Jr., against W. H. Coons. From judgment for plaintiff, defendant appeals. Affirmed.

For opinion in Supreme Court denying rehearing, see 167 Pac. 890.

H. H. Bell, of Maricopa, and E. F. Brittan, of Bakersfield, for appellant. E. L. Foster and Chas. A. Barnhart, both of Bakersfield, for respondent.

CONREY, P. J. The defendant appeals from the judgment and contends that the judgment should be reversed on grounds of insufficiency of the evidence to support the findings.

The only records filed herein are a typewritten reporter's transcript settled and allowed by the judge, and the typewritten clerk's transcript certified by the clerk of the court below. The judgment roll has not been printed, and it is not before the court in the form required by law. McKinnell v. Hansen, 167 Pac. 887, decided by this court June 2, 1917. By assuming the existence of the record as counsel assume it in their argument, we learn that the action was brought by the plaintiff as assignee of several creditors of Warren Barnes against the defendant, Coons, under an alleged agreement of novation whereby Coons was substituted as debtor instead of Barnes.

[1] It is conceded that there was no agreement in writing, and it is claimed by appellant that the evidence failed to show a release of Barnes by his original creditors. Such release would be necessary to make a novation substituting a new debtor. Civ. Code, § 1531, subd. 2; section 2794, subd. 3.

[2] Counsel for appellant in their brief have quoted some portions of the testimony, and thereby have attracted our attention "to such portions of the record as they desire to call to the attention of the court." Code Civ. Proc. § 953c. It may be conceded that the testimony quoted does not show any release of the original debtor by his creditors. This, however, does not enable us to say that there is no such evidence, when we observe also by reading the same brief that there was other evidence on the subject which they did not quote. Thus they refer us to the testimony of Warren Barnes and assure us that it fails to show that he was released by the creditors. They tell us that this testimony commences on page 81 of the transcript, but their quotations give only certain parts of pages 100 to 103. They do not tell us that these quotations are the only portions of the testimony of Barnes bearing upon the question argued. Again, they tell us that the testimony introduced by the defendant is in contradiction to that offered by the plaintiff. Then, instead of quoting the testimony on which they rely, they give us a statement of counsel for appellant purporting to outline what the testimony of the defendant's witnesses "shows." This is one of those numerous cases in which the Supreme Court and the Courts of Appeal are asked to waste their time in digging through records not presented as required by law, in order to reverse judgments. With hundreds of cases waiting for decision, the interests of justice do not demand and it scarcely can be said that those interests permit us to delay the decision of the cases in waiting while we make up statements and attempt to analyze records that are not properly presented. In this case there has been a more extensive quotation of evidence by counsel for respondent, who deemed it not safe to rely upon the fact that the record was not sufficiently presented on the other side.

[3] From the evidence quoted in the brief for respondent, we learn that there were meetings of creditors of Barnes, at one or more of which meetings the defendant, Coons, was present. The witnesses failed to give the names of all the creditors who were present, but apparently there were more than the number whose assigned claims are represented by the plaintiff in this action. Counsel admit that it was stipulated that the amounts of the claims as set forth in the complaint are not in question. One of the witnesses testified that:

> "It was finally agreed by everybody present that they would accept 20 per cent. reduction, and accept Mr. Coons' proposition and look to Mr. Coons for their money."

In one instance a suit which had been commenced against Barnes was, in accordance with that agreement, dismissed, and in other instances the creditors transferred their accounts to the name of Coons. While the testimony thus developed by the brief of respondent might well be more definite in some details, it does tend to support the finding which counsel have chosen to discuss, and we are unable to say that the findings are not supported by the evidence.

We have discussed the principal proposition upon which appellant relies for a reversal. The other propositions referred to in the brief are subsidiary to the principal one, and as presented are not sufficient to sustain the appeal.

The judgment is affirmed.

We concur: JAMES, J.; WORKS, Judge pro tem.

34 Cal. App. 197

EMMETT v. COONS. (L. A. 5323.)

(Supreme Court of California. Aug. 23, 1917.)

APPEAL AND ERROR ⚷631—PRINTING JUDGMENT ROLL—NECESSITY.

In an appeal from a judgment on the grounds of the insufficiency of the evidence to support the findings, it is not necessary that the judgment roll be printed where a typewritten reporter's transcript settled and allowed by the judge and a typewritten clerk's transcript certified by the clerk of the court below are filed.

In Bank. Appeal from Superior Court, Kern County; Howard A. Peairs, Judge.

Application for rehearing. Denied.

For opinion of appellate court, see 167 Pac. 888.

H. H. Bell, of Maricopa, and E. F. Brittan, of Bakersfield, for appellant. E. L. Foster and Chas. A. Barnhart, both of Bakersfield, for respondent.

PER CURIAM. In denying the application for a hearing in this court, we deem it proper to say that we disapprove the statement in the opinion that because the judgment roll was not printed "it is not before the court in the form required by law." We have already expressed our view on this question, in denying a hearing in this court of the case of McKinnell v. Hansen, 167 Pac. 887, referred to in the opinion. The opinion, however, shows that in deciding the case the court did assume the existence of a proper record of the judgment roll.

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34 Cal. App. 267

CUNNISON v. MILLER et al. (Civ. 2104.)

(District Court of Appeal, Second District, California. July 6, 1917.)

1. APPEAL AND ERROR ⚷757(1)—BRIEFS—INCORPORATING RECORD.

Judgment will not be reversed on appeal under "alternative method" where appellant prints in his brief no part of record to which he desires to call attention.

2. APPEAL AND ERROR ⚷957(2)—JUDGMENT ⚷139—DEFAULT—SETTING ASIDE—DISCRETION—REVIEW.

Determination of motion to set aside default judgment on the ground of mistake, inadvertence, surprise, and excusable neglect rests in discretion of trial court, which will not be disturbed in the absence of abuse.

3. APPEAL AND ERROR ⚷865—REVIEW—BILL—SUFFICIENCY.

On an appeal from deficiency judgment taken against appellant by default in action to foreclose mortgage, objection that complaint does not state cause of action cannot be reached where the judgment is not void.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by James Cunnison against Charles Lee Miller, William Evans, and another. From judgment for plaintiff, William Evans appeals. Affirmed.

Jas. W. Bell, of Los Angeles, for appellant. Ralph E. Swing, of San Bernardino, for respondent.

JAMES, J. Defendant Evans prosecutes this appeal from an order made by the trial court denying the motion of said defendant to have set aside a judgment taken against him after service of summons and complaint had been regularly made and default entered. The notice of appeal also states that the defendant appeals from the "deficiency judgment made and entered against him in said action."

[1] The appeal is taken under the so-called and most unsatisfactory "alternative method," but appellant has failed to follow the statute in that no part of the record to which he desires to call attention is printed in his brief. Having omitted to comply with the direction of the statute in that regard, no duty is imposed upon this court to examine the typewritten transcript. Marcucci v. Vowinckel, 164 Cal. 693, 130 Pac. 430; Wills v. Woolner, 21 Cal. App. 528, 132 Pac. 283; Miller v. Oliver et al., 163 Pac. 357; Pasadena Realty Co. v. Clune, 166 Pac. 1025; McKinnell v. Hansen et al., 167 Pac. 887.

We have, however, looked over the briefs and in an abstract way considered the propositions argued therein. The appellant, it is stated, was the mortgagee named in a certain mortgage. This mortgage and the accompanying note he transferred to this plaintiff. The transfer of the note was effected by a simple indorsement on the back. The plaintiff, bringing this action to foreclose the mortgage, joined appellant as a party for the purpose of securing a deficiency judgment against him in the event that by sale of the security the debt was not satisfied. The sale of the property did not in fact produce sufficient money to satisfy the mortgage debt, and deficiency judgment was entered against appellant for the sum of $401.50. This appellant, after service of summons, made no appearance in the action and allowed judgment to be taken against him by default. He afterwards made motion, based upon the alleged ground of mistake, inadvertence, surprise, and excusable neglect, to have this judgment set aside, which motion was by the court denied.

[2] The matter of determining such a motion rests within the sound discretion of the trial judge, and upon the statement of the facts as set forth in the brief we cannot see that the court abused its discretion. Appellant did not appeal from the judgment of foreclosure, but appealed, so it is stated, from the "deficiency judgment." The liability of appellant was determined by the judgment of foreclosure wherein it was adjudged that he was liable for any money that might be necessary to make up the deficiency between the amount realized on the sale of the property and the mortgage debt, with incidental costs. The entry of deficiency judgment was an incident which followed only because it was adjudged in the original decree that the plaintiff was entitled to that relief.

[3] The question whether the complaint stated facts sufficient to constitute a cause of action, as it is argued by appellant it did not, we think could not be reached by this appeal; for a judgment so entered upon such a complaint, where the party defendant has defaulted, would not be void.

The judgment and order are affirmed.

We concur: CONREY, P. J.; WORKS, Judge pro tem.

34 Cal. App. 459

PEOPLE v. EDGAR. (Cr. 673.)

(District Court of Appeal, First District, California. Aug. 24, 1917.)

1. Witnesses 🔑351—Impeachment—Relationship with Accused—Misconduct.

While it may be shown that a witness had illicit relations with accused, as affecting her credibility, it is improper to ask questions in bad faith, and lay foundations for impeachment, when no evidence is to be offered in impeachment.

2. Criminal Law 🔑720(5)—Misconduct of Counsel.

An insistence by a prosecuting attorney that a witness swear to the truth of her statements upon a crucifix pressed against her breast was a direct intimation that the witness could not be believed under an ordinary oath, and was flagrant misconduct.

3. Criminal Law 🔑723(1)—Misconduct of Counsel.

Where, on objection to a question on cross-examination of a prosecutrix in a rape case as to her knowledge of what would happen if defendant was convicted, counsel said, "I know what would happen to him if it were my daughter," there was misconduct tending to inflame the jury.

4. Criminal Law 🔑719(1, 3) — Misconduct of Counsel in Argument.

It is error in argument to tell the jury the opinions of different persons as to the guilt of accused, the indictment and opinions of guilt not being evidence of guilt; nor can the prosecuting attorney give his opinion, except as to evidence introduced on the trial.

5. Criminal Law 🔑719(3) — Remarks of Counsel.

A remark of a prosecuting attorney that he would not prosecute a man if he did not believe him guilty is erroneous, as putting the opinion into evidence, and leads the jury to believe the attorney has based his opinion partly on facts not shown in evidence.

6. Criminal Law 🔑1171(3) — Remarks of Counsel—Error.

Remark of prosecuting attorney that he would not let fraternal orders and politics affect his prosecuting the case was prejudicial; there being no evidence whatever regarding it.

7. Criminal Law 🔑1171(3)—Misconduct of Counsel—Argument to Jury.

A statement of a prosecuting attorney in a rape case, in effect that if the defendant were not guilty he could and should have discovered and shown whether or not prosecutrix had sexual intercourse with others, was prejudicial, as impressing the jury that the burden of proof was on defendant.

8. Rape 🔑36 — Evidence — Burden of Proof.

In a rape case, there is no duty on the defendant to show who the guilty party was, or that other persons had intercourse with prosecutrix, no matter if defendant has special means for knowing.

9. Criminal Law 🔑1037(2)—Appeal—Misconduct of Counsel—Request That Jury be Admonished.

Although ordinarily necessary to request the court to admonish the jury where there is misconduct of counsel, such is not the case where the court tells the jury that he is not going to admonish them each time, but that they should not consider anything to which an objection is sustained.

10. Criminal Law 🔑730(1)—New Trial—Misconduct of Counsel — Admonishment of Jury.

Where misconduct of counsel is so persisted in and pernicious that it is not in human nature to forget, a mere admonishment to the jury is insufficient, and a new trial is necessary.

Appeal from Superior Court, Santa Clara County; W. A. Beasly, Judge.

William Edgar was convicted of statutory rape, and he appeals. Reversed.

H. A. Blanchard, of San Jose, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

PER CURIAM. The defendant was charged with and convicted of the crime of rape, alleged to have been committed upon a female under the age of consent. He was sentenced to 20 years' imprisonment in the penitentiary, and appeals from the judgment and from an order denying his motion for a new trial.

As is quite frequent in criminal cases appealed from the county of Santa Clara (from which this appeal comes), the misconduct of the district attorney during the trial of the cause is the principal point made for a reversal of the judgment. It seems to be a pronounced proclivity of the district attorney of that county to endeavor, in the trial of a person charged with crime, to circumvent the well-settled and generally well-understood rules of evidence by willfully injecting into the case immaterial and prejudicial matters, through the medium of innuendo, bald assertions of his personal opinion as to alleged facts, and the poor pretense of arguing objections, all obviously intended for the ears and consideration of the jury. In the past, similar misconduct, which has been brought to our attention in other recent cases, did not result in a reversal of the judgment, not, however, because it was not abundantly established, but because the evidence in the given case sufficiently showed the defendant to be guilty, and we were satisfied that the verdict of the jury had not been controlled or materially affected by such misconduct. The situation in the present case is obviously different. Here the testimony of the prosecuting witness was not only uncertain and contradictory in matters of vital importance, but was shown to be willfully and absolutely false in certain particulars affecting a material phase of her story. Moreover, her story in part runs close to the border line of the fantastic.

No good purpose would be served by narrating in detail her testimony; but for the purpose of showing its improbability in an essential feature it will suffice to say that she testified in substance that the defendant, prior to the commission of the particular act for which he was on trial, had had sexual intercourse with her at regular intervals during a period of several months, but that on each occasion there was but slight penetration, and she undertook to state with exactitude its extent, and also testified that on each occasion the defendant was content to lie passively upon her for a period of 15 minutes without engaging in the motions which ordinarily accompany an act of sexual intercourse. The improbability of the testimony of the prosecuting witness in the particular stated is obvious. It was so to Dr. Beaty, a witness for the prosecution, who, referring to it, said:

> "I can conceive of an entering carefully, very carefully, and being withdrawn, without causing a rupture of the hymen. I think it is very unnatural, very unusual. It is not common to carry on acts of sexual intercourse as described by the prosecutrix. I have a reasonable doubt as to whether that would be probable, but not as to its being possible. It is a possibility, but not a probability."

The defendant, testifying in his own behalf, denied the story of the prosecutrix; and a Mrs. Perry, a witness called by him, corroborated him in the particular that he did not and could not have committed the offense charged on the day and at the place and time charged. This witness testified in substance that she and her husband had been particular and intimate friends of the defendant and his wife, and had frequently visited them at their home, and that after the wife's death she (the witness) had been in the habit of visiting the defendant at his home for the purpose of gathering up and doing his laundry, and at one time after the death of his wife had attended him during an illness; that she was at the defendant's home, accompanied by her children, on the day and during the hours that the prosecutrix testified the defendant had committed the act charged against him; that while there the prosecutrix called, but that the defendant told her to go home, and on that occasion at no time attempted, and had no opportunity to commit, any act of impropriety with her. This witness was subjected to a very severe cross-examination by the district attorney. He was not satisfied to rest upon the results obtained by this examination, but resorted to what we must characterize as the grossest misconduct in a further effort to discredit her. His attitude and conduct will be best shown by excerpts from the record of the trial.

> "Q. (By Mr. Free on cross-examination). You cannot say whether you went there [to the defendant's home] once or several times that week [the week in which the offense was charged]? A. I never went several times in one week when Mr. Edgar was not sick. Q. Oh, I see. A. When Mr. Edgar was sick, my husband as a rule would go with me, and sometimes I went alone, and my husband was a frequent visitor, and visited Mr. Edgar very often, and I went with my husband's consent. Q. Did your husband go there to visit Mr. Edgar, or come to get you to bring you home?
>
> "Mr. Blanchard (counsel for the defendant): Just a second. I object to that, on the ground it is immaterial, irrelevant, and incompetent, not proper cross-examination, and intended by the district attorney as an insult to this witness, and I assign the same as misconduct, and ask that the jury be instructed to disregard it.
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> "The Court: The objection is sustained. Gentlemen of the jury, whenever the court sustains an objection to a question you are to disregard the question as well as the answer—there being no answer in this case.
>
> "Q. Haven't you and your husband had frequent trouble about Mr. Edgar?
>
> "Mr. Blanchard: That is objected to as immaterial, irrelevant, and incompetent, and not proper cross-examination, and intended by the district attorney as an insult to this witness, and I assign the same as misconduct of the district attorney, and I ask the court to instruct the district attorney to desist from such misconduct, and I ask that the jury be instructed to disregard any statement of that character.
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> "Mr. Free: I want to answer that. This witness alleges that her conduct in this respect is agreeable to her husband, which is contrary to the fact, as we know, and the husband will so state; and I want the right to cross-examine her and lay the foundation for further testimony.
>
> "Mr. Blanchard: I assign the statement of the district attorney as misconduct. I state that it is absolutely false, and the husband has visited Mr. Edgar frequently himself.
>
> "Mr. Free: Will you consent to the husband being called and sworn and asked the questions?
>
> "Mr. Blanchard: I will waive none of my rights so far as that is concerned. The fact of a defendant such as Mr. Edgar being indicted on a charge of rape, and then deny him the right to have a lady come to testify, without branding her as being guilty of every crime than that one you allege this man is guilty of. This lady is the mother of five children, and one a baby in arms, a baby 18 months old; yet she comes into court to be insulted by an officer whose duty it is to protect this woman, and I insist that we have a right to the protection of this court, and I demand that the district attorney of this county desist from insulting this witness time after time.
>
> "The Court: Well, I don't think that further discussion is necessary. The court sustained the objection yesterday. The witness has volunteered the statement here that I presume the district attorney thought I invited this question. If he wishes to have that statement stricken out, I will have it stricken out; and, gentlemen of the jury, counsel sometimes become heated, and the court usually tries to moderate their arguments as far as possible. These arguments and statements by the district attorney and the attorney for the defendant are not evidence, and you must not accept them as evidence in any way; and when the court sustains an objection to a question you must wipe the question from your mind, as well as remember that the answer has not been given, or, if it has been given and stricken out, that you must not regard it in any way. I will not repeat this instruction to you frequently. It may appear proper to do so, and it may be asked; but I am depending upon you as intelligent men to remember it and bear it in mind whenever such instances occur in the future.
>
> "Mr. Free: Q. What did you mean when you

testified that you got the bedding on Tuesday? A. I was there on Tuesday, the 14th, and the children went on Thursday. You get me complicated. I suppose that is your business to do so. You have attacked my character so terrible that you got me so overwrought that I don't know what I am saying sometimes. I want you to understand that I am a good woman. * * * Q. Well, Mrs. Perry, I don't think you know any date that you were there, and I don't think that you know that you were there on the 14th.

"Mr. Blanchard: That is objected to, and I assign the same as misconduct. * * *

"Q. You and Mr. Edgar have been in the house alone for a considerable time on various occasions? A. Yes, sir. Q. And you and your husband have had some words about it?

"Mr. Blanchard: I object to that, on the ground it is immaterial, irrelevant, and incompetent, and I assign the question as misconduct.

"The Court: The objection is sustained.

"Q. You are living with your husband? A. Yes, sir. Q. Have you any other children (evidently referring to a child not previously mentioned)? A. Yes, sir. Q. What is his name? A. William. Q. William Edgar, isn't it? A. Not William Edgar. William Oliver.

"Mr. Blanchard: I assign the statement of the district attorney as an insult to the witness and as misconduct.

"Q. Isn't the child generally known about the community as William Edgar Perry?

"Mr. Blanchard: Just a moment. I object to that as irrelevant, incompetent, and immaterial, and intended by the district attorney as an insult to the witness, and I demand the protection of the court for this lady, and I assign the same as misconduct.

"The Court: The objection is sustained. It is incompetent, Mr. Free.

"Q. What did you say his name is? A. William Oliver. Q. And how old is it? A. Fourteen months old, it will be, the 25th of this month. Q. And after whom was it named?

"Mr. Blanchard: I object again to the question, and I assign the same as misconduct.

"The Court: The objection is sustained."

[1] The misconduct of the district attorney as shown above is apparent; and that it was deliberately pursued, with the intent and purpose of prejudicing the jury against the witness and discrediting her testimony, is equally apparent. It will be conceded that the district attorney was privileged to show, if he could, that the relationship existing between the witness and the defendant was of such a character that she would be likely to color her testimony to suit the needs of the defendant; and with that end in view he would have been justified in asking in good faith questions based upon fact, or what he honestly believed to be the fact, for the purpose of laying a foundation for the impeachment of the witness. Of course, in urging the question in the face of an objection, he would have been justified in stating what he expected to prove by way of impeachment. But to state in the presence of the jury that it was a fact within his knowledge that the visits of the witness to the home of the defendant were not agreeable to her husband, and that the latter would so testify, was manifestly improper and injurious, both to the witness and the defendant. That the questions and statements objected to were not asked or made in good faith is evident, from the fact that the district attorney did not call the husband of the witness, for the purpose of impeachment or any other purpose during the trial, even though he had laid the foundation for impeachment. That he was acting in bad faith, and in so doing was prompted by a desire to badger and discredit the witness, is evidenced by his request, made to counsel for the defendant, to consent that the husband be called as a witness. Surely a man of the ability and extended experience of this particular district attorney in the trial of criminal cases must have known that it was not necessary for such consent to be had before the husband could be called as a witness for the people; and there can be no escape from the conclusion that in making the request it was the purpose of the district attorney to draw an objection from counsel for the defendant, and thereby give the jury the impression that he could substantiate his statement of what he asserted to be the fact, if counsel for the defendant would permit him to do so. In short, the district attorney by this device succeeded in placing before the jury his unsworn statement of a fact which was well calculated to prejudice the witness and the defendant in the eyes of the jury; for, as was said in the case of People v. Fleming, 166 Cal. 357, 380, 136 Pac. 291, 301 (Ann. Cas. 1915B, 881):

> "The plain effect of the statement was that the prosecution had such proofs, but could not make them, because the law of evidence prevented such a course."

The questions of the district attorney, which by innuendo conveyed the impression that the witness' child, William, was the son of the defendant, were wholly unwarranted by anything that had been previously testified to by the witness, and were therefore improper cross-examination. Such a vile, and, in so far as the record shows, unwarranted, insinuation, uttered by one so high in authority as the district attorney—whose sworn duty it is to protect witnesses from unnecessary insult—must have prejudiced the witness and the defendant in the eyes of the jury, for—

> "the prosecuting attorney may well be assumed to be a man of fair standing before the jury, and they may well have thought that he would not have asked the question unless he could have proved what it intimated." People v. Crosby, 17 Cal. App. 524, 120 Pac. 441; People v. Tufts, 167 Cal. 266, 139 Pac. 78.

[2] The district attorney's successful insistence that the witness should swear to the truth of her statements upon a crucifix pressed against her breast was another instance of the badgering to which the witness was subjected; and doubtless was intended as a direct intimation to the jury that she could not be believed while testifying under the ordinary form of oath. This was a flagrant piece of misconduct.

[3] Another instance of misconduct is to be found in the cross-examination of the prosecutrix when, in making an objection to a question which called for the knowledge

of the witness as to what would happen to the defendant if he were convicted upon her testimony, the district attorney, after stating the usual grounds of objection, said, "I know what would happen to him if it were my daughter." This statement was wholly unnecessary to the objection, and was plainly intended as an intimation to the jury that if the prosecutrix were his daughter he would kill the defendant because he believed him to be guilty; and the evident purpose of the statement was—and very likely had for its result—to inflame the minds of the jury against the defendant. State v. Robinson, 170 Iowa, 267, 152 N. W. 595.

[4] In his closing argument to the jury the district attorney again resorted to culpable misconduct, which was duly protested by defendant's counsel without any resulting admonition from the court, the trial court evidently being of the opinion that any irregularities occurring during the course of the argument would be corrected by its final charge to the jury. Extracts of the argument complained of follow:

> "Mr. Free: Gentlemen of the jury, Professor Holland and Mr. Lake heard this girl's story, and they believed it. They brought her before the grand jury. Nineteen men of this county, acting upon their oaths as grand jurors, heard her story, and believed it. I heard her story, and I believed it. The deputy sheriffs heard her story, and they believed it; and why shouldn't you believe it? * * * Another thing, gentlemen. If this condition had been caused by any person other than Edgar; if this little girl had been seen with any other man; if she had been in company with any boy—don't you suppose that they would have found it out with * * * detectives scouring the city? Don't you think that, if this had been done by anybody else, * * * they would have found it out and offered that proof? * * * I will not prosecute any man that I do not believe to be guilty for a thing of this kind; but you cannot put enough fraternal orders before me, you cannot put political inducements in my face to stop me, when the fate of a little girl is at stake. * * *"

No justification has been made of this argument, and, in our opinion, none can be made. It was grossly improper, and undoubtedly must have weighed heavily against the defendant. The indictment of the defendant was not any evidence of his guilt; and the personal belief in the guilt of the defendant entertained by the grand jurors, the district attorney, or the persons mentioned in the argument, nor the testimonial of the district attorney to his own integrity, had any proper place in the case, and should not have been presented for the consideration of the jury; for obviously such belief might have been based upon matters and things which were not before the jury in the form of legal evidence. The injection into the case of the district attorney's opinion and the opinion of others as to the guilt of the defendant in all likelihood must have weighed with the jury. State v. Baker, 246 Mo. 357, 152 S. W. 52; Nixon v. State, 14 Ga. App. 261, 80 S. E. 513; Moore v. State, 10 Ga. App. 805, 74 S. E. 318; People v. Dane, 59 Mich. 550, 26 N. W. 781; Commonwealth v. Shoemaker, 240 Pa. 255, 87 Atl. 685.

[5] When the district attorney declared that he would not prosecute any man he did not believe to be guilty, he thereby wrongfully placed his personal opinion of the guilt of the defendant in evidence in the case. He was privileged to argue to the jury that it was his opinion, formed from deductions made from the evidence adduced at the trial, that the defendant was guilty of the crime charged. People v. Rogers, 163 Cal. 476, 126 Pac. 143. But his declaration to the jury that he would not prosecute any man whom he did not believe to be guilty was tantamount to an assertion that he believed in the guilt of the defendant at the very inception of the prosecution; and necessarily such belief must have been founded upon the result of the district attorney's original and independent investigation of the charge, and therefore in all likelihood was based, in part at least, upon facts which did not appear, and which perhaps could not have been shown, in evidence.

In the case of State v. Gunderson, 26 N. D. 294, 144 N. W. 659, Ann. Cas. 1916A, 429, the defendant was convicted of the crime of rape upon the uncorroborated testimony of a 15 year old girl, which the Supreme Court of North Dakota characterized as "inconsistent and vacillating, and in many instances opposed to all human probabilities." In that case counsel for the state in his closing argument to the jury said, "I do not come here to try a case unless the defendant is guilty." This remark was held under all the circumstances of the case to be misconduct of so grievous a character as to necessitate a reversal of the judgment, for, as stated in the opinion:

> "No one who is at all conversant with jury trials can fail to see the possible prejudice of this remark. The scales were hanging in the balance. On one side is the positive denial of the defendant; on the other is the practically uncorroborated testimony of the complaining witness, that testimony being more or less contradictory and inconclusive. In such a juncture the state's attorney himself testifies, and seeks to force into the issue his own personality and his own standing and influence. * * *"

It is universally held that such remarks are not only a breach of professional propriety and professional ethics, but constitute legal error.

[6] We have searched the record in vain for any evidence to support the intimation of the district attorney, made in his argument, to the effect that the influence of fraternal orders and politics had been brought to bear on him to prevent the prosecution of the defendant. Such an argument, therefore, was entirely without the record, and ought not to have been indulged in. That it was intended to be, and was in a measure, prejudicial to the defendant, we have no doubt.

[7, 8] The district attorney placed a burden of proof upon the defendant greater than the law demands when in his argument he

in effect told the jury that if the defendant were not guilty he could and should have discovered and shown in evidence whether or not the prosecutrix had had sexual intercourse with other persons. This argument was clearly improper and well calculated to mislead the jury. Obviously the motive of this argument was to impress the jury with the belief that, if the defendant was not guilty, it was incumbent upon him to show in evidence who the guilty party was; and the district attorney must have known as a matter of law that the defendant, in order to secure an acquittal, was not burdened with any such duty. Morris v. State, 9 Okl. Cr. 241, 131 Pac. 734; Brown v. State, 98 Miss. 786, 54 South. 305, 34 L. R. A. (N. S.) 815.

[9] It is contended upon behalf of the people that, while counsel for the defendant repeatedly protested the misconduct complained of, nevertheless he did not in any instance request the trial court to admonish the jury not to be influenced by the same, and that therefore the defendant will not now be heard to complain. Ordinarily, it is true, an assignment of misconduct will not be considered upon an appeal, in the absence of a showing that it was protested in the court below, coupled with a request that the court remove, if possible, the evil effects thereof by a proper admonition to the jury. It is also true that no such request was made in this case with every assignment of misconduct; but it must be remembered, as shown by the excerpt from the record hereinbefore quoted, that the first assignment of misconduct was accompanied with a request that the jury be admonished not to be influenced thereby, and, whether or not this particular assignment was well taken, the fact remains that the trial court sustained an objection to the question which it was claimed constituted misconduct, and at the same time charged the jury that whenever an objection was sustained they were to disregard the question as well as the answer, and later, when another assignment of misconduct was made, but which was not accompanied by a request for an admonition to the jury, the trial court, to its credit, of its own motion interposed with an admonition, and, as if anticipating what was to come, again told the jury that the sustaining of an objection to a question would suffice to warn them not to be influenced by the question or the answer, and that, while it might appear proper to do so, still no other or more explicit admonition would be frequently given.

Clearly, in view of the trial court's announcement, it was not incumbent upon counsel for the defendant to thereafter request an admonition to the jury when making an assignment of misconduct. Moreover, the learned trial judge, in an endeavor to safeguard the rights of the defendant against unfair attack, and apparently appreciating the gravity of the repeated misconduct of the district attorney, was not content, as he first intimated, to have a mere ruling sustaining an objection as an admonition to the jury; for the record shows that he at times, of his own motion, reprimanded the district attorney, and admonished the jury not to be influenced by certain misconduct. Such reprimands, however, apparently did not avail to deter the district attorney from the commission of subsequent acts of misconduct, which were so pronounced and persistent as to run close to the border line of contempt. And that this is so is evident by the fact that a particular piece of misconduct, occurring just as the trial was drawing to a close, and one which we have not heretofore mentioned, provoked the trial court to say:

> "Now, Mr. Free, one more transgression such as this one will merit a severe penalty from the court."

Thus it will be seen that the paramount point presented here does not involve a waiver of the misconduct complained of by failure to request that its evil effect be offset by an admonition to the jury, but rather presents the question of whether or not the admonitions actually given suffice to remove the prejudice engendered by the misconduct.

[10] While it is the general rule that, if it can fairly be said, from all of the circumstances of the case, considered in conjunction with the nature and extent of the assigned misconduct, that an admonition of the court had the desired effect, there can be no just cause for complaint, nevertheless it is a recognized exception to that rule that where, as here, in a closely balanced criminal case, misconduct is repeated and persisted in, despite the warnings and admonitions of the trial court, and is so pronounced and pernicious that it is not in human nature to forget or disregard its prejudicial effect, then manifestly a mere admonition, or any number of admonitions, will not suffice to right the wrong done, and the only remedy remaining is to be found in a reversal of the judgment.

The judgment is reversed, and the cause remanded for a new trial.

(34 Cal. App. 433)

ARMSTRONG v. BARCELOUX.
HOSKING v. SAME.

(Civ. 1680.)

(District Court of Appeal, Third District, California. Aug. 15, 1917.)

1. PRINCIPAL AND AGENT ⚷195—FINDINGS—SUFFICIENCY — "OSTENSIBLE AGENCY" — "OSTENSIBLE AUTHORITY."

Under Civ. Code, §§ 2300, 2317, 2334, declaring that agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him, and that an ostensible authority is such as a principal intentionally, or by want of ordinary care, causes or allows a third person to believe an agent possesses, and that a principal is bound

by the acts of his agent under a merely ostensible authority, a finding that defendant by his acts and conduct caused plaintiff to believe that another was his agent, and that plaintiff sold and delivered goods to such person upon the faith that defendant was responsible for her acts, is insufficient to show that an ostensible agency was created; not showing any intentional conduct or neglect on defendant's part creating in plaintiff's mind the belief that the agency existed.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Ostensible Agency; Ostensible Authority.]

2. PRINCIPAL AND AGENT 🔑195—FINDINGS—REJECTION.

A finding of fact, in an action for goods sold, that defendant caused plaintiff to believe that another was his agent, and that plaintiff sold and delivered goods to such person upon the faith of defendant, being liable for her acts, may be disregarded as immaterial, not being germane to the theory of the complaint, which was that sale was to defendant direct, and being insufficient to establish an ostensible agency.

3. TRIAL 🔑404(1) — FINDINGS — CONSTRUCTION.

Findings of fact by the trial court should receive such a construction as will uphold, rather than defeat, the judgment.

4. PRINCIPAL AND AGENT 🔑189(4)—AGENCY—PLEADING—VARIANCE.

In an action for goods sold and delivered, proof that they were sold to defendant through his authorized agent will support a judgment against defendant, though the agency was not averred.

5. APPEAL AND ERROR 🔑173(6) — ISSUES IN LOWER COURT—MODE OF RAISING.

In an action for goods sold and delivered, defendant on appeal cannot secure reversal of a judgment against him on the ground that the contract was void under the statute of frauds, because not in writing, where the point was not raised by objection to the evidence nor by motion for nonsuit.

6. APPEAL AND ERROR 🔑195—AMENDMENTS—OBJECTION BELOW.

Defendant cannot on appeal for the first time object to the allowance of a trial amendment to the complaint.

7. SALES 🔑52(6)—ACTIONS—EVIDENCE—SUFFICIENCY.

In an action for goods sold and delivered, evidence *held* sufficient to warrant a judgment for plaintiff on the ground that the sale was directly to defendant; credit being extended to him alone.

8. PRINCIPAL AND AGENT 🔑22(1)—AUTHORITY OF AGENT—DECLARATIONS OF AGENT.

An agency cannot be established by the declarations or conduct of the supposed agent.

9. SALES 🔑187 — INTEREST — ALLOWANCE — RIGHT TO.

Interest on an account for goods sold is properly allowed from the time of filing the complaint.

Appeal from Superior Court, Sacramento County; Chas. O. Busick, Judge.

Action by E. C. Armstrong against H. J. Barceloux, doing business under the fictitious name of Hotel St. Francis, and action by W. A. Hosking against the same defendant. There were judgments for plaintiffs, and defendant appeals. Affirmed as to the first-named plaintiff, and reversed with directions as to the last.

Wm. T. Belieu and C. L. Donohoe, both of Willow, for appellant. J. J. Henderson, of Sacramento, for respondents.

BURNETT, J. This is an appeal from the judgment rendered in each of the above-entitled causes, which by stipulation were tried at the same time, the issues and testimony in each being of a similar nature.

The action by E. C. Armstrong, a corporation, consists of a single cause of action. W. A. Hosking sues as assignee for collection of the Golden Poppy Bakery & Confectionery Company, a copartnership; of the Sacramento Laundry, a corporation; of the Meredith Fish Company, a corporation; of the Peerless Ice Cream Company, a copartnership; and of the American Fish Company, a corporation. The claim of the American Fish Company was subsequently dropped.

Both complaints were originally against H. J. Barceloux and Amelia Pratt, also known as Aimee M. Wolf, also known as Mrs. G. M. Pratt, doing business under the firm name and style of Hotel St. Francis, and G. M. Pratt, upon the theory that Barceloux and Amelia Pratt formed a copartnership, but at the close of the case plaintiffs filed complaints to conform to proofs against "H. J. Barceloux, doing business under the fictitious name of Hotel St. Francis," upon the theory that Amelia Pratt was but the ostensible agent of Barceloux.

It appears that the Hotel St. Francis was owned and operated by the Plaza Realty Company, a corporation, the stock of which was owned by one Dr. Tryon and Barceloux, each owning 50 per cent. Up to February, 1915, Dr. Tryon acted as general manager, though in October, 1914, Mrs. Pratt became a sort of partial manager, watching out particularly for the interests of Barceloux. During this period plaintiffs and their assignors had been creditors of the Realty Company, each having an open and running account.

The stockholders being unable to agree, Barceloux, in February, 1915, ousted Dr. Tryon, and himself assumed personal control of the hotel. Dr. Tryon thereupon himself paid what debts were owed by the hotel, and obtained releases from creditors of all claims against the Realty Company. Barceloux, having no authority to act for the Realty Company in order to facilitate his management, opened an account in the Fort Sutter National Bank in his own name, through which the finances of the hotel passed. From this time on Mrs. Pratt was in full control, doing all purchasing, engaging help, making necessary contracts, etc. Down to May 15, 1915, most of the outgoing checks were signed personally by Barceloux, but often checks were signed "H. J. Barceloux, by Aimee M. Pratt." It appears also that upon assuming control, Barceloux, together with Mrs. Pratt, visited different merchants with whom they dealt, among them E. C. Armstrong and Craddoc Meredith. Both Armstrong and Meredith testify that Barceloux there told them that Mrs. Pratt was in charge of the hotel, to let her have what credit she asked and that he would be responsible. Barceloux claims that he forcefully impressed upon their minds that he was merely representing the Realty Company and intended to assume no personal liability.

In May, 1915, the Plaza Realty Company sold their property to the city of Sacramento, and on May 13, 1915, the said city leased the hotel to Mrs. Pratt. In January, 1916, Mrs. Pratt failed financially. It is the relationship that existed between Barceloux and Mrs. Pratt during this period from May to January that is in issue, for it is during this period that the bills sued upon were contracted. Barceloux claims to have notified the creditors through Mrs. Pratt of his withdrawal from the business. It appears, however, that but seven or eight at most, of some fifty creditors, were notified; no balances were struck in the running accounts, nor were any accounts settled as of May 15, 1915. Though the creditors acknowledged some familiarity with the proposed sale to the city through having read the newspapers, they deny having received any notification or intimation of Barceloux's changed relationship. On the other hand the Barceloux account in the bank was changed to "H. J. Barceloux, by Mrs. G. M. Pratt," and hence forward and down to November 4, 1915, all checks in payment of goods sold the hotel were signed "H. J. Barceloux, by Mrs. G. M. Pratt." Mrs. Pratt was permitted to use Barceloux's name to avoid any attachment that might result to a personal account of her own, and she agreed to place the account in her own name as soon as possible. Mrs. Pratt, however, neglected to do so until November 4, 1915, when Barceloux, having learned that the account still existed, insisted upon it. It appears that Barceloux visited the hotel at least once during this period, but registered no protest as to the manner in which the accounts were paid.

Upon these facts the lower court in both cases found, inter alia, "(2) that the said defendant, H. J. Barceloux, by his acts and conduct, caused the said plaintiff to believe that Aimee M. Pratt, also known as Mrs. G. M. Pratt, was the agent of said H. J. Barceloux"; and (3) "that plaintiff sold and delivered goods, wares, and merchandise to said Aimee M. Pratt, also known as Mrs. G. M. Pratt, in good faith and in the exercise of ordinary care, and parted with value, upon the faith of the said defendant, H. J. Barceloux, being responsible for the acts of the said Aimee M. Pratt, also known as Mrs. G. M. Pratt."

Appellant claims that the findings are unsupported by the evidence in either of the two cases, that the findings and judgment are against law, and that the judgment is not supported by the findings in the case.

[1, 2] One particular contention of appellant is that the court erred in that it failed to find as a fact that an agency existed, and found only that Barceloux caused creditors to "believe" that Aimee M. Pratt was his agent, and that creditors reasonably acted upon the faith thereof.

Section 2300 of the Civil Code provides:

> "An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him."

Section 2317 of the same Code provides:

> "Ostensible authority is such as a principal intentionally, or by want of ordinary care, causes or allows a third person to believe the agent to possess."

Section 2334 of the same Code provides:

> "A principal is bound by acts of his agent, under a merely ostensible authority, to those persons only who have in good faith, and without want of ordinary care, incurred a liability or parted with value, upon the faith thereof."

These sections clearly set forth the two elements that constitute ostensible agency, viz., some intentional conduct or neglect on the part of the alleged principal creating a belief in the minds of third persons that an agency exists, and a reasonable reliance thereon by such third persons. The second finding is indefinite in that it does not designate Barceloux's conduct either as intentional or wanting in ordinary care, one of which is required by the Code. An allegation in the language of said finding if found in the complaint would undoubtedly constitute a demurrable defect, but no such averment is contained therein, the complaint not having been framed upon the theory of ostensible or actual agency, but that the goods were supplied to defendant directly. The case was tried, though, upon the theory, as before suggested, of agency, but it is plain that said finding may be disregarded as immaterial in the case. Eliminating it, there is sufficient support for the judgment in this finding:

> "That said defendant became indebted to plaintiff in the sum of $390.16, being the balance due upon an open account for goods, wares, and merchandise sold and delivered by plaintiff to defendant at the Hotel St. Francis, in the city of Sacramento * * * at his special instance and request within two years next preceding the filing of said complaint."

[3, 4] Indeed, the said defective finding is not directed to the particular subject-matter of this action. It is entirely indefinite as to what goods, wares, and merchandise were sold to Mrs. Pratt "in good faith and in the exercise of ordinary care," and we may treat the finding as irrelevant to any issue made by the pleadings. For aught that appears to the contrary, it relates to different supplies, and we may, therefore, disregard it. Of course, "it is a well-settled rule that the findings of fact made by the trial court are to receive such a construction as will uphold, rather than defeat, its judgment therein."

Breeze v. Brooks, 97 Cal. 77, 31 Pac. 742, 22 L. R. A. 257; Perkins v. West Coast Lumber Co., 129 Cal. 427, 62 Pac. 57; Paine v. San Bernardino, etc., Co., 143 Cal. 654, 77 Pac. 659. In this connection it may be said that it was not necessary for plaintiff to allege that the goods were sold and delivered to defendant through his agent, but under the general count evidence was admissible of either actual or ostensible agency. This was recognized by both parties and no objection was made to the course pursued.

[5] Appellant's point that Barceloux's promise was to answer for the debt, default, or miscarriage of another and, therefore, void because not written, is without merit since he raised the question of the statute of frauds neither by objection to the evidence nor by a motion for a nonsuit. Besides, as we shall see, the liability of defendant, as far as it appears in the record, rests upon a different theory, namely, that the credit was extended to him; that he, in other words, was the real debtor and not a surety or guarantor.

[6] It seems that, after the evidence was submitted, the court permitted an amended complaint to be filed to conform to proof. The original pleading was against Barceloux and Pratt and proceeded, as we have seen, upon the theory that a partnership existed between them, but the amended complaint charged Barceloux with sole liability. It is claimed that this constitutes an entirely different cause of action, and such practice is not to be countenanced. But it is sufficient to say that no such objection was made at the trial, and it cannot be urged for the first time on appeal. Keefe v. Keefe, 19 Cal. App. 310, 125 Pac. 929; Stockton, etc., Wks. v. Glens, etc., I. Co., 121 Cal. 167, 53 Pac. 565.

[7] The objection most seriously urged by appellant is that the evidence is insufficient to show his liability for the debt. It is earnestly contended that the goods were not furnished to Barceloux, and, also, that he cannot be held upon the theory that he is legally responsible for anything that was supplied to Mrs. Pratt.

As to the Armstrong claim herein, it may be said there is evidence that the agreement was directly between plaintiff and defendant. Armstrong testified that he did business, as far as the hotel was concerned, with Mr. H. J. Barceloux, that he met him personally at the hotel after Dr. Tryon left, that "Mr. Barceloux assumed the management of it and made arrangements with me to furnish goods for the hotel, that he would be responsible for it, pay the bills from that time on;" furthermore, that "at the time we arranged for the account he stated that she (Mrs. Pratt) would run the hotel, manage it for him; that he would not be here much of the time and she would do the ordering, looking after the business." We need not quote further from his testimony, as the foregoing is sufficient to show the primary liability of appellant. We may add that it is fair to say that Armstrong relied upon his contract with appellant and that it was not repudiated by the latter until after the goods were all supplied by the former.

The Hosking Case finds much less support in the evidence.

As to the Meredith Fish Company's claim, we find, however, sufficient evidence to support the finding of the court. Mr. Craddoc Meredith testified that he dealt directly with Mr. Barceloux, that the latter told him that he was interested in the hotel and that he would be responsible for supplies that the Fish Company would furnish to Mrs. Pratt. It further appears from his testimony that he was never notified that Mr. Barceloux would not be responsible for the claim. There is, in other words, a sufficient showing of an enforceable contract between the Fish Company and appellant.

[8] The evidence seems entirely insufficient to support the claim of the Peerless Ice Cream Company or of the Golden Poppy Bakery. Neither had any dealings directly with Mr. Barceloux. In fact, he was not known to either of them. There is nothing to show that either firm was misled by the conduct of appellant, and there is no competent evidence that Mrs. Pratt was authorized to represent Mr. Barceloux as to either of these claims. Indeed these claimants base their contention against appellant upon the statement of Mrs. Pratt that "the financial end was a rancher up the river, he would take care of the financial end," and upon the fact that she signed Barceloux's name to the checks. But manifestly a third person cannot be held to accountability by such conduct and declarations of a supposed agent. If such were the law, no one would be safe from the machinations of designing persons. As to the insufficiency of the evidence to support the claim of actual agency, Mitrovich v. Fresno Fruit & Packing Co., 123 Cal. 379, 55 Pac. 1064, is in point, and, bearing upon the failure of the case in material features of ostensible agency, Harris v. San Diego Flume Co., 87 Cal. 526, 25 Pac. 758, may well be consulted.

The claim of the Sacramento Laundry is sought to be upheld upon the ground of ostensible agency. It is doubtful whether the evidence is sufficient to support it. It is indeed quite unsatisfactory, but the question as to whether it is entirely inadequate may be passed, as the showing may be different upon another trial.

[9] It is suggested that the court improperly permitted interest on the amounts due, but the allowance seems to have been made from the filing of the complaint. This appears to be the correct practice in this class of cases. Grangers' Union v. Ashe, 12 Cal. App. 757, 108 Pac. 533; Heald v. Hendy, 89 Cal. 632, 27 Pac. 67.

The judgment in the case of "E. C. Armstrong v. H. J. Barceloux, doing business under the fictitious name of Hotel St. Francis," is affirmed, and in the case of "W. A. Hosking v. H. J. Barceloux, doing business under the fictitious name of Hotel St. Francis," is reversed, with direction to retry the issues as to all the claims except that of the Meredith Fish Company.

We concur: CHIPMAN, P. J.; HART, J.

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34 Cal. App. 471

TAYLOR v. NORTHWESTERN NAT. INS. CO. (Civ. 1993.)

(District Court of Appeal, First District, California. Aug. 24, 1917. Rehearing Denied Sept. 22, 1917. Rehearing Denied by Supreme Court Oct. 18, 1917.)

1. INSURANCE 🔑163(2)—PROPERTY COVERED —"ADDITIONS ADJOINING AND COMMUNICATING."

An insurance policy, under the caption "Country Store Building and Contents Policy Form," provided for insurance on a one-story frame building and its additions adjoining and communicating, occupied as a grocery store, and on the stock of groceries and other merchandise contained in the described building and its additions, and granted permission for mechanics and artisans to make alterations or repairs and to build additions. Insured erected, within a few feet of the one-story building described, a shed in which to store groceries, not connected with the store building otherwise than by a removable board, on which goods were passed from the one building to the other. *Held*, that this shed was covered by the term "additions adjoining and communicating," though not structurally connected with the store building, as the insurance was intended to cover the store as a store, and the property insured was to be treated as a store, and not as a separate and distinct building or a stock of goods contained in that identical structure.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Addition.]

2. INSURANCE 🔑146(1) — CONSTRUCTON OF POLICY.

The construction of an insurance policy is to be ascertained from the whole instrument, the nature of the property, the purposes for which it is ordinarily to be used, its situation, and the manner in which it is usually kept.

Appeal from Superior Court, Alameda County; Everett J. Brown, Judge.

Action by Thomas Taylor against the Northwestern National Insurance Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Peter J. Crosby, of Oakland, for appellant. L. D. Manning and L. C. Fish, both of Oakland, for respondent.

BEASLY, Judge pro tem. This is an appeal from a judgment for plaintiff upon a policy of insurance written by defendant in favor of plaintiff. At the time the policy was issued the plaintiff owned a grocery store in a one-story frame building in Alameda county. About three months after the date of the policy, a small shed was erected upon the same property with the store covered by the policy. Into this shed a part of the stock of groceries of the store were placed and kept. The shed was subsequently burned.

The trial court found that the shed was an addition to the store, within the meaning of the word "addition" as it was used in the policy. The point made here is that this finding is not supported by the evidence. Under the caption "Country Store Building and Contents Policy Form," the policy, among other things, provided for insurance:

> "On the one-story frame building and its additions, adjoining and communicating, including foundations, piping, plumbing, stationary heating apparatus, electric wiring and fixtures, and all other permanent improvements and fixtures attached to and forming a part of said building, occupied as a grocery store, situate on the southwest corner of Forty-First avenue and Foothill boulevard, Oakland, California.
>
> "On store and office furniture and fixtures, of every description, including safes, signs, cash registers, typewriting machines, stationery, office supplies, and utensils in use, all contained in or attached to the above-described building and its additions.
>
> "On stock of groceries and other merchandise, including merchandise held in trust or on commission, or sold, but not delivered, all contained in the above-described building and its additions.
>
> "Permission is granted for mechanics or artisans to make alterations or repairs to the within-described building for more than fifteen (15) days at any one time, and to build additions, this policy to cover on and in same, under the respective terms hereof."

The court found that the damage by the fire was done to the stock of groceries contained in the shed above referred to; that the building was about 12x14 feet in size, and erected upon the same premises, and at a distance of about 7 feet from the original building mentioned in the policy; that it was erected for the purpose of storing a part of the groceries covered by the policy and a portion of the stock contained in the original store building at the time the policy was issued. The trial court further found that this shed or building was communicating and connected with the one-story frame building described in said policy only in manner as follows:

> "The door of the shed was placed opposite a window in the one-story building, and the groceries were passed from the one-story building to the shed by sliding along a removable board connecting the one-story building with the shed. This shed or building was the only structure erected on the premises after the issuance of the policy, and that this shed or building constituted an addition to the one-story building described in the insurance policy. This shed or building was of the same character of construction as the one-story frame building and did not increase the insurance risk. That none of the groceries in the one-story frame building were damaged by the fire."

[1, 2] If the words "additions, adjoining and communicating," are to be construed as intended to cover only such additions to the store building as are structurally connected therewith, then this case must be reversed, for the evidence does not sustain the finding to which the appellant objects; but it seems to us that in this case this would be too nar-

row a construction to be placed upon the language of this policy. The construction of a policy of insurance is to be ascertained from the whole instrument, the nature of the property to which the language of the policy is to be applied, the purposes for which property is ordinarily to be used, its situation, and the manner in which it is usually kept (Marsh v. Concord M. F. Ins. Co., 71 N. H. 253, 51 Atl. 898), and in speaking of the manner in which a policy of insurance should be viewed the Supreme Court of California has said in Victoria S. S. Co. v. Western Assurance Co., 167 Cal. 348, 139 Pac. 807, that the rule of law is that policies are to be construed liberally in favor of the insured, and that any uncertainty or ambiguity in a contract of insurance is to be interpreted most strongly against the insurer. In this case the insurance was undoubtedly intended by both the defendant and the insured to cover the store as a store. The caption of that portion of the policy above quoted strongly corroborates this view. In other words, the property insured was to be treated as a store, and not as a separate and distinct building, or a stock of goods contained in that identical single structure. This case seems more rationally classified as belonging to that class where additions to a manufacturing plant, not structurally connected with the original buildings of the plant, are nevertheless held to be covered by insurance, where the policy includes additions as it does in this case. Some flexibility of meaning must be given to the language of standard forms of insurance policies such as this, the rigid language of which must be interpreted in the light of the common understanding of the parties, in order to do justice between them; and, when this is taken in consideration with the court's finding that the risk was not increased by the erection of this small shed, it would seem to be just that the trial court's construction of the language of this policy and of the evidence in the case, resulting in the finding above referred to, should be sustained.

The judgment is therefore affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

34 Cal. App. 424

PEOPLE v. IRISH. (Cr. 689.)

(District Court of Appeal, First District, California. Aug. 13, 1917. Rehearing Denied by Supreme Court Oct. 11, 1917.)

CRIMINAL LAW ⟹564(1)—VENUE—SUFFICIENCY OF EVIDENCE.

In a prosecution under Pen. Code, § 270, for failing to provide necessary food, etc., for a minor son, evidence *held* to sustain the finding implied from the verdict that the residence of the mother, to whom the custody of the minor had been awarded in a divorce proceeding, was in M. County, where prosecution was brought.

Appeal from Superior Court, Marin County; Edgar T. Zook, Judge.

Clarence B. Irish was convicted of failing to provide necessary food, etc., for his minor son, and appeals. Affirmed.

Walter R. Dunn, of Oakland, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

PER CURIAM. The defendant was charged by information with violation of section 270 of the Penal Code in failing to provide necessary food, clothing, shelter, and medical attendance for his minor son during a period of three years immediately prior to March 1, 1917, and was tried and convicted. The court suspended sentence for the period of five years, and admitted him to probation upon the usual conditions, together with the requirement that he contribute the sum of $150 to his wife for the maintenance and support of the child for six months beginning April 14, 1917, and to again appear before the court October 11, 1917, to furnish security for the further support of the child for the ensuing six months, and thereafter semiannually for the same purpose during the term of probation.

We conceive of no reason for discussing at length the points argued in the briefs. We have read them carefully together with the record of the trial, and all we feel required to say is that the evidence contrary to the appellant's contention, sustains the finding implied from the verdict that the residence of the mother—to whom the custody of the minor was awarded in a divorce proceeding between her and the defendant—was in the county of Marin. She testified that she lived there "off and on," meaning, as was developed later in the trial, that as she earned her living as a nurse she was sometimes out of the county at work in that capacity; but she finally testified that she lived in that county; that her residence was there.

The evidence also abundantly shows that the defendant was able to support the minor, that no one voluntarily undertook to relieve him or the mother of any obligation to support the child, and—if it is important—that the mother was without sufficient means to support it at the time the offense is charged.

The judgment is affirmed.

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34 Cal. App. 420

FERNANDEZ v. WESTERN FUSE & EXPLOSIVES CO. (Civ. 1486.)

(District Court of Appeal, First District, California. Aug. 10, 1917. Rehearing Denied by Supreme Court, Oct. 8, 1917.)

1. EXPLOSIVES ⟹8—ACTION—PLEADING AND PROOF—VARIANCE.

In an action for damage by an explosion on the theory that storing powder was a nuisance, it was error to admit testimony showing defective construction of the magazine.

2. APPEAL AND ERROR 🔑882(6)—REVIEW—OBJECTIONS—ESTOPPEL TO MAKE.

When the trial court and the parties to an action proceed to trial upon the theory that there is a material issue, and the court upon the evidence addressed to that issue, and received without any or without a sufficient objection, finds in accordance with that evidence, a party will not be allowed, for the first time on appeal, to say that there was no such issue.

3. PLEADING 🔑430(1) — VARIANCE — OBJECTIONS TO EVIDENCE.

Where the complaint was framed on the theory of nuisance in storing powder, a single objection by defendant to the evidence as to defective construction of the magazine as not within the issues was sufficient to apprise plaintiff of the nature of the objection.

4. PLEADING 🔑430(2)—VARIANCE—WAIVER.

Where the complaint was based upon nuisance in maintaining of powder magazine, and plaintiff introduced evidence of negligent construction of the magazine, the mere fact that defendant then introduced evidence in rebuttal thereof did not estop it from claiming that there was a variance between pleading and proof.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by J. F. Fernandez against the Western Fuse & Explosives Company. Judgment for plaintiff, and defendant appeals. Reversed.

John J. Barrett and Alfred Sutro, both of San Francisco (Pillsbury, Madison & Sutro, of San Francisco, of counsel), for appellant. Reed & Nusbaumer and Chapman & Trefethen, all of Oakland, and A. A. Moore and Stanley Moore, both of San Francisco, for respondent.

PER CURIAM. This is an appeal from a judgment against the defendant for the sum of $925, being the amount of damages claimed to have been suffered by the plaintiff by reason of the destruction of his house and premises at Melrose in Alameda county through the explosion of a powder magazine on the premises of the defendant.

This is one of a series of cases which grew out of that explosion, two of which were Kleebauer v. Western Fuse & Explosives Co., 138 Cal. 497, 71 Pac. 617, 60 L. R. A. 377, 94 Am. St. Rep. 62, and Fisher v. Western Fuse & Explosives Co., 12 Cal. App. 299, 107 Pac. 332. Briefly the facts are that the defendant conducted an establishment at Melrose for the manufacture of fuse, and in connection therewith maintained a powder magazine in which it stored the powder used in the manufacture of its product. On the day of the accident one of its employés, a Chinaman—who had murdered a fellow countryman—sought refuge in the powder magazine, the entrance to which he barricaded. Being pursued by peace officers and threatened with arrest he fired the magazine, thereby causing much damage to surrounding property, including that of the plaintiff.

The amended complaint appears to have been drawn on the theory that the defendant was guilty of negligence in the employment of an unfit and incompetent employé whose act exploded the powder magazine, and also upon the theory that the powder magazine as maintained by the defendant was a nuisance. The act of the Chinaman in firing the magazine is out of the case since the evidence shows without conflict, and the court expressly finds, that the defendant was not responsible for its employé's act in causing the explosion.

As to the nuisance theory, it is obvious that the complaint as amended was drafted upon the theory that the mere keeping of a large quantity of explosive powder in a thickly populated neighborhood, irrespective of the manner in which the magazine in which it was stored was constructed was a nuisance per se. But before the case came on for trial the Supreme Court, in the case of Kleebauer v. Western Fuse & Explosives Co., supra, had held that the magazine of the defendant, constructed and maintained as disclosed by the evidence in that case—and which is similar to the evidence now before the court, leaving out of consideration so much of it as refers to the effect of the presence or absence of an embankment or bulkhead—did not constitute negligence per se. Accordingly in this case, in order apparently to escape the principle laid down in that case, the plaintiff, over objections of the defendant, introduced evidence tending to show that the magazine was improperly constructed; and, based thereon, the court found that the magazine of the defendant was a nuisance because of its improper construction in not being surrounded by a bulkhead or embankment, which would have tended to minimize the effects of the explosion by directing its force upwards.

[1] It thus appears that neither this particular evidence nor the finding of the court based thereon was responsive to any issue in the case. It has been repeatedly held by the Supreme Court that under those circumstances the complaint cannot be looked to in support of the judgment. "Where," says the Supreme Court in Chetwood v. Cal. Nat. Bank, 113 Cal. 414, 424, 55 Pac. 704, 707, "the case made out by the findings is a different case from that presented by the pleadings, the judgment will be reversed; for the relief decreed must be the relief sought, and the variance, even if it be such as could have been cured by amendment, is fatal to the validity of the judgment (Bryan v. Tormey, 84 Cal. 126 [24 Pac. 319]), and the point may be raised on appeal from the judgment (Putman v. Lamphier, 36 Cal. 151)."

[2] But it is also well settled that when the trial court and the parties to an action proceed to trial upon the theory that there is a material issue, and the court upon the evidence addressed to that issue, and received

without any or without a sufficient objection, finds in accordance with that evidence, a party will not be allowed for the first time on appeal, to say that there was no such issue. Schroeder v. Mauzy, 16 Cal. App. 443, 118 Pac. 459.

[3] It is the contention of the plaintiff that under this rule the defendant is estopped to assert that no issue was framed as to the negligent construction of the magazine, for the reason that when testimony upon that point was offered the defendant failed to make its objection thereto sufficiently specific to apprise him of its nature and scope, and for the further reason that the defendant itself introduced testimony as to the construction of the magazine in rebuttal of plaintiff's testimony on that subject. With regard to this contention the record discloses that the defendant several times objected to this character of testimony, but only once included in the objection that the evidence was not responsive to any issue in the case, and that in a motion for nonsuit made by the defendant, it did not include as a ground thereof the insufficiency of the complaint to cover this aspect of the nuisance theory. We do not think that the defendant intended to conceal the real nature of its objection to this testimony, especially as the rule in the Kleebauer Case, apparently responsible for the offer of this testimony, had been announced prior to the trial of the case at bar, and must have been in the mind of counsel both in the offer of testimony and the making of objections thereto. We think under these circumstances the plaintiff was sufficiently apprised of the nature of the objection, and could, if he so desired, have requested leave to amend his pleading, which he failed to do. In the state of the pleadings and in the face of the objection made, the evidence as to the alleged improper construction of the magazine should have been excluded by the court.

[4] The fact that the defendant introduced testimony in rebuttal upon this same point does not now estop it from claiming that the testimony was erroneously admitted over its objection. In Washington Tp. F. C. & G. v. McCormick, 19 Ind. App. 663, at page 667, 49 N. E. 1085, at page 1086, the court said:

> "Appellant, in rebuttal, introduced some evidence of the same general character as that objected to. But this cannot be said to be a waiver of the objections to the evidence introduced by appellee. It was not invited error. It does not fall within the rule that a party who calls out incompetent evidence thus precludes himself from successfully objecting to evidence of like character introduced by his adversary. * * * The error was committed at the instance of the opposite party, and appellant did all it could * * * to prevent the error. After the court had held, over appellant's objection, that the evidence was competent, and had permitted appellee, who had the burden, to introduce such evidence to maintain his case, appellant, in seeking to overcome the case made by appellee, could follow the theory laid down by the court without impliedly admitting the court's theory to be right, and without waiving his right to question the court's action. * * *"

See, also, 3 Cyc., p. 246, and cases there cited.

The judgment is reversed.

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34 Cal. App. 431

MACDONALD et al. v. BERNAL et al. (Civ. 2127.)

(District Court of Appeal, First District, California. Aug. 14, 1917.)

PARTITION ⚷94(3)—REFEREE—REPORT.

Where a partition suit is referred, the report of the referee as to the value of the lands is merely advisory, and the court may disregard it and determine the value on another basis.

Appeal from Superior Court, City and County of San Francisco; Thos. F. Graham, Judge.

Action by D. B. MacDonald and others against Jose Cornelio Bernal, as executor, and others, and William B. McKinnon, as administrator, and others. From the judgment, the last-named defendants appeal. Affirmed.

Theo. J. Savage and Burke Corbet, both of San Francisco, and Corbet & Selby, of San Francisco, for appellants. Sullivan & Sullivan and Theo. J. Roche, Norman A. Eisner, and Heller, Powers & Ehrman, all of San Francisco, for respondents.

PER CURIAM. This is an appeal from a judgment in favor of plaintiffs in an action for the partition of certain premises consisting of 25 acres, known as the Bernal tract, in the city and county of San Francisco.

Upon the trial of the cause an interlocutory decree of partition was entered, by the terms of which one Frank A. Dwyer was appointed sole referee to make partition of the property. Said referee proceeded with his work, and presently filed his report, wherein he made certain valuations of the lands embraced in the tract, and recommended the partition of the property among the parties to the action in accordance with such valuations. The appellants filed their objections to the said report of the referee, and the court set the same for hearing and took evidence thereon, after which the court filed its final decree, in which the referee's proposed partition of the premises was not approved or adopted in full, but was modified to conform to the views of the court arrived at upon the hearing thereon; and the court in its final decree made a different award and partition of the property than that recommended by the referee.

The only contention of the appellants which the court is in a position to consider upon the record before us is that the court erred in awarding to the appellants less land in valuation than that to which they would have been entitled upon the basis of the calculations contained in the referee's report. It is a sufficient answer to this contention to say that the report of the referee in an action for partition is merely advisory to the court, which is not bound to adopt the basis used by the referee for his calculation as to the values of the property involved, but may, in its final decree, make its own findings with respect to such matters. The court did this in the instant case, and there is no evidence before us to show that it committed any error in so doing.

The appeal not having been taken within 60 days after the judgment, there is no evidence before us by reference to which the findings and final decree of the trial court could be assailed.

Judgment affirmed.

(34 Cal. App. 440)

Ex parte CLARK et al. (Cr. 414.)

(District Court of Appeal, Third District, California. Aug. 20, 1917.)

1. Criminal Law 🔑238—Preliminary Examination—Probable Cause—Evidence—Larceny.

Evidence *held* sufficient to establish reasonable or probable cause to believe that the defendants had committed the crime of larceny, so as to authorize their commitment by the examining magistrate.

2. Larceny 🔑14(2) — Borrowing Money with Intent to Steal the Same—Title.

Where confidence men procure money upon the pretext that it is a loan, with the intent to steal the same, the crime is larceny; the owner of the money not having parted with the title thereto.

J. H. Clark and Adolph Lyons were arrested and committed for trial in the superior court, and they apply for a writ of habeas corpus. Petition denied.

Ralph H. Lewis and Martin I. Welsh, both of Sacramento, for petitioners.

HART, J. The petitioners were charged with, and preliminarily examined before and committed for trial in the superior court by the police judge of the city of Sacramento, sitting as a committing magistrate, for the crime of grand larceny. It is claimed by the petitioners that the magistrate was without legal authority or jurisdiction to order them committed for the crime of grand larceny, inasmuch as the evidence taken in support of the charge is wholly insufficient to establish reasonable or probable cause that said or any crime had been committed by them.

[1] It is unnecessary to recite the facts of the transaction from which the charge preferred against the prisoners arose. It is sufficient to say that the evidence taken before the magistrate discloses that the case involves the oft-told story of a bucolic and guileless individual, who, while waiting for a train at the Sacramento railroad station to convey him to his home in a northern town, after a brief sojourn in the central portion of the state, accommodatingly handed over to a brace of oily-tongued strangers $120 of his available cash, as a loan, after the latter had insidiously crept into and gained his confidence and were suddenly awakened to a realization that the freightage on certain freight, which they represented that one of them had previously put on board of a freight train, had to be prepaid, and that they were without sufficient funds to pay the bill, exhibiting to the aforesaid guileless gentleman, as evidence of their "good faith," a document purporting to be a draft on an Eastern bank for a sum greatly in excess of the amount necessary for their purpose. The case, as made by the proofs, is in all respects of such striking resemblance to the case of People v. Rae, 66 Cal. 423, 6 Pac. 1, 56 Am. Rep. 102, that it may well be said that the relationship between the two is not merely one of affinity, but one of consanguinity. The salient facts of the two cases are so near alike that it would be difficult to differentiate them. If the petitioners, assuming that the evidence taken before the magistrate correctly reveals the circumstances under which they obtained the money of the prosecuting witness, are not guilty of larceny, they are guilty of no public offense whatever.

[2] We are satisfied that the inference is

fairly and reasonably justified by the evidence taken before the magistrate that the petitioners, acting in confederation for that purpose, designedly and deliberately, by the artful and crafty methods in which so-called "confidence men" are adepts, obtained possession of the money of the prosecuting witness, upon the pretext that it was to be a mere loan, with the intent to steal the same. The owner of the money not having parted with the title hereto, the crime, if any, is larceny. People v. Rae, supra; People v. Delbos, 146 Cal. 737, 81 Pac. 131; People v. Arnold, 17 Cal. App. 68, 118 Pac. 729; People v. Schenone, 19 Cal. App. 280, 282, 125 Pac. 758; People v. Ballo, 19 Cal. App. 370, 125 Pac. 1081.

The petition for the alternative writ must be denied; and it is so ordered.

I concur: CHIPMAN, P. J.

(34 Cal. App. 475)

RANSOME CONST. CO. v. VON SCHROEDER et al. (Civ. 2061.)

(District Court of Appeal, First District, California. Aug. 25, 1917. Rehearing Denied Sept. 24, 1917. Rehearing Denied by Supreme Court Oct. 18, 1917.)

1. CONTRACTS ⚷229(1)—CONSTRUCTION.

Plaintiff, who had offered to remove débris from defendants' property for a fixed price of $16,076, or to do it for actual cost plus 10 per cent. on a specified scale of wages for labor, entered into a written contract providing that the work should be paid for upon cost charges plus 10 per cent. for superintendence, that in case any increase of wages demanded for labor above the amount specified plaintiff's charges should thereafter be based upon such increased cost of labor, but that, if defendants should deem the increase excessive, they should have the privilege of stopping all further work, and that the total of the work should not exceed the sum of $16,076, except as specified. The specification related to increased cost of labor. *Held*, that the contract limited plaintiff's charge for the entire work, except for increases in the cost of labor to the sum of $16,076.

2. CONTRACTS ⚷170(2)—OFFER—ACCEPTANCE.

Where plaintiff contractor, after work had been stopped because of the increases demanded by laborers, resumed work in response to letters written by defendants setting forth their interpretation of the contract, plaintiff must be deemed to have acceded to defendants' interpretation, though not expressly assenting.

3. CONTRACTS ⚷322(3), 350(3) — ACTIONS — EVIDENCE—SUFFICIENCY.

In an action on a contract for the removal of débris from land, evidence *held* insufficient to show that plaintiff did not repudiate the contract, or that defendants' refusal to make further payments on account amounted to a breach on their part.

4. WORK AND LABOR ⚷14(1) — ACTIONS — QUANTUM MERUIT.

Where defendants' refusal to make further payments on account of a contract for the removal of débris from land was warranted, and the contractor himself repudiated the contract, he cannot maintain an action on the quantum meruit for sums claimed to be due.

Appeal from Superior Court, City and County of San Francisco; James M. Seawell, Judge.

Action by the Ransome Construction Company, a corporation, against Mary E. Von Schroeder and others. From a judgment for plaintiff, and an order denying new trial, defendants appeal. Reversed.

Bishop, Hoefler, Cook & Harwood and A. J. Harwood, all of San Francisco, for appellant Von Schroeder. Felix T. Smith, of San Francisco, for appellant Sprague. Garret W. McEnerney and Walter Rothchild, both of San Francisco, for appellants Martin and others. Pringle & Robbins, of San Francisco, for respondent.

RICHARDS, J. This is an appeal from a judgment in favor of plaintiff, a contractor, for the value of work and labor performed upon the property of the defendants situate in the city of San Francisco, in an effort to clear said property from débris resulting from the fire of 1906. There is also an appeal from an order denying the defendants' motion for a new trial.

The facts of the case—concerning which there is little dispute—are as follows: The defendants, prior to the date of their contract with the plaintiff, had been joint owners of the property in question, but subsequent to the fire had partitioned it among themselves in severalty. The débris occasioned by the fire covered the entire premises, including the basement. In the month of July, 1906, the owners of the property called for bids for the removal of the débris and clearance of the lot. The Ransome Construction Company responded with a written bid, offering to do the work within 30 days, and submitting two alternative propositions as to the price. One of these was an offer to do the entire work for $16,076; the other was to do it for the actual cost to it plus 10 per cent. on a specified scale of wages for labor. A written contract was finally entered into between the owners and the contractor on July 27, 1906, wherein it was provided that the work was to be done within 40 days of the date of the contract, save delays caused by strikes, accident, and other causes beyond the control of the parties, and was to be paid for upon cost charges, plus 10 per cent. for superintendence and certain other items specified in the agreement, payment for the work done during the preceding week to be made on Monday of each week while it was in progress, upon statements to be rendered by the contractor and certified by the timekeeper of the owners, the amount of said weekly payments to cover the actual cost of the work done during the preceding week plus 5 per cent. of the amount to be added for superintendence, etc., the balance of 5 per cent. of these latter charges to be paid on full completion of the work. It was provided in the contract that, in case of any increase in wages demanded for labor above the amounts specified in the agreement, the charges of the contractor should thereafter be based upon such increased cost of labor, but that, if the owners should deem such increase excessive, they should have the privilege of refusing to accede to the same and of stopping all further work upon the contract, in which case they should immediately pay the amount in full due upon the contract up to the time of such stoppage, and the contract should thereupon cease. There was a further agreement in the contract:

> "That the total cost of the work * * * should not exceed the sum of $16,076, except as hereinabove specified."

The contractor began work under this agreement on July 30, 1906. On August 6, 1906, the teamsters demanded an increase in wages of 50 cents a day, and the laborers demanded an increase of 25 cents a day. The contractor at once notified the owners of these demands, and paid the increase demanded until August 10, 1906, when the owners ordered the work suspended, and notified the contractor that they did not approve of the demands of the teamsters or laborers and were unwilling to meet such demands at that time. The strike of teamsters and laborers was general throughout the city, and was followed by conferences between the contractors and the strikers, which resulted in the former yielding to the latter's demands for increased wages after about two weeks of negotiation. This result being reported to Mr. Martin, the agent of the owners, he wrote on August 23, 1906, a letter to the contractor, undertaking to state what his understanding of the terms upon which the contractor would resume work upon the premises was, as a result of a recent conversation between himself and the contractor's officers, in which the proposed increase of wages and consequent increase in the fixed cost to the owners, viz. the sum of $16,076, were discussed, together with an extension of time required on account of the delay, and also certain other matters of detail connected with the progress of the work. In this first letter of Mr. Martin he requested the contractor to confirm his understanding of the various matters referred to therein as soon as possible, in order that he might submit the matter to the owners and obtain their sanction before giving instruction to proceed with the work. The contractor did not reply to this letter with any written confirmation of its terms, but its officers responded to repeated requests on the part of Mr. Martin for such confirmation with the assurance that a written confirmation would be sent, and in one instance at least with a statement that it had been sent. Not having received such confirmation up to September 6, 1906, Mr. Martin wrote another letter to the contractor on that date, calling its attention to the fact that he had on several occasions endeavored to ascertain when and under what conditions it would resume work, and restating in detail the substance of his former letter, and concluding with these words:

> "If this understanding is correct, kindly confirm the same in writing as soon as possible, and you can take this letter as our consent to proceed with the operations, these terms being satisfactory."

The contractor made no written reply to either of these letters, but on September 7, 1906, resumed work upon the property. From time to time thereafter Mr. Martin and Mr. Wallis, agents of the owners, requested written confirmation of Mr. Martin's letters, and were told on each occasion that a letter to that effect would be, or even had been, sent. Between September 7th and October 24th the work went on. Weekly bills for progress payments according to the new labor schedule were presented, and these were regularly paid up to October 5th, during which time the contractor received a sum in excess of $7,000 on account of the work since its resumption. During the period between September 20th and October 18th Mr. Martin—who chiefly acted for the owners in respect of this matter—was absent from the state; but shortly after his return, and on October 22d, he caused a letter to be written to the contractor, requesting an interview with its officials before any more bills were paid. Mr. Crummey, representing the contractor, called at Mr. Martin's office on October 24th, when a heated interview ensued; Mr. Crummey demanding the payment of the bills, and Mr. Martin insisting upon a written confirmation of the terms of the contract as embodied in his letters. The result of this conference was an immediate cessation of work by the contractor and the later institution of the present action.

[1, 2] The first and the controlling proposition presented upon these appeals relates to the construction to be placed upon the written contract between the parties, with special reference to the question as to whether it provides by its terms that the contractor shall complete the specified work for a price within the maximum sum of $16,076, or such further sum as these figures might be increased by acceding to labor demands for increased wages. On the part of the respondent it is earnestly contended that the contract is not susceptible of this construction, for the reason, chiefly, that the contractor, in the performance of its portions of the contract, was subject to the direction of the agents of the owners in certain particulars, which are claimed to essentially affect the amount and detail of the work to be done and the manner of doing it, and to also affect its cost and the time within which it was to be performed. The owners, on the other hand, contend that the contract, construed in the light of the circumstances attending its creation, clearly contemplates that the work of clearing the premises of such of the material and débris as the owners should direct to be removed was to be completed at a cost to them within the maximum figure stated in the contract, which amount was only to be increased to an extent necessitated by their accession to demands involving the increased cost of labor.

We are constrained to adopt this latter conclusion. The admitted facts of the case show that prior to the making of the agreement in question the owners advertised for bids for the removal of débris and clearing of the lot in question, and that in response to this advertisement the plaintiff in this action presented a written proposal, embracing the clearance of the débris, of all walls to the sidewalk level, and the removal of everything to the basement floor, for the sum of $16,076, and offering to do the work within 30 days of the acceptance of its bid. There was also an alternative proposition to do the work upon a specified percentage basis. The contract, which within a few days followed this bid, is the one under construction here. It enters more into detail as to what work the contractor was to do, and leaves with the owners of the property a certain amount of discretion in the matter of directing how much of the brick and iron débris the contractor was to remove; but this discretion, when exercised, could clearly have had no other effect than to lessen, rather than increase, the amount of work which the contractor was to perform in the clearance of the lot, and hence cannot be construed as changing the original intent of the parties that the work of clearing the lot of its débris was to be completed under the terms of the contract within the limiting specified cost to the owners. The fact that the contract also contained substantially the alternative proposition submitted by the contractor in his bid can only be construed as so included for the purpose of giving the owners the benefit of a possible completion of the work within the maximum sum specified in the contract, and expressly therein agreed to be the amount which was to cover the total cost of the work, except as the same might be increased by the enforced increase in labor charges. Under the contract as thus to be construed, the work of clearance began, and continued until interrupted by the demands of the teamsters and laborers for an increase in wages, and by their strike to enforce such increase. This caused a cessation of the work for about a fortnight; but this was regarded by neither party as an adandonment of the contract. When the labor troubles were adjusted upon the basis of a specified increase in wages, the contractor notified the agent of the owners of the amount of such increase, and desired to learn the wishes of the owners as to resumption of the work. A few days thereafter Mr. Martin wrote the contractor his first letter above referred to, stating his understanding of what the increase in labor charges was to be, and also undertaking to set forth his interpretation of the terms of the contract with respect to the effect of such increase upon the total contract price for the completion of the work. Not receiving a written reply to this letter, Mr. Martin about two weeks later wrote another letter to the contractor, repeating the interpretation of the contract as set forth in his former letter, and requesting a written confirmation of the correctness of such interpretation. This latter letter informed the contractor that it was to constitute the owners' consent to the resumption of the work upon its specified terms. The contractor did not respond with the required confirmation in writing, but he at once resumed work upon the property. The appellants herein lay too much stress upon the necessity of a confirmation in writing of Mr. Martin's two letters. The conduct of the contractor in assuring Mr. Martin that such confirmation would be forthcoming, coupled with its prompt renewal of the work upon receipt of his last letter, would in our opinion amount in effect to such confirmation of Mr. Martin's interpretation of the contract, if such were requisite; but, since his interpretation of the contract as to the maximum cost to the owners of completing the specified work was in accord with our construction of the original agreement between the parties, it was sufficient for the contractor to resume the work upon receipt of Mr. Martin's letter to constitute an acceptance of its terms.

[3] Having recommenced the work upon the property in response to the owners' directions so to do, both parties were bound to live up to the letter and spirit of their original agreement, as modified by the accepted increase in the cost of labor. During the period between September 7 and October 24, 1906, the contractor went ahead with the work, and regularly rendered weekly bills to the owners in accordance with the terms of the contract, but upon the basis of the increased cost of labor. These bills were regularly paid up to October 8th; but the bills rendered upon that date and for the two following weeks were not paid. The total amount paid the contractor from the inception of the work up to and including October 1, 1906, amounted to $9,548.36. The bills presented for the three weeks' work thereafter amounted to $7,265.25. These two amounts of payments made and due upon the work since its inception aggregated on October 22, 1906, the sum of $16,813.61, a sum considerably in excess of that originally contemplated and agreed to between the parties as the entire cost of the completed work, and a sum also perilously near the total sum to be paid under the contract upon the basis of the increase in the

cost of labor, which increase, according to the findings of the court, would up to that date have amounted to $1,153.09. Upon any view of the evidence before us the work was still far from completion; and it was both natural and proper that the owners of the property should insist upon a conference with the contractor before the payment of bills which would thus almost exceed the total allowance for the completed work while said work was but little more than half completed. Such a conference was requested and held between the officials of the contractor and the agents of the owners on October 24, 1906, by which date the claims of the contractor had been still further increased by approximately $2,000. The evidence is somewhat conflicting as to what occurred at this conference; but the proofs are practically undisputed that the owners then and there offered to pay the back bills of the contractor to date, conditioned upon the latter's acceptance of the owners' interpretation of the terms of the original contract as embodied in the letters of Martin, and that the representatives of the contractor at that conference, not only refused to do this, but expressly asserted that said contract was no longer in effect. This asseveration was in exact accord with a letter of the contractor to the owners under date of September 26, 1906, which amounted to a substantial repudiation of the contract, and which, while written and signed by its officials, was never delivered to the owners, and only came to light upon the trial of the case. The undisputed proofs are further to the effect that the contractor did on that day or the following day, cease and never thereafter resumed work upon the premises. The undisputed evidence also discloses that the owners some time later completed the work of clearing the lot at a cost in excess of $10,000. Notwithstanding these facts, the trial court has found that the contractor did not, on October 24, 1906, repudiate the contract under which the work had thus far proceeded.

Upon the foregoing state of the evidence we are of the opinion that this finding of the trial court cannot be sustained; and for a like reason we are satisfied that the conclusion of the trial court that the defendants' qualified refusal to pay any more of the plaintiff's bills on October 24, 1906, amounted to an actionable breach of the agreement upon their part is not justified by the proofs in the case.

[4] It follows from these conclusions that the plaintiff was not entitled to begin and maintain an action upon quantum meruit at the time this suit was instituted. This view obviates the necessity of a consideration of the asserted errors of law committed by the trial court during the trial of the action, and also insisted upon by the defendants upon these appeals.

The judgment and order are reversed.

We concur: BEASLY, Judge pro tem; KERRIGAN, J.

(34 Cal. App. 397)

BETTS v. ORTON. (Civ. 1905.)

(District Court of Appeal, Second District, California. July 31, 1917.)

1. CONTRACTS ⟹233—CONSTRUCTION—"HARVESTING EXPENSES."

Where a note given in payment of the purchase price of an interest in a growing crop contained a condition that the payee should look for payment solely to the proceeds of the crop after any and all harvesting expenses shall have been fully paid, the term "harvesting expenses" is not limited to expenses incurred in the cutting and threshing of the crop, but includes expenses for repairs of machinery used in harvesting the crop, the rent of live stock, implements, and the cost of labor.

2. CONTRACTS ⟹169—CONSTRUCTION—EXTRINSIC CIRCUMSTANCES—STATUTE.

Under Civ. Code, § 1636, declaring that contracts are to be interpreted so as to give effect to the mutual intention of the parties, circumstances surrounding the making of the contract cannot be considered, unless it is doubtful, uncertain, or ambiguous.

Appeal from Superior Court, Kings County; M. L. Short, Judge.

Action by Irvin H. Betts against C. N. Orton. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

Frank B. Graves, of Hanford, for appellant. Robt. W. Green, of Lemoore, and J. L. C. Irwin, of Hanford, for respondent.

SHAW, J. This is an action which partakes of the nature of a demand for an accounting, wherein plaintiff asks to have a certain note given by him to defendant canceled, and also seeks to recover a balance alleged to be due him from defendant. Judgment went for plaintiff from which, and an order denying his motion for a new trial, defendant appeals.

The material facts, as appear from findings made by the court, are as follows: Plaintiff and defendant were joint owners of a four-fifths interest in a growing crop of grain. On May 27, 1914, plaintiff bought defendant's interest therein, giving in payment for the purchase price of $2,500 his promissory note secured by a mortgage on the growing crop. On the back of the note was indorsed an agreement executed at the time by defendant to the effect that the payee thereof should look for payment solely and alone to the proceeds of the sale of the crop "after any and all harvesting expenses in the harvesting of said crop have been fully paid out of the proceeds realized from the sale of said crops." The crops were harvested and sold for the sum of $5,770.90, of which sum defendant received $3,772.95, out of which he paid on account of harvesting $1,376.28, leaving a balance of $2,396.67 which he applied in payment of the note. In addition to the amount so paid by defendant towards the expenses of harvesting, plaintiff received direct from the purchaser of the grain certain moneys which, when added to the sum so paid by defendant, left a balance, as found by the court, of $835 still due plaintiff out of the proceeds of the sale for the expense of harvesting. Upon this last sum the court found he had received from defendant $249.45, leaving a balance of $585.59 due him from the amount so received by defendant, for which judgment was rendered. These findings, which are material to the issues joined, find ample support in the evidence. Other findings attacked by appellant, even conceding insufficiency of evidence, as claimed, to support them, are, from our point of view, deemed immaterial. Among such facts the court found that plaintiff tended, took care of, harvested, and threshed the said crops and delivered the same to defendant prior to October 31, 1914, in accordance with the terms of the mortgage, and that defendant sold the same to the Chinn Warehouse Company, receiving therefor the sum of $5,770.90. There was testimony on the part of defendant that some 90 acres of the crop was overripe or burned, as a result of which it was damaged some 30 per cent. But there is no evidence tending to show that such fact was due to any negligence on the part of plaintiff; nor can it be ascertained from such testimony what the amount of such alleged loss or damage was, since it is not made to appear what the production would have been had it been harvested as defendant claims it should have been. It also appears that physical delivery of the grain was not made direct to defendant, but to the Chinn Warehouse Company, purchaser thereof, and that plaintiff received directly from the purchaser a certain sum of money, which, however, was insufficient to pay the harvesting expenses; the balance being paid by the purchaser to defendant. Hence, conceding that the grain was not delivered directly to defendant, as found by the court, and that defendant did not receive all of the proceeds of the sale thereof, such facts, under the circumstances, are immaterial.

[1] The chief ground for the controversy appears to have been a dispute between the parties as to the meaning of the agreement indorsed upon the back of the note and as to what constituted "harvesting expenses"; defendant insisting that the agreement should be read, not in accordance with the plain import of the language used therein, but that the term "harvesting expenses" referred only to such expenses as plaintiff might have incurred in the cutting and threshing of the crop. We find no error in the ruling of the court in this regard. The meaning of the agreement appears to be clear and unambiguous, namely, that out of the proceeds of the sale of the grain plaintiff should be entitled to a sufficient sum to meet the expenses of harvesting the same. The disputed claim of several hundred dollars was made up of many items, such as the cost of making repairs to machinery used in harvesting the crop, rent of live stock and implements likewise required for such purpose, cost of labor, board of men, all of which the court upon sufficient evidence found were proper charges under the terms of the agreement. Upon the record we are unable to perceive any reason why plaintiff was not entitled to reasonable compensation in the way of hire or rent for the use of mules owned by himself and which were worked in the harvest field.

[2] Contracts are to be interpreted so as to give effect to the mutual intention of the parties (Civ. Code, § 1636), which intent, where the language is clear and explicit and does not involve an absurdity, is to be ascertained from the language thereof. It is only where it is doubtful, uncertain, or ambiguous that the circumstances surrounding the making of the contract become important in ascertaining the intent of the parties. No such uncertainty exists in this case.

As disclosed by the record, defendant appropriated and applied in payment of the note the sum of $585.59 in excess of that to which he was entitled. Plaintiff was entitled to judgment for such excess.

The judgment and order appealed from are affirmed.

We concur: CONREY, P. J.; JAMES, J.

34 Cal. App. 638

PEOPLE v. SILVAS. (Cr. 686.)

(District Court of Appeal, First District, California. Sept. 17, 1917.)

1. Criminal Law 🔑112(9)—Venue—Receiving Stolen Goods.

Where a person delivered a suit case containing stolen property to an express company for shipment, having the shipping receipt issued in defendant's name, and delivered the receipt to defendant with a key to the suit case, there was a constructive delivery of the property to defendant in the county where such receipt and key were delivered, so as to give the superior court of that county jurisdiction of a prosecution for receiving stolen goods.

2. Witnesses 🔑277(4) — Cross-Examination of Accused—Limitation to Subjects of Direct Examination.

Where on a trial for receiving stolen property defendant in his examination upon his own behalf testified that he had known the person from whom the property was received prior to the transaction, this warranted his cross-examination as to the extent of his previous acquaintance with such person and as to the details of a previous transaction between them of a suspicious nature.

Appeal from Superior Court, Fresno County; George E. Church, Judge.

Joe Silvas was convicted of receiving stolen property, and he appeals. Affirmed.

Thomas F. Lopez, of Fresno, and Henry Brickley, of Merced, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

PER CURIAM. The defendant was convicted of the offense of receiving stolen property knowing the same to have been stolen, and appeals from the judgment and from an order denying his motion for a new trial.

The evidence discloses that the defendant met one Demas, with whom he had some prior acquaintance, in a poolroom in Fresno, and in conversation with him learned that Demas intended to make a visit to Stockton for the purpose of selling some "stuff." The defendant thereupon, without inquiry as to the nature or value of the articles to be disposed of, stated that he was going to Stockton, and would save Demas the trouble of journeying to that place by undertaking to sell them himself. The property, consisting of cameras and inexpensive jewelry recently stolen from a local store, was contained in a suit case. Demas took it to a transportation company for shipment to Stockton, had the shipping receipt issued in the name of the defendant, delivered it to him, together with the key to the suit case. The defendant went to Stockton, and when there he employed a messenger boy to procure the suit case from the office of the carrier, who in the course of the execution of his commission was confronted by peace officers on the lookout for the claimant of the suit case, and the arrest of the defendant followed. It also appears from the record somewhat vaguely that the defendant and Demas had been engaged in a somewhat similar transaction in another part of the state.

[1] Four points are presented upon this appeal. The first is that the evidence does not show such a delivery of the property to the defendant in the county of Fresno as to bring the case within the jurisdiction of the superior court of that county. We are, however, satisfied that the proof presented on behalf of the prosecution to the effect that Demas delivered to the defendant the shipping receipt which had been obtained by him from Wells Fargo & Co., the carrier, and at the same time delivered to the defendant the key to the suit case, was sufficient to show a constructive delivery of the property to the defendant in the county of Fresno, and thus to give the superior court of that county jurisdiction of the case.

The second point relates to the instruction of the court bearing upon the same question; and of course it follows that if the evidence was sufficient to show a constructive delivery of the property to the defendant, the instruction of the court to the jury to that effect correctly stated the law.

The third point is that the evidence is insufficient to show that the defendant received the property knowing the same to have been stolen. Upon this point the evidence is circumstantial, but is, on the whole, we think, sufficient to have warranted the jury in finding that the defendant either knew the goods to have been stolen at the time he received same, or that the circumstances under which he received them and agreed to dispose of them were so suspicious as to have required the defendant to inquire into the source of Demas' possession of the same before receiving from him and undertaking to dispose of them in a distant city.

[2] The final point made by the defendant is that the court erred in permitting the cross-examination of the defendant as to his previous acquaintance with Demas, and particularly as to the details of a transaction between him and Demas of a suspicious nature in the city of Oakland upon a prior occasion. It is sufficient to say that the defendant in his examination upon his own behalf testified that he had known Demas prior to this transaction, and that this would be sufficient to have warranted his examination as to the extent of that acquaintance and of the past transactions between the pair.

Finding no merit, therefore, in these four contentions, the judgment and order are affirmed.

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NORTON v. TITLE GUARANTY & SURETY CO. (S. F. 8328.)

(Supreme Court of California. Sept. 25, 1917. Rehearing Denied Oct. 25, 1917.)

1. LIMITATION OF ACTIONS ⚷100(7)—ACCRUAL OF CAUSE OF ACTION—DISCOVERY OF FRAUD.

Under Code Civ. Proc. § 338, subds. 1, 4, providing that an action upon a liability created by statute other than a penalty or forfeiture must be brought within three years, and that an action for relief on the ground of fraud must be brought within the same period, but that the cause of action in such case shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud, an action on the bond of a notary public, who affixed a false certificate of acknowledgment to a mortgage forged by him and delivered to a client who had placed money with him for investment, was barred in three years from the date of the wrongful act, regardless of the time of its discovery, though the action was based upon fraud, as the form of the action cannot change the liability of the sureties.

2. PRINCIPAL AND SURETY ⚷66(1)—LIABILITY OF SURETY—SCOPE.

Sureties are never held beyond the strict terms of their agreements.

3. NOTARIES ⚷11—LIABILITY OF OFFICIAL BONDS.

The bond of a notary public, who was also a practicing attorney and acted as agent in loaning money for his clients, was collateral security for his official conduct only, and not for his general course of action as the agent and legal adviser of a client.

In Bank. Appeal from Superior Court, Santa Clara County; W. A. Beasly, Judge.

Action by Elmira Norton against the Title Guaranty & Surety Company. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Reversed.

Geo. F. Hatton and Hartley F. Peart, both of San Francisco (Gus L. Baraty, of San Francisco, of counsel), for appellant. J. C. Black, of San Jose, for respondent. N. E. Wretman, E. M. Rea, and A. A. Caldwell, all of San Jose, amicus curiæ.

MELVIN, J. Defendant appeals from the judgment against it and from an order denying its motion for a new trial.

The action was upon the bond of a notary public executed by defendant as a surety for the faithful performance of official duty by the said notary public, one Frank L. Dreischmeyer.

It appears from the evidence that Dreischmeyer was not only a notary public, but that he also acted as an agent in matters relating to property, and that he was a practitioner at the bar. In November, 1909, plaintiff delivered to Dreischmeyer $600 to be used in making an investment for her in a mortgage on real property. A few days later, Dreischmeyer informed her that he had loaned the money, and had taken a mortgage upon a piece of real property in San Jose owned by G. A. and Josephine Mancuso. As a matter of fact he had appropriated his client's money, and in the furtherance of the fraud he exhibited to her certain forged papers, including a purported mortgage to which he had, as notary public, affixed a false certificate that Mr. and Mrs. Mancuso had appeared before him and had duly acknowledged their respective signatures. A fabricated note accompanying the forged mortgage provided for the quarterly payment of interest upon the loan, and Dreischmeyer undertook to collect the interest for plaintiff. To avoid discovery of his crime by his victim Dreischmeyer regularly paid her the amounts apparently due on the note as interest. Finally, however, she learned of his crime, and this action was commenced, more than three years after the breach by Dreischmeyer of his official duty as a notary public in making the false certificate of acknowledgment, but within four years of that date, and likewise within three years of plaintiff's discovery of the fraud practiced by her agent. Both the discovery of the crime and the inauguration of the suit occurred after the expiration of Dreischmeyer's term as notary public.

[1] Among the many defenses urged by demurrer and otherwise the surety company presented the contention that the period of three years provided by subdivision 1 of section 338 of the Code of Civil Procedure ran from the date of the malfeasance, and not from the time of the discovery by plaintiff of the crimes which Dreischmeyer had committed. Respondent insists that while, ordinarily, a suit upon a bond of a public officer for breach of official duty is "upon a liability created by statute," and therefore is governed by the first subdivision of section 338 of the Code of Civil Procedure, this is an action based upon the fraud of the public officer, and that therefore the fourth subdivision of the section, giving to plaintiff three years after the discovery of the fraud for the commencement of the action, is the only statute of limitations which may be applied in such a litigation. Both theories seem to be supported by adjudications in different jurisdictions, but in California, under the reasoning in County of Sonoma v. Hall, 132 Cal. 589, 62 Pac. 257, 312, 65 Pac. 12, 459, and the authorities cited therein, we are constrained to hold that, without regard to the form of action, a surety sued upon the bond of a public officer may successfully plead the first subdivision of section 338 of the Code of Civil Procedure if the action shall have been commenced after the lapse of three years following, not the

discovery, but the misfeasance or malfeasance itself. That was an action upon the bond of a county recorder who had collected and failed to return certain fees. The court held that such a suit is "upon a liability created by statute, other than a penalty or forfeiture," and that the period of three years was the proper time of limitation to be applied. The question of continuing fraud resulting in concealment of the breach of duty was not directly presented in that case, but it was there squarely decided that the form of action did not change the liability of the sureties. In the course of the opinion the case of State v. Conway, 18 Ohio, 234, is cited with approval. That was a suit against the sureties of a sheriff who, as was alleged, had levied upon property under a writ of execution, and by means of false returns to that and subsequent writs, had prevented the satisfaction of the judgment, and by his conduct had permitted the property to be squandered. It was sought to apply the statute of limitations relating to promises in writing founded upon a specialty or any agreement, contract, or promise, but the court held that the proper law for that purpose was the one prescribing the period within which actions against officers for nonfeasance and misfeasance in office might be commenced, the court saying, among other things:

> "So far as actions of this character are concerned, the limitation acts upon the cause, not the form of action. And the effect of the statute cannot be evaded by any change of the form of action."

In the later case of County of Calaveras v. Poe, 167 Cal. 519, 140 Pac. 23, this court approved County of Sonoma v Hall, holding that a cause of action for violation by a public officer of his statutory duty is governed by subdivision 1 of section 338, Code of Civil Procedure, as to the time within which it must be commenced. It is not necessary, therefore, to consider what statute of limitations might apply to an action against Dreischmeyer on account of his fraud and his breach of duty as attorney and agent, in carrying out a general rascally scheme of which the false acknowledgment was but a part.

[2, 3] Sureties are never held beyond the strict terms of their agreements, and it would seem illogical to bind this defendant, not only for the violation by Dreischmeyer of his official duty, but for other and subsequent frauds against which it did not promise to indemnify persons doing business with the notary public, and without which the plaintiff must have discovered the illegal nature of the forged acknowledgment. The bond was collateral security for Dreischmeyer's official conduct, not for his general course of action as plaintiff's agent and legal adviser. Clearly the gist of the action was the breach of official duty, and not fraud. It therefore becomes unnecessary to determine whether or not plaintiff was excused by Dreischmeyer's conduct from making such investigations as would have discovered the frauds sooner.

The judgment and order are reversed.

We concur: ANGELLOTTI, C. J.; HENSHAW, J.; SHAW, J.; SLOSS, J.; LAWLOR, J.

176 Cal. 236

TALLAC CO. v. PILLSBURY et al., Industrial Acc. Commission. (S. F. 7584.)

(Supreme Court of California. Oct. 4, 1917.)

MASTER AND SERVANT 🔑368—WORKMEN'S COMPENSATION ACT—CONTRACT TO BE PERFORMED IN FOREIGN COUNTRY.

A contract under which the employé was to act as second mate in a voyage from San Francisco to New Westminster, British Columbia, and return was a maritime contract relating to foreign commerce within the exclusive jurisdiction of the courts of the United States, and the Industrial Accident Commission had no jurisdiction under Workmen's Compensation Insurance and Safety Act (St. 1913, p. 318) § 84, to make an award for injuries sustained by the mate at the latter city.

In Bank. Application for a writ of review by the Tallac Company against A. J. Pillsbury and others, constituting the Industrial Accident Commission of the state. Award of Commission annulled.

McCutchen, Olney & Willard and Ira A. Campbell, all of San Francisco, for petitioner. Chris. M. Bradley, of San Francisco, for respondents.

SHAW, J. Proceeding in review, under section 84 of the Workmen's Compensation Insurance and Safety Act of 1913. Henry G. Classen was second mate of the steamer Tallac, which was owned in part and entirely managed by the Tallac Company, the petitioner herein. The home port of the steamer was San Francisco, Cal. Classen was hired in San Francisco by said company as second mate of the Tallac for the voyage from San Francisco to New Westminster, British Columbia, and return. While at the port of New Westminster, engaged in loading poles upon the steamer on October 8, 1914, he was injured by accident in the course of his employment. On reaching San Francisco in April, 1915, he applied to the Industrial Accident Commission for relief under the aforesaid act. The case was heard and the commission made him an award against the Tallac Company for the payment of $627.84 in cash, and $1,308 in weekly installments of $17.44 each for 75 weeks. The Tallac Company applies to this court to annul said award, claiming that the Industrial Accident Commission had no jurisdiction. This presents the sole question for our consideration.

The contract of service in the performance of which Classen was injured was clearly a maritime contract relating to foreign commerce, and was of a character which brings the case within the admiralty and maritime jurisdiction given by the Constitution of the United States to the courts of the United States. When the case was first submitted to this court it was discovered that the question whether or not it was within the power of a state, by means of such laws as the Workmen's Compensation Insurance and Safety Act of this state, to impose additional burdens upon such commerce, was involved in a case then pending in the Supreme Court of the United States. Thereupon the submission was set aside and consideration of the case postponed to await decision of the question by the court of paramount authority.

On May 21, 1917, in Southern Pac. Co. v. Jensen, 244 U. S. 205, 37 Sup. Ct. 524, 61 L. Ed. 1086, the Supreme Court of the United States decided that the Workmen's Compensation Act of New York, which, in all respects material to the question, is similar to that of this state, could not be extended to workmen injured while assisting in unloading a steamer in navigable waters in New York, if such steamer was then engaged in commerce between the states, or in foreign commerce. The court said:

> "Exclusive jurisdiction of all civil cases of admiralty and maritime jurisdiction is vested in the federal district courts, 'saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it.' The remedy which the compensation statute attempts to give is of a character wholly unknown to the common law, incapable of enforcement by the ordinary processes of any court, and is not saved to suitors from the grant of exclusive jurisdiction."

This decision is conclusive of the case at bar. The Industrial Accident Commission was without jurisdiction to make any award for the injury complained of, and its adjudication is invalid.

The award is annulled.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; LAWLOR, J.; HENSHAW, J.

(176 Cal. 216)

In re MORAN'S ESTATE.

HYNES v. PEAKE.

(S. F. 8334.)

(Supreme Court of California. Sept. 28, 1917.)

EXECUTORS AND ADMINISTRATORS ⟹17(1)—RIGHT TO ADMINISTER ESTATE—PUBLIC ADMINISTRATOR.

Code Civ. Proc. § 1365, fixing priorities in right to administer the estates of intestates after naming husband, wife, etc., and next of kin, names the public administrator prior to creditors or any other person legally competent. Section 1350a declares that, if all the executors named in a will are incompetent or renounce or fail to appear or qualify, letters of administration with will annexed must be issued as provided for in granting letters in case of intestacy. Section 1323, relating to proceedings on production of a foreign will, declares that, when a copy of the will and the probate thereof, duly authenticated, shall be produced by the executor or by any other person interested in the will, the same must be filed, and the clerk must appoint a time for hearing, etc.; while section 1299 declares that any executor, devisee, or legatee named in any will, or any other person interested, may at any time after the death of the testator, petition to have the will proved, etc. Executors named by a testator, who were his sole legatees and lived in a foreign state, renounced and assigned their interest in the estate to respondent. Respondent applied for letters of administration, being opposed by the public administrator. *Held* that, as the respondent was a stranger to the estate, and the public administrator was preferred to him in case of intestacy, the fact that the will had been executed and that the entire estate had been assigned to respondent does not entitle him to letters of administration in preference to the public administrator.

Department 1. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

In the matter of the estate of Thomas Moran, deceased. William A. Peake applied for letters of administration with the will annexed, and W. J. Hynes, public administrator, opposed the application. From an order appointing Peake as administrator, Hynes appeals. Reversed.

Cullinan & Hickey, of San Francisco, for appellant. Tobin & Tobin, of San Francisco, for respondent.

SHAW, J. Moran died testate, a resident of the city and county of San Francisco, where he left estate. The legatees, a brother and sister of the decedent, both reside in Illinois. The will appoints them as executors of the estate. Both of them have failed to apply for letters testamentary upon the estate, or for the probate of the will. They duly assigned their interest in the estate to Peake, who thereupon filed the will for probate and applied for letters of administration with the will annexed. Hynes, as public administrator, contested the application for letters. The court below appointed Peake as administrator, he being a stranger to the estate, having no other interest. Hynes appeals from the order.

The sole question is whether, under the circumstances stated, the assignee of the interests of nonresident legatees under a domestic will, claiming solely by virtue of the assignment, is entitled to letters of administration with the will annexed, upon the estate, in preference to the public administrator.

Being a stranger, the public administrator is preferred to him by section 1365, Code of Civil Procedure, unless the fact that the decedent died testate makes a difference. Section 1350a, Code of Civil Procedure, taken in connection with section 1365, covers the case, and declares that the public administrator is entitled. Estate of Crites, 155 Cal. 392, 101

Pac. 316; Estate of Cook, 173 Cal. 471, 160 Pac. 553; Estate of Meier, 165 Cal. 456, 132 Pac. 764, 48 L. R. A. (N. S.) 858, Ann. Cas. 1914D, 121.

Respondents refer to section 1323, Code of Civil Procedure, relating to foreign wills, and to the decisions holding that in the case of a foreign will any person interested in the will is entitled to letters of administration with the will annexed. They contend that under the same rule of construction section 1299 should be held to entitle any person interested in the estate to receive letters of administration with the will annexed in case the executor fails to apply. Section 1299 does not authorize any person to obtain letters testamentary, or letters of administration with the will annexed. It merely authorizes any person interested in the estate to file a petition for the probate of the will, but it in no wise changes the rule regarding the persons entitled to letters of administration upon a domestic will, where the executor named therein is dead, incompetent, renounces or fails to apply for letters, or where there is no executor named. Those cases are provided for in section 1350a, which refers to section 1365 as a source of authority for the grant of such letters. The court erred in refusing to appoint the public administrator.

The order is reversed.

We concur: SLOSS, J.; LAWLOR, J.

176 Cal. 83

Ex parte DARE. (Cr. 2106.)

(Supreme Court of California. Sept. 5, 1917.)

1. Weapons 🔑3 — Concealed Weapons — Statute—Constitutionality.

The provision of St. 1917, p. 221, that "any person who attempts to use, or who with intent to use the same unlawfully against another, carries or possesses," etc., the weapon described, is a valid exercise of the legislative power.

2. Statutes 🔑64(2)—Partial Invalidity—Effect.

Where petitioner was prosecuted under the first sentence of St. 1917, p. 221, the question of the invalidity of the second sentence as to presumptive evidence cannot be considered on application for habeas corpus as its invalidity would not render void the first provision.

In Bank. Application by R. C. Dare for a writ of habeas corpus. Denied.

Wm. M. Abbott, Wm. M. Cannon, and James F. Sheehan, all of San Francisco, for petitioner.

PER CURIAM. [1, 2] We are of the opinion that the first sentence of section 5 of the act of May 4, 1917 (Stats. 1917, p. 221), providing that "any person who attempts to use, or who with intent to use the same unlawfully against another, carries or possesses," etc., the weapon described, is a valid exercise of legislative power, and that none of the objections urged to the validity of the act is good in so far at least as this provision is concerned. This is the provision under which petitioner is charged by the indictment. The question of the invalidity of the second sentence of section 5, the sentence as to the effect of certain facts as presumptive evidence, cannot be considered on this application for a writ of habeas corpus. If this provision be invalid, its invalidity does not render void the provision first referred to.

The application for a writ of habeas corpus is denied.

176 Cal. 230

WILLIAMS v. WILLIAMS. (S. F. 8508.)

(Supreme Court of California. Oct. 3, 1917.)

Appeal and Error 🔑623 — Transcript — Time for Filing.

Under rule 2 (119 Pac. ix), providing that the transcript must be filed within 40 days after an appeal is perfected, but that where a transcript is prepared under Code Civ. Proc. § 953a, the time for filing shall not begin to run until the proceeding to obtain the same has been terminated, where on the day the appeal was perfected appellant's motion for a phonographic report for use on appeal was dismissed, the time for filing a transcript began to run with such dismissal, and an appeal from the order of dismissal did not prevent the running of the time for filing a transcript.

In Bank. Appeal from Superior Court, Alameda County.

Action by Florence E. Williams against Hugh D. Williams. From a judgment for defendant, plaintiff appeals. On motion to dismiss appeal. Motion granted.

R. E. Hewitt, of Oakland, for appellant.

Wm. S. Cox and Walter R. Dunn, both of Oakland, for respondent.

PER CURIAM. This is a motion to dismiss an appeal from a judgment denying a divorce, on the ground that the appellant has failed to file in this court a transcript on appeal within the time provided by our rules. The appeal here was perfected June 22, 1917, and no transcript has been filed herein. Rule 2 (119 Pac. ix) provides that the transcript must be filed "within 40 days after an appeal is perfected," except as otherwise stated in the rule. The only other provision material here is one reading as follows:

> "If the transcript for use on appeal is prepared under the provisions of section 953a of the Code of Civil Procedure and a notice is filed by the appellant requesting a transcript of the phonographic report, the time for filing the transcript of the record on appeal shall not begin to run until such phonographic report is approved and certified by the judge or until the proceeding to obtain the same has been terminated in the court below by dismissal or otherwise."

In this case such a notice requesting a transcript was filed in the court below on June 22, 1917, but on July 27, 1917, the proceeding to obtain such a record was dismissed by the court below on motion duly made by respondent.

According to the provisions of our rule the time for filing the transcript on appeal apparently began to run with such dismissal, July 27, 1917, expiring September 5, 1917. Appellant, however, appealed from said order of dismissal on August 30, 1917, by filing a notice of appeal, and urges the existence of this latter appeal as a sufficient excuse for failure to file the transcript on the appeal from the judgment. The rule granting extensions in certain cases does not so provide. According to that rule it is the dismissal by the lower court that starts the time running, and an appeal from the order of dismissal does not ipso facto operate to prevent the running of the time. It may be that if it was made to appear to this court on a motion to dismiss an appeal that there had been an arbitrary disregard by the lower court of the rights of the appellant in the dismissal of his or her proceeding for a record and a gross abuse of the discretion committed to it to determine whether the appellant had proceeded in good faith and with due diligence, with the result that the pending appeal from the order of dismissal had real merit and the order should be reversed, we would accept such showing as a sufficient excuse for the failure to file the transcript pending a diligent prosecution of the appeal from the order of dismissal. But after an examination of the papers submitted on this motion we are constrained to hold that no such showing of merit in the appeal from the order is here made.

The appeal is dismissed.

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176 Cal. 232

In re HILLS' ESTATE.

HILLS v. HANSEN. (S. F. 8002.)

(Supreme Court of California. Oct. 3, 1917.)

1. Descent and Distribution ⊂⊃4 — What Law Governs—Real Estate.

With regard to real property, the law of the state in which it is situated as it exists at the date of the death of the owner controls the descent.

2. Descent and Distribution ⊂⊃4 — What Law Governs — Land of Ancestor Not Sold.

Where at the time of the daughter's death her intestate father's land in Colorado had not been sold, title to one-half of the daughter's share immediately passed to her husband as real estate, and could not be divested, except for some purpose of administration, by subsequent sale of the father's land under an order of the court and transmission of the money to California.

Department 1. Appeal from Superior Court, Alameda County; Wm. S. Wells, Judge.

In the matter of the estate of Leonora May Hills, deceased. From an order of distribution in favor of Charlotte Hills Hansen, Winford Grant Hills appeals. Reversed.

Marguerite Ogden, of San Francisco, for appellant. Eugene W. Roland, of Oakland, for respondent.

SHAW, J. The appeal is from an order distributing the estate of said decedent. Leonora May Hills died intestate on June 4, 1914, being then a resident of the state of California. She left as her heirs at law her surviving husband, Winford Grant Hills, one son, and two daughters. On January 7, 1908, her father, George Raugh, had died intestate in Colorado, seised of a tract of land in that state. There was no administration in Colorado or elsewhere of his estate until December 22, 1914, which was after the death of Leonora May Hills. In the administration of his estate in the Colorado court, on May 3, 1915, all his real property was sold at probate sale. After paying out of the proceeds the debts and expenses of administration of his estate the share thereof which had descended to Leonora May Hills amounted to $4,795.44. The final distribution of his estate was had, whereby said sum was ordered to be distributed according to the law of descent of real property in that state to the heirs of said Leonora May Hills, that is to say, one-half of her said share to her said husband, and the other one-half, share and share alike, to her three children. Her husband, in the meantime had been appointed by the superior court of Alameda county administrator of the estate of his said wife. The sum of money belonging to the heirs of his said wife in Colorado was paid over to an ancillary administratrix of her estate in Colorado, and by that administratrix was transmitted to and received by her said husband as administrator in California. It is this money so received that is the subject of the decree of distribution appealed from.

The court below was of the opinion that it should be treated as personal property of the decedent, and should be distributed according to the law of descent of this state. The appellant contends that this money was the proceeds of the sale of real estate owned by the decedent, at the time of her death, situated in Colorado; that it descended at the time of her death according to the law of Colorado regulating the descent of real estate, and that it should be distributed here in accordance with the law of descent of real estate by which it had originally vested in her heirs at the time of her death. By the law of Colorado the surviving husband of a married woman inherited one-half of her real estate, and the surviving children the remaining one-half. By the law of California, if a decedent leaves a surviving husband and more than one child living, the husband takes by descent only one-third of her estate, and the remainder goes in equal shares to her children.

Appellant's counsel states the case of the appellant as follows:

(a) At the date of the death of Leonora May Hills she was the owner of real property situated in Colorado.

(b) The title to this real property then immediately vested in her heirs.

(c) With regard to real property, the law of the state in which it is situated as it exists at the date of the death of the owner controls the descent.

(d) The sale of this real property in administration proceedings in the state where the land is situated does not work a conversion of the proceeds into personal property, so as to make the share of one of the heirs who had died after the death of the original owner and before said sale personal property of the estate of such heirs, descendible according to the law relating to personal property.

[1, 2] These propositions are sound and should have controlled the court below in making the distribution. The decision in Brenham v. Story, 39 Cal. 179, and many other cases following and confirming it, supports proposition (b). Proposition (c) is too well established to require the citation of authority in its support. Proposition (d) is in principle supported by the decisions in Estate of Garrity, 108 Cal. 472, 38 Pac. 628, 41 Pac. 485, Estate of Packer, 125 Cal. 396, 58 Pac. 59, 73 Am. St. Rep. 58, and Martinovich v. Marsicano, 137 Cal. 354, 70 Pac. 459. In point of fact, the title to one-half of the interest of the decedent in the land in Colorado had vested in the husband prior to its sale by the Colorado administrator in the administration of the ancestor's estate. The title of the husband to one-half the proceeds being then vested could not become divested by the subsequent transmission of the money to California for administration there as a part of the estate of Leonora May Hills, except as it might have been divested for some legitimate purpose in the administration of her estate. For purposes of distribution the title remained as it was when the property was passed to the California administrator.

The cases cited by the respondent in opposition to this conclusion are not in point. In Pennell's Appeal, 20 Pa. 515, a minor child had inherited certain real estate, and during his minority his guardian had sold the same under order of the orphans' court, for the use of the minor. Thereafter the minor died. The court held that the proceeds of the real estate so converted into money in his lifetime for his use descended according to the law of descent of personal property, and not according to the law of descent of real estate. The reason is plainly apparent. It had been converted into money for his use during his lifetime, and was part of his personal estate at the time of his death. Its character was precisely the same as if, after arriving at majority, he had sold the property, received the money, and had then died, leaving the money as part of his estate. The distinction between that case and the present one is obvious. Here the property at the death of the decedent, Mrs. Hills, was real estate. Its subsequent conversion into personalty did not change the title which vested at her death.

The other case cited is Muus v. Muus, 29 Minn. 115, 12 N. W. 343. In that case a husband and wife were resident in Minnesota. The father of the wife died in Norway, leaving property there, an interest in which descended to the wife. By the laws of Norway relating to husband and wife, property acquired by the wife in that manner became the common property of herself and her husband, with the sole control in the husband. By the law regulating the marriage relation in Minnesota, where the husband and wife resided, such property became and remained the separate property of the wife, free from the control of the husband. The Minnesota court decided that while the property descended to the wife according to the law of Norway, its character as the separate property of the wife, or the common property of the two, was determined by the law of their domicile regulating the marriage relation, and that it was therefore the separate property of the wife. It is scarcely necessary to say that this decision has no bearing upon the question involved in this case.

The order is reversed.

We concur: SLOSS, J.; LAWLOR, J.

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176 Cal. 226

In re FRIEDMAN'S ESTATE.

Appeal of HEBREW HOME FOR AGED DISABLED.

(S. F. 8271.)

(Supreme Court of California. Oct. 2, 1917. Rehearing Denied Oct. 29, 1917.)

EXECUTORS AND ADMINISTRATORS 🔑111(1)—PROCEEDINGS TO DETERMINE SUCCESSION—ATTORNEY'S FEES.

As it was no part of the duty of the executor to participate in a proceeding under Code Civ. Proc. § 1664, to determine succession to the estate of deceased, he had no power to engage attorneys for either claimant to the estate, and the court had no power to allow compensation out of the estate for services rendered in assisting one of the parties to the proceedings in establishing his claim, although the executor employed them to render such services.

Department 1. Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Proceeding under Code Civ. Proc. § 1664, in the matter of the estate of Julius Friedman, deceased. From an order allowing attorney's fees to Marshall B. Woodworth and another, the Hebrew Home for Aged Disabled appeals. Reversed.

See, also, 171 Cal. 431, 153 Pac. 918; 173 Cal. 411, 160 Pac. 237.

Charles W. Slack and Lucius L. Solomons, both of San Francisco, for appellant. Edmund Tauszky and Marshall B. Woodworth, both of San Francisco, for respondent.

SHAW, J. This is an appeal from an order of the superior court allowing to Marshall B. Woodworth and Edmund Tauszky, each respectively, the sum of $5,000 out of the funds of the estate of said decedent, for certain services found to have been rendered by them as attorneys.

Julius Friedman died prior to April, 1900. His will was duly admitted to probate, and the estate has been in the course of administration for many years. Edward R. Lande and I. M. Friedberg have, during all that time, been the executors of said estate. By the terms of the will the residue of the estate was given to the Hebrew Home for Aged Disabled, an eleemosynary corporation. The said disposition was for charitable purposes, and was therefore invalid as to two-thirds of the estate, with respect to the legal heirs of Friedman, if he had any. In course of time numerous sets of persons appeared and claimed to be the heirs of the estate. The Hebrew Home for Aged Disabled thereupon began a proceeding, under section 1664 of the Code of Civil Procedure, to obtain a decree determining the rights of all persons to the estate and to whom the distribution thereof should be made. The several persons who claimed to be the heirs of Friedman appeared and filed their answers therein, the cause proceeded to trial, and findings and judgment were regularly made and entered, declaring that the deceased left no heirs at law entitled to his estate, and that the entire estate should be distributed to said Hebrew Home for Aged Disabled. An appeal from this judgment was taken by one set of claimants, which appeal is now pending for decision. The services for which the compensation in question was allowed were rendered during the period from May 31, 1913, to September 30, 1915. Ever since the administration of the estate began, Woodworth has been employed by the executor, Lande, as his attorney to conduct the proceedings in the administration of the estate, and Tauszky has been employed for the same purpose by the executor, Friedberg. The allowances made by the court were almost entirely for services rendered by the two attorneys, respectively, in the proceeding to determine the succession to the estate, begun by the said Hebrew Home for Aged Disabled. It is claimed that they were rendered at the request, or at least for the benefit, of the said Hebrew Home, the successful claimant in the proceeding.

The court in probate has power to allow to the executor all necessary expenses incurred by him in the settlement of the estate, including the reasonable value of the services of attorneys employed by him to advise him in the matter, and conduct the proceedings in administration. An attorney who has rendered such services to the executor may, during the administration, apply to the court for an allowance to himself for compensation therefor, and it is the duty of the court to allow him the reasonable value of the services rendered. Code Civ. Proc., § 1616. These services may include fees for conducting the ordinary probate proceedings, and such further allowance as the court may deem just and reasonable for "extraordinary services such as sales or mortgages of real estate, contested or litigated claims against the estate, litigation in regard to the property of the estate, and such other litigation as may be necessary for the executor or administrator to prosecute or defend." Civ. Code, § 1619.

It is no part of the duty of the executor to participate actively in a proceeding under section 1664 to ascertain and determine the succession to the estate. That proceeding may be begun by any person claiming to be entitled to distribution of all or any part of such estate. All opposing claimants must be made parties to the proceeding. The executor or administrator is required to be named in the petition, and process must accordingly be served upon him; but he has no interest in the question to be determined. No answer is required to be filed by him. He has no claim which he can set up in opposition to those of the rival claimants for the estate, and his name is inserted as a party solely for the purpose of giving him information of the proceeding, so that he may be advised as to the judgment therein given, and of the pendency of the proceeding itself. As far as he is concerned, it is in the nature of a notice of lis pendens. It follows, therefore, that he has no authority as executor to engage attorneys for either claimant to the estate, or to bind the estate in any manner to pay for services rendered in that behalf. These principles are thoroughly settled by many decisions, among which may be named the following: Estate of Parsons, 65 Cal. 240, 3 Pac. 817; Estate of Jessup, 80 Cal. 625, 22 Pac. 260; Estate of Healy, 137 Cal. 477, 70 Pac. 455; McCabe v. Healy, 138 Cal. 89, 70 Pac. 1008; Estate of Hite, 155 Cal. 456, 101 Pac. 448. It is unnecessary to quote from the decisions or to elaborate upon the matter further.

The necessary result is that the court has no power to allow compensation out of the estate for services rendered in assisting one of the parties to the succession proceedings in establishing its claim even if the executors employed them to render such service. If they have any lawful claim against the successful party therefor, it will be necessary for them to establish the same by action against the party in whose behalf the services were rendered. They cannot obtain an allowance out of the property of the estate for such services. Their duty, and that of the executors, also, was to stand indifferent to all claimants, and not to favor one above the other. This duty does not change upon the decision in the court below in favor of one claimant, but continues until that decision becomes final.

It is claimed, and there was some evidence to show, that the attorney for said Hebrew Home requested the performance of the services for which compensation is claimed by respondents, and that as it was successful, and the services have inured to its benefit, it is estopped from taking an appeal from the allowance, and, further, that if the appeal in the succession proceeding is successful they will not be harmed, because in that event the property will go to the successful claimants, and they alone have a right to object to the allowance to these attorneys. With respect to the alleged estoppel by reason of the alleged request of the attorneys regularly employed by the Hebrew Home to conduct the proceeding, it is sufficient to say that there is no showing that that corporation ever authorized such employment, or ratified the same, even if in any event there could be an estoppel of that character. Furthermore, as above indicated, the probate court is not the proper forum in which to assert such estoppel. The Hebrew Home is entitled to have the question tried in an ordinary action. The suggestion that, if the other appeal is successful, the successful claimant, and not the present appellant, will be the loser, is not supported by the facts. In any event, the present appellant will be entitled to one-third of the estate, and it has not yet received that proportion thereof. Consequently the payment of these services will diminish the entire estate, and one-third of such diminution will fall upon appellant. As the major part of the allowance is for services for which the court had no power to order payment from the estate, and we have no means of apportioning the allowance, the order must be reversed as a whole.

The order is reversed.

We concur: SLOSS, J.; LAWLOR, J.

34 Cal. App. 442

CITY OF OAKLAND v. WHEELER et al.

(Civ. 1699.)

(District Court of Appeal, First District, California. Aug. 23, 1917. Rehearing Denied by Supreme Court Oct. 18, 1917.)

1. EMINENT DOMAIN 🔑191(6)—PROCEEDINGS—COMPLAINT—DESCRIPTION OF PROPERTY—"SHIP CHANNEL."

In a proceeding by the city of Oakland to condemn lands on the water front, the southerly boundary of the property was described as the northerly boundary of the ship channel in the harbor which was the line of ordinary low tide of May 4, 1852, and which northerly boundary line of ship channel was the southerly boundary line of the lands granted and released to the town of Oakland by Act May 4, 1852 (St. 1852, p. 180). By the act referred to all the land within the limits of the town between high tide and ship channel was granted to the town with the right in the town to wharf out on the entire water front. The property was conveyed by the town, title finally vesting in defendants. *Held*, that the words "ship channel," as employed in the complaint and statute, meant the line of low tide on May 4, 1852, and hence the description was sufficient.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Ship Channel.]

2. EMINENT DOMAIN 🔑195—PROCEEDINGS—DESCRIPTION OF PROPERTY SOUGHT TO BE CONDEMNED.

While the description of property sought to be condemned must be such that the property or interest to be acquired can be ascertained from the description itself without reference to extraneous facts, the description of water front property as bounded by ship channel, which was the low tide of May 4, 1852, is sufficient, so that evidence of the location of the line is admissible notwithstanding the accumulation of débris rendered it impossible to ascertain the line by observation, and the parties were unable to agree as to where the line was located on the ground.

3. EMINENT DOMAIN 🔑201—PROCEEDINGS—EVIDENCE.

Where defendants and their predecessors accumulated débris on the line of their water front property which was sought to be condemned, evidence as to the location of the line cannot be excluded for that reason.

4. EMINENT DOMAIN 🔑262(2)—REVIEW—ADMISSION OF EVIDENCE.

In a proceeding to condemn water front property, the boundary line of property was described as the ship channel, which was the low tide line of a fixed year. Débris had accumulated, so that the line could not be ascertained from observation. Plaintiff, after proof of its charter power to condemn, the filing of a lis pendens, and the passage of an ordinance authorizing condemnation, rested. Defendants then introduced testimony as to the location of the boundary line, and upon a witness testifying that he could not locate the line without other data, moved the court to require plaintiff to specify the tract sought to be condemned. The motion was denied in terms, but was in effect complied with by plaintiff. *Held* that, though defendant subsequently claimed that its evidence was offered not to establish the boundary, but to show that it could not be located, defendant cannot object to the admission of testimony as to its location on the ground.

5. APPEAL AND ERROR 🔑992 — QUESTION PRELIMINARY TO ADMISSION OF EVIDENCE—MAPS—ACCURACY.

In a proceeding to condemn water front property, evidence as to the coast survey chart made by United States engineers of the coast and geodetic survey cannot be excluded on the ground of inaccuracy, where the evidence as to the accuracy of the map which was introduced subsequently conflicted.

6. EVIDENCE 🔑333(5)—EMINENT DOMAIN—COAST SURVEY CHART.

A coast survey chart of United States engineers of the coast and geodetic survey is competent in a proceeding to condemn land under Code Civ. Proc. §§ 1920, 1926, providing for the admission of evidence of entries in official books, and that entries made by officers shall be prima

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

facie evidence; the map being an original record of the United States.

7. EVIDENCE 🔑506 — OPINION EVIDENCE—JURY QUESTION.

In a proceeding to condemn water front property, where a coast survey map made by United States engineers was introduced, testimony by experts as to their opinion concerning the accuracy of the map is inadmissible, that being a question for the jury, though they might testify to specific inaccuracies.

8. EMINENT DOMAIN 🔑71—PROCEEDINGS—DAMAGES.

Code Civ. Proc. § 1249, declaring that for the purpose of assessing compensation the right shall be deemed to have accrued at the date of the issuance of the summons and the actual value of the property at that date shall be the measure of compensation, is constitutional.

9. NAVIGABLE WATERS 🔑39(3) — RIPARIAN PROPRIETORS — WHARFING-OUT PRIVILEGE.

Owners of land upon the littoral of a navigable bay have no right of access to deep water over intervening tide lands; hence in a suit to condemn water front property an instruction that if defendants had a wharfing-out right it could be considered an assessing damage was more favorable to defendants than they were entitled to.

10. WHARVES 🔑9—EXERCISE OF RIGHT—ADVERSE USES.

Where defendants and their predecessors in ownership of water front property were by reason of a lease entitled to a wharfing-out privilege, their exercise of such privilege cannot ripen into adverse title.

11. NAVIGABLE WATERS 🔑39(3) — TIDE LANDS—ADVERSE POSSESSION.

Where the title to tide lands was withheld from sale by Const. 1879, art. 15, § 3, no wharfing-out right by an owner of water front property can be acquired by adverse possession.

12. EMINENT DOMAIN 🔑222(1) — PROCEEDINGS—INSTRUCTIONS.

In a suit to condemn water front property described as extending to a tide line of May 4, 1852, where the city did not attempt to condemn any land added by accretion, an instruction on the subject of accretion was properly denied, though there was testimony that the tide line had been extended from the shore by accretion; such testimony being material to the location of the line.

13. TRIAL 🔑255(14)—EMINENT DOMAIN—INSTRUCTIONS—NECESSITY OF REQUEST.

In a proceeding to condemn land, defendants cannot complain of the failure of the court to instruct on a particular element of damage, where no such instruction was requested.

14. EMINENT DOMAIN 🔑262(2) — REVIEW — INVITED ERROR.

A proceeding to condemn water front property was disposed of on the theory that the jury could not only assess the damage, but could determine all questions of fact by a general verdict. Such theory appeared from defendants' own requests. *Held*, that defendant could not for the first time on appeal complain that the court failed to make findings on the issue of fact, such as the boundaries other than the question of damages.

15. EMINENT DOMAIN 🔑262(5)—REVIEW — HARMLESS ERROR—FAILURE TO MAKE FINDING.

In an eminent domain suit, where the jury were allowed to render a general verdict, but there were no seriously disputed issues of fact requiring findings by the court, the failure of the court to make findings was harmless if erroneous.

Appeal from Superior Court, Alameda County; John Ellsworth, Judge.

Action by the City of Oakland, a municipal corporation, against Peter L. Wheeler and others. From a judgment for plaintiff and orders allowing plaintiff to take possession, defendants appeal. Affirmed.

Chapman & Trefethen, of Oakland, and Wm. B. Bosley, of San Francisco (Goodfellow, Eells, Moore & Orrick, of San Francisco, of counsel), for appellants. Paul C. Morf, City Atty., of Oakland (Charles A. Beardsley, of Oakland, of counsel), for respondent.

BEASLY, Judge pro tem. The appeals in this case are taken by defendants, trustees of the Samuel Merritt Hospital, from a judgment of the superior court of Alameda county, condemning for public purposes certain lands owned and held by said trustees on the Oakland water front of San Francisco bay, from a final order of condemnation of these lands, and from an order authorizing plaintiff to take possession thereof.

[1] The facts in this case naturally group themselves about the questions of law which are presented on this appeal, and they will therefore be stated so far as they are material in connection with the discussion of these questions.

(1) The first contention of the appellants is that the property sought to be condemned was not described by plaintiff in the pleadings with definiteness, nor so that it could be located with certainty. This question was presented in varying forms to the trial court, for example, by a demurrer to plaintiff's amended complaint, by objection to the introduction of evidence of the disputed boundary, and by instructions which the court was requested to give the jury "that if the location of the southern boundary of the property could be ascertained only by taking the testimony of witnesses they should render a verdict in favor of the defendants," and by a motion that the court require the location of the disputed southern boundary of the property to be fixed. On all these points the trial court ruled against the defendants.

The southern boundary of the property sought to be condemned is alone in dispute. The description of this line as found in the amended complaint on which the judgment rests, with so much of the remainder of the boundaries of the property as is necessary to understand the objections urged by defendants, is as follows:

> "* * * Thence southerly along said center line of Washington street extended southerly on its present course to *the northerly boundary line of ship channel in Oakland Harbor, which northerly boundary line of ship channel is the line of ordinary low tide of May 4, 1852, and which northerly boundary line of ship channel is the southerly boundary line of the lands granted and released to the town of Oakland by an act of the Legislature of the state of California en-*

titled 'An act to incorporate the town of Oakland and to provide for the construction of wharves thereat,' approved May 4, 1852; thence westerly along *the said northerly boundary line of ship channel* to the center line of Clay street. * * *"

The italicized portions of the description indicate the disputed southerly boundary line. The three criticisms of the description of this line in the complaint, as stated by defendants, are: (a) That the description of this boundary line is on its face uncertain; (b) that the southerly boundary cannot therefrom be located on the ground at all; and (c) that if it can be so located the location can only be made by the aid of evidence outside the description in the complaint and in addition thereto. These questions are stated and presented at great length and, as has been said, in varying form; but this statement sets them forth so that they can be clearly understood, and whether presented by special demurrer or in the form of the various motions, objections to evidence, and requests made to the court at various stages of the trial, present identical questions so far as this phase of the case is concerned.

This description is sufficient under a decision of the Supreme Court passing upon this same question arising out of this very description. A brief history of the defendants' title will assist in understanding that this is a correct conclusion. The town of Oakland was incorporated under an act of the Legislature in effect May 4, 1852, which is the act referred to in the description above quoted, and which is entitled as therein set forth. Stats. 1852, p. 180. By this act all the land within the limits of the town between high tide and "ship channel" was granted to the town, with the right in the town to wharf out upon the entire water front from said lands. Within one month of the taking effect of this act the town of Oakland conveyed all the land so granted to it to one Horace W. Carpentier, and also in the same instrument granted to him a wharfing-out privilege on the entire water front of the town for a period of 37 years; and in 1868 Carpentier in turn conveyed all this property and the accompanying wharfing-out privilege to the Oakland Water Front Company. In this same year (1868) Samuel Merritt, then mayor of the city of Oakland, which had meanwhile become the municipal successor of the town of Oakland by legislative act in 1854 (Stats. 1854, p. 183), made an arrangement with the Oakland Water Front Company pursuant to which he established a lumber yard on this property, and built a wharf out to deep water thereon. Of course he acquired by this arrangement no rights beyond those which had already been granted to Carpentier and conveyed by him to the Oakland Water Front Company. From Merritt this property came in time into the hands of these defendants. The exact description of the water side boundary of the Oakland water front so far as here involved contained in the act of 1852, under which the town of Oakland was incorporated and acquired these lands, is as follows:

> "The lands lying within the limits aforesaid (i. e., the corporate limits of the town as defined in the first section of the act) between high tide and ship channel."

It will be seen that the term "ship channel" employed in this act is the exact term used in plaintiff's amended complaint to describe the southerly boundary of the property sought to be condemned in this proceeding. It is about the meaning of the words "ship channel" that this controversy is waged. This description is both precise and definite, for it is held in Oakland v. Oakland Water Front Co., 118 Cal. 160, 50 Pac. 277, that the words "ship channel" as employed in this statute mean the line of low tide of the date of the statute, namely, May 4, 1852, and in that case (118 Cal. 177, 50 Pac. 283), in the court's opinion, the Supreme Court of this state, in determining the meaning to be given to the words "ship channel" in this very act of 1852, says:

> "The next term of the description which requires construction is 'thence to ship channel.' What did the Legislature mean by 'ship channel'? * * * It is certain some meaning must be ascribed to the term 'ship channel' in order to give effect to the act, and it must be some precise and definite meaning; for the law abhors want of definition in matters of boundary as nature abhors a vacuum. Especially is this true with respect to the boundaries of a municipal corporation invested with power and authority to make and enforce local laws, civil and criminal. It is not to be supposed that the Legislature, in conferring the municipal franchise upon the inhabitants of a local district, will purposely leave its boundaries in any respect uncertain. On the contrary, it must be assumed that the intention was to mark the boundary so exactly and definitely that no question could arise as to whether a particular spot was within or without the local jurisdiction. * * * And when we are required to locate its boundaries with precision, and no artificial boundary has been established by competent authority, we are driven to seek a definite natural boundary, if any such may be found, and here we do find such a boundary at the line of low tide. This is a definite line, and the only definite line beyond the line of high tide, and my conclusion is," said the learned Chief Justice Beatty in his opinion in the case, "that the line of low tide as it existed on the 4th of May, 1852, was the western boundary of the town of Oakland intended by the original act of incorporation."

In summing up the result of his discussion on this topic the late Chief Justice says:

> "The boundary of the town of Oakland, as defined by the act of May 4, 1852, commencing at the intersection of the northeast line with the line of low tide on the eastern side of the northern branch of the estuary, follows the line of low tide on said branch to the mouth of the eastern basin, crosses said mouth and continues along the line of low tide on the southern side of the estuary to its mouth in the bay, and thence follows the line of low tide northerly and easterly till it intersects the northeast boundary line, as to the location of which there seems to be no dispute."

The quoted language used by the court was employed in considering the exact line in dispute in this case; and the language of the court leaves nothing to be decided when it is applied to the case now under discussion. Indeed, the description above quoted from the complaint herein is the description contained in the act of 1852, supra, construed with and supplemented by the definition of the words "ship channel" as given in the Oakland Water Front Case, where the words "ship channel" are held to have a precise and definite meaning. Under this authority it must be held that the description used in the amended complaint in this case is definite and certain. As a matter of law it is as definite and certain as if it were a line of rock or the thread of a stream or any other natural boundary.

[2] (2) Counsel for defendants also claim that it was error for the trial court to permit evidence to be introduced at the trial as to the location of this southerly boundary upon the ground, because of what they claim is the uncertainty of this description. The low tide line had been covered by débris placed over it by the defendants' predecessors in ownership; and it seems to be claimed now that the line of low tide had receded during the intervening years between 1852 and the beginning of this action. The contentions of counsel on these points can be stated largely in their own language thus:

> "In order to locate the line in question the position of the line of low water on the north side of the estuary as it existed on May 4, 1852, must first be determined."

And it is contended that the rule of law governing descriptions in condemnation proceedings under the power of eminent domain is this:

> That "the property or interest to be acquired must be ascertainable from the description thereof in the petition itself without reference to extraneous facts."

If by this is meant that the description must be a boundary the location of which can be found by any person looking for the location of the line unaided by anything but the data contained in the description itself, the proposition is too broadly stated; for a section line running over a brushy hillside would hardly be challenged, nor would it be seriously argued that it is not a sufficient description in a condemnation proceeding, although it might require the services of a land surveyor to ascertain its actual location, and the line of a stone wall covered by the débris of years would be a sufficient description, even though excavations were necessary to uncover it and show it to the officer executing the judgment of condemnation. Thompson v. Trowe, 82 Minn. 471, 85 N. W. 169. And the fact that the parties are not able to agree as to where the lines of location run upon the ground, or as to what property is included within them, does not make a description insufficient in condemnation proceedings under the power of eminent domain. Coe v. Aiken (C. C.) 61 Fed. 24. Counsel cite many cases as sustaining their position on this point; but the distinction drawn in at least one of these cases, and which seems applicable here is, in the language of the court in the case of Coe v. Aiken, supra, that:

> If the description is "uncertain in law, not merely in fact but in law, it could not stand; but that it is uncertain in fact that individuals may differ in regard to its construction, and that it must go to the courts to ultimately settle its boundaries, do not make it uncertain in law, as the law says that what can be made certain is certain."

This is only another manner of saying that such a description may be sufficient in a pleading, although its exact location on the ground might require some search or investigation outside the data contained in the description itself. This description being certain in law, as was held in the Oakland Water Front Case, supra, its exact location under the débris with which it was covered could be and was shown by the introduction of evidence at the trial. In fact there is no way by which such a line can be made certain and its definite location made binding upon the defendants if they choose to dispute the fact, except by settling the question in a proceeding or trial where there are adversary claims as to the line to be settled between the parties; and the law provides no means for obtaining a judgment adjusting or fixing boundaries between parties in contemplation of condemnation proceedings.

[3, 4] The defendants for another reason should not be allowed to complain of this, for they were at all times in possession of the land and in a position to ascertain the line by uncovering it, and by the other means which, as appeared at the trial, were adopted by the witnesses for ascertaining its location. The plaintiff was not in as good a position as the defendants, if in a position at all, to do this before the complaint was filed. The débris which covered the line and hid it was placed upon it by the defendants' predecessors in interest, who filled in the land over it without regard to whether or not they obliterated or obscured their boundaries. Besides this, in their amended and supplemental answer upon which the action first went to trial and under which the trial continued for eight days, the defendants averred that their southern boundary (the one in dispute) was the present low tide line, that the land sought to be condemned "is the very parcel described by the plaintiff and bounded on the south by the low tide line of 1852," and that this "present low tide line" is "identical with the ordinary low tide line on the northerly shore of the estuary of San Antonio or Oakland harbor in front of said parcel of land on the 4th day of May, 1852"; and they do not deny the allegations of plaintiff's amended complaint filed during the trial that the property described therein

was the whole of the parcel of land owned by them. Further, the manner in which the trial proceeded precludes defendants from now objecting to the evidence locating this line upon the ground, which was introduced in behalf of the plaintiff, for at the opening of the trial the plaintiff introduced in evidence a lis pendens properly recorded, the charter of the city of Oakland approved by the Legislature in the year 1889, and the so-called new charter of the city of Oakland approved by the Legislature in the year 1911, an ordinance determining that the public interest and necessity demanded the construction of certain permanent public municipal improvements for which the condemnation of this land was necessary, a resolution of the city council authorizing the city attorney to commence this action as required by the charter, and thereupon the plaintiff rested its case without offering any evidence as to the location of this boundary. The defendants then took the oar, and called witness after witness to prove the location of this southern boundary line of their property upon the ground. They accepted the case made by the plaintiff, and themselves assumed the burden of introducing evidence to show the location of their boundary. In the face of all this it must be held that plaintiff's evidence as to the location of the southerly boundary of the defendants' property on the ground was properly admitted by the trial court.

It is true that some of the witnesses called, as above stated, on behalf of the defendants, to testify as to the location of this boundary, said that by the description in the complaint they could not locate it; one of them said he would have to hunt up evidence outside the courtroom to enable him to locate it; and the defendants then and not before moved the court to require plaintiff to specify—presumably by measurements in feet and inches, although they did not say so—the tract sought to be condemned, to the end, as they claimed, that they might be enabled to know what questions to ask witnesses as to value. This motion was denied in terms by the court, but in effect it was complied with by the attorneys for the city, for during weeks of the trial thereafter they produced evidence as to the location of this line. Under these circumstances and facts it cannot be held, as is the contention of the defendants, that the boundary cannot be located on the ground, nor that evidence tending to locate it was improperly admitted, for they themselves invited and precipitated this method of proceeding under which the court permitted evidence to be introduced upon this subject.

The defendants now claim, however, that their evidence on the subject of location of the southerly line was not offered to establish the boundary, but to show that it could not be located. Before insisting upon this construction of their case, however, the defendants offered evidence of the length of their boundary lines, of the location of a certain stone wall on their property, of the area of their wharf, of the location of the present low tide line alleged by them to be the same as the line of May 4, 1852, and other evidence of the same purport. It is impossible to read this evidence without coming to the conclusion that it was introduced in an attempt to locate this boundary. The trial court certainly so understood it, as is evident from the context; and this being so, the competent evidence on the same point subsequently offered by plaintiff was properly admitted. To sum up this phase of the case, we must hold that the description of this boundary line is not uncertain; that while the boundary line could not be located upon the ground by simple inspection without the aid of evidence outside of and in addition to the description in the complaint itself, it could be and was so located by the aid of competent evidence outside the description contained in the complaint and in addition thereto. All rulings adverse to defendants involving these contentions as to boundary were therefore correct.

(3) This disposes of the questions arising directly from the claim that the description of the southerly boundary of the property sought to be condemned is uncertain, except that in dealing with the sufficiency of the description the exceptions to instructions given and refused on this subject seem to merit special mention in addition to what has already been said on that topic.

Complaint is made of an instruction in which the jury were told that the description was not uncertain in law. As may be gathered from what has been said, this was a correct statement of the law. The court left the question whether under the evidence the boundary could be located as a matter of fact to the jury, and by its instructions left to the jury the question of the location of the boundary on the ground and of the area of the land embraced within the parcel sought to be taken in the proceeding. From what has been said it will be seen that this instruction to the jury was not in conflict with the instruction that the description was not as a matter of law insufficient or uncertain.

[5, 6] (4) The evidence introduced by the plaintiff to establish the location of the southerly or waterside boundary included the coast survey chart of 1855, made by the engineers of the United States coast and geodetic survey. The introduction of this map was objected to for many reasons, only two of which are sufficiently serious to require attention here. These are: First, inaccuracy; and, second, that it is not an official record such as is evidence under sections 1920 and 1926 of the Code of Civil Procedure—it being claimed that the map was made solely for the purpose of aiding navigation, and hence cannot be used to establish a boundary.

The most that can be said in support of the first objection is that the evidence as to the accuracy of the map was conflicting. The evidence of the inaccuracy was introduced subsequent to the admission of the map in evidence. Besides, this map is an original record of the United States coast and geodetic survey, and as such is admissible in evidence under sections 1920 and 1926 of the Code of Civil Procedure. Merryman v. Kirby, 13 Cal. App. 344, 109 Pac. 635. With this ruling admitting the map under these conditions we cannot interfere. On the second point the witness Von Geldern testified that it was an original map and record of the United States coast and geodetic survey, and it appeared upon its face to be such a record. Under sections 1920 and 1926 of the Code of Civil Procedure it is provided that such records are prima facie evidence of the facts stated therein. This map is a record of the United States coast and geodetic survey, made in the performance of their duties by federal officers, as appears from the record. Nor does this map appear to have been made solely for purposes of navigation. It was properly admitted in evidence. The same rule applies for similar reasons to the coast and geodetic survey map of 1859. The court instructed the jury that these maps were prima facie evidence of the location of the lines shown thereon. To this instruction defendants objected. The disputed boundary appears on these maps. The instruction was therefore a correct statement of the rule of law embodied in sections 1920 and 1926 of the Code of Civil Procedure above quoted. See 5 Cyc. 950, 955; Breen v. Donnelly, 74 Cal. 301, 15 Pac. 845; Goodwin v. McCabe, 75 Cal. 584, 17 Pac. 705. Whatever the rule may be elsewhere than in California, in this state these sections of the Code cited settle the competency of these maps and their character as prima facie evidence of the facts sought to be established by them.

[7] (5) Defendants asked certain questions of the engineers who were witnesses on their behalf, which called for the opinions of these gentlemen concerning the accuracy and reliability of the coast and geodetic survey maps heretofore referred to, for the purpose of defining boundaries in private ownership which by deed or statute is defined to be the low tide line. Objections to these questions were sustained, and properly so. These questions called for opinions of the witnesses as to the weight to be given by the jury to these maps as evidence. If any inaccuracies existed in the maps themselves these experts, if qualified to do so, could have been permitted to point them out, and they were permitted to do exactly this; but they could not be permitted to give their general opinions as to the value of these maps for the purpose of defining boundaries, nor as to the weight to be given them as evidence. These were questions for the jury, whose province it was to determine the weight and value of the maps as evidence. These same experts were permitted to spend much time pointing out the incompleteness of these maps, and this is as far as they should have been permitted to go. This answers also the exception to the court's ruling in excluding certain questions of similar import asked of the witness Davidson at the taking of his deposition.

[8] (6) The trial court properly instructed the jury that the value of the property should be fixed as of the date of the issuance of the summons, as is provided in the Code of Civil Procdeure, section 1249. The question of the constitutionality of this section of the Code raised by defendants is no longer an open one in this state. Los Angeles v. Gager, 10 Cal. App. 378, 102 Pac. 17; Cal. S. Ry. Co. v. Kimball, 61 Cal. 90; San Jose, etc., Co. v. Mayne, 83 Cal. 566, 23 Pac. 522; Tehama Co. v. Bryan, 68 Cal. 57, 8 Pac. 673; Sacramento Co. v. McDougall, 19 Cal. App. 562, 126 Pac. 503. The section is constitutional.

[9] (8) Complaint is made because the trial court refused to give certain instructions to the effect that defendants had a wharfing-out right on their property to deep water, and that this right must be considered by the jury in fixing their damages. Defendants requested several instructions along this line. The court gave one of these instructions, namely, that if the defendants had such right it should be considered in fixing their compensation for lands taken. It refused to instruct as a matter of law that the defendants had such wharfing-out right. It might have instructed that they had at the time of the issuance of the summons no such right, for it has been settled in Dalton v. Oakland, 168 Cal. 463, 143 Pac. 721, that owners of land upon the littoral of a navigable bay have no right of access to deep water over intervening tide lands. Western Pacific v. Southern Pacific Co., 151 Fed. 376, 80 C. C. A. 606. The instruction given was therefore more favorable to the defendants than it should have been, and they cannot complain of it.

[10, 11] (9) But the defendants also claim a wharfing-out right acquired by adverse possession, and this claim will be considered. Appellants and their predecessors in ownership of this property exercised for 37 years, from some time in June, 1852, until a corresponding date in 1889, the wharfing-out privilege granted by the town of Oakland to Carpentier in his deed of the former date. The exercise of the right conferred by this instrument, whether it be termed a lease or by whatever designation it be characterized, estopped the defendants and their predecessors so exercising it from claiming title to or right or easement in the land below low tide on which the wharf stood as against the city of Oakland from whom they derived the right so exercised during those years. Assuming that it was possible for the defendants to have acquired title to this land below low tide, or any privilege to use it for wharfing out, by adverse possession under any circum-

stances—which we do not concede to have been possible in this instance—still they did not so acquire either title or wharfing-out privilege, because before the termination of their privilege or lease under the Carpentier deed this land was withdrawn from sale by the Constitution of 1879 (Const. 1879, art. 15, § 3), and it has been held that the title to tide lands withheld from sale cannot be acquired by adverse possession (Patton v. City of Los Angeles, 169 Cal. 521, 147 Pac. 141; People v. Southern Pacific Co., 169 Cal. 537, 147 Pac. 274). So that having no deed to this property, and having acquired no title thereto or privilege of using this land, or user thereof, below the low tide line by adverse possession, the defendants show no wharfing-out rights belonging to them at the time this summons was issued upon which they could stand in a claim for damages to or compensation for the taking of land below the low tide line, for the defendants had no right of access to navigable water from their property.

[12] (10) The exception to the refusal of the trial court to instruct the jury upon the subject of accretion is not tenable, even if it be conceded, in view of what has already been said, that the defendants could have acquired additional land below the low tide line of May 4, 1852, by reason of accretions thereto; still under the pleadings in this case there was no attempt to condemn any land added to defendants' land by accretion, nor any land whatever below said low tide line. It is straining and misconstruing both the evidence on the subject of accretion and the claims of plaintiff's brief to attribute to it an attempt to condemn any land added by accretion. The defendants contended that the evidence of the witness Hewer was introduced for the purpose of supporting a claim by the plaintiff to the right to take land so added to their holdings by accretion; but the evidence of this witness was material upon the question of the location on the ground of the tide line of 1852, and it is not necessary to refer its introduction to an issue as to accretion at all. Hewer testified—and to this testimony the objection is directed—that soil held in solution in water such as the Oakland estuary would be deposited by the water if the current were retarded by improvements such as wharves built on piles; a fact which must be obvious to any person of intelligence who has had opportunities to observe flowing water carrying débris in solution. This case, therefore, should not be reversed on account of this evidence, even if it found no support in any other issue than that of accretion. The line to which the plaintiff desired to condemn was the definite low tide line of May 4, 1852, and the city sought nothing beyond this, and could take nothing beyond this, under its pleadings. Hence if any land had been added by accretion below this line, and if the defendants had any claim to it, a separate proceeding would be necessary to acquire it; and it was stated in the briefs and at the oral argument, and not denied, that such separate proceeding has been instituted by the city and prosecuted to judgment.

[13] (11) No just complaint can be made by defendants of the failure of the court to instruct the jury on the subject of damages by severance, because no such instruction was requested. Trial courts cannot be expected to guard the rights of parties where they are represented by able and distinguished counsel, as was the case here.

[14] (12) Finally, the most serious contention urged by defendants is this: That no question except that of the amount of the compensation to be paid for the property should have been submitted to the jury, and that the question of boundary and location thereof on the ground, and the area of the land sought to be taken, should have been decided by the court. The court left all these questions to the jury. On the request of the defendants the court instructed the jury that if they should find that the disputed southern boundary was unascertainable their verdict must be for the defendants. During the entire trial after the first eight days thereof the defendants contended that under the pleadings the court had no authority to hear evidence upon the question of the location of the southern boundary of this land. They did indeed, after four days consumed in introducing evidence directed to the location of their southerly boundary, make certain requests of and directed certain motions on the subject to the court. These requests and motions were "that the plaintiff be required to amend its complaint and specifically describe the property"; that the court "direct them as to the particular property which should be valued by them"; that "plaintiff be required to first establish the line before defendants were required to introduce any evidence of value"; that the "southern boundary be definitely established either by a verdict of the jury, or by the determination of the court." This last request is instructive of the attitude of court and counsel in the trial of this case. The case was tried from the beginning on the theory that all questions in issue could be properly submitted to the jury. Let it be borne in mind that this trial took place in the year 1911, which was three years before the decisions of the Supreme Court which counsel claim hold that the only question proper for the jury in condemnation cases in eminent domain is that of the amount of compensation to be paid for the property. Vallejo, etc., v. Reed Orchard Co., 169 Cal. 545, 147 Pac. 238; City of Oakland v. Pacific Coast Lumber Co., 171 Cal. 392, 153 Pac. 705; San Joaquin, etc., Irrigation Co. v. Stevenson, 26 Cal. App. 274, 147 Pac. 254, 258. These cases were all decided in the year 1915. The trial court was never in this case asked

in plain language to take the issues as to the boundaries from the jury. Before the time when the motions above referred to were made the defendants had, as heretofore stated, introduced much evidence upon the subject of boundary and its location. Not having asked the court in definite terms to take these issues from the jury, but knowing the theory upon which the court and counsel were proceeding, namely, that the solution of all issues was for the jury, counsel for the defendants cannot now be heard to complain of the method pursued by the trial court in the conduct of this case, for the theory of all the counsel in the case, as plainly appears from the entire record, was that all issues should be submitted to the jury, and that upon them they might return a general verdict. Nor can counsel now complain because the court, without plain and unequivocal notice of their contention that these questions must be tried and decided by the court, failed to make findings upon these issues, but entered its judgment upon the verdict of the jury alone, for no one of the counsel in this case during the trial extending over months of time ever asserted that these issues other than compensation and damages must be decided by the judge, nor that findings should be made in addition to the verdict upon these questions, and no one can read this record without being convinced that court and counsel for all parties assumed from beginning to end of the trial that all the issues should be submitted to the jury, that they could bring in a general verdict thereon, and that their verdict was final.

When a case has been tried upon a well-defined theory, accepted by all parties and the court as well, counsel cannot after years have elapsed raise for the first time in this court the question of the correctness of this theory. Many cases announce such to be the general rule of practice. In most of them it is true the party appealing complained of some finding outside the issues, or of the reception of some evidence on some question not raised by the pleadings. But there seems to be no reason why the same rule should not apply where all parties have assumed that issues were to be tried by the jury, or have assumed and tried the case upon the theory that the jury's verdict was absolute and final rather than advisory. Lestrade v. Barth, 19 Cal. 660; Moore v. Copp, 119 Cal. 429, 51 Pac. 630. And in any event it does not appear from the record that findings were not waived, and nonwaiver thereof will not be presumed. Cushing-Wetmore Co. v. Gray, 152 Cal. 118, 92 Pac. 70, 125 Am. St. Rep. 47; Baker v. Baker, 139 Cal. 626, 73 Pac. 469; Leadbetter v. Lake, 118 Cal. 515, 50 Pac. 686; Tomlinson v. Ayres, 117 Cal. 568, 49 Pac. 717; Richardson v. Eureka, 110 Cal. 441, 42 Pac. 965; Kritzer v. Tracy, 16 Cal. App. 287, 116 Pac. 700.

The difference of view of counsel in this case was never as to whether court or jury should try the issues. It does not seem to have occurred to any of the eminent counsel in the case that all the issues should not be submitted to the jury. The difference between them was as to what the issues were—not as to who should try them. Counsel are bound by a theory in which they plainly acquiesced until the subsequent decision of cases in the Supreme Court of California, which the trial court did not at the time of the trial have as guides, indicated that this theory was incorrect. To reverse this case now upon such a contention would be a great injustice to the plaintiff.

[15] In addition to this it may be said that there was no seriously disputed issue of fact in this case requiring findings by the court. A recital of the issues made by the pleadings is instructive on this point. The plaintiff alleges that the defendants were trustees and owners of the property, and that the plaintiff was a municipal corporation empowered to condemn the property for certain specific public uses, that the object of this proceeding was to condemn the property for these uses, and further alleges the passage of a resolution determining the necessity for the acquisition of the property and the creation of a bonded indebtedness to bear the expenses of the condemnation, and that the same was not now devoted to public use, but was held and used for private purposes. None of these allegations of the complaint was seriously disputed, nor was any of them denied by defendants' final answer to plaintiff's amended complaint, and even if issues such as these had been made by the pleadings there was no evidence whatever upon which the court could predicate a finding that would stand in this court contradicting any of these allegations. The defendants in their turn allege their right of access to navigable water from their property. As we have seen, they had no such right. There is no dispute of the allegations of the defendants as to their improvements or as to certain leases and possession by the lessees. There was therefore no disputed issue of the class which defendants contend the court must try, and hence no necessity for findings.

The judgment and orders appealed from are affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

34 Cal. App. 488

NORTH PACIFIC S. S. CO. v. INDUSTRIAL ACC. COMMISSION et al. (Civ. 2213.)

(District Court of Appeal, First District, California. Aug. 27, 1917.)

MASTER AND SERVANT 🔑417(4½) — WORKMEN'S COMPENSATION ACT—REVIEW.

The statute, providing that a petition for writ of review of an award of the Industrial

Commission must be made within 30 days of the award, must be regarded as a statute of limitations, and a petition made after that time will be dismissed.

Proceedings under the Workmen's Compensation Act (St. 1913, p. 279) by William T. Soley to obtain compensation for personal injuries, opposed by the North Pacific Steamship Company, employer. Compensation was awarded, and the employer applies for a writ of review. Writ dismissed.

Glensor & Clewe, of San Francisco, for petitioner. Christopher M. Bradley, of San Francisco, for respondent Industrial Acc. Commission. Herbert N. Ellis, of San Diego, for respondent Soley.

PER CURIAM. Conceding that the record upon this application for a writ of review directed to the Industrial Accident Commission shows that the award of the commission on its face was beyond and in excess of the jurisdiction of the commission, nevertheless it also appears that the petition for the writ to this court was not made within the 30 days after the award of the commission as prescribed by the statute. That statute, we think, must be regarded as a statute of limitations in so far as the right of the petitioner to apply for the writ is concerned, and the application has not been made within the statutory time. We are compelled therefore to dismiss the writ, and that will be the order.

176 Cal. 238

In re LINDSAY'S ESTATE.

FOLSOM et al. v. MONROE. (S. F. 8304.)

(Supreme Court of California. Oct. 6, 1917. Rehearing Denied Nov. 5, 1917.)

BASTARDS ⟹100 — OMITTED CHILDREN — "HEIRS."

Within Civ. Code, § 1307, providing that when testator omits to provide in his will for any of his children, unless it appears such omission was intentional, the omitted children shall share in his estate as if he had died intestate, where a will gives all testator's property to his wife, stating that he does so because he knows that she will provide for their son C., and then provides that, should any other person or persons claim to be "heirs" of him, he gives to them $5, there is a provision for any illegitimate children, acknowledged in writing, and under section 1387 having right of inheritance, as, if his wife and the child mentioned should survive him no one else except some other children, or the issue of deceased children, could, under section 1386, be his heirs; and testator, being presumed to know the law, when speaking of persons claiming to be "heirs," must have had in mind only persons claiming to be children or their issue.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Heirs.]

Department 1. Appeal from Superior Court, Alameda County; Wm. S. Wells, Judge.

In the matter of the estate of David Lindsay, deceased. From an adverse decree, Josephine Folsom and another appeal; C. A. Monroe, administrator with the will annexed of deceased, being the respondent. Affirmed.

Jos. P. Lucey and James G. Conlan, both of San Francisco, and Louis B. Diavila, of Oakland, for appellants. W. B. Rinehart and H. S. Craig, both of Oakland, for respondent.

SLOSS, J. David Lindsay died, leaving a will which contained the following provisions:

"First:—I give, devise and bequeath all my property, of every kind and nature, and wheresoever situated, to my wife, Permelia Lindsay.

* * * * * * * *

"Fourth:—I purposely bequeath all my property to my wife, Permelia Lindsay, knowing that she is a kind and loving mother and will provide for our son Clyde Lindsay.

"Fifth:—Should any other person or persons present themselves claiming to be heirs of mine, I give and bequeath to such person or persons the sum of five dollars ($5.00)."

The will was admitted to probate, and letters of administration with the will annexed were issued to C. A. Monroe. In due time the administrator filed his final account, with a petition for distribution. The appellants herein, Josephine Folsom and Louise Kamps, appeared, alleging that they were illegitimate children of the testator, and that he had, in his lifetime, made a written acknowledgment sufficient, by the terms of section 1387 of the Civil Code, to give them the rights of inheritance which they would have had if born in lawful wedlock. Their contention was that the testator had omitted in his will to provide for them, and that it did not appear that such omission was intentional. Accordingly, they claimed, under section 1307 of the Civil Code, to have succeeded to the same share of Lindsay's estate as if he had died intestate.

It was stipulated in the court below, for the purposes of the hearing, that said claimants were the illegitimate children of David Lindsay, and that he had made the written acknowledgment as asserted. The court concluded, however, that, by paragraph fifth of the will, the testator had made provision for them, and that they were not entitled to any part of the estate, except the sum of $5 each. A decree was made, distributing this sum to each of them, and the rest of the estate to the widow. The claimants appeal from this decree.

We think the court below took the right view. The case is, in its essence, not distinguishable from Estate of Hassell, 168 Cal. 287, 142 Pac. 838. There the testator had made a will which contained a provision for one of his children only. The will contained this clause: "Those of my heirs not herein mentioned has been omitted by me with full knowledge thereof." Three children, not named as beneficiaries in the will, sought to share in the testator's estate as pretermitted heirs. It was held that they were excluded by the clause above quoted. While recognizing that the right of children to share "in the inheritance of their immediate ancestors" will not be taken away unless the intent that they shall not so share clearly appears upon the face of the will (In re Stevens, 83 Cal. 322, 330, 23 Pac. 379, 17 Am. St. Rep. 252; Rhoton v. Blevin, 99 Cal. 645, 34 Pac. 513; In re Salmon, 107 Cal. 614, 40 Pac. 1030, 48 Am. St. Rep. 164) the court decided that the intent to exclude the complaining children did so appear. It was pointed out that the word "heirs" necessarily included children, and that the declaration that "heirs" not mentioned had been intentionally omitted conclusively showed that any children not named had been excluded by design.

Under section 1307 of the Civil Code, two conditions must concur to entitle a child to succeed as in case of intestacy. There must be an omission to provide for the child in the will, and the will must fail to show that the omission was intentional. In the Hassell Case there was no provision, but it appeared that the omission was intentional. Here there is a provision for any person claiming to be an heir. If the use of the general word "heirs" in Hassell's will was sufficient to show the intentional character of the failure to provide for the children not named, it must be equally operative to cover children in a clause bequeathing a legacy to any persons claiming to be heirs. The will showed that, at the time of its execution, the testator had a wife and one child. In the event that such wife and child should survive him, his heirs could not include any one else, except other children, or the issue of deceased children. Civ. Code, § 1386. It must be presumed that the testator knew the law, and when, therefore, he spoke of persons claiming to be heirs, he could have had in mind only such persons as might claim to be children or their issue. The will, read in the light of the law of succession, shows on its face that the testator had in mind the persons, or the very class of persons, here asserting a right to succeed to a portion of his estate. He did make provision for all such persons, and the appellants, accordingly, do not bring themselves within the terms of section 1307, which is operative only where the testator "omits to provide in his will for any of his children. * * *"

In Boman v. Boman, 49 Fed. 329, 1 C. C. A. 274, the United States Circuit Court of Appeals, in considering a somewhat similar question under a Washington statute, took the view that the word "heirs" was not to be given the effect attributed to it in the Hassell Case. But that decision cannot, of course, have controlling force as against the later ruling by our own court in a case arising under the statute of this state.

The decree is affirmed.

We concur: SHAW, J.; LAWLOR, J.

(176 Cal. 264)

PRINGLE et al. v. FASSLER et al.
(S. F. 7570.)

(Supreme Court of California. Oct. 9, 1917.)

1. LANDLORD AND TENANT 🔑230(1) — ACTIONS FOR RENT—PLEADING.

A complaint alleging execution of lease, that defendant took possession, has remained in possession, failed to pay rents due and that the same remain unpaid, sufficiently alleges that plaintiff had performed all conditions precedent, where there were no conditions in the lease, other than to deliver possession to the lessee, and enjoyment thereof by the lessee.

2. COSTS 🔑260(1) — APPEAL FOR DELAY—DAMAGES.

In an action involving rent money, where an appeal appeared to be solely for delay and vexation, the court will add to the costs under Code Civ. Proc. § 957, providing, in appeals for delay, the court may add such damages to the costs as may be just.

Department 1. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by S. J. Pringle and E. C. Pringle against Joseph Fassler and Thomas Horn. Judgment for plaintiffs, and defendant Joseph Fassler appeals. Affirmed.

Jas. P. Sweeney, of San Francisco, for appellant. James M. Shields, of San Francisco, for respondents.

SHAW, J. The defendant Joseph Fassler appealed from the judgment in favor of the plaintiffs, taken upon the default of the defendants. The action is to recover rents alleged to be due from the defendant Fassler to the plaintiffs, upon a lease executed by the plaintiffs to Fassler of certain property in San Francisco, and upon a bond executed by the two defendants to secure the rents accruing upon said lease. The complaint alleges the execution of the lease; that the defendant Fassler immediately went into possession of the property and has ever since remained in possession; that the defendant Fassler failed to pay the rents due upon the lease, amounting to $2,937.52 and that the same remain unpaid. A copy of the lease was made a part of the complaint, and is set forth in the record.

[1] The only point alleged in support of the appeal is that the complaint is insufficient in its statement of facts, because it does not allege that the plaintiff had performed all the conditions precedent imposed by the lease upon himself. There were no conditions precedent to be performed by the lessors in order to impose upon the lessee the obligation to pay the rent, except the delivery of possession of the property in pursuance of the lease, and the enjoyment thereof by the lessee during the time for which the rent sued for accrued. These conditions are specifically and expressly alleged.

[2] There is no merit whatever in the point presented, nor in the appeal. It could have had no object other than vexation and delay, and the case calls for the exercise of the power of this court to add to the costs such damages as may be just. Code Civ. Proc. § 957.

The judgment is affirmed, and it is ordered that the plaintiff recover of the defendant Fassler, as a part of the costs of appeal, the sum of $100.

We concur: SLOSS, J.; LAWLOR, J.

(176 Cal. 259)

GREEN v. FRAHM. (S. F. 7301.)

(Supreme Court of California. Oct. 9, 1917. Rehearing Denied Nov. 8, 1917.)

1. LANDLORD AND TENANT 🔑184(2) — BREACH OF LEASE—LIQUIDATED DAMAGES—VALIDITY OF CONTRACT.

Where the lessee deposited $3,000 to secure performance of the lease, and payment of the rent to be forfeited on default in any covenants of the lease, regardless of whether the deposit was liquidated damages or a penalty, the provision for forfeiture was void under Civ. Code, § 1670, as an attempt to fix by contract the amount of damage to be paid or other compensation to be made for breach of an obligation, unless it was shown that the damages could not easily have been ascertained.

2. DAMAGES 🔑163(3) — LIQUIDATED DAMAGES—WHEN VALID.

The difficulty of ascertaining damages where there is a provision for liquidated damages is not to be presumed.

3. LANDLORD AND TENANT 🔑184(2)—BREACH OF LEASE—LIQUIDATED DAMAGES—VALIDITY OF CONTRACT.

Where the lessee was required to deposit $3,000 to secure payment of rent, and he failed to pay, and the landlord secured possession of the premises and obtained judgment for the rent due, canceling the lease, the landlord was not entitled to retain the deposit, but he held it as bailee for the tenant.

4. Landlord and Tenant 🔑184(2)—Validity—Public Policy.

That the premises were leased to a lessee who intended to use them for immoral purposes, though contrary to public policy, did not establish that the action of the lessee to recover a deposit made to secure payment of the rent after a breach and cancellation of the lease could not be upheld, on the ground that it was against public policy.

5. Contracts 🔑138(3) — Validity — Public Policy.

Where a contract for an illegal purpose was abandoned, there could be recovery of the money deposited under the contract, provided that the recovery itself did not accomplish the illegal purpose or require a resort to the illegal portion thereof for its support.

Department 1. Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by L. M. Green against Henry Frahm. From a judgment for plaintiff, and an order denying motion for new trial, defendant appeals. Affirmed.

Jos. E. O'Donnell and Costello & Costello, all of San Francisco (E. R. Hoerchner, of San Francisco, of counsel), for appellant. Jas. P. Sweeney and Jos. P. Lucey, both of San Francisco, for respondent.

SHAW, J. The defendant appeals from a judgment in favor of the plaintiff, as assignee of Myer Cohn, and from an order denying defendant's motion for a new trial.

The plaintiff sued to recover of the defendant the sum of $3,000, alleged to be due from the defendant to the plaintiff, upon the following facts:

On May 24, 1911, Frahm and Cohn executed an agreement whereby Frahm leased to Cohn for the term of ten years, beginning July 1, 1911, certain premises in San Francisco, and agreed to erect thereon for the use of Cohn a building according to the plans agreed upon between the parties within 90 days thereafter. If the building was not ready for occupancy until after that time, Cohn was to be released from the payment of the rent accruing prior to its completion. The rent for the first year was $500 a month, payable monthly in advance, and for subsequent years it was a larger sum. The controversy arises over the following clause in the lease. In copying it we substitute the name of the party for the phrases "party of the first part," and "party of the second part," where they occur:

"Cohn hereby deposits with Frahm the sum of $3,000, receipt whereof is hereby acknowledged, said sum of $3,000 to be retained by Frahm as a guarantee that Cohn will pay the rent as herein provided, and in the manner herein specified, and will keep and perform each and every covenant herein contained to be performed by Cohn, and in the event of the failure of Cohn to pay the rent or to keep or perform any of the covenants herein contained to be performed by Cohn, then and in that event the said sum of $3,000 shall become forfeited unto Frahm. On the other hand, should Cohn pay the rent herein reserved, then and in that event the said sum of $3,000 shall be returned to Cohn at the end of the term hereinbefore created, or at any sooner determination thereof. Frahm agrees to pay Cohn 4 per cent. interest on the sum of $3,000 to be paid annually."

Another clause provided that in case of any termination of the lease through no fault or neglect of Cohn, then the $3,000 reserved should be repaid to him, with interest.

The building was not finished until December, 1911. Thereupon possession was delivered to Cohn, and he paid one month's rent upon the lease, which was accepted as payment of rent up to the 1st day of February, 1912. Cohn refused to pay rent for the following month. Frahm instituted proceedings in unlawful detainer against him, wherein, on March 1, 1912, judgment was given in his favor for the restitution of the premises, for $500 rent, and for the cancellation of the lease. In pursuance of said judgment, Frahm was immediately put in possession of the property. Cohn thereupon assigned his claim to the plaintiff herein, who began this action against Frahm to recover the $3,000, which, in pursuance of the terms of said lease, had been deposited by Cohn with Frahm at the time of the execution thereof. The defendant in his answer denied the assignment of the claim from Cohn to Green, and the indebtedness alleged. For an affirmative defense he averred that although the lease provided that the building was to be used solely for a lodging house, in reality it was intended to be used by Cohn as a house of prostitution, and that this intent was known to and consented to by Frahm.

The court found in favor of the plaintiff, and particularly, that while the building to be erected by Frahm for the use of Cohn was ostensibly to be used as a lodging house, in reality it was intended to be used by Cohn as a house of prostitution "with the knowledge and consent of the defendant," but that in fact the said premises never were used for that purpose, or for any immoral or illegal purpose, and that the intention to use the same in that manner was abandoned by Cohn, and was never consummated.

1. The contention that the evidence does not support the finding that the demand of Cohn against Frahm was assigned to Green before the beginning of the action is without merit. The assignment itself was introduced in evidence, and its execution proven.

[1, 2] 2. The first paragraph of the above-quoted provisions of the lease naturally divides itself into two parts: One, a provision that the $3,000 deposit with Frahm was to be a guarantee for the performance by Cohn of the covenants of the lease, including the payment of rents; the other, that in the event of the failure of Cohn to perform any

of said covenants, the said money should become forfeited to Frahm. The provision for a forfeiture upon the failure of Cohn to pay the rent was either a penalty or a provision that the $3,000 should be liquidated damages for the breach of the covenants. In either aspect, the provision was void. Whether as liquidated damages, or as a penalty, it comes within the terms of section 1670 of the Civil Code, that is, it is an attempt to fix by contract "the amount of damage to be paid, or other compensation to be made, for a breach of an obligation," in anticipation thereof, and by that section it is declared to be void, unless the case is of such a nature that "it would be impracticable or extremely difficult to fix the actual damage," as provided in section 1671 of the Civil Code. Jack v. Sinsheimer, 125 Cal. 563, 58 Pac. 130. Calling it a penalty instead of liquidated damages does not change its nature. The case cited also declares that the fixing of damages for breach of an obligation to pay rent is not impracticable or extremely difficult. There was no evidence in the case showing any peculiar circumstance which would make such damages more difficult to fix in this case than in the ordinary case. Such difficulty is not to be presumed. Long Beach v. Dodge, 135 Cal. 404, 67 Pac. 499. This part of the clause must therefore be treated as a void provision, and disregarded entirely.

[3] The other part of the clause, providing for the deposit of $3,000 as a guarantee for the payment of rent, was for a legal purpose, and was in all respects valid and enforceable. In virtue of that clause, Frahm had the legal right, in case of the failure of Cohn to pay rent, to retain the $3,000 and apply it on the rent until the same was exhausted. He did not choose to do this, but on the contrary, he immediately began proceedings for the restitution of the premises, and the recovery of the rent due, and succeeded in obtaining judgment for both, and also for the cancellation of the lease. He is, of course, bound by his own judgment, and therefore the lease must be considered as having been terminated on March 1, 1912. The complaint alleged that Frahm refused to return any portion of the $3,000 to Cohn, or to apply any portion thereof to the rent due. The answer admits this to be true, and alleges that by the terms of the contract it was to be retained by Frahm as a guarantee for the payment of the rent, as it came due. Frahm did not ask that he be allowed to retain $500 of the money in satisfaction of his judgment for rent. He defended on the ground that the whole sum had become absolutely forfeited to his use and was his own property, by reason of the failure of Cohn to pay the rent, and notwithstanding the early termination of the lease at his own request. Under these circumstances, the conduct of Frahm must be deemed to be a repudiation of the security and a waiver of the right to retain the $3,000 as security for the payment of rent subsequently accruing, and of his right to apply any portion thereof to the rent due. The fund deposited is therefore to be considered as money held by Frahm, as bailee, for the use of Cohn, and due demand having been made for its return, the plaintiff was entitled to recover it.

[4, 5] 3. The defense sought to be made on the ground of illegality was not established. In the first place, the plaintiff is not suing on any contract embodied in the lease. His right of action arises from the termination of the lease, whereby the purpose for which his money was deposited was defeated and he has become entitled to its return. Frahm, being only a bailee, held the fund in trust for Cohn for the purposes stated in the lease, and when the trust ceased the title and right to the money reverted to the original owner, Cohn. The asserted illegality was in the lease, not in the rights growing out of its premature termination by the judgment. The doctrine that one cannot recover upon a contract that is against public policy does not apply. In the second place, the alleged illegal purpose was never accomplished, but was abandoned, and the contract therefor, assuming that there was one, was never executed. In such cases there may be a recovery on the contract, provided such recovery does not, of itself, accomplish the illegal purpose, or require a resort to the illegal part of the contract for its support. De Leonis v. Walsh, 140 Cal. 182, 73 Pac. 813; Wassermann v. Sloss, 117 Cal. 431, 49 Pac. 566, 38 L. R. A. 176, 59 Am. St. Rep. 209; Johnston v. Russell, 37 Cal. 670; Teachout v. Bogy, 166 Pac. 321, 322. We are not to be understood as holding that there was any contract to use the leased property for immoral purposes. The lease expresses no such contract, and all the court finds is that Cohn intended to so use it, and that said intent was "with the knowledge and consent of the defendant." But as the intent was abandoned before its execution was begun, we need not discuss the question further.

The judgment and order are affirmed.

We concur: SLOSS, J.; LAWLOR, J.

176 Cal. 287

In re McSWAIN'S ESTATE.

CRAYCROFT v. McSWAIN.

(S. F. 8138.)

(Supreme Court of California. Oct. 11, 1917.)

1. Guardian and Ward 🔑10—Nomination of Guardian by Ward—Duty of Court.

In view of Code Civ. Proc. § 1748, providing that if the minor is 14 years of age he may nominate his own guardian, which, if approved by the court, must be appointed, where a child over 16 years of age nominated a guardian of her person and estate, and the court approved the nomination, the appointment of the nominee as guardian of the estate was imperative.

2. Appeal and Error 🔑781(2) — Moot Questions.

Where after the appeal from the order appointing a guardian and before it was submitted the child became of age, whether the order was properly made is a moot question, which will not be considered.

Department 1. Appeal from Superior Court, Fresno County; George E. Church, Judge.

In the matter of the guardianship of the estate of Annie Irene McSwain, a minor. From an order appointing Harry J. Craycroft as guardian of the estate and person of said minor over 16 years of age, Susie McSwain, the mother of the child, appeals. Appeal dismissed, without costs.

See, also, 168 Pac. 117.

Short & Sutherland, of Fresno (Carl E. Lindsay, of Fresno, of counsel), for appellant. Everts & Ewing, of Fresno, for respondent.

SHAW, J. Harry J. Craycroft filed a petition for letters of guardianship of the estate and person of Annie Irene McSwain, a minor then over the age of 16 years. The application was opposed by Susie McSwain, the mother of the child. The court overruled the objections and made the appointment as prayed for. From this order, the mother appeals.

[1] There is no dispute in this court, and there was none in the court below, as to the propriety of the order appointing a guardian of the estate of the minor. She was the owner of an undivided one-half interest in property of the value of some $30,000, which required the attention of a guardian and made such appointment proper, if not necessary. Being over 16 years of age, the minor had the right to nominate her guardian, and such nominee, if approved by the court, must be appointed. Code Civ. Proc. § 1748. The minor nominated Craycroft to be the guardian of her person and estate, and the court approved the nomination. His appointment as guardian of the estate was therefore imperative. In re Kirkman, 168 Cal. 688, 144 Pac. 745; Estate of Meiklejohn, 171 Cal. 247, 152 Pac. 734.

The only objection here made is that there was no showing, either in the petition or in the evidence, to the effect that the mother was not a suitable and fit person to have the care and custody of the child's person during her minority, and hence that it does not appear that it was either necessary or convenient that a guardian of the person should be appointed. Section 1747 of the Code of Civil Procedure provides that the superior court, "when it appears necessary or convenient, may appoint guardians for the persons and estates, or either of them, of minors who have no guardian legally appointed by will or deed, and who are inhabitants or residents of the county, or who reside without the state and have estate within the county." The child had left her mother and gone to reside with another person. The mother was not an unfit person to have the custody of the child, and the child had requested the appointment of Craycroft. It is not contended that the person with whom she was living was an unfit person for her to associate with. No other facts appeared relating to the subject.

[2] We do not deem it necessary to decide the question thus presented. After the appeal was taken on the order, and before it was submitted, the child became of age, and the guardianship, and the right to guardianship, of her person terminated. It is not claimed that any prejudice has been suffered by any one by reason of the fact that the order included the guardianship of her person as well as of the estate. The question whether the order was properly made or not is of no further importance. It is a moot question which the court will not take time to consider. To avoid any hardship to anybody we deem it proper to refuse any allowance for the costs of appeal. The proper proceeding in such a case is to dismiss the appeal.

It is ordered that the appeal be dismissed, and that neither party recover costs on appeal.

We concur: SLOSS, J.; LAWLOR, J.

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176 Cal. 280

In re McSWAIN'S ESTATE.

McSWAIN v. CRAYCROFT et al.

(S. F. 8178.)

(Supreme Court of California. Oct. 11, 1917.)

1. Executors and Administrators 🔑194(2) — Allowance for Support — Common-Law Rule.

At common law a court had no power to direct the payment of money out of the estate of a deceased person for the support and education of his family to the exclusion of his creditors or heirs at law.

2. Executors and Administrators 🔑180—Allowance for Support—Who Entitled.

Code Civ. Proc. §§ 1465, 1466, were enacted to make provision for the family of deceased prior to distribution, and no one who is not a member of family at the death of decedent is entitled to an allowance for maintenance and support.

3. Executors and Administrators 🔑180—Family Allowance—Statute—Construction—"Family."

Code Civ. Proc. § 1465, providing that the court may "set apart for the use of the surviving husband or wife, or, in case of his or her death, to the minor children of the decedent, all the property exempt from execution, including the homestead selected, designated and recorded," and if no proper homestead has been selected the court must set apart "a homestead for the use of the surviving husband or wife and the minor children; or if there be no surviving husband or wife, then for the use of the minor children," and section 1466, providing that "if the property set apart is insufficient for the support of the widow and children, or either, the court or a judge thereof must take such reasonable allowance out of the estate as shall be necessary for the maintenance of the family, according to their circumstances, during the progress of the settlement of the estate," should be construed together; and, when so construed, it is obvious that the "family" referred to in the latter section consists of the same persons as those expressly mentioned in the first; that is, the surviving husband or wife, if any, and the minor children, if any, of the decedent.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Family.]

4. Executors and Administrators 🔑196—Allowance Pending Administration—Separate Allowance to Child.

Where the court had made an allowance of $200 a month to the widow for the support and maintenance of the family, it was improper to make an additional allowance for the child, unless the widow was not applying the same for the benefit of the child; the mother under all ordinary circumstances being the proper person to receive the allowance and supervise its expenditure.

5. Executors and Administrators 🔑196—Allowance Pending Administration—Separate Allowance to Child.

Where an allowance presumably sufficient had been made to the widow for the support of the family, if the minor daughter left the family home and went to live with others without cause, the persons with whom she lived or her guardian would have to look to the mother for the support of the child, and would not be entitled to an allowance by the court out of the estate for that purpose, at all events not unless the mother was at fault in the matter.

6. Executors and Administrators 🔑180—Family Allowance—Presumption.

In the absence of evidence to the contrary, the presumption would be that the widow was the proper person to receive the family allowance, and that she would be entitled to have the care, custody, and education of her child.

7. Executors and Administrators 🔑194(5)—Family Allowance—Evidence Admissible.

On an application by the guardian for a separate allowance for the child, it was wrong for the court to refuse to allow the widow, to whom a family allowance had been made, to testify that she was willing and able to properly support the child.

8. Executors and Administrators 🔑194(1)—Family Allowance—Province of Court.

It is not within the province of the probate court to determine that the parent of the child, who is a fit person to control its custody and education, is not educating such child so as to fit it for a calling for which the court may believe it has a natural talent; the court in the administration of an estate not being empowered to substitute its judgment for that of the parent on such matters.

9. Executors and Administrators 🔑196—Family Allowance—Province of Court.

The court had no power to direct the payment of an additional allowance to the aunt of the child, without proof that the mother was unfit to care for the child or that she was neglecting her duty in that regard.

Department 1. Appeal from Superior Court, Fresno County; Geo. E. Church, Judge.

In the Matter of the Estate of Walter S. McSwain, deceased. From an order directing the payment by Susie McSwain, administratrix, out of the funds of said estate, of the sum of $125 each month for the maintenance and education and support of Annie I. McSwain during her minority or until the administration was closed, Susie McSwain appeals. Order reversed.

See, also, 168 Pac. 117.

Frank Kauke, of Fresno, for appellant. Everts & Ewing, of Fresno (M. G. Gallaher, of Fresno, of counsel), for respondents.

SHAW, J. This is an appeal by Susie McSwain, as the administratrix of the estate of Walter S. McSwain, and also as the widow and heir at law of said deceased, from an order made by the superior court in the course of administration of said estate, directing the payment, by said administratrix out of the funds of said estate, of the sum of $125 each month for the maintenance, education, and support of Annie I. McSwain during her minority or until the said administration was closed.

Walter S. McSwain died intestate on December 6, 1915, leaving surviving as his only heirs at law his widow, Susie McSwain, and his daughter, Annie I. McSwain, then above the age of 16 years. Prior to his death he and his wife and daughter were living together as a family in his home in Fresno. On January 5, 1916, Susie McSwain duly qualified, and has ever since been acting as the administratrix of said estate. The property of the estate has been appraised at the value of over $39,000. On February 28, 1916, the court duly made an order setting apart to Susie McSwain, as surviving wife of said deceased, the personal property exempt from execution, and directing a family allowance to her in the sum of $200 per month out of said estate, for the support and maintenance of the family of said deceased during the administration of said estate.

On November 23, 1916, the court made an order appointing Harry J. Craycroft guardian of the person and estate of Annie I. McSwain. On December 5, 1916, Susie McSwain duly appealed from said order. On December 1, 1916, Craycroft, as such guardian, filed the petition upon which the order herein appealed from was made, asking an allowance out of the estate of the decedent to be paid to him for the maintenance, support, and education of said minor, in the sum of $125 a month during the pendency of the administration.

The only grounds upon which Craycroft based his petition for an allowance were that soon after the death of the decedent, said child began to reside with her aunt, Mrs. Thorne, and had not received any money from said estate, but had been maintained and supported by said aunt; that the child was contemplating a course in a conservatory of music, and that the petitioner intended to have her enter the same; that it would be necessary to have the sum of money asked, to defray the expenses thereof, and maintain and support her, and that the administratrix had contributed nothing out of said estate to the maintenance and support of said child, and refused to do so.

Susie McSwain, in her triple capacity as administratrix of said estate, as surviving wife, and as heir of said deceased, filed an answer opposing the petition for an allowance to Annie I. McSwain. She alleged that she was the mother of said Annie I. McSwain, and had ever since the death of said decedent maintained a good and sufficient home for her, and was during all of said time, and ever since has been ready, able and willing to care for, maintain, and support said child, in a fit and proper manner, in accordance with her station in life, and to provide for and educate her, and had repeatedly sought and requested that she be permitted to do so.

A few weeks after the death of her father the child, without good cause, so far as appears, went to live with her aunt, and has ever since resided there. There is no pretense that the mother is not a wholly fit and proper person to have the care, custody, and education of her child. There was evidence to the effect that the sum of money allowed would be necessary for the expenses of her proposed musical education and for her support, and that the administratrix had paid nothing to the child or to Mrs. Thorne towards such support or education. Upon the trial the widow testified that she had the home in which she, her husband and child, had been living prior to his death, and had been maintaining it ever since that time. She then offered to prove that she was able and willing to provide for her daughter and educate her, and that she was still keeping up the home. The respondent objected to this proof, on the ground that it was immaterial and irrelevant. The court sustained the objection, and refused to allow any evidence to that effect. Thereupon it made the order appealed from.

[1] At common law the court had no power to direct the payment of money out of the estate of a deceased person for the support and education of his family, to the exclusion of his creditors or heirs at law. Such power to do so as the court now has comes entirely from the statute. Estate of Noah, 73 Cal. 588, 15 Pac. 287, 2 Am. St. Rep. 829; Estate of Heywood, 149 Cal. 130, 84 Pac. 834. On this subject Mr. Woerner says:

> "The common law secures to the widow her dower, and to the widow and children their pars rationalibus (corresponding to dower and distribution under American statutes), but no provision whatever is found therein to meet the exigencies arising immediately upon the death of the head of the family, save, perhaps, the clause in Magna Charta securing to the widow the right to remain in her husband's capital mansion for 40 days after his death, within which time her dower was to be assigned."

Our statute provides that the court may "set apart for the use of the surviving husband or wife, or, in case of his or her death, to the minor children of the decedent, all the property exempt from execution, including the homestead selected, designated and recorded," and that if no proper homestead has been selected, then the court must set apart "a homestead for the use of the surviving husband or wife and the minor children, or if there be no surviving husband or wife, then for the use of the minor children" (Code Civ. Proc. § 1465); and, further, that:

> "If the property set apart is insufficient for the support of the widow and children, or either, the court, or a judge thereof must take such reasonable allowance out of the estate as shall be necessary for the maintenance of the family, according to their circumstances, during the progress of the settlement of the estate." Code Civ. Proc. § 1466.

[2, 3] These statutes were enacted in order to make a provision for the family of the deceased prior to the time when the estate could be finally distributed to them. No one who is not a member of such family at the time of the death of the decedent is entitled to any allowance from the estate for support or maintenance. It is well settled that a surviving widow who had separated from her husband and had ceased to be a member of his family, or to be entitled to his support at the time of his death, is not entitled to an allowance as a member of the family under these provisions. In re Noah, supra; Wickersham v. Comerford, 96 Cal. 438, 31 Pac. 358; Estate of Yoell, 164 Cal. 540, 129 Pac. 999. So, also, the authorities declare that adult children who had left the family home and were providing for themselves at the death of the decedent are entitled to no support out of the estate, pending administration. Wood v. Wood, 63 Conn. 327, 28 Atl. 520; Weber v. Short, 55 Ala. 311; Hoffman v. Neuhaus, 30 Tex. 633, 98 Am. Dec. 492. And a child who was a minor at the death of the decedent cannot have a probate homestead set apart out of his estate if the application is made after she arrives of age. Estate of Heywood, supra. The reason of the decision in the Heywood Case was that the statute makes provision only for minor children, and has no application to those who have become of age, and that the daughter in that case waived her right to the homestead by failing to apply therefor during her minority. Sections 1465 and 1466 relate to the

same subject. The latter obviously refers to the conditions described in the former. They should be construed together, and, so construed, it is obvious that the family referred to in the latter section consists of the same persons as those expressly mentioned in the former section, that is, the surviving husband and wife, if any, and the minor children, if any, of the decedent.

[4] Prior to the application of Craycroft, the court had made an allowance of $200 a month to the widow for the support and maintenance of the family. This would include the daughter, in whose behalf the present application is made. Unless there were circumstances which required an additional allowance to be made expressly for the child, as, for example, if the widow was not properly applying the same for the benefit of the child, the court should not make a separate allowance, but should require the child to be supported out of the allowance already made. Under all ordinary circumstances, the mother, as the head of the family, would be the proper person to receive the allowance and to supervise its expenditure. It was said in Estate of Moore, 72 Cal. 342, 13 Pac. 883:

> "It must be, however, in the power of the court to direct the expenditure of the allowance in such manner as will insure the maintenance of the family, and it may happen in some cases that the mother would not be a suitable person to be intrusted with it."

In that case a family allowance of $250 a month had been made for the support of the widow and five minor children of the decedent. Afterward the widow and one child left the home of the decedent, in which the family had been living, and there was a dispute over the question whether she had done so voluntarily, or had been forcibly excluded therefrom by other persons interfering in behalf of the other children. Believing that she had done so voluntarily, the administrator thereafter refused to pay her more than $50 per month of the allowance, and had expended money of the estate in the maintenance of the other children who had remained in the homestead. The widow offered to prove that she had been expelled forcibly, and that she was ready and willing to care for, educate, and support all the children. The court below refused to permit this testimony, and allowed the administrator for the expenses incurred by him in supporting the other children separate and apart from the mother. The court said:

> "The administrator does not, however, by virtue of his office, become charged with the care of the family, and had no right, arbitrarily, to remove the children from the mother. Nor were the disbursements here in question proper charges against the estate."

It was held that the evidence excluded was material and proper, and should have been admitted, but that if, upon investigation, the conduct of the administrator was justifiable, and his expenditures for the other members of the family necessary, a reasonable allowance could be made for the support of that portion of the family.

[5-7] This decision seems to be applicable to the case in hand. An allowance of $200 a month, presumably sufficient, was made to the widow for the support of the family. If the minor daughter left the family home and went to live with others, without cause, the persons with whom she lived, or her guardian, if some one other than her mother were appointed guardian, would have to look to the mother for the support of the child, and would not be entitled to an allowance by the court out of the estate, for that purpose, at all events not unless the mother was at fault in the matter. In the absence of evidence to the contrary, the presumption would be that the widow was the proper person to receive the family allowance, and that, as the parent, she would be entitled to have the care, custody, and education of her child. She is by law charged with that duty. There was nothing to indicate, in fact no assertion, that she was not in all respects competent, fit, and worthy. It would not be necessary for her to prove the fact, for it would be presumed in the absence of evidence. It was clearly wrong for the court to refuse to allow her to testify that she was able and willing to support her child as she, in her discretion, believed was proper and necessary.

[8] It is not within the province of the probate court to determine that the parent of a child, who is a fit person to control its custody and education, is not educating such child so as to fit it for a calling for which the court may believe it has a natural talent. The probate court, in the administration of an estate, is not empowered to substitute its judgment for that of the parent on such matters.

[9] Upon like grounds it must be considered that the court had no power to direct the payment of an additional allowance to the aunt of the child, without proof that the mother was unfit to care for her child, or that she was neglecting her duty in that regard. And if all this was shown, and the allowance already made was sufficient, in view of the condition of the estate, the needs of the parties, and their station in life, the court should not have made an additional allowance, but should have directed that a part of the allowance already made should be applied to the benefit of the daughter.

The order is reversed.

We concur: SLOSS, J.; LAWLOR, J.

(176 Cal. 241)

BECKLEY v. THE TOPO et al. (S. F. 7482.)

(Supreme Court of California. Oct. 8, 1917.)

1. Master and Servant 🔑289(36)—Injury—Contributory Negligence—Evidence.

Evidence in a servant's action for injury in fastening a boom to a mast *held* to support finding that his injury was caused by his contributory negligence.

2. Appeal and Error 🔑867(1) — Appeal from Denial of New Trial — Questions Reviewable.

The point that findings are contradictory and conflicting, and so do not support the judgment, cannot be raised on appeal from denial of new trial, but only on appeal from judgment.

Department 1. Appeal from Superior Court, City and County of San Francisco; Thos. F. Graham, Judge.

Action by H. O. Beckley against the gasoline steamer Topo, and another. From an order denying a new trial, plaintiff appeals. Affirmed.

H. W. Hutton, of San Francisco (Edward Lande, of San Francisco, of counsel), for appellant. Wright, Wright & Stetson, of San Francisco, for respondents.

SHAW, J. The plaintiff has appealed from an order denying his motion for a new trial. The object of the action was to recover damages sustained by the plaintiff from a personal injury alleged to have been caused by the negligence of the defendants. The answers alleged facts showing that the plaintiff was himself guilty of negligence, and that his injury was at least proximately caused by his own negligence. They also alleged directly that the injury was caused in part by the contributory negligence of the plaintiff. The court below found in favor of the defendant upon the issue of contributory negligence, and rendered judgment accordingly.

The plaintiff was the mate of the steamer Topo, employed as such by its owners, the Bay Development Company. The vessel was not yet completed by the builders, but was ready for its trial trip, and the owner was in charge for that purpose. Upon the deck, lengthwise of the vessel, lay a boom, a timber 57 feet long, weighing about 1,800 pounds. The forward end rested upon the forecastle, and the after end upon a plank extending across the vessel from side to side; each end resting upon the side rail of the vessel, and supported in the middle upon a bulkhead. The plank was about 4½ feet above the deck of the vessel. The plaintiff was engaged in preparing to fasten this boom to the mast. The after end of the boom lay about the middle of the vessel, and it was necessary that it should be moved over near to the rail on one side thereof. The plaintiff and three other men at his command undertook to slide the boom along the plank to the side of the vessel. The boom, being very heavy, did not slide along the plank easily, and the friction was so great that it carried the plank with it, until one end slipped off the supporting rail at one side and off the bulkhead in the center, causing the boom to fall upon the plaintiff, whereby he was injured in the manner complained of. The day before the accident plaintiff was on the vessel, and his attention was called to the fact that the boom should be fastened, so that it would not slip. For that purpose the builders bored two holes through the plank, one on each end, just inside the rail of the vessel, so that a bolt could be slipped through the hole and project down through the plank below the tops of the respective railings, and thus prevent the plank from slipping in either direction. After boring the holes, the bolts to be slipped through them were procured and laid upon the deck of the vessel, ready for insertion in the holes at any time. This occurred the day before the injury. The plaintiff knew of this preparation; but, so far as appears, he was not informed that the bolts had not been inserted in the holes, or that they lay upon the deck of the vessel ready to be so inserted. He testified, however, that he knew that the plank should be in some manner fastened so as to prevent its slipping from side to side. The evidence shows that, when they began pushing the boom toward one side of the vessel, one of the men assisting the plaintiff called to him that the plank was slipping, to which plaintiff paid no attention. Another push was given to the boom, and the man again called to him that the plank was slipping, and to this also he paid no attention, but proceeded to push a third and fourth time, with the result that the plank slipped off the railing and his injury resulted.

[1] That this evidence supports the finding of the court that the plaintiff's injury was caused by his contributory negligence is a proposition that is so obvious that argument is unnecessary. The order denying the new trial is sufficiently supported by this finding. Inasmuch as the plaintiff's injury was caused by his own negligence contributing thereto, he is not entitled to recover of the defendants, although they also may have been negligent in the matter either of furnishing a safe place for the plaintiff to work, or of seeing that the appliances furnished him were suitable and proper for that purpose, and in a safe condition for use.

[2] Plaintiff also argues that the findings are contradictory and conflicting, and that for that reason they do not support the judgment. This is a question that can be raised only upon an appeal upon the judgment. It cannot be decided upon appeal from an order denying a new trial. Hunter v. Milam, 133 Cal. 601, 65 Pac. 1079; Durfee v. Seale, 139 Cal. 603, 73 Pac. 435; Holmes v. Warren, 145 Cal. 457, 78 Pac. 954; Green v. Duvergey, 146 Cal. 384, 80 Pac. 234.

The appellant also contends that other findings are not supported by the evidence. We find it unnecessary to consider these questions, for, if the finding above mentioned is sustained, as it unquestionably is, there could be no recovery by the plaintiff in any event.

The order is affirmed.

We concur: SLOSS, J.; LAWLOR, J.

176 Cal. 218

EVARTS v. WEISE. (S. F. 8466.)

(Supreme Court of California. Oct. 1, 1917.)

1. ELECTIONS 🔑305(6)—CONTESTS—APPEAL—PRESUMPTIONS—CUSTODY OF BALLOTS.

In an election contest where the ballots were counted in court, and the contrary does not appear in the record, it will be presumed that they were thereafter placed in custody of the clerk, and the contestant had the burden of showing the contrary, in view of Code Civ. Proc. § 1963, subd. 15, making it a rebuttable presumption that an official duty has been regularly performed.

2. ELECTIONS 🔑299(1)—CONTESTS—POWERS OF COURT—RECOUNT.

If the trial court hearing an election contest is not satisfied with a count of the ballots before it, it may order that such ballots be again counted before it.

3. ELECTIONS 🔑194(11)—BALLOTS—DISTINGUISHING MARKS.

Where marks upon ballots might have been made with a defective stamp furnished by the election board, the impression being slightly smeared or indistinct, but clearly showing the choice of the voter, the ballots should be counted, and could not be rejected, as containing a distinguishing mark, in view of Pol. Code, § 1211, subd. 4, providing that no mark upon a ballot which is unauthorized by this act shall be held to invalidate such ballot, unless it shall appear that such mark was placed thereon by the voter for the purpose of identifying such ballot.

4. ELECTIONS 🔑194(10)—BALLOTS—DISTINGUISHING MARKS.

Where a ballot indicated that the voter had stamped the cross in the proper space and in folding the ballot had caused an offset in the form of half a cross, the vote could not be rejected as bearing a distinguishing mark.

5. ELECTIONS 🔑180(4) — BALLOTS — REJECTION.

A ballot containing a cross distinctly stamped in the space after the names of two candidates for the same office was properly rejected.

6. ELECTIONS 🔑180(4) — BALLOTS — REJECTION.

That a ballot contained a distinct impression of a stamped cross opposite the name of one candidate, and a slight impression after the name of another for the same office, which the crease in the ballot showed could have been made by folding the ballot so as to cause an offset, the ballot was properly counted according to the distinct mark.

7. ELECTIONS 🔑194(6) — BALLOTS — DISTINGUISHING MARKS.

A ballot could not be rejected merely because it contained a cross in the name space and in the voting space, in the absence of showing that the two marks were intended as identifying the ballot.

8. ELECTIONS 🔑305(8)—CONTESTS—COUNT OF BALLOTS—ERROR—OFFSET.

Where the refusal of the court to count a ballot for contestant was offset by its refusal to count a ballot identically marked for contestee, possible error in refusal to count the ballots need not be considered.

In Bank. Appeal from Superior Court, Sonoma County; Emmet Seawell, Judge.

Election contest by William Evarts against J. H. Weise. From the judgment rendered, Evarts appealed to the District Court of Appeal, which affirmed the judgment. On rehearing in Supreme Court. Affirmed.

The following is the opinion of Hart, J., in the District Court of Appeal (concurred in by Chipman, P. J., and Burnett, J.):

Evarts and Weise were rival candidates for the office of supervisor for the First supervisorial district of Sonoma county at the general election held in the month of November, 1916. The board of supervisors of said county, acting as a canvassing board, upon canvassing the returns, ascertained that Weise had received 1,286 votes and Evarts 1,281 votes at said election for said office, and thereupon and accordingly officially declared that the former had been elected thereto, and issued to him a certificate of election. The appellant thereupon instituted this action for the purpose of contesting the purported election of the respondent and, upon a trial thereof, in which a recount of the ballots was had, the trial court rendered judgment that the contestant and contestee each received at the election an equal and the highest number of legal votes cast thereat for supervisor for said supervisorial district, "and that the contestant take nothing by his action and proceeding, and the same is hereby dismissed, and each party hereto is directed to pay his own costs herein incurred."

This appeal is by Evarts from said judgment, his general contention being that the court erroneously rejected certain ballots which should properly have been counted for him, and that certain ballots which should have been rejected were likewise ordered counted for Weise. Evarts further contends that the court committed error and transcended its jurisdiction in again canvassing the returns and counting the ballots of a certain precinct after a count thereof had already once been had at the trial.

It is deemed the more orderly, although not in the order in which the alleged error involved therein occurred at the trial, first to consider the point last above stated. After the canvassing of the returns and the counting of the ballots had been completed, whereby it was made to appear that Evarts had received 1,286 and Weise 1,284 votes, thus showing that the former had received the highest number of votes and had therefore been elected, Mr. Early, of counsel for the respondent (Weise), addressing the court, called attention to the fact that, in counting the ballots of Elmore precinct before the court on the preceding day, "Weise went from 71 to 69, and Mr. Evarts went from 101 to 103, and that that must have been due to some irregularity in the count here. We have had a great amount of doubt about it. It is a small precinct. We are all here now. We would feel better if we could go through and count it again." The court thereupon declared that "if there is any doubt about the count, bring them [the ballots] in, and we will count them again." After considerable discussion over the objections of counsel for Evarts against a recount of said ballots, the court overruled said objections, and ordered and caused the ballots of said precinct to be recounted, the result being the same as was shown by the original count before the court. On the following morning the court ordered another recount of the ballots of said precinct. The result of the last recount disclosed that Evarts had received 101, instead of 103, as shown by the previous counts, and Weise 71, in lieu of 69, as likewise shown. The specific objections to the recounting of said ballots were: That said ballots "are not sealed in the original sealed package; that they have been open since being officially counted, and out from under the jurisdiction of the court; that there was no objection to the registering of that vote as shown by the official count, and that all of the objections to this official count were made after the count has been made and accepted by the attorneys for the plaintiff and the defendant without any objection on the part of either."

[1] So far as the record shows to the contrary, the contestant made no attempt to support the objection that the ballots recounted were not resealed immediately after they were first counted in court, or that they were in any manner tampered with after that event. Necessarily, in order to count them in this proceeding, the ballots had to be removed from their original sealed package; and so, having necessarily been made a part of the record of the contest, presumptively they were, after being counted in court, committed to the custody of the clerk of the court, where then they properly belonged, and presumptively that officer properly safeguarded and preserved them intact, or in the same condition in which they were found by the court when first taken out of their sealed package to be counted in this proceeding. Section 1963, subd. 15, Code Civ. Proc. The appellant having objected to the recounting of the ballots on the ground stated, the burden was upon him to dispel such presumptions. He made no attempt to do so.

[2] Counsel have directed our attention to no law, legislative or judicial, which interdicts the counting of ballots in an election contest before a court after such ballots have therein once before been counted. We can perceive no objection to such a procedure. If the trial court by which the contest is heard is not satisfied with a count of the ballots before it, we can see no reason why it may not cause such ballots to be again counted so as to satisfy itself that there has been made before it no mistake in the counting. In this case the original and second counts of the ballots of Elmore precinct disclosed a discrepancy between those counts and the result of the canvass of the board of supervisors as against Weise and in favor of Evarts, the former losing 2 and the latter gaining a like number of votes as against the result shown in each case by the official count by the board of supervisors. The court was authorized to make such an investigation as would satisfy and convince it of either one of the two propositions suggested by the situation so presented, viz.: Whether, in counting the Elmore votes, a mistake had been made by the court, or whether, in totaling the returns from said precinct, the supervisors had made a mistake whereby Weise had been given more and Evarts fewer votes than each was entitled to.

The ballots, the counting or rejection of which constitutes the general ground of the several specific objections pressed upon us by the appellant, are classified into three groups, and are so considered in the briefs. We find it convenient to follow that course in our review of the objections to said ballots.

Group No. 1.

[3] This group consists of five ballots which contain a cross in the proper space opposite the name of the candidate appearing on the said ballots voted for by the persons casting the ballots. Three of these ballots were ordered by the court to be counted for Weise and 2 for Evarts, and the ground of objection to all of them was the same, to wit: That the mark in the square opposite the name of the supervisorial candidate so sought to be voted for was not made with the voting stamp provided by law. These objections were made by both the contestant and contestee; that is to say, where the mark was placed in the space opposite the name of Weise, the contestant objected to the ballot, and where made in the space opposite the name of Evarts, the contestee objected. We cannot say that the court erred in ordering the said ballots to be counted as indicated. The ballots are marked with a cross, but the cross is larger than that which is made by the stamp ordinarily seen in use at elections. In nearly every instance, the cross on the ballots objected to appears as though it might have been made with the blunt end of some article, as the butt end of a pencil or penholder, and the ink is more or less smeared in the voting space. Yet we cannot say, from the mere appearance of the ballots, and in the absence of evidence de hors the ballots themselves, showing or tending to show by what means the marks were made, that said marks or crosses were not produced by means of a stamp furnished by the officers charged with the duty of furnishing voting stamps and other supplies necessary to be used in election booths at elections. Pol. Code, § 1205. There is no evidence in the record disclosing the size or character of the stamps used in the several precincts in which the ballots in question were cast. So far as we are otherwise advised by the record, the stamp actually furnished by said officers and used in marking each of said ballots might have been larger than the stamp which we may assume is usually put to such a use; and it may be, so far as we can know or say to the contrary, there being no evidence as to the kind of stamps, if any, used in marking these ballots, that such stamps were old and had been worn down from use so that smooth and unbesmeared impressions could not be produced by them. At any rate, as stated, the mark made in the spaces of the ballots is plainly a cross, and we do not see how we can say on the record as it appears before us that it was not made with a voting stamp regularly furnished by the proper officer to be used in the booth by the voters for the purpose of marking their ballots. Nor can we hold that the cross or mark as it appears upon the ballots and as it is above described constitutes a distinguishing mark. All the marks upon the five ballots, it should be explained, are substantially the same or of the same general character. In other words, each voter marked or stamped his ballot in the same general manner, and all the ballots are substantially alike in the character of the stamp used or the means employed in marking them.

Subdivision 4 of section 1211 of the Political Code provides: "No mark upon a ballot which is unauthorized by this act shall be held to invalidate such ballot, unless it shall appear that such mark was placed thereon by the voter for the purpose of identifying such ballot." In construing the above provision, which was, by amendment added to section 1211 by the Legislature of 1903, the Supreme Court has said: "The effect of the amendment is that, where there is no evidence whatever before the trial court, other than the ballot itself, unless such ballot is so marked as to warrant an inference by the trial court that the marking was designedly made by the voter for the purpose of identifying his ballot, the ballot must not be rejected on the ground that it bears a distinguishing mark." Turner v. Wilson, 171 Cal. 600, 603, 604, 154 Pac. 2, 4. See, also, Sweetser v. Pacheco, 172 Cal. 137, 155 Pac. 639.

There was in this case no evidence produced before the trial court, extrinsic to the ballots themselves, showing or tending to show that the manner of marking the ballots or of making the cross thereon was intended by the voters as means of facilitating an identification of the ballots as those voted by the voters voting them. As before stated, the markings on the respective ballots were substantially or approximately uniform in form and style, the ink spreading a little more in some of the voting spaces than in others, but each representing a cross.

We cannot say from the record so far as it bears upon the ballots in question that the rulings of the court below that said ballots were entitled to be counted are erroneous.

Group No. 2.

[4] 1. Plaintiff's exception No. 3 involves an objection to a ballot counted for Weise and which, in addition to a cross stamped in a voting space opposite Weise's name, bears a mark in the large space on the ballot just below the names of Weise and Evarts, and which has the appearance of being the upper half of the cross on the voting stamp, thus: V. The objection to this ballot was that the mark as indicated constituted an identifying or distinguishing mark. The trial court held that the said mark was an offset, and overruled the objection. Although the particular point on the ballot where the said mark was made or is to be found does not, when the ballot is folded, precisely correspond or come in contact with any of the marks properly in the voting spaces above it, we think it is very clear that the said mark or impression must have been made while the voter was in the act of folding the ballot. This could easily occur in the act of folding by sliding one half of the ballot over the other half in the first fold, thus causing, before the ends of the two parts of the ballot had been adjusted evenly, the lower part, where the mark complained of is located, to come in contact with the upper part, where the cross in the voting spaces was stamped, the ink used in stamping not then being entirely dry. We think this ballot was properly counted for Weise.

[5] 2. Plaintiff's exception No. 6 is addressed to a ballot whereby the voter seemingly attempted to vote for both the appellant and the respondent, there having been stamped a voting cross in each of the voting spaces opposite the names of the said parties, one opposite that of the appellant and the other opposite that of the respondent. The impression of the cross or stamp in each space is clear and distinct. The court rejected the ballot and refused to order it counted for either candidate, and properly so, as obviously it cannot be told therefrom for which of the two candidates the voter intended to vote, if, indeed, he really intended to vote for either.

[6] 3. Plaintiff's exception No. 7 relates to a ballot on which there is a distinct impression of the cross opposite the name of Weise and a slight impression thereof opposite that of Evarts. By folding the said ballot according to the crease therein which was undoubtedly caused by the first fold of the ballot by the voter, the stamp opposite the name of Weise strikes or comes in contact with the voting space opposite the name of Evarts and precisely where the slight impression of the cross is located in the latter space. The court below held the mark opposite the name of Evarts to be an offset, and accordingly the ballot was counted for Weise. The physical appearance of the ballot seems to sustain that conclusion. At any rate, we cannot say that the ruling is erroneous.

Group No. 3.

[7] 1. Plaintiff's exception No. 2: On this ballot appears the impression of the voting stamp or cross both in the space in which the name of Weise is printed and in the voting space directly opposite the name of Weise. There is nothing to indicate that the mark in the space in which Weise's name is printed was intended as an identifying mark. The ballot was therefore properly counted for Weise. Turner v. Wilson, supra; Sweetser v. Pacheco, supra.

2. Plaintiff's exception No. 5 refers to a ballot on which the voter made a cross with a lead pencil and also a cross with the voting stamp in the voting space opposite the name of Evarts. The two marks are distinct. The ballot was rejected, and properly so under the ruling in the cases above cited.

Several other ballots were sent up with the record, but no point is made in the briefs as to them. We are therefore not called upon to examine said ballots.

There are no other matters which have been submitted here for consideration and decision, and, agreeably to the views above expressed, the judgment is affirmed.

G. P. Hall, of Petaluma (E. J. Dole, of Petaluma, of counsel), for appellant. W. F. Cowan, of Santa Rosa, and W. H. Early, of Petaluma (A. H. Crook, of San Francisco, of counsel), for respondent.

PER CURIAM. In this case, a hearing here was ordered by this court after decision by the District Court of Appeal of the Third Appellate District, solely because of what was said by that court as to the last ballot discussed as involved in plaintiff's exception No. 5. In all other respects we are satisfied with the opinion of the District Court of Appeal, which was filed in that court July 9, 1917, and adopt the same as the opinion of this court.

[8] As to the one ballot referred to above, one for Evarts which was rejected by the trial court, it appears from the record that the rejection was solely because of the conclusion of the trial court that it was not sufficiently shown that the ballot had ever been voted. It is unnecessary to consider whether the trial court erred in this conclusion, for the record also shows that at the same time another ballot, one for Weise, as to which the situation was the same, was likewise rejected for the same reason. If error was committed as to one, which we do not decide, it was likewise committed as to the other, and one offset the other.

The judgment is affirmed.

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176 Cal. 244

In re HEALY'S ESTATE. (S. F. 8266.)

(Supreme Court of California. Oct. 8, 1917. Rehearing Denied Nov. 5, 1917.)

WILLS 🔑552(3)—CONSTRUCTION—"BY RIGHT OF REPRESENTATION."

A testator, who left no descendants, and who had two sisters, gave personal property unto named grandnieces and grandnephews by right of representation. In specifying the grandnieces and nephews whom the testator intended to take, he named two grandnieces, who were the children of a son of one sister, another grandniece, the daughter of another son of the same sister, and a grand nephew, the son of a son of the other sister. Civ. Code, § 1403, declares that taking by right of representation occurs when the descendants of a deceased heir take together the same share of the estate of another person that their parents would have taken, if living. *Held* that, though the testator, in specifying the nieces and nephews who should take, named their immediate parents, it was obvious that he intended such beneficiaries should take in place of the two sisters; hence the grandnephew, who was the only descendant of one sister given any bequest, was entitled to one-half of the property, while the three grandnieces, who were descendants of the other sister, took respectively a one-fourth interest and one-eighth interest in the estate, the two grandnieces, daughters of one nephew, taking only a one-eighth interest.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, By Right of Representation.]

Department 1. Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

In the matter of the estate of James Healy, deceased. From the decree of distribution, Bridget Rhead, assignee of one of the legatees, appeals. Reversed and remanded.

W. H. Morrissey, Chas. S. Wheeler, and John F. Bowie, all of San Francisco, for appellant. John J. O'Toole, Cullinan & Hickey, and J. E. Derham, all of San Francisco, for respondent.

SHAW, J. By his last will James Healy bequeathed the residue of his personal property to certain grandnephews and grandnieces by right of representation. The decision in the case requires a determination of the meaning of the phrase "by right of representation" as applied to this bequest. James Healy left no descendants. He had two sisters, Mary Healy, who married a man named Lanning, and Bridget Healy, who married a man named Burke. Mary had three sons, namely, George, Joseph, and Henry Lanning. Joseph had two daughters, namely, Milly and Annie Lanning. Henry had one daughter, Nellie Lanning. Bridget had a son, Patrick Burke, who had a son, William Burke. The two nephews, Joseph and Henry Lanning, the nephew Patrick Burke, and the two sisters of James Healy, had all died before the execution of the will. The persons named as residuary legatees were the said Milly and Annie Lanning, the said Nellie Lanning, and the said William Burke. The question is whether these persons are to be taken as representing their parents, respectively, who were nephews of the testator, or as representing, respectively, the sisters of the testator, Mary and Bridget.

The following are the provisions of the will in controversy. We give them with the paragraphing as they appear in the will itself.

"Fifth. I give and bequeath all other personal property of whatsoever nature or description or wheresoever situated, of which I may die possessed, unto the following grandnephews and grandnieces by right of representation:

"Milly and Annie Lanning, residents of Montreal, Canada, being the children of a nephew whose name I do not now recall, but which said nephew is a son of my sister Mary Healy.

"Nellie Lanning, of Montreal, Canada, daughter of a nephew whose name I do not now recall, but which said nephew is a son of my sister Mary Healy. Said Nellie Lanning was for some time connected with the office of the 'True Witness' as proofreader.

"William Burke, of New York City, son of my nephew Patrick Burke, which nephew is a son of my sister Bridget Healy."

The respondents contend that the intent of the testator, manifested by the fifth clause of the will, was to give one-third of the residue to Milly and Annie Lanning, one-third to Nellie Lanning, and one-third to William Burke. Their theory is that the phrase "by right of representation," in the opening paragraph, refers exclusively to the three nephews described in the last three paragraphs, and that its only effect is to limit the shares of Milly and Annie, as representatives of their unnamed father, to one-sixth of the estate each, instead of the one-fourth each that would have been theirs if the residue left to the four persons named had been given to them as a class, without the qualifying phrase. The court below took this view and distributed the residue accordingly. Bridget Rhead, who is the owner by assignment of the share of William Burke, appeals from the decree of distribution.

For the appellant it is contended that the phrase "by right of representation," in the opening paragraph, refers primarily to the two deceased sisters of the decedent, subsequently named; that it is their grandchildren who are to take the residue as their representatives, respectively, the result being that one half will go to the assignee of William Burke as the representative of his grandmother, Bridget Healy Burke, and the other half to Milly, Annie, and Nellie Lanning, as the representatives of their grandmother, Mary Healy Lanning.

We do not perceive any strong reasons for selecting the nephews as the stocks to which said introductory qualifying phrase refers, which do not point with equal or greater force to the selection of the sisters as the point of beginning of lineage intended. The phrase is in the introductory sentence of the fifth clause. By implication and grammatical construction it is to be taken as a qualification of all that follows relating to the subject to which the phrase would naturally apply. The natural meaning, therefore, would be that wherever the relationship of the legatees is such that the rule of descent by right of representation would apply, and nothing appears to indicate a contrary intent, the parties are to take "by right of representation" and not per capita, or, in other words, that the principle of taking by representation should apply to the dispositions made, in all cases to which it could apply.

Taking by right of representation occurs when the descendants of a deceased heir take together the same share of the estate of another person that their parents would have taken if living. Civ. Code, § 1403. We are to take the testator as conceiving that his two deceased sisters should be the original stocks of descent, arbitrarily naming certain of their descendants to represent them as descendants in his testamentary scheme, and then declaring that the principle of representation should apply to the entire scheme. Giving the phrase this meaning and application, the result would be that the residue would first be divided into two parts, one for the persons named who were descendants of the sister Mary Healy Lanning, the other for those named who were descendants of the sister Bridget Healy Burke. This would give William Burke, as the sole representative of the testator's sister Bridget, one half of the residue, and to the three descendants of the other sister, Mary, the other half thereof.

In disposing of the share appointed to the descendants of Mary, the principle of representation would again apply. By descent from Mary, her sons, Joseph and Henry, if living, would each take a share. The two daughters of Joseph, namely, Milly and Annie, would represent him, and by that rule they would take, together, the share of their father as the descendant of Mary; that is, one-fourth of the residue, or one-eighth thereof to each of them, the other one-fourth going to Nellie Lanning as the only named representative of her father Henry Lanning. This appears to us to be the most reasonable and natural interpretation of the will, and the one which best accords with the literal meaning and grammatical construction of the language.

The only circumstance that can be considered as indicating an opposite interpretation is the fact that in naming and describing the legatees the paragraph form of composition is used, and a separate paragraph is devoted to the children of each deceased nephew. This, at best, is of very slight importance as a key to the meaning, and its force is much weakened by the fact that he did not remember the names of two of the nephews, showing that his mind was not dwelling strongly upon them, and that, in each case, he did expressly mention a sister as the parent, and apparently without any necessity of doing so except to point to them as the parent stocks. The paragraphing alone is insufficient to overcome the natural meaning of the words.

Counsel for respondents rely on the decisions in Robinson v. Shepherd, 4 De Gex, J. & S. 129, 46 Eng. Rep. 865; Parker v. Winder, L. R. (1883) 24 Ch. Div. 664, and In re Dering, Weekly Notes 1911, p. 187, as precedents in their favor. In Rosenberg v. Frank, 58 Cal. at page 411, decided in 1881, this court quoted and approved the following from the decision of the United States Supreme Court in Lambert's Lessee v. Paine, 3 Cranch (7 U. S.) 130, 2 L. Ed. 377, decided in 1803:

> "Except for the establishment of general principles, very little aid can be procured from adjudged cases in the construction of wills. It seldom happens that two cases can be found precisely alike."

The experience of the present members of this court confirms this declaration. In the cases referred to by counsel for respondents, the language was different from that of the present will, and the reasoning of those cases has little, if any, application to the present case. The cases of Gibson v. Fisher, L. R. 5 Eq. Cas. 51, decided by Lord Romilly, Master of the Rolls, and Siders v. Siders, 169 Mass. 523, 48 N. E. 277, are more nearly like the case at bar, and are to that extent precedents in favor of our conclusion. It follows that the court below erred in the decree of distribution appealed from.

The decree of distribution is reversed, and the cause remanded, with directions to the court below to enter an order distributing the residue of the estate in accordance with the views expressed in this opinion.

We concur: SLOSS, J.; LAWLOR, J.

176 Cal. 275

BROOKER et al. v. INDUSTRIAL ACCIDENT COMMISSION et al. (S. F. 8185.)

(Supreme Court of California. Oct. 11, 1917.)

Master and Servant 🔑373 — Workmen's Compensation Act—"Arising Out of and in the Course of the Employment."

Under Workmen's Compensation Act (St. 1913, c. 279) § 12, allowing compensation to the dependents of an employé only where the proximate cause of his death is a personal injury sustained by an "accident arising out of and in the course of the employment," the death of an employé engaged in the erection of a building upon a scaffold 39 feet above the ground, properly guarded by a rope along its outer side, as a result of an epileptic fit in which he fell down on the scaffold and rolled over the edge, was not within the statute; the question whether the injury arose "out of" the employment not depending on the height from which the employé fell or the extent of his injury.

In Bank. Application for writ of review by B. M. Brooker, employer, and the United States Fidelity & Guaranty Company, insurer, to review an award made by the Industrial Accident Commission against the insurer, in favor of Rodrigo Fuente and Amelia Fuente, on account of the death of R. R. Fuente. Award annulled.

Lloyd S. Ackerman, of San Francisco, for petitioners. Chris M. Bradley, of San Francisco, for respondents.

SHAW, J. This is a petition to review an award made by the Industrial Accident Commission against the United States Fidelity & Guaranty Company, insurance carrier for Brooker, in favor of Rodrigo and Amelia Fuente, on account of the death of R. R. Fuente, caused by injuries received by Fuente while he was in the employment of the defendant Brooker as a laborer. Fuente was the son of the petitioner Rodrigo and the stepson of the petitioner Amelia. The petition is based upon the claim that the injury which caused the death of Fuente, and the accident which produced the injury, although they happened to him in the course of his employment, did not arise "out of" his employment.

The decedent was a laborer employed by Brooker in the erection of a building. He was working upon a scaffold 5 feet in width and 39 feet above the ground. The scaffold was guarded, in compliance with the law or ordinance, by a rope 3 feet high along its outer edge. While so engaged, the decedent fell to the surface of the scaffold, rolled off the edge, and thence fell to the ground. Death resulted from the injuries caused by the fall to the ground. There was evidence sufficient to show that he was subject to epileptic fits at long intervals, and that he was seized with one of these fits while at work on the scaffold, as a consequence of which he fell down upon the scaffold, and that as a result of the contortions incident to such fit he rolled off the edge and was precipitated to the ground. There was no evidence to the contrary. The commission did not find that the epileptic fit caused the fall, as it should have done, but found in general terms that the injury which caused the death of Fuente arose out of and happened in the course of his employment. It is practically conceded that the sole cause of his fall was a fit of epilepsy.

The contention of the petitioners is that the proximate cause of the fall was the epileptic fit, with which his employment had no causal connection, and hence that the accident and resulting injury arose from the fact that he was an epileptic and had the fit, and not out of his employment. We are of the opinion that this contention must be sustained. The Workmen's Compensation Act allows compensation to the dependents of an employé only where the proximate cause of the death of such employé is a personal injury sustained by him "by accident arising out of and in the course of the employment." Section 12. There was nothing in the nature of the work which the deceased was doing at the time that had any tendency to bring on a fit of epilepsy. Neither the fit, nor the fall, nor the injury, was produced by the nature of the work in which he was engaged. The injury was doubtless the greater by reason of the distance from the scaffold to the ground, but this distance was not due to the nature of the work itself. The question whether or not such an injury arises "out of" the employment cannot and does not depend upon the height from which the employé falls or the extent of the injury he receives as the result of the fit.

The exposition of this question by the Supreme Court of Michigan in Van Gorder v. Packard Motor Car Co., 162 N. W. 107, is so clear and so well fits the conditions of the case at bar that we cannot do better than to quote it here. The employé, while at work on a scaffold 6 feet in height, was seized with an epileptic fit, which caused him to fall off the scaffold to the floor, whereby his skull was fractured and his death ensued. The court, after an elaborate review of the authorities, says:

> "There is no claim that the scaffold was improperly constructed or in any way unsuitable for the service. Due to no conditions arising out of his employment, but solely to his predisposition to epilepsy, of which his employer had no notice, he fell from the scaffold, receiving an injury from which death resulted. The fall was caused, and caused only, by the epileptic fit. The fit was the direct and only cause of his injury. We do not think it would be seriously contended that, had he fallen in an epileptic fit while standing on the floor and received the injury he did, the injury arose out of the employment, and that the defendant was liable. * * * The height from which he fell, here only a short distance, could not change the liability for the injury. The most that can be said is that the height from which the deceased fell may have aggravated the extent of the injury. A person falling a greater distance may be more seriously injured than one falling a lesser distance; but it does not change the question of responsibility, of liability. The distance of the fall might contribute to the extent of the injury, but it was not a contributory cause to the fall. When the deceased was seized with the epileptic fit, he would have fallen, no matter where he was; and the employer cannot be held responsible because that unfortunate seizure occurred when the workman was on the scaffold, a few feet from the floor."

The other authorities are, for the most part, to the same effect. In Butler v. Burton-on-Trent Union, 5 Butterworth's Workmen's Compensation Cases, 355, the decedent, while on duty, was sitting at the top of a stairway. A fit of coughing, due to the fact that he was afflicted with tuberculosis, came on and made him giddy, causing him to fall down the steps. From the injuries resulting therefrom he died in a few days. It was held that "the accident did not arise out of the employment, in the sense that it was due to the nature of the employment, or to anything to which the nature of the employment required him to expose himself," and that to say that it "'arose out of' because it took place on premises where he was in fact engaged," would make the fact that it arose "in the course of" the employment the sole test, whereas the law requires that it shall also arise "out of" the employment. In Nash v. Rangatira, L. R. [1914] 3 K. B. Div. 978, a sailor, while drunk, was walking up the gangway of the steamer, and solely because of his intoxication fell therefrom and was killed. The court said that the accident and injury did not arise "out of" the employment, and that the fact that he was on the gangway did not make it so, although it increased the peril from a fall. Frith v. Louisianian, 5 B. W. C. C. 410, L. R. [1912] 2 K. B. Div. 155, was a similar case of a sailor who fell over the side of the vessel because of his intoxication, and was drowned. He was "within the ambit of his employment," but the court held that his death did not arise out of that employment. In Rodger v. Paisley, 5 B. W. C. C. 547, a messenger, while carrying a message on the street, fainted and fell, thereby injuring him so that he died. This injury did not, the court says, arise out of the employment. In Collins v. Brooklyn, etc., Co., 171 App. Div. 381, 156 N. Y. Supp. 957, the decedent, while at work, fell to the ground in a swoon due to heart disease, and thereby received the injury which caused his death. The court said that it did not arise out of the work, and that to make it so it must appear that the injury was "a consequence of something that had a relation to the work of the employer," and that the act does not "make the employer an insurer of the life, health, or regular heart action, of an employé," and that it should have been shown that the swoon, for example, arose out of overexertion in the employer's service. See, also, McCoy v. Michigan Screw Co., 180 Mich. 454, 154 N. W. 572, L. R. A. 1916A, 323; Klawinski v. Lake Shore, etc., Co., 185 Mich. 643, 152 N. W. 213, L. R. A. 1916A, 342; Hawkins v. Powell's, etc., Co., 4 B. W. C. C. 178, L. R. [1911] 1 K. B. Div. 988; Barnabas v. Bersham Colliery Co., 4 B. W. C. C. 119—all involving the same principle.

A distinction is to be made between cases of this character, and those where the accident, though partly caused by the idiopathic condition of the employé, is due in part also to the overexertion of the employé in performing his work, or to the nature of the work or the appliances furnished to him with which to work, or to the lack of proper safeguards against the ordinary dangers of the place of work, the injury being sometimes greater because of his idiopathic condition. In those cases the injury is held to arise out of the employment. An example of those cases is Fennah v. Midland, etc., Ry., 4 B. W. C. C. 440, where the decedent, an engine driver, was tightening a nut in the engine and suddenly fainted and fell. The court, from the evidence, was of the opinion that his fainting fit was brought on by the work and held that the injury arose out of the employment. Where the idiopathic condition and the employment are each contributing causes of the accident the employer is liable, but not where the idiopathic condition is the sole cause.

The case of Carroll v. What Cheer Stables Co., 38 R. I. 421, 96 Atl. 208, L. R. A. 1916D, 154, is cited in support of the opposite view. It is, however, distinguishable on the principle just stated. A hack driver, while driving on the highway, fell from his seat and was injured by the fall. The fall was probably caused in part by a faint or dizziness induced by a disease from which he was suffering. But there was evidence that his horses were in a kind of gallop, and that he was "pitched out" by the motion, and the court said that the "fall was more than the mere inert fall or collapse of an unconscious man; that it was a positive throwing or pitching of the driver from his seat by the movement of the hack turning or lurching into the gutter, toward or against the curbstone, and might have happened to a driver in full possession of his senses." Upon this ground the court based its decision in his favor.

The only case to the contrary is Wicks v. Dowell, L. R. [1905] 2 K. B. Div. 225. The deceased was seized with an epileptic fit while standing on a wooden stage in a ship, close to the edge of a hatchway opening into the hold, and while guiding the descent of a bucket into the hold by means of a long pole, and as a result he fell into the hold and was injured. The award was made. The court held that the accident arose "out of" his employment. The facts are somewhat similar to the case at bar. But it stands alone, and is contrary to the later decisions above cited arising in England under the same law. We think the better reason is with the later cases.

The award is annulled.

We concur: ANGELLOTTI, C. J.; HENSHAW, J.; MELVIN, J.

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176 Cal. 248

WILSON v. PACIFIC ELECTRIC RY. CO. et al. (L. A. 3998.)

(Supreme Court of California. Oct. 8, 1917. Rehearing Denied Nov. 5, 1917.)

1. Railroads 🔑178—Enforcement of Liabilities Against Property—Assessment for Public Improvements.

Where a railroad company had only a strip of land 95 feet wide, being below the average of width of similar land devoted to railroad purposes, the segregation of all of the strip except that occupied by the tracks with sufficient clearance for the convenient passage of the rolling stock as not a part of the right of way and as subject to sale in satisfaction of assessments for a street improvement, with no investigation of the amount of business transacted by the railroad, no inquiry regarding the necessities of the company in the matter of space for loading and unloading commodities, and no estimate of probable future requirements of space, though a part of the assessed land had been used for railroad purposes, was unauthorized.

2. Railroads 🔑178—Enforcement of Liabilities Against Property—Assessment for Public Improvements.

Under the law existing prior to 1911, a sale by metes and bounds of all of a railroad company's interest, including a part of its right of way, in satisfaction of an assessment for a street improvement, could not be enforced.

3. Railroads 🔑178—Enforcement of Liabilities Against Property—Assessment for Public Improvements—"Right of Way."

The "right of way" of a railroad company as respects its liability to be sold in satisfaction of an assessment for a public improvement is not a mere right to operate trains over tracks, and cannot arbitrarily be confined to easements over just enough land for running trains; the criterion being the land actually occupied and reasonably necessary for use, and the right of way being merged in the fee where the railroad company owns the fee.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Right of Way.]

Angellotti, C. J., and Shaw and Sloss, JJ., dissenting.

In Bank. Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by Phillip L. Wilson against the Pacific Electric Railway Company and others. From a judgment in favor of plaintiff, and from an order denying a new trial, the defendant named appeals. Reversed.

Frank Karr, R. C. Gortner, and A. W. Ashburn, all of Los Angeles, for appellant. Tanner, Odell, Odell & Taft, of Los Angeles, for respondent.

MELVIN, J. Plaintiff sued successfully to foreclose a lien for improvement of a street against certain property of the Pacific Electric Railway Company situated in the city of Venice. The railway corporation appeals from the judgment and from an order denying its motion for a new trial.

The court found, partly upon the testimony of witnesses and partly upon stipulation of the parties, that prior to the 23d day of June, 1909, the Los Angeles Pacific Company, appellant's predecessor in interest, was the owner and in possession of that strip of land in the city of Ocean Park, now Venice, which now constitutes a portion of Sereno street, extending from the southerly line of Elena avenue to the southerly line of Rose avenue; that prior to that time and pursuant to an agreement in writing carried into effect by an ordinance of the municipality the Los Angeles Pacific Company and the city exchanged certain properties; and that deeds were duly delivered by which, among other things, title to the land now occupied by the part of Sereno street here involved, together with other adjoining property, passed from the railroad company to the city. The city, in the contract, in the ordinance, and by acceptance of the deed with appropriate covenants to express that purpose agreed to defray all expenses of opening and improving and maintaining streets over or across the lands deeded to it by the railroad company, and that said company should never be compelled as an abutting owner or as the proprietor of property within an assessment district to pay any assessment for opening, improving, or maintaining such streets. By the city's deeds to the railroad company the latter became the owner in fee of land which, when added to other property possessed in like tenure, formed a continuous strip 95 feet in width, occupied in part by its tracks. Sereno street as it now exists is parallel to this strip and adjoins it. Less than six months after the acceptance by the city of the deed from the railroad company a proceeding to open said Sereno street was instituted, and in October, 1910, an assessment for the improving of said street was levied upon a portion of the strip of land owned by the said railroad corporation. The assessment was by metes and bounds and embraced the southerly part of the strip of land adjacent to Sereno street and 47 feet in width, including part of that acquired from the city and part of the property previously owned by the railroad company. Appellant pleaded in its answer that the property thus assessed was part of its right of way. The court found that this allegation was untrue, and that the land had never been devoted to public use. There were further findings to the effect that the property was legally assessable for the improvement of Sereno street and the lien of plaintiff, an assignee of a street contractor who performed work on said street, was held to be valid in every respect.

Appellant asserts that the findings upon which the judgment is predicated are wholly unsupported in that the evidence and stipulations compel the conclusion that a railroad right of way was assessed; that prior to the amendment of the "Vrooman Act" in 1911 such an assessment was void; and that the assessment was illegal also because it was levied in violation of the conditions upon which the city acquired title to the land over which the street was opened.

Mr. Ashburton, a civil engineer, in the employ of appellant, testified that the strip of land 95 feet wide, belonging to the railroad company, was fenced upon its northerly and southerly sides; that an average of 40 or 45 feet was occupied by rails, although at one end the track curved in such manner as to extend almost all the way across the strip; that at the time of the assessment there were some few small houses on the property between the main tracks and the site of Sereno street; and that the north boundary line of the assessment district did not encroach upon the land actually used by the Pacific Electric Railway Company for its tracks. Mr. Bugbee, another witness, testified in part as follows:

> "This particular parcel of the right of way, i. e., the 95-foot strip, was the old Santa Fé right of way running into Inglewood and into Santa Monica. It has been in use for a good many years as a freight line, with the exception that our Inglewood passenger traffic we handled on that line."

Counsel thereupon stipulated that the part of defendant's right of way upon which the tracks are laid is and has been at all times used for purposes of traffic. Witness said that the four small houses or "shacks" had been used for a section camp and for storing materials. Later on he said he rented them "just to keep them occupied and get what revenue we could out of them until after the road was standardized." The witness testified that after the land formerly owned by the city had been added to that of the defendant company it had been used for industrial purposes. Those purposes he explained as follows:

> "By that I mean in the handling of material such as building materials, fuel, feed, and things of that kind. In order to be economically handled, they have got to be on a spur track, and we have put in spur tracks in here to serve the industries, and I think we have two at the present time, but I would have to verify that by reference. There are two fuel and feed yards there at the present time. They are occupied by lessees of the Pacific Electric Railway Company. We have spur tracks in there to reach them, and are serving them with those spur tracks."

He further gave it as his opinion that the whole of the strip 95 feet wide was necessary for the present and future purposes of the company. "The United States government," said the witness, "recognizes 200 feet." He also said that the small buildings or "shacks" formerly on the southerly portion of the land had been removed. Mr. Crawford, the only witness called by the plaintiff, described the running of the line by which the northern boundary of the assessment district was fixed. He testified partly as follows:

> "My instructions were not to include any property in the district only what was covered by the buildings, such as houses, shacks. We measured the distance of those houses from Sereno street. We did not include in the assessment any land upon which was situated tracks belonging to the defendant company. We ran the assessment I think 47 and some fraction feet from Sereno street, as now situated. I couldn't say how far away that would be from the nearest track. We measured up the buildings, houses, and included property that had the buildings on. I suppose we left more land behind the buildings next to the track in some places than in others. At Elena street I think it was about 6 or 8 feet. I don't just remember what it was."

He also said:

> "There were some poles supporting wires within the territory included in the assessment district. I don't know whether they belonged to the defendants in this action or some one else. The poles were standing. I couldn't say whether they were parallel with the tracks. They were not connected with the trolley wires. * * * There was no track upon the 47 feet, which I have described belonging to the railroad company. I don't know whether there were any piles of lumber, brick, or anything of that nature upon the 47-foot strip."

[1] Appellant insists that this testimony utterly fails to sustain the finding that the strip of land included in the assessment district was not and had not been used for public purposes. We think it clear that the court arbitrarily determined that the railroad company's "right of way" consisted only of the land occupied by the tracks with sufficient clearance for the convenient passage of the rolling stock. There was no investigation of the amount of business transacted by the railroad. There was no inquiry regarding the necessities of the company in the matter of space for loading and unloading commodities. There was no estimate of the probable future requirements of space, but one of the witnesses stated that an additional track would soon be necessary for the business. That a part of the assessed land had been used for railroad purposes is clear, and there was uncontradicted testimony that the strip, 95 feet wide, was below the average of width of similar land devoted to railroad purposes. The segregation of this property as not a part of the appellant's right of way had no proper basis. It was not sufficient that the actual traffic could be operated over the tracks without the constant use of the land within the railroad company's fences. At least that portion of the assessed strip which had been a part of the railroad's property before the acquisition of the land from the city had been devoted to various railroad purposes. Therefore the finding attacked by appellant was not supported by the evidence.

[2] The question then is whether or not, under the law existing at the time this assessment was levied, a lien could be foreclosed as decreed in this case. It is to be remembered that this assessment was levied prior to the amendment to the general street law expressly authorizing the assessment of rights of way and subjecting them to sale for nonpayment of assessments. Stats. 1911, p. 742 § 20, subd. 11. Therefore this case is to be determined according to the principles announced by such authorities as Southern California Railway Co. v. Workman, 146 Cal. 80, 79 Pac. 586, 82 Pac. 79, 2 Ann. Cas. 583, and Fox v. Workman, 155 Cal. 201, 100 Pac. 246. In this case as in those the question was not whether the fee, subject to the easement for right of way, might or might not be sold for satisfaction of an assessment, but whether or not a sale by metes and bounds of all the railroad company's interests, including a part of the right of way, could be enforced. Following those authorities we must answer the question in the negative. In Schaffer v. Smith, 169 Cal. 764, 147 Pac. 976, the two cases in which Workman, treasurer of Watts, was defendant, were cited, and it was again said that while the property of a railroad company may be assessed to pay for work upon an abutting street there was no authority to sell in foreclosure of the lien both the fee and the right to operate the railroad.

[3] The "right of way" of a railroad company is not the mere right to operate trains over tracks, and cannot arbitrarily be confined to an easement over just enough land for running trains. The criterion is the land actually occupied and reasonably necessary for use by the common carrier. For this reason spur tracks and very short lines have been held to be instruments for public use of land. Madera Railway Co. v. Raymond Granite Co., 3 Cal. App. 668, 87 Pac. 27. Where, as in this case, the fee of the property rests in the railroad company, the "right of way" denoting in its technical sense the tenure by which the land is held, is merged in the fee, as no person may have an easement in land which he himself owns. San Pedro, Los Angeles & Salt Lake Railroad Co. v. Pillsbury, 23 Cal. App. 675, 139 Pac. 669, 671. The sale contemplated by the fore-

closure was of all of appellant's interest, and, as we have seen, at the time of the attachment of the lien there was no authority for such a disposition of at least a portion of the land included in the assessment district and devoted to railroad purposes.

As the judgment and order must be reversed for the reasons given above, it will not be necessary to decide the other question involving the force of the city's agreement not to assess its vendee. Respondent insists that McNeil v. City of South Pasadena & Pacific Electric Railway Co., 166 Cal. 153, 135 Pac. 32, 48 L. R. A. (N. S.) 138, is decisive of the whole matter, but appellant is equally positive that where two modes of paying for street improvements are possible, one by assessment under the Vrooman Act (St. 1885 p. 160), and another by resort to funds in the city treasury, the municipality may, as a part of the consideration for property purchased, agree to forego the former method. Under the circumstances it is not necessary for this court in the present appeal to decide this very interesting question.

The judgment and order are reversed.

We concur: HENSHAW, J.; LORIGAN, J.; VICTOR E. SHAW, Judge pro tem.

ANGELLOTTI, C. J. (dissenting). I dissent. I am of the opinion that the evidence is sufficient to support the conclusion of the trial court that no part of the assessed portion of the land owned in fee by the railroad company, the greater part of which admittedly was used for purposes in no way connected with the railroad such as being leased to private parties for other purposes, was ever devoted to railroad purposes, and that none of such assessed portion ever constituted a part of the railroad right of way. As to the other objection made by appellant I think the case clearly falls within the principle of McNeil v. City of South Pasadena, 166 Cal. 153, 135 Pac. 32, 48 L. R. A. (N. S.) 138.

I think the judgment should be affirmed.

We concur with ANGELLOTTI, C. J.: SHAW, J.; SLOSS, J.

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176 Cal. 266

KING v. SAN DIEGO ELECTRIC RY. CO. (L. A. 3863.)

(Supreme Court of California. Oct. 9, 1917.)

1. NEGLIGENCE 🔑6—VIOLATION OF STATUTES —WHO MAY SUE.

In an action for negligent injuries, where one relies upon the violation of an ordinance or statute, he must be within the class intended by the legislative body to be benefited by the enactment.

2. STREET RAILROADS 🔑84—PERSONAL INJURIES—VIOLATION OF ORDINANCE—WHO MAY INVOKE.

An ordinance requiring street cars to stop or hurry from crossings in case of fire may be invoked, as for his benefit, by a bystander injured while on the sidewalk by a fire automobile, forced to take to the sidewalk by sudden obstruction of a crossing by a street car.

3. STREET RAILROADS 🔑114(5) — PERSONAL INJURIES—VIOLATION OF ORDINANCE—EVIDENCE.

In an action by an injured bystander on the sidewalk by the sudden obstruction of a crossing by a street car, in violation of ordinance giving fire apparatus right of way, evidence *held* to support a finding that the motorman should have known there was a fire and was negligent.

4. STREET RAILROADS 🔑81(1) — STREETS — STREET CARS—FIRES.

Where defendant's motorman knows or should know that a fire automobile is coming at a great speed and runs his car out on a crossing suddenly, forcing the automobile to swerve to the walk injuring plaintiff, the company is negligent, whether violating an ordinance or not.

5. NEGLIGENCE 🔑15 — CONCURRING NEGLIGENCE—JOINT AND SEVERAL LIABILITY.

One injured by the concurring negligence of two persons can sue either or both, and it is no defense that the person sued was not himself the sole tort-feasor.

Department 1. Appeal from Superior Court, San Diego County; W. A. Sloane, Judge.

Action by Bradley W. King against the San Diego Electric Railway Company, a corporation. Judgment for plaintiff, and defendant appeals. Affirmed.

Eugene Daney, of San Diego, Read G. Dilworth, of Coronado, and E. Swift Torrance, of San Diego, for appellant. Crouch & Harris, Claude L. Chambers, and Ray M. Harris, all of San Diego, for respondent.

LAWLOR, J. This is an action for damages arising out of personal injuries to plaintiff alleged to have been caused by the negligence of defendant. The court, sitting without a jury, gave judgment for plaintiff for $6,000. Defendant appeals. The facts sufficiently appear in the following findings of the trial court:

"That on the 16th day of January, 1912, the plaintiff was upon the sidewalk at the southwest corner of Fifth and G streets in the city of San Diego, Cal., and was in the exercise of due and proper care for his own safety; that at said time there was a fire near the said place, to wit, a block west and about one-half a block south from said corner on the west side of Fourth street between G and H streets; that said fire was pouring forth a large quantity of black smoke; that the fire department of said city was racing westward on said G street near its intersection with said Fifth street in order to reach said fire as soon as possible; that at said time the defendant, by and through its servants and employés, was running one of its street cars southerly upon said Fifth street between F street and G street in said city.

"That the defendant carelessly and negligently and without due or proper care or regard for plaintiff's safety ran its said street car suddenly across the intersection of Fifth and G streets and directly in the way of an automobile which was part of said fire department, and which said automobile was then approaching the said intersection from the east on the said G street; that said automobile was being driven at a rapid rate of speed by the chief of said fire department.

"That all of said facts heretofore found were known by the defendant, or could have been known had it been in the exercise of due or proper care in the plaintiff's behalf.

"That part of said fire department, to wit, the assistant chief, driving his horse and buggy and ringing his fire bell, had already just passed said corner in plain view of defendant's servants in charge of said street car; and the fire chief, as he approached said corner in his automobile, continually blew a large whistle; and that said bell and whistle so sounded by said assistant fire chief and fire chief could easily have been heard by defendant's servants in charge of said car had they exercised ordinary care for the safety of the plaintiff; that a considerable part of the fire department of said city was also racing to said fire, and were also clanging their fire bells.

"That when said street car was run upon said intersection of said street and directly in front of said automobile of said fire chief, it became necessary for said fire chief, in order to avoid a collision with said street car, to steer and swerve his said automobile around in front of and past the said street car, and the said fire chief did so steer and swerve his said automobile around in front of said street car, and in so doing unavoidably ran his said automobile upon the sidewalk where the plaintiff was standing and struck the plaintiff with great force and violence, crushing him to and upon the ground there, and inflicting upon him great and grievous bodily injury as follows, to wit, his left leg was so crushed, bruised, contused, and wounded that it became and was necessary to amputate same above the knee, and the same was thereupon amputated above the knee. * * *

"The court finds that the injuries which the plaintiff received, as hereinbefore found, were not the direct and proximate result of the negligence of the plaintiff; that the plaintiff, at the time of the accident which resulted in his injury, was standing upon the northerly edge or curb line of the sidewalk upon the south side of the said G street, at or about the place where it intersects with the westerly boundary of said Fifth street, with portions of his body, sufficient to be struck by said automobile, extending slightly northerly of said curb line, and was leaning out slightly into that portion of said G street set apart for the use of vehicles, and that, while so standing, plaintiff was then looking westerly down said G street away from the direction in which said automobile was approaching; that the plaintiff did not know that said automobile and said street car, or either of them, were approaching or that they were approaching each other, or that said fire chief was going to endeavor to pass in front of said car, and did not know that he was in great, or any, danger of injury to his person in standing where he was, and in the exercise of ordinary care and diligence for his own safety should not have known; and it was not the portion of the plaintiff's body which was extending northerly over said curb line and into said street which was struck by said automobile of the fire chief, and that the injuries which the plaintiff received, as hereinbefore found, were not the direct or proximate result of the negligence of the plaintiff.

"That by reason of the personal injuries, hereinbefore found, plaintiff has been damaged in the sum of $6,000."

The amended complaint, upon which issue was joined, merely set out the facts showing negligence, but by subsequent amendment the following paragraph was added:

"That on the 21st day of August, 1888, the legislative department of the city of San Diego duly passed and adopted an ordinance entitled, 'Ordinance No. 276. An Ordinance providing for Blockading the Streets and Alleys and the Preservation of Fire Department Property During Fire,' which said ordinance was thereafter duly approved by the mayor of said city, and published according to law, and at the time of the committing of the grievances herein mentioned, had never been repealed, and was in full force and effect, a portion of which said ordinance is as follows, to wit:

" 'Sec. II. All steam engines and other moving apparatus of the fire department shall have paramount right of way through all streets, lanes, alleys, courts and other places in the city of San Diego, when going to a fire, and such engines and other apparatus, and vehicles belonging thereto, shall take and keep to the right side of the street, unless the same be obstructed, and all street cars in the vicinity of any such fire engine, or other apparatus or vehicles going to a fire, shall retard or accelerate their speed, as occasion may require, in order to give to the fire department the unobstructed use of the street for the time being.' "

Section III of this ordinance provided that:

"Any person or persons having control of any vehicle or street car who *willfully* or *carelessly* permits the same to obstruct the progress of any engine or apparatus of the fire department going to a fire * * * shall be guilty of a misdemeanor. * * *"

It is appellant's contention, argued at great length, that respondent's cause of action is based entirely upon the ordinance above mentioned, and that conceding a violation of the ordinance by appellant still there was no violation of any duty owing to respondent, since the purpose of the ordinance was to insure a right of way to the fire department while going to a fire and not to prevent injury such as was suffered by respondent. In other words, appellant's view is that respondent is not one of the class intended to be benefited by the ordinance, and cannot therefore take advantage of its violation. Upon this ground appellant objected to the introduction of the ordinance, and now assigns its admission in evidence as error. We think the ruling of the trial court was proper.

[1] We agree with appellant that one who relies upon the violation of a statute or ordinance must be within the class intended by the legislative body to be benefited by the enactment. 29 Cyc. 438.

[2] We do not, however, concede that the application of this rule affects the respondent in this case. No doubt the primary object of those portions of the ordinance above quoted was to insure to the fire department the right of way for its vehicles while going to a fire. But that was not the only purpose contemplated. Suppose the chief had actually collided with the street car, and had sued appellant for resulting injuries. Could he have relied upon the ordinance? Unquestionably he could, and such has been the ruling wherever an enactment of this kind has been invoked by a member of the fire department. Buys v. Third Ave. R. Co., 45 App. Div. 11, 61 N. Y. Supp. 113; Geary v. Met. St. Ry. Co., 73 App. Div. 441, 77 N. Y. Supp. 54; Id., 84 App. Div. 514, 82 N. Y. Supp. 1016, affirm-

ed 177 N. Y. 535, 69 N. E. 1123; City of New York v. Met. St. Ry. Co., 90 App. Div. 66, 85 N. Y. Supp. 693, affirmed 182 N. Y. 536, 75 N. E. 1128; Duffghe v. Met. St. Ry. Co., 109 App. Div. 603, 96 N. Y. Supp. 324; McBride v. Des Moines City Ry. Co., 134 Iowa, 398, 109 N. W. 618; Boylan v. New Orleans Ry., etc., Co., 139 La. 185, 71 South. 360; Indianapolis Traction, etc., Co. v. Hensley (Ind.) 115 N. E. 934. Suppose, further, that in this collision between the chief and the street car, a bystander also was injured. Should we say that the chief can invoke the ordinance but the bystander cannot, although both were injured in the collision which resulted from the violation of the ordinance? We think not. We think the legislative body intended not only to enable the fire department to reach a fire speedily and unhampered, but also to prevent collisions with other vehicles and consequent injury to firemen and bystanders. There is nothing in the ordinance itself to negative such an intent, and the very close relation between an obstructed right of way and a collision shows that an accident like the one here involved was in the contemplation of the city council when it framed the ordinance. In other words, both the members of the fire department and the individual members of the public are within the class intended to be protected by this provision.

[3] It is not contended that the motorman in charge of defendant's car "willfully" permitted it to obstruct the progress of the chief's automobile. The question is therefore whether the motorman "carelessly" permitted such obstruction. This is denied by appellant, and its determination requires a review of the evidence.

A cursory reading of the testimony given by the 35 or more witnesses examined at the trial would seem to reveal a remarkable conflict in the evidence, particularly as to the relative positions of the street car, the assistant chief, and the chief. But a closer scrutiny will show that the statements of the bystanders are not positive statements; they are merely the best recollection of matters observed at a time of more or less excitement, when several things were happening simultaneously, some of them at opposite points of the compass, with the natural result that no one of the witnesses can be relied upon for an accurate account of all the details. A careful study of the testimony establishes the following sequence of events at the intersection of Fifth and G streets, where the accident occurred: First, the general city fire alarm, heard by practically all the witnesses; second, the crossing of the street intersection by the assistant chief in his red buggy, drawn by a white horse, traveling about 20 or 25 miles an hour, and ringing his large bell; third, the approach of the chief in his red automobile at a speed of 25 to 30 miles an hour, coming west on G street toward Fifth, sounding his whistle, and the simultaneous approach of the street car at its usual speed of 7 to 8 miles an hour, coming south on Fifth toward G street.

Plaintiff's theory for holding that defendant was negligent is that the motorman of the street car in question heard or should have heard the general fire alarm; that in the exercise of ordinary care he would have seen and heard the assistant chief as the latter passed by on G street within at least 50 feet of the car, and he would have seen the people congregating around the corners of Fifth and G streets, and heard the approach of the chief and the fire apparatus following him—all of which would have indicated to a careful motorman that there was a fire in the vicinity and that a proper regard for the safety of passengers and bystanders required him to stop, before venturing upon the intersection, to investigate the chances of a collision with some of the apparatus coming down the street. This is in substantial accord with the findings, but appellant contends that they are not supported by the evidence. A careful review of the testimony convinces us, however, that there was sufficient showing made at the trial to sustain the findings.

The record shows that a number of people on both sides heard the fire alarm and fire bells some time before the chief reached the intersection. Some of the witnesses were on the various corners of Fifth and G streets; others were in their offices on the second and third floors of the City Hall, some 50 or 60 feet from the intersection; defendant's witness Demers was on Fifth street about 25 feet north of G street, and defendant's witness Reese was on Fifth street 100 feet south of G street. None of these had any difficulty in hearing the fire signals. Other witnesses testified that they saw the smoke rolling up from Fourth and G streets to a height of 25 or 30 feet, and according to the witness Tellison and others it was an "awful black smoke," which was to be expected, considering that it came from burning tar oil. The plaintiff's witness Salmons stated that he was driving an automobile south on Fifth street between F and G, when he first became aware of a fire in the vicinity, either by reason of the fire whistle or the people, some of whom he saw going down the street and others looking out of the City Hall windows. He turned at G street and drew up at the curb to get out of the way of fire vehicles which he knew were to be expected. He saw the assistant chief go by, and he heard the bell on the latter's buggy. He saw the chief about 200 feet back of the assistant chief, and saw the street car shoot out on the crossing just as the chief got there. The general condition at the intersection was, he declared, such "as is usual around a busy corner at the time of a fire." It will be noted that the motorman was coming from the same direction and had the same opportunities of observation as this witness. One Hooker, who was driving a horse and buggy on G street at the time, testified that there was considerable noise and ringing of fire bells, and that he was particularly concerned with the gong on the chief's machine which he was seeking to avoid. Many witnesses saw the assistant chief approach and cross Fifth street, and heard the "peculiar gong which he had on the front of his vehicle." The witness Hay stated that the street car was about 50 feet north of the crossing when the assistant chief passed. Another witness said the street car had traveled less than 30 feet from the time it slowed up to let the assistant chief go by to the time when the chief passed. He saw the motorman put on the brakes when the assistant chief approached and release them when the latter passed. The assistant chief himself remembered distinctly that he saw the car and motorman, who was looking out at the time, and that the car was only 25 or 26 feet away from him at the crossing. There is also ample testimony to the effect that the chief followed the assistant at a distance of about 150 to 200 feet, and that the chief was traveling about 25 to 30 miles an hour, while the speed of the street car was about 7 to 8 miles an hour. These relative speeds and distances show that the motorman was not over 50 feet from the intersection of Fifth and G streets when the assistant chief passed in plain view of the car, and that the motorman was therefore in a position to see and hear the various things indicating a fire, and that fire vehicles were to be expected at the intersection. The motorman testified that he did not see the assistant chief at the crossing, nor did he observe any evidences of the fire. He stated that he had slackened the speed of his car to allow two buggies drawn by dark horses racing abreast on G street to pass the intersection. But every witness on both sides who was asked the question, including the conductor of the car, testified that he did not see the vehicles described by the motorman. Furthermore, there was evidence tending to show that as he approached the intersection the motorman was not looking straight ahead, as he should, but was gazing off to the side in the direction of the fire. The witness Freeman, in particular, stated on both direct and cross-examination that he watched the motorman coming down Fifth street from the time the latter was within 125 feet of the intersection, and that during all that interval the motorman was looking out under the eaves of his car as if trying to see the smoke, and was not paying attention to anything ahead. The witness sought to warn the motorman by waving and whistling to him, but the motorman continued to look away until almost at the intersection, when he saw the chief and pressed down his brakes hard and slid across the street about 75 or 80 feet, stopping on the south side. The motorman denied that he was looking out under the eaves of his car, but the testimony of Freeman, taken together with the motorman's ignorance of all that was going on in front of him, was evidently sufficient to convince the trial court that the motorman was negligent, and that such negligence was the proximate cause of the injury to plaintiff. We cannot say that there is not sufficient evidence to support such finding.

[4] The facts thus found by the court are sufficient to show not only that the motorman carelessly permitted the street car to obstruct the progress of the chief's automobile, which constituted a violation of the ordinance and negligence per se, but also that there was ample showing of negligence without resort to the ordinance. Appellant makes the point that the court would not have found negligence if the ordinance had not been introduced. As we have decided that the ordinance was properly in evidence, and that its violation could be relied upon by respondent as negligence per se, it is immaterial whether or not there was a cause of action without the ordinance. However, the specific facts found were independent of the violation of the ordinance, and would in themselves sustain the finding of negligence.

We are not called upon at this time to decide whether or not the chief of the fire department was himself negligent in exceeding the speed limit set by the city ordinance.

[5] It needs no citation of authority for the point that one who is injured by the concurring negligence of two persons can sue either or both, and it is no defense that the particular person sued was not himself the sole tort-feasor.

Appellant also insists that the lower court should have found the plaintiff guilty of contributory negligence. We have examined the evidence upon this point, and cannot say that the finding that the plaintiff was in the exercise of due care is not sustained.

Judgment affirmed.

We concur: SHAW, J.; SLOSS, J.

176 Cal. 289

MARTIN v. SUPERIOR COURT OF CALIFORNIA IN AND FOR ALAMEDA COUNTY et al. (S. F. 8213.)

(Supreme Court of California. Oct. 11, 1917.)

1. Common Law 🔑12 — Adoption — Construction of Statute.

Pol. Code, § 4468, making the common law of England, so far as not repugnant to nor inconsistent with the state Constitution and laws, the rule of decision in the courts of California, does not refer solely to the lex non scripta, the common law unmodified by statute, but the term "common law" contemplated the whole body of jurisprudence as it stood, influenced by statute at the time when the Code section was adopted, and also embraced equity.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Common Law.]

2. Costs 🔑128 — Proceeding in Forma Pauperis — Inherent Power of Common-Law Courts.

The power of the English common-law courts to remit fees on petition in forma pauperis did not originate in any statute, but was exercised as one of the inherent powers of the courts themselves, independently of statute.

3. Costs 🔑129 — Prosecution in Forma Pauperis—Construction of Statute.

Code Civ. Proc. § 91, providing for the right of a suitor in a justice court to prosecute an action in forma pauperis, does not forbid a poor suitor from prosecuting an action in a court of record.

4. Costs 🔑129 — Prosecution in Forma Pauperis — Power of Superior Court — Statutes.

The power of superior courts to admit suitors to commence, or, having commenced, to prosecute, actions in forma pauperis in all proper cases is not curtailed by Pol. Code, § 4295, and other statutes dealing with the payment and prepayment of fees, as such provisions are general and relate to the collection and disposition of the fees, payment or prepayment of which is prescribed by law, and apply to cases where the court has not remitted the payment of fees on behalf of a poor suitor.

5. Costs 🔑132(4)—Prosecution in Forma Pauperis—Petition.

A petition by plaintiff in an action in the superior court to be allowed to prosecute in forma pauperis, supported by affidavit that except for his chose in action plaintiff was not possessed of more than $25, and that no one except himself was interested in the successful prosecution of the action, was sufficient, as against the judge's return declaring that he had information and belief to the effect that the plaintiff's attorney had a contingent fee in the action, on which ground he refused the petition.

6. Jury 🔑31(10)—Prosecution in Forma Pauperis—Right to Jury Trial.

In such case, the denial of the petition merely depriving plaintiff of his right to a trial by jury and leaving him to a trial of his cause without a jury was a denial of remedy, as a party entitled to prosecute in forma pauperis is entitled to a trial by jury.

7. Costs 🔑132(4)—Prosecution in Forma Pauperis—Sufficiency of Petition.

Moving papers before the superior court, entitled "Notice of Motion for Leave to Sue in Forma Pauperis," were not misleading by reason of the misnomer, though it was in fact a motion for leave to further prosecute in forma pauperis.

8. Costs 🔑132(4)—Prosecution in Forma Pauperis—Moving Papers.

The moving papers were not imperfect because not defining what was meant by the request "for permission to prosecute the above-entitled action in forma pauperis," though the term "forma pauperis" is not used in the statutes.

9. Costs 🔑132(4)—Prosecution in Forma Pauperis—Sufficiency of Moving Papers.

The moving papers were not deficient in failing to specify the remission of just what fees was sought by plaintiff, where it was manifest that he sought the remission of all fees exacted by law.

10. Costs 🔑131 — Prosecution in Forma Pauperis—Right.

A party plaintiff, who had paid the original filing fees for the commencement of an action did not thereby bar himself of the right to make future application for a remission of subsequent fees.

11. Costs 🔑132(6)—Prosecution in Forma Pauperis—Affidavit of Merits.

To a petition by a plaintiff for leave to prosecute in forma pauperis, an affidavit of merits, declaring that plaintiff had stated the facts of his said suit to his attorney and was advised that he had a good, sufficient, and just cause of action against defendant, was sufficient, in view of the complaint showing a meritorious cause of action and of what might be shown by an amended affidavit.

In Bank. Application by Andrew Martin for writ of mandate directed against the Superior Court of the State of California in and for the County of Alameda, Hon. T. W. Harris, Judge thereof, heard after order in District Court of Appeals, First District, refusing the mandate. Mandate issued.

Elwin B. Carson, of Oakland, and C. A. Linn, of San Francisco, for petitioner. D. C. Dutton, of Oakland, for respondents. Alden Ames, of San Francisco, for Legal Aid Society, as amicus curiæ.

HENSHAW, J. Plaintiff commenced this action in the superior court of the county of Alameda against Ergo A. Majors, to recover damages for the death of plaintiff's minor daughter, alleged to have been occasioned by the wrongful acts of Ergo A. Majors. After the commencement of this action this petitioner, who is a day-laborer, married and the father of ten minor children, all of whom are living and dependent upon him for support, sought leave of the court to be allowed to prosecute his action in forma pauperis. His application was supported by an affidavit to the effect that, saving for his chose in action, he was not possessed of more than $25, and that no one saving himself was interested in the successful prosecution of the action. The superior court denied his application. He sought by mandate from the Court of Appeal to secure an order directed to the superior court of Alameda county, compelling the latter court to grant his application. The court of appeal declined to issue the mandate, assigning no reasons for its order refusing to issue the writ. It was in effect a dismissal. Application then being made by petitioner to this court, an alternative writ of mandate was issued.

The fundamental question thus presented is of the right of the petitioner to proceed with the prosecution of his action in the superior court in forma pauperis, and therefore without the payment in advance of the legal fees. Certain minor subsidiary questions are raised by respondents, going to the asserted insufficiency of the papers filed in support of the application made to the superior court, but the principal answer of respondents is based upon our laws and their construction of those laws. Thus it is pointed out that by section 631 of the Code of Civil Procedure:

"Trial by jury may be waived by the several parties to an issue of fact in actions arising on contract or for the recovery of specific real or personal property. * * * 5. By failing, at the beginning of each day's session, to deposit with the clerk the jury fees and, if there be any, the mileage for such day."

Further, that the statutes of 1871–72 (Stat. 1871–72, p. 188) declare that in civil cases the party in whose favor verdict is rendered, before the same shall be entered, shall pay the jury fees, and that if in any trial in a civil case the jury be for any cause discharged without finding a verdict, the fees of the jury shall be paid by the party who demanded the jury. Still further, that section 4295 of the Political Code forbids state, county, and township officers from performing any service for which fees may be required (saving in proceedings on habeas corpus) without prepayment of such fees, excepting from the operation of this law only the state and any county, city, city and county, public officer, board or body acting in his or its official capacity, and that only upon the payment by any person of the fees required by law is it made the duty of the officer to perform the required services. And, finally, we are referred to a rule of the superior court of the county of Alameda to the following effect:

"In the trial of a civil action by a jury, each party is required daily, during the trial, at or before the case is called for trial each day, to deposit with the clerk the amount of money necessary to pay the jury fees, including mileage for such day and one-half of the reporter's fees. Out of the money so deposited the clerk shall pay the reporter's fees. The jury fees shall be paid out of the moneys deposited by the party who is required by the statutes of this state to pay the same. All moneys not required to be paid out pursuant to this rule shall be returned by the clerk to the party depositing the same."

We have thus been at pains to set forth all of the written law which respondents present, since it is by virtue of these laws that they insist that the order of the superior court of Alameda county refusing to grant petitioner's application was well founded. Indeed, they go further and assert that by virtue of these laws the court had no power to grant the application. Herein their argument is that the right of one so to commence, and, having commenced, to prosecute, his action in forma pauperis is a right unknown to the common law; it exists only by virtue of statute, and goes no further than the statute permits; that in the English law it owed its origin solely to statute. Next (so runs respondents' argument) our adoption of the English common law as the basis of our jurisprudence was an adoption of lex non scripta, the immemorial usage and custom out of which grew the common-law system, and therefore, the English statutes, however ancient, form no part of the body of that law. Finally the argument is that under the English law the authority of the court to waive fees under a pauper's application rested wholly upon statute and formed no part of the inherent common-law power of those courts. From this the conclusion is advanced, as being unescapable and controlling in the matter, that as our statutes have not in terms, nor yet by necessary implication, vested our courts with power to waive fees upon such poor man's petition, it cannot be done.

[1] Little need be said as to the meaning of the language of our Political Code (section 4468), which makes the common law of England, so far as it is not repugnant to nor inconsistent with our Constitution and laws, the rule of decision in all the courts of this state. Learned, indeed exhaustive, discussions of the matter will be found in 8 Cyc. 366, and the note in 30 (1913 Ed.) Am. & Eng. Ann. Cas. 1222, 1252. But as the matter seems to be seriously pressed upon the attention of this court, under the statement that we have not distinctly defined the meaning of this section of the Political Code, and as it is further said that our decisions adverting to the matter (such as People v. Vasquez, 9 Cal. App. 548, 99 Pac. 982; Ex parte Karlson, 160 Cal. 382, 117 Pac. 447, Ann. Cas. 1912D, 1334; Peters v. Peters, 156 Cal. 34, 103 Pac. 219, 23 L. R. A. [N. S.] 699; City of Pasadena v. Superior Court, 157 Cal. 794, 109 Pac. 620, 21 Ann. Cas. 1355; Estate of Sutro, 155 Cal. 733, 102 Pac. 920; McDaniel v. Cummings, 83 Cal. 518, 23 Pac. 795, 8 L. R. A. 575; Estate of Fair, 132 Cal. 534, 60 Pac. 442, 64 Pac. 1000, 84 Am. St. Rep. 70) point to the conclusion that the language of the section of the Political Code above mentioned is to be construed as referring solely to the lex non scripta, the common law unmodified by statute, it is here proper to say that such a view of our decisions is completely mistaken. It would be strange, indeed, if our Legislature should have designed to limit the applicability of the Code section to the ancient and frequently most barbarous rules and customs of the common law, and in so doing refuse to take into account the mitigation of their harshness and the broadening of the rules themselves which followed the successive enactments of the English statutes. To the contrary, we hold that our Legislature in its use of the phrase "common law" had in contemplation the whole body of that jurisprudence as it stood, influenced by statute, at the time when the Code section was adopted. And more than that, that it embraced also in

its contemplation the great handmaiden and coadjutor of the common law, equity. And in exemplification of this we need but refer to the language of this court in Katz v. Walkinshaw, 141 Cal. 116, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35. Manifestly no harm can be done by this construction of the language of the Code, since that language itself limits the applicability of the common-law system to such of its rules and principles as are not repugnant to nor inconsistent with the spirit of our own law. And if we needed further support than that given by pure reason on so plain a proposition, it can be found in the similar construction which the Supreme Court of the United States has put upon the language of one of its own statutes, "saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it." The Supreme Court of the United States construes this language not to be limited to remedies as they existed at common law, but to embrace such substituted remedies as might be provided by statute, and still further to such relief as equity might afford, equity being for this purpose considered as a branch of the common law. North Pacific Steamship Co. v. Industrial Accident Com., 163 Pac. 199, Knapp, Stout & Co. v. McCaffrey, 177 U. S. 638, 20 Sup. Ct. 824, 44 L. Ed. 921.

[2] But quite independently of this determination, there is still the controlling fact that the power of the English common-law courts to remit fees on petition in forma pauperis did not have its origin in any statute, but was in fact exercised as one of the inherent powers of the courts themselves, quite independently of statute. And this one would naturally expect to find since, imperfect as was the ancient common-law system, harsh as it was in many of its methods and measures, it would strike one with surprise to be credibly informed that the common-law courts of England shut their doors upon all poor suitors who could not pay fees, until Parliament came to their relief. Even greater would be the reproach to the system of jurisprudence of the state of California if it could be truly declared that in this twentieth century, by its Codes and statutes, it had said the same thing, and yet this is precisely the position which respondents to this application take.

Respondents do cite certain authorities, such as Hoey v. McCarthy, 124 Ind. 466, 24 N. E. 1038, Campbell v. Chicago & Northwestern Ry. Co., 23 Wis. 490, 11 Cyc. 200, where it is declared that this power rests upon statute, and therefore cannot be exercised saving under the statute. An examination satisfies us that this error in the declaration of these courts and others has arisen from a misconstruction of the language of Blackstone's Commentaries. He declares as follows:

> "And paupers, that is, such as will swear themselves not worth £5, are, by St. 11 Hen. VII, c. 12, to have original writs and subpœnas gratis, and counsel and attorney assigned them without fee; and are excused from paying costs, when plaintiffs, by St. 23 Hen. VIII, c. 15, but shall suffer other punishment at the discretion of the judges. And it was formerly usual to give such paupers, if nonsuited, their election either to be whipped or pay the costs: though that practice is now disused."

It will be noted that Blackstone does not found the existence of the power upon statute. He is merely discussing the exercise of the power under existing statutes, which is of course a wholly different matter. But a very brief review will establish that the power was an existent power, recognized and exercised before the enactment of these or other acts of Parliament. Thus says Marshall in his Law of Costs in all Suits and Proceedings in Courts of Common Law (page 347):

> "With a view to enable such poor persons as have not ability to pay the expenses incidental to the prosecution of an action to enforce their rights, they may, upon such inability being shown, be admitted to sue in forma pauperis. When so admitted the plaintiff is exempt from the payment of court fees, and he is entitled to the service of counsel, and of an attorney, who render their services without reward. This privilege, so far as regards the exemption from court fees, was conceded at common law; for where the plaintiff swore that he was unable to pay for entering his pleadings, the officer was bound to enter them gratis."

In the case of Mounford v. Pate (82 Eng. Rep., Full Reprint, p. 1093; s. c., 1 Keble's Rep., p. 913), the motion was made on behalf of a plaintiff applying in forma pauperis to be discharged of costs "there being none at common law and paupers thereby discharged." Discussion followed, and "the court agreed with Twisden that the continual practice being to assess costs, the plaintiff (in forma pauperis who has suffered nonsuit) must pay them or submit to be whipt at election." In Brunt v. Wardle, 133 English Reports, Full Reprint, 1254, the principal question before the justices was whether a plaintiff upon the institution of his action must make application to sue in forma pauperis, or whether such order could be made after the commencement of the action to enable a plaintiff to prosecute it in forma pauperis. Tindal, C. J., and his associate justices held that it was within the power of the court to make the order after the commencement of the action, the Chief Justice saying:

> "After all, is St. 11 H. 7, c. 12, anything more than confirmatory of the common law? In the learned report of the Serjeants' Case by my Brother Manning, p. 41, note (d), a case is referred to that occurred in the 15 Ed. 4, 20 years before the passing of that act, from which it appears that at common law if a party would swear that he could not pay for entering his pleadings, the officer was bound to enter them gratis; and that in this court there was a presignator pur les poers. It seems to me that the proper conclusion for us to come to is that this plaintiff was entitled to be admitted

to sue in forma pauperis, pendente lite, and that the rule must be discharged,"

—and Maule, J., added:

> "I am also of opinion that this rule should be discharged. The objection to the order of my Brother Coltman is that the court has no power to admit a party to sue in forma pauperis, pendente lite; and the objection is sought to be supported by the recent decisions in the Court of Exchequer. Those decisions, however, are open to the observations which have been already made—that they were cases relating to costs, and that the attention of the court does not appear to have been called to the undoubted common-law authority of the court to admit parties to sue in forma pauperis. The authority cited by my lord from the Serjeants' Case shows that so early as St. 15 Ed. 4, it was the established practice to admit a party to sue in forma pauperis, and various instances are to be found in the books of parties being so admitted after the commencement of the suit."

This case, decided so recently as 1841, may well be regarded as conclusive in its construction of the common law of England and controlling upon our section of the Code making that law the basis of our jurisprudence, and this quite apart from any consideration of the modifications of the common law of England worked by acts of Parliament.

[3] It is pointed out that our Code of Civil Procedure (section 91) makes express provision for the right of a suitor in a justice court to prosecute such an action in forma pauperis, while no such express provision of our statute is made applicable to our courts of record. Thus section 91 of the Code of Civil Procedure declares that the payment of fees in advance—

> "shall not be exacted from parties who may prove to the satisfaction of the presiding justice that they have a good cause of action and that they are not of sufficient pecuniary ability to pay the legal fees."

Again we say that it would be an unmerited reproach cast upon the legislative branch of our state government to hold that it meant to permit a suitor to prosecute his action in forma pauperis in a justice court, where the amount involved could not be large nor the consequences of the litigation great, and yet designed to forbid such a poor suitor from prosecuting his action according to the laws of the land in a court of record, where rights might and could be all-important and his recovery of the utmost consequences. No such reproach justly attaches. It is quite plain that the Legislature, recognizing the power of courts of record to admit suitors in forma pauperis, designed to save all question in the case of inferior courts not exercising common-law jurisdiction, and that it is for this reason that the power which exists in our courts of general jurisdiction without statute is expressly conferred upon the inferior courts of limited jurisdiction.

[4] With the power in our superior courts thus declared, to admit suitors to commence, or, having commenced, to prosecute, their actions in forma pauperis in all proper cases, the next consideration is whether or not the Legislature has by its enactments designed to curtail that power. Quite aside from the question as to the power of the Legislature to do this thing, it is obvious that only the plainest declaration of legislative intent would be construed as even an effort to do this thing. We find no such expressed intent. All of the statutes dealing with the payment and prepayment of fees, such as section 4295 of the Political Code, are general in their nature, and have to do with the orderly collection and disposition of the fees, payment or prepayment of which is prescribed by law. Neither individually nor collectively are they even susceptible of the construction that the design of the Legislature was to deny to the courts the exercise of their most just and most necessary inherent power. They have applicability to all cases where the court has not, in the exercise of that power, remitted the payment of the fees on behalf of a poor suitor, and in every instance the court's order to this effect is sufficient warrant to every officer charged with the collection of fees to omit the performance of that duty in the specified case.

[5, 6] Our next consideration is the narrow one of objections urged by respondents to the sufficiency of the petitioner's moving papers addressed to the superior court. Certain of these appear in the verified return of the judge of that court. The plaintiff's verified petition before the superior court declared that no person other than himself had any interest in the successful prosecution of the action. The judge's return declares that he had information and belief to the effect that the attorneys for the plaintiff had a contingent interest, being a contingent fee, in the successful outcome of the litigation, and that for this added reason the plaintiff's application was refused. But if it be conceded that issue was here joined upon the direct averment of plaintiff's petition, something more is required as to the nature, source, origin, and soundness of the court's belief, before its order can be upheld on this ground. This showing is not made. Yet in view of the fact that the attorneys for the plaintiff were before the superior court, it could most easily have been made. Next it is said that plaintiff was not remediless, since the order of the court refusing to grant his application deprived him merely of his right to a trial by jury, but left open to him the trial of his cause without a jury. Little need be said to show the inadequacy of such a response. Where the suitor was allowed to prosecute in forma pauperis, all the rights which were open to him upon the payment of fees were open to him by virtue of the order, and every officer was required to perform his duty without the payment of fees as fully as though the legal fees had been paid. Precisely as anciently such a plaintiff in forma pauperis was entitled to prosecute his action "after the course of the common law," so in

this state he is equally entitled to prosecute his action under our Constitution and laws, and the right of trial by jury is one of the most important of these. Therefore we will not say that a suitor who can pay court fees shall have his trial by jury, and the suitor who cannot pay court fees must be content to go to trial without a jury. The law does not say this, and we will not read such a declaration into the law.

[7-11] Respondents' final contention is that petitioner's moving papers before the superior court were defective: (1) They were entitled "Notice of Motion for Leave to Sue in Forma Pauperis," whereas in fact it was not a motion for leave to sue, but a motion for leave further to prosecute the action in forma pauperis. Suffice it here to say that the misnomer could have misled, and in fact did mislead, nobody. (2) The moving papers were imperfect in not defining what was meant by the request "for permission to prosecute the above-entitled action in forma pauperis," since the phrase "in forma pauperis" is not used in the statutes of this state. But we cannot yield acquiescence to the suggestion that the learned judge or the learned attorneys for the defendant did not fully understand the meaning of this Latin phrase so prequently employed in the common law. (3) The moving papers are said to be deficient in failing to specify the remission of just what fees was sought by plaintiff. It seems quite manifest that he sought, as he had the right to seek, the remission of all fees exacted by law. (4) It is said that there was a failure to show that the application was seasonably made. What we are to understand by this is not made plain. We have shown, and indeed quoted from the decisions showing, that the right to prosecute in forma pauperis was fully recognized with the right to commence an action in forma pauperis. The right here sought is the right to prosecute after the plaintiff had paid the original filing fees for the commencement of the action. Certainly by having paid this first fee he did not debar himself of the right to make future application for a remission of subsequent fees. (5) The application was accompanied by an affidavit of merits made by plaintiff, and declaring:

> "That he has stated the facts of his said suit to said C. A. Linn, Esq., attorney at law, and is advised that he has a good, sufficient, and just cause of action against the defendant."

Such cases as Nickerson v. California Raisin Co., 61 Cal. 268, People v. Larue, 66 Cal. 235, 5 Pac. 157, and Jensen v. Dorr, 9 Cal. App. 18, 98 Pac. 45, are relied on in support of the deficiency of this affidavit of merits. The cases are in point, but to support such an application as this, an affidavit of merits going to the justice and sufficiency of the cause of action is not called for by our law, nor was it called for by the common law. At common law the unfortunate suitor whose cause of action proved to be nonmeritorious stood liable to be "whipt." Further, we are advised that the attention of the superior court was not in any way directed to this asserted insufficiency in the affidavit of merits. An amended affidavit could and would doubtless have been filed. Moreover, the case was at issue on matters of fact, and there was a sufficient showing in the complaint at least of a meritorious cause of action. Therefore, while the court may call for a sufficient affidavit of merits, or indeed for any other form of satisfactory evidence before issuing its order allowing an action to be commenced in forma pauperis, the need of such supporting affidavit becomes very much less when, as in this case, the action has been brought and is at issue on its facts. Nor would such a defective affidavit of merits justify the court in refusing to the poor suitor the relief sought, if in all other respects he was entitled to it, without at least giving him an opportunity to present an affidavit measuring up to the requirements of the law.

For these reasons we hold that the court erred in refusing to grant the order prayed for. Let mandate issue accordingly.

We concur: ANGELLOTTI, C. J.; MELVIN, J.; LAWLOR, J.; LORIGAN, J.

SHAW, J. (concurring). I concur in the judgment and in all of the opinion of Mr. Justice HENSHAW, except the statements to the effect that the "common law of England," referred to in section 4468 of the Political Code as the rule of decision in this state where not repugnant to or inconsistent with our written law, includes that law "as it stood influenced by statute, at the time when the Code section was adopted"; that is, on April 13, 1850. (Stat. 1850, p. 219.) This proposition, as the opinion shows, is not necessary to the decision, for the right to sue in forma pauperis existed at common law in England before any statutes regulatory thereof were enacted. In 1850 there were in England, I have no doubt, many general acts of Parliament in force which no one would claim were adopted as parts of our law by the act of our Legislature. The statement of what is included by that section needs more qualification and elaboration than is given to it in the main opinion. I think it inadvisable to attempt to state any rule on the subject, except in cases where it is necessarily involved.

I concur: SLOSS, J.

(176 Cal. 255)

TENNYSON v. BEGGS (DREISCHMEYER, Intervener). (S. F. 7558.)

(Supreme Court of California. Oct. 9, 1917. Rehearing Denied Nov. 8, 1917.)

1. HUSBAND AND WIFE 🔑268(2)—COMMUNITY PROPERTY — MINGLING OF PROPERTY — DEBTS OF HUSBAND.

Where a husband owned a prune orchard, which was community property, and the wife owned an adjoining orchard which was her separate property, and the husband managed and controlled the entire property, sold the prunes, and took the cash proceeds and a note for the balance payable to himself, there being no fraud on creditors, the share of the wife did not become community property subject to payment of his debts.

2. HUSBAND AND WIFE 🔑270(8)—MINGLING OF PERSONALTY—PAYMENTS—PRESUMPTIONS.

Where the proceeds of a wife's property become mingled with the money of the husband, and payments are made by the husband, it will be presumed that he intended to pay out of his share, and the share of the wife will be included in the remainder.

3. BANKRUPTCY 🔑295—MINGLED FUNDS—JURISDICTION OF STATE COURTS.

Where a trustee in bankruptcy brings action in the superior court against a debtor of the bankrupt, and bankrupt's wife intervenes, claiming ownership of the fund sued for, and it appears that a portion of the fund belonged to her, the superior court had jurisdiction to apportion the fund; its jurisdiction being at least equal to and concurrent with the United States, as, in contemplation of law, the share never belonged to the bankrupt.

Department 1. Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Action by D. D. Tennyson, trustee in bankruptcy for Frank L. Dreischmeyer, against Will M. Beggs; Carrie N. Dreischmeyer, intervener. Judgment rendered, and defendant and intervener both appeal. Affirmed.

Louis Oneal, of San Jose, for plaintiff. R. C. McComish, of San Jose, for defendant. S. G. Tompkins, of San Jose, for intervener.

SHAW, J. The plaintiff sued the defendant Beggs to recover the sum of $2,750, alleged to be in his possession and control, belonging to the said Frank L. Dreischmeyer, who had been theretofore adjudged a bankrupt by the United States district court. Carrie N. Dreischmeyer, the wife of Frank, filed a complaint in intervention, alleging that the money in the hands of Beggs belonged to her and was her separate property. Beggs appeared and answered both the complaint and the complaint in intervention. The court made findings to the effect that of the sum of $2,750 which it found was held by Beggs, $1,480.75 belonged to the intervener, less $148.07, which it found was due from the intervener to said Beggs, and that $1,269.25 thereof belonged to said Frank L. Dreischmeyer and should be paid to the plaintiff as trustee in bankruptcy, less the sum of $359.93 due from said bankrupt to Beggs for services previously performed. Judgment was given accordingly. From this judgment Beggs and the intervener have each appealed.

Beggs has made no appearance upon this appeal and has filed no brief. The controversy is between the intervener and the plaintiff. The facts are as follows:

Carrie N. Dreischmeyer was the owner of 5½ acres of land as her separate estate. Her husband owned 15 acres adjoining, which was community property. The entire tract had been planted in prune trees, which were in full bearing. The husband managed and controlled the entire property. He sold the crop of prunes on both tracts for the year 1912 to one Pavlicevich for the sum of $5,250, of which he paid $2,500 in cash, giving his note for the remaining $2,750. It is this note which gave rise to the controversy. On June 9, 1913, the husband assigned this note to his wife without consideration, except such as may be inferred from the fact that the prunes from her land were a part of the consideration of the note. The next day Pavlicevich, at the husband's request, took up the latter note and in consideration thereof executed a new one to the wife for the same amount. Soon afterwards the wife indorsed and delivered this note for collection to Beggs by the following indorsement:

> "Pay to W. M. Beggs, or order, without recourse upon or any responsibility to me except for what is my separate property. C. N. Dreischmeyer."

Beggs collected the entire sum due upon the note and still retains the same. Upon the trial evidence was given to the effect that the prune crop upon the 5½ acres belonging to the wife was worth as much as $1,500 of the $5,250 for which the entire crop was sold, and also to the effect that the crop upon the 5½ acres was larger proportionally than that upon the 14 acres belonging to the husband. Upon this the court below concluded that the wife was entitled to resort to the balance of the fund received by her husband for the entire crop, and to have a trust therein declared and enforced in her favor to the extent of her share in the entire prune crop at the price paid by Pavlicevich, to wit, $1,480.75. Thereupon the court awarded to the wife the said sum as her portion of the proceeds of the crop, and the remainder thereof to the plaintiff as trustee in bankruptcy, as the proportion of her husband therein.

[1, 2] The plaintiff contends that by the conduct of the husband and wife, whereby he took control of the entire property and sold it for a lump sum, taking the cash proceeds himself, and a note payable to himself for the remainder, he so mingled the separate property of the wife with the community property that it became community property, subject to payment of his debts, and that it therefore passed to the trustee in bankruptcy. We do not think this contention is well founded. There was no fraud or deceit prac-

ticed upon the creditors, so far as it appears, and no reason in equity and justice why the wife should not now have her share of the proceeds of her own property out of the fund in the hands of Beggs, produced by the sale thereof. Under the well-settled rules of equity concerning such matters, the payments made by the husband out of the common fund will be attributed to his share thereof, or it will be presumed that he intended them to come out of his share, and the share of the wife, as beneficiary, will be held to be included in the amount remaining. People v. California Safe Deposit & Trust Co. (S. F. No. 8088) 167 Pac. 181, 388, decided August 27, 1917; Elizalde v. Elizalde, 137 Cal. 634, 66 Pac. 369, 70 Pac. 861. This doctrine governs the case, and the action of the court below is justified by it.

There is no merit in the claim that the court did not properly apportion the fund. The facts already stated show that the husband's creditors will receive their full share of the proceeds of the property.

[3] It is further urged that the superior court has no jurisdiction to determine the matter, but that the entire fund should be paid over to the trustee in bankruptcy, for distribution and apportionment by the District Court of the United States, after further investigation by that court. We see no ground for his contention. The trustee himself presented his claims to the state court and asked its decision thereon. He alleged that the property belonged to the bankrupt, and thereby presented that matter to that court for determination. The intervener took issue thereon, and alleged that she was the owner of the fund. The evidence shows that she is the owner of a part thereof. In contemplation of law, therefore, the share adjudged to her never belonged to the husband, and neither the bankrupt court, nor the trustee in bankruptcy, has any jurisdiction over it. The state court is as competent to determine the question of title to the fund sued for as is the District Court of the United States, and its jurisdiction to do the same is at least equal to and concurrent with that of the District Court. We find no error in the judgment appealed from.

The judgment is affirmed, with judgment against the plaintiff for intervener's costs of appeal.

We concur: SLOSS, J.; LAWLOR, J.

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34 Cal. App. 512

BLANC v. DE LATOUR. (Civ. 2120.)

(District Court of Appeal, First District, California. Aug. 31, 1917.)

APPEAL AND ERROR ⚷1011(1) — REVIEW — FINDINGS.

Findings on conflicting evidence will not be disturbed on appeal.

Appeal from Superior Court, City and County of San Francisco; George E. Crothers, Judge.

Action by J. E. Blanc against George De Latour. Judgment for plaintiff, and defendant appeals. Affirmed.

Sterling Carr, of San Francisco, for appellant. P. A. Bergerot and A. P. Dessouslavy, both of San Francisco, for respondent.

PER CURIAM. This action was brought to recover the amount of a note for $586.87, dated June 27, 1914, and payable 90 days thereafter, executed by defendant to plaintiff. Its execution, delivery, and nonpayment are not denied, but defendant in his answer alleges that the note was given in part payment of the purchase price of a stock of goods in New York City, in which transaction the plaintiff falsely represented that he had purchased said stock of goods for the benefit of the defendant, paying therefor a certain sum, when in fact he had paid for it some $1,500 less than the sum represented. It is also alleged in the defendant's pleading that the note was without consideration. Plaintiff, on the other hand, in his answer to the cross-complaint, denies that the note was without consideration, or that any fraud was practiced upon the defendant in the transaction concerning the purchase and sale of said stock of goods. He also avers that the note formed no part of that transaction, but was given as evidence of an indebtedness between the parties which sprang from an entirely different business dealing.

As to the issues in the case thus framed by the pleadings it is sufficient to say that while there is evidence in the record to support defendant's view of the case, on the other hand there is also evidence to sustain plaintiff's contention. This latter the trial court adopted. Being based upon conflicting evidence, this appellate court, under the rule well settled in this state, will not interfere with such court's finding and its appropriate judgment.

The judgment is affirmed.

34 Cal. App. 530

HANCOCK v. HUNT, County Treasurer, et al. (Civ. 2335.)

(District Court of Appeal, Second District, California. Sept. 4, 1917.)

INTEREST ⟹50—EFFECT AS STOPPING INTEREST—TENDER OF INHERITANCE TAX—STATUTES.

Under Civ. Code, §§ 1498, 1499, providing that when a debtor is entitled to the performance of a condition precedent to, or concurrent with, performance on his part, he may make his offer dependent upon the due performance of such condition, and that a debtor has a right to require from his creditor a written receipt for any property tendered in the performance of his obligation, and under section 1504, providing that an offer of payment duly made, though title to the thing offered be not transferred, stops the running of interest on the obligation, where the executor and devisee of testatrix, the superior court having fixed the amount of the inheritance tax, pending appeal taken by the state, tendered the county treasurer in lawful money of the United States the amount of the tax as fixed by the superior court, but refused to deliver the money because the county treasurer tendered a receipt in terms "subject to appeal now pending from above order of said superior court to the Supreme Court of the state of California," the treasurer's absolute and unwarranted refusal of the money tendered stopped the running of interest on the amount fixed by the order.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Application for writ of mandate by G. Allan Hancock, individually and as executor of the estate of Hancock Ross, deceased, against John N. Hunt, Treasurer of Los Angeles County, and John S. Chambers, Controller of the State of California. From an order denying the writ, applicant appeals. Order reversed.

Chandler P. Ward and Stephens & Stephens, all of Los Angeles, for appellant. Robert A. Waring, of Sacramento, and John W. Carrigan and Edwin H. Pennock, both of Los Angeles (U. S. Webb, Atty. Gen., of counsel), for respondents.

SHAW, J. The facts upon which the superior court made its order denying petitioner's application for the writ of mandate, and from which order he appeals, are as follows: Ida Hancock Ross died on March 15, 1913, leaving an estate of inheritance to G. Allan Hancock, petitioner herein. For the purpose of fixing the amount of tax which should be paid upon the estate so inherited, a proceeding was instituted in the superior court to determine the value thereof, in which contest the court, on February 27, 1914, made an order fixing the amount of such tax at $159,354.90, which order, on an appeal taken by the state prior to September, 1914, was affirmed. 171 Cal. 64, 151 Pac. 1138. Under the provisions of the Inheritance Tax Act, the 18 months within which such tax might be paid without interest or penalty expired on September 15, 1914. On September 8, 1914, after the perfecting of the appeal, petitioner served upon the proper officers and agents of the state an offer in writing—

> "to pay to the state of California the sum of $159,354.90 as payment in full of the inheritance tax due to the state of California upon the interest inherited by the undersigned, G. Allan Hancock, in the estate of said deceased and under the last will and testament of said deceased, said sum of $159,354.90 having been fixed as the tax due to the state of California upon the said inheritance by an order of the superior court of the county of Los Angeles, state of California, duly made in the above-entitled matter on February 27, 1914. You will further take notice that in the city of Los Angeles on the 14th day of September, 1914, the undersigned will formally offer and tender said sum of $159,354.90 to John N. Hunt, the treasurer of Los Angeles county, as payment in full of the inheritance tax due to the state of California on said inheritance of the undersigned, G. Allan Hancock, from the estate of, and under the last will and testament of, Ida Hancock Ross, deceased; and will demand a valid receipt in full for said tax."

Pursuant to this notice and on the day specified therein, petitioner did tender to the county treasurer, in lawful money of the United States, said sum of $159,354.90 as payment of the inheritance tax due to the state of California on the property inherited by him from the estate of Ida Hancock Ross under the terms of her will, and demanded "a valid receipt in full for said tax" so ascertained and fixed by order of the court, in response to which demand the county treasurer tendered to him a receipt in the usual form and containing the usual data, except that across the face of the receipt was written the following:

> "Subject to appeal now pending from above order of said superior court to the Supreme Court of the state of California, made by John S. Chambers as state controller," etc.

Petitioner objected to the form of the receipt and refused to deliver the money subject to the condition so imposed, and which respondent Hunt refused to accept otherwise than subject thereto. On October 22, 1915, upon the coming down of the remittitur pursuant to the order of the Supreme Court on affirmance of the appeal so had by the state, petitioner paid the principal sum of the tax as fixed by the court, upon which he received a receipt in the usual form, except that it contained conditions to the effect that its acceptance should in no way prejudice the right of the state to collect interest and penalties imposed by the Inheritance Tax Act for nonpayment of said tax within 18 months from the date of the death of said Ida Hancock Ross, or prejudice the right of petitioner to maintain that said payment constitutes a full satisfaction in payment of said tax, nor prejudice him in attempting to obtain a receipt in full for the tax.

It thus appears that the real controversy is whether or not the state is entitled to interest upon the principal sum so fixed by the court as due upon the inheritance of petitioner; his contention being that the tender so made by him, under the authority of Ferrea v. Tubbs, 125 Cal. 687, 58 Pac. 308, released him from all liability to pay interest thereon, notwithstanding the fact that the state refused to receive the same save and except upon the condition named. In our opinion, this contention should be sustained. The obligation of petitioner had been ascertained and fixed by an order of court. In performance of this obligation he tendered the full amount thereof, and under the provisions of sections 1498 and 1499 of the Civil Code he was entitled, as a condition of delivery, to a valid receipt showing such payment. "If the debtor tender a sufficient amount of money, he is entitled to a receipt in full, and may couple his tender with a demand for such receipt." Ferrea v. Tubbs, supra. The tender so made was free of conditions other than those which appellant was entitled to exact, viz. "a valid receipt" in full of the sum so tendered in payment of the judgment. This being true, the case is brought within the provisions of section 1504, Civil Code, which provides that:

> "An offer of payment * * * duly made, though the title to the thing offered be not transferred to the creditor, stops the running of interest on the obligation, and has the same effect upon all its incidents as a performance thereof."

In the Tubbs Case the plaintiff recovered a judgment from which he appealed, pending which the defendant tendered the full amount thereof "as payment in full." Plaintiff refused to accept it, and upon affirmance of the judgment insisted upon payment of interest to the date of the filing of the remittitur. The court held that the tender, though not accepted, stopped the running of interest. The principle there announced finds approval in the subsequent cases of Wadleigh v. Phelps, 149 Cal. 627, 87 Pac. 93, and Stein v. Leeman, 161 Cal. 502, 119 Pac. 663. The facts in the Tubbs Case are identical with those here involved, except that here the state was appellant, to which as such litigant, however, the same rule is applicable. Concededly, since there would have been no subject of controversy left, an acceptance of the tender would have constituted ground for motion to dismiss the appeal; hence the provision that respondent insisted upon inserting in the receipt to the effect that the judgment debtor should waive the exercise of such right. We are directed to no rule of law, statutory or otherwise, under which a party appealing from a judgment in his favor may nullify the legal effect of a tender of payment duly made pending appeal, by a refusal to accept it unless the judgment debtor will agree to waive a right resulting from acceptance thereof. No authority existed for exacting the condition which the state sought to attach to its acceptance of payment. The tender was unconditional, save that the obligor, as he had the right to do, demanded the delivery of a valid receipt concurrent with delivery of the money. The judgment creditor refused to give the receipt to which appellant was entitled, or any receipt other than one nullifying the incidental effect of payment, thus by its own act preventing payment of the judgment. Such act was equivalent to an absolute and unwarranted refusal of the money tendered and, upon the authorities cited, stopped the running of interest on the amount fixed by the order. This sum has been paid, and it follows that petitioner is entitled to a writ of mandate as prayed for, requiring the respondents to execute and deliver to him a valid receipt in the usual form adopted in such cases, showing such payment.

The order of the court denying the writ is reversed.

We concur: CONREY, P. J.; JAMES, J.

34 Cal. App. 519

PEOPLE v. FRISBIE. (Cr. 400.)

(District Court of Appeal, Third District, California. Sept. 3, 1917.)

INTOXICATING LIQUORS ⚷236(11) — SALE—EVIDENCE—SUFFICIENCY.

Evidence *held* sufficient to support a finding that a transfer of liquor was a sale, and not a mere accommodation.

Appeal from Superior Court, Glenn County; W. M. Finch, Judge.

Cyrus Adelbert Frisbie was convicted of crime and appeals. Affirmed.

W. T. Belieu, of Willows, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

BURNETT, J. Defendant was convicted under an indictment charging that he did "willfully and unlawfully furnish, sell, distribute and give away to one Joe Street, a human being, alcoholic liquors, to wit, whisky" in the town of Willows, Glenn county; it being no-license territory.

The only point made by appellant is that the evidence fails to show any violation of the Wylie law (St. 1911, p. 599), in that it appears that:

> "There was no sale, but on the contrary the testimony will show that what was done by Frisbie was a mere act of accommodation on his part in delivering the liquor in question to the state's witness, Joe Street."

It must be admitted that defendant and Street so testified, but reading between the lines we are impressed with more than a mere suspicion that this contention involves a mere subterfuge, that it was a simulated defense, an afterthought and the product of a collusive understanding reached upon the suggestion of appellant. Such inference is fairly deducible from this portion of Street's testimony:

"Q. Were you at Mr. Goddard's place last night? A. Yes, sir. Q. Was Mr. Frisbie there?

A. Yes, sir. Q. Did Mr. Frisbie ask you in substance to say that he was your agent? A. Well, I will tell you. He asked me this question. He says, 'Do you remember, Joe, the time that you sent up by me to get that whisky for you, that two bottles of whisky?' and I stopped and studied a minute, and I said, 'I believe I do, Bert; I believe I do remember about sending up by you to get the two bottles of whisky,' and he said, 'Will you swear to that effect?' and I said, 'I will swear to it as it comes along as I am asked that question.' I says, 'If I am asked that question I will swear to it that I did send by you to get two bottles of whisky and only paid you for one at the time being. I give you one dollar and a half, and of course the other last bottle I had not paid him for.' * * * He said, 'That will make me an agent for you.' "

It may be said also that there are some inconsistencies and contradictions in the testimony of these witnesses that cast suspicion upon their explanation of the transaction, and we think the jury were not unwarranted in holding that there was an actual sale by appellant to Street of the two bottles of whisky. Aside from that, in stating what occurred at the time he received one of the bottles, Street testified:

"There was no words spoken. I laid the money down on the writing desk and there was a bottle standing on the end of the writing desk, and I laid down the money and put the bottle in my pocket, and he laid down the change and I put that in my pocket, and he said, 'You better have a drink before you go,' and he treated me to a couple of drinks, and treated my friend, and we walked out."

It thus appears that appellant furnished Street with liquor that was not contained in said bottle. That it was whisky and belonged to appellant also sufficiently appears. Indeed, the language as to treating would, of course, imply a gift from appellant to Street. It is also true that Street was not a guest. This evidence brought out on cross-examination is sufficient to satisfy the charge of the indictment, and hence the question of agency as to the liquor furnished in the bottle is not of controlling moment.

We think the conviction was just, and the judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

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34 Cal. App. 498

WALLACE et al. v. MacDONOUGH THEATER CO. et al. (Civ. 2147.)

(District Court of Appeal, First District, California. Aug. 30, 1917.)

1. NUISANCE 🔑75—INJUNCTION—SPECIAL DAMAGES TO PLAINTIFFS—STATUTE.

Under Civ. Code, § 3493, providing that a private person may maintain an action for a public nuisance especially injurious to himself, but not otherwise, a complaint by negro plaintiffs for injunction against the exhibition of a motion picture as a nuisance, which merely alleged that its exhibition would tend to cause general race hatred between the white and negro races, but did not state any facts showing that plaintiffs suffered any peculiar or special damages by reason of the exhibition, was demurrable, though it alleged that it was specially injurious to plaintiffs.

2. PLEADING 🔑8(20)—CONCLUSION OF LAW—INJUNCTION SUIT.

In an action to enjoin as a public nuisance the exhibition of a motion picture film, the allegation of the complaint that the exhibition was especially injurious to plaintiffs was a mere conclusion of law.

Appeal from Superior Court, Alameda County; T. W. Harris, E. J. Brown, Wm. H. Waste, Wm. S. Wells, Wm. H. Donahue, Judges sitting en banc.

Action by Father D. R. Wallace and others against the MacDonough Theater Company and others. From a judgment for defendants on demurrer to the complaint, plaintiffs appeal. Affirmed.

Lawrence Sledge and Glesner Fowler, both of Oakland, for appellants. Rose & Silverstein, of Oakland, for respondents.

KERRIGAN, J. By this action an injunction was sought against the defendants, restraining and enjoining them from exhibiting a moving picture or photoplay known as "The Clansman" or "The Birth of a Nation." It is the claim of the plaintiffs that such exhibition constitutes a nuisance; that it is indecent and offensive to the moral senses of plaintiffs, and especially injurious to them for the reason that the play holds them up to public ridicule and contumely. Defendants demurred thereto, and the superior court of Alameda county sitting en banc sustained such demurrer, entered judgment thereon, and this appeal is from such judgment.

By such demurrer it is first alleged that the complaint does not state a cause of action for the reason that it is based upon the theory that the pictures shown constitute a public nuisance, and that there is no allegation that the plaintiffs sustained any special or particular injury by reason of their production. As a further ground of demurrer defendants alleged that the trial court was without jurisdiction to hear the matter for the reason that the moving picture censor of the city of Oakland, the place in which the picture was exhibited, had determined the question adversely to plaintiffs' contention, and that its action in that behalf was binding upon the court.

[1] With reference to the first objection it appears that the complaint simply alleges that the exhibition of the picture would tend to cause general race hatred between the white and negro races, but nowhere does it state any facts which show that plaintiffs suffered any peculiar or special damage by reason of the exhibition or any different injury than would be suffered by other members of the negro race. The complaint is predicated upon the theory that the pictures constitute a public nuisance, and it is well established that private parties seeking to restrain or abate a public nuisance must

show some special injury to themselves aside from and independent of the general injury to the public, and in the absence of such showing private persons will be denied an injunction. Our Code in substance so provides. Civ. Code, § 3493.

[2] Nor does the mere allegation, as here, that it is especially injurious to the plaintiffs, change the rule; such recital being held to be a mere conclusion of law. Spring Valley Water Works v. Fifield, 136 Cal. 14, 68 Pac. 108.

It follows that the complaint herein does not state a cause of action against the defendants which justifies plaintiffs in invoking the relief sought. This being so, we deem it unnecessary to discuss the other grounds of demurrer.

Judgment affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

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34 Cal. App. 490

DRISCOLL et al. v. MYERS et al.
(Civ. 2131.)

(District Court of Appeal, First District, California. Aug. 28, 1917.)

1. LANDLORD AND TENANT ⚷291(13)—MODIFICATION ON LEASE—EVIDENCE.
Evidence *held* sufficient to support a finding that a written agreement to repay lessee a certain portion of the rent, as it was paid, on account of unsettled business conditions, was not a modification of the lease, but was a temporary agreement.

2. LANDLORD AND TENANT ⚷290(3) — CONSTRUCTION OF BUILDINGS — INDEMNITY TO TENANT—ACTION FOR RENT.
An agreement to indemnify a lessee for losses on account of buildings put up on a long lease, due to unsettled business conditions, cannot be set up in defense of an action of detainer for rent, because the loss could not be determined until the end of the lease.

Appeal from Superior Court, Alameda County; Everett J. Brown, Judge.

Action by Joanna M. Driscoll and Thomas A. Driscoll against J. S. Myers and others. Judgment for plaintiffs, and J. S. Myers appeals. Affirmed.

H. B. Griffith, of San Francisco, and L. D. Manning and Gibson & Woolner, all of Oakland, for appellant. Neal Power and Snook & Church, all of Oakland (J. C. Flannery, of San Francisco, of counsel), for respondents.

LENNON, P. J. In this action of unlawful detainer, the plaintiff had judgment from which the defendant appeals. The action was defended upon the theory that the defendant was holding under an alleged modification of the original lease, and that he was not in default of the terms thereof.

Briefly stated, the facts of the case are these: On October 15, 1906, one McFadden, plaintiffs' predecessor in interest, as lessor and J. S. Myers, the defendant, as lessee, entered into a written lease of certain real property for a term of 15 years, commencing January 1, 1907, and ending December 31, 1921. At the time of the execution of the lease, the demised premises consisted of an unimproved lot of land in the city of Oakland for which graduated rentals were provided to be paid in increasing amounts as follows:

> "$100 per month for each of the first thirty months; $120 per month for each of the second thirty months; $160 per month for each of the third thirty months; $225 per month for each of the fourth thirty months; $260 per month for each of the fifth thirty months, and $275 per month for each of the sixth and last thirty months thereof."

There was no agreement or obligation on the part of the lessee to improve the lot, but the lease in terms provided:

> "That said lessee * * * agrees that all buildings and improvements that may be erected or put upon said premises shall be at his own cost and expense, and shall thenceforth remain thereon as an inseparable part of said premises and kept by him generally in repair, and shall continue and be the property of said lessor upon the determination of this lease."

The lessor McFadden died testate August 5, 1911, and plaintiff Thomas A. Driscoll was appointed and qualified as executor of his estate. On July 9, 1912, the demised premises were distributed to plaintiffs by a decree duly made and entered in the estate of McFadden.

It appears that on August 2, 1909, McFadden executed to the defendant the following writing, which, it is contended, constituted the alleged modification of the lease:

> "August 2, 1909.
>
> "Mr. J. S. Myers: I think that this memorandum will be satisfactory to you for the time being in reference to the lease made by myself and you on the property on the northwest corner of Grove and 22nd streets, Oakland, California. I realize that this lease was entered into at a time when business conditions and rental values were more prosperous than at present. I do not care to make permanent changes in reference to the lease at this time; but if you will send the rent each month according to the terms of the lease, I will call upon you every two or three months and will examine the account and make up and pay you an amount which will be equal to one-third of the total income on the property, until such time as conditions become more settled as to permanent rental values. It is my intention, and I agree, that during the life of said lease, you shall not lose more than approximately one-third of the cost of the improvements, repairs, and necessary expenses.
>
> "[Signed] B. McFadden.
>
> "This agreement is satisfactory and I agree to the same. [Signed] J. S. Myers."

The defendant regularly paid McFadden the rental reserved in the lease, save during a period of 13 months, commencing October 1, 1909, and ending October 1, 1910. During this period the defendant paid $100 per month instead of $120 per month, as called for by the lease. Upon the termination of this period, the defendant resumed the payment of the rental in the amounts reserved in the lease, and continued to pay the same up to and including the month of December, 1913. Since then the defendant has failed and refused to pay any rental at all upon the ground that if an accounting were had pursuant to the terms of the alleged modification of the lease, it would be found that the defendant was not in default, and that the plaintiffs were indebted to him.

[1] The trial court found, among other things, that the writing in question was not executed as, and was never intended by the parties thereto to be, a modification of the lease, and that the abatement of the rental reserved therein to the extent of $20 per month from October 1, 1909, to October 1, 1910, was not made by McFadden under and pursuant to the terms of the alleged modification.

These findings are assailed upon the ground that they are not supported by the evidence. This is the only question necessary to be considered, for if, as we are convinced, the evidence supports these findings, they in turn will alone suffice to support the judgment, and therefore we need not determine the remaining question as to whether or not the further finding of the trial court that there was no consideration for the alleged modification is supported by the evidence.

That the abatement of the rent was not made because of the alleged modification of the lease is evidenced in part by the undisputed facts revealed by the evidence that no abatement of the rent immediately followed its execution, and that none was allowed until October 1, 1909, which was some two months subsequent to its execution.

That the abatement of the rent was the result of an understanding apart from the execution of the alleged modification is fairly inferable from the further fact that on November 16, 1909, which was just about two weeks subsequent to the first abatement of the rent, the defendant in a letter written by him to McFadden said:

> "I want to thank you very kindly for the consideration you have shown in the adjustment of the rent, and I assure you that I intend to treat you fairly and justly. In making this lease I simple overbid the value of the land when conditions were booming, I expect to lose pretty heavily, but that is no fault of yours."

Added to this, the record shows the admitted fact that after the expiration of the 13 months, during which the rent was abated, and up to and including December 31, 1913, the defendant resumed payment of the rent in the several amounts reserved in the lease, and this fact tends most strongly to negative the idea that the abatement of the rent was anything more than a mere temporary adjustment, and fortifies the conclusion that it was not made and allowed pursuant to any agreement or understanding of the parties embodied in the alleged modification of the lease.

Upon its face the writing in question shows affirmatively that it was never executed as, or intended to be, a permanent modification of the lease, for it is expressly declared therein that McFadden did not at that time "make any permanent changes in reference to the lease."

Moreover, there is the testimony of defendant to the fact that neither he nor McFadden ever construed and considered the writing in qustion to be a permanent modification of the lease. Indeed, he could not say otherwise in the face of the undisputed fact that at all times subsequent to the execution of the alleged modification, save during the period that the rent was abated, he paid the rent called for in the lease, and thereafter repeatedly importuned plaintiffs for a modification of the lease with reference to the rentals, without ever at any time asserting or even intimating that the lease had been modified by McFadden.

In this connection the record further shows that on December 23, 1913, the defendant, writing to the plaintiff Thomas A. Driscoll, requesting a change in the terms of the lease, admitted that he recognized the fact that the plaintiffs were "not under any legal obligation to change the terms of the lease, and it would clearly be a matter of equitable adjustment between man and man if anything is done." It will thus be seen that the language of the writing in question, coupled with the admissions and conduct of the defendant concerning the purpose and effect of the writing, warranted the finding that it was not executed as, and intended by the parties thereto to be, a modification of the lease.

[2] Conceding, as is contended, that by the writing in question McFadden contemplated and agreed to indemnify the defendant to the extent of two-thirds of any loss which might accrue to him during the entire period of the lease as the result of his improvement of the demised premises, still that fact could not be availed of as a defense to the action of unlawful detainer grounded upon a breach of the covenant to pay the rent reserved in the lease, nor interposed as an offset to the sum sued for as rent, for manifestly the defendant's loss, if any, could not, under the terms of the writing, be determined or even approximated until the expiration of the term of the lease and a full performance by the defendant of all of its terms.

The judgment and order appealed from are affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

34 Cal. App. 521

SOUTHERN PAC. CO. v. DORE et al.

(Civ. 2068.)

(District Court of Appeal, First District, California. Sept. 4, 1917. Rehearing Denied by Supreme Court Nov. 2, 1917.)

COVENANTS 🔑14—IMPLIED WARRANTIES—"GRANT."

A deed providing that the parties of the first part do "grant," bargain, and sell "all of their right, title, and interest," etc., did not purport to pass a fee, and a covenant that the land was free from incumbrances could not be implied from the word "grant"; the deed not being within Civ. Code, § 1113, providing that from the use of the word "grant" in any conveyance by which an estate of inheritance or fee simple is to pass is implied the covenant that such estate is free from incumbrances done, made, or suffered by the grantor or any one claiming under him.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Grant.]

Appeal from Superior Court, City and County of San Francisco; Edward P. Shortall, Judge.

Action by the Southern Pacific Company against Ellen Dore and others. From an order sustaining defendants' demurrer without leave to amend, plaintiff appeals. Affirmed.

Frank McGowan and H. C. Booth, both of San Francisco, for appellant. Dorsey & Henderson, of San Francisco, for respondents.

KERRIGAN, J. The appeal in this case is from an order sustaining the demurrer of the defendants without leave to amend.

The question in the case is whether or not there is to be found in the conveyance set out in the complaint an implied covenant against incumbrances. The complaint alleges that the deed signed and acknowledged by the defendants on the 9th day of July, 1907, was not delivered until June 2, 1910; that for the years 1908, 1909, and 1910 the lands described in the deed were assessed for taxes in a sum which, with interest and accrued penalties, aggregated $8,804.01, when they were paid by plaintiff on June 21, 1913. For this sum plaintiff demands judgment, together with the statutory rate of interest from said last-mentioned date. The granting clause in the deed reads:

> "That the said parties of the first part * * * do by these presents grant, bargain and sell unto the said party of the second part, and to its successors and assigns forever, all of their right, title and interest in and to the following tracts" (describing certain parcels of land).

The plaintiff relies for a recovery in this action upon the provisions of section 1113 of the Civil Code, which section so far as material here is as follows:

> "From the use of the word 'grant' in any conveyance by which an estate of inheritance or fee simple is to be passed, the following covenants, and none other, on the part of the grantor for himself and his heirs to the grantee, his heirs and assigns, are implied, unless restrained by express terms contained in such conveyance: * * *
>
> "2. That such estate is at the time of the execution of such conveyance free from incumbrances done, made or suffered by the grantor, or any person claiming under him. * * *"

Plaintiff's position on this appeal is that since the conveyance of July 9, 1907, contains therein the word "grant," it implies in law a covenant that the land affected was free from incumbrances as provided in the section of the Code just quoted—a covenant broken by the defendants in suffering the taxes assessed against the land to remain unpaid. The defendants' position on the other hand is that the deed in suit is not within the purview of this section, for the reason that it does not purport to pass a fee; that, on the contrary, the use of the words "all of their right, title, and interest in and to" the land described had the effect as a matter of law to restrain or negative the implication of the statute.

We are constrained to accept the defendants' contention. According to the plain language of the statute it is only when a conveyance of an estate of inheritance or a fee simple is to pass that from the word "grant" a covenant is implied that the land to be conveyed is free from incumbrances; and when the conveyance by its terms merely purports—as does the conveyance here—to pass all the right, title, and interest of the grantors, according to the authorities nothing more passes than the estate which such grantors had in the land at that time subject to all defects and equities which could have been asserted against the grantors. In Hull's Adm'r v. Hull's Heirs, 35 W. Va. 155, at page 164, 13 S. E. 49, at page 52 (49 Am. St. Rep. 800), the court says:

> "Where a deed conveys the grantor's right, title, and interest, though it contains in general terms a covenant of general warranty, the covenant is regarded as a restricted one, limited to the estate conveyed, and not one defending generally the land described. The covenant of warranty is intended to defraud only what is conveyed, and cannot enlarge the estate conveyed" (citing numerous cases).

In Gee v. Moore, 14 Cal. 472, 474, the court said:

> "The deed does not purport to convey the premises in fee simple absolute, so as to bring the instrument within the provision of the thirty-third section of our statute (section 1113) concerning conveyances. It only purports to pass all the right, title, and estate, which the grantor possessed in the land."

In Kimball v. Semple, 25 Cal. 440, the conveyance was of the grantor's right, title and interest. At page 452 the court said:

> "The deed to Whitcomb was simply a conveyance of whatever interest Larkin then held in the land mentioned in the deed, but it did not purport to convey the land nor any certain interest therein."

In Allison v. Thomas, 72 Cal. 562, 14 Pac. 309, 1 Am. St. Rep. 89, the court says:

"It has been uniformly held that a conveyance of the right, title, and interest of the grantor vests in the purchaser only what the grantor himself could claim, and the covenants in such deed, if there were any, were limited to the estate described. Coe v. Persons Unknown, 43 Me. 432; Blanchard v. Brooks, 12 Pick. (Mass.) 47; Brown v. Jackson, 3 Wheat. 449, 4 L. Ed. 432; Adams v. Cuddy, 13 Pick. (Mass.) 460, 25 Am. Dec. 330; Allen v. Holton, 20 Pick. (Mass.) 458; Sweet v. Brown, 12 Metc. (Mass.) 175, 45 Am. Dec. 243; Pike v. Galvin, 29 Me. 183. This construction is in accord with the obvious meaning of the language. The grantee in such a deed necessarily takes only what the grantor then had, and subject to all defects and equities which could then have been asserted against the grantor."

It follows that the judgment should be affirmed, and it is so ordered.

We concur: RICHARDS, J.; BEASLY, Judge pro tem.

34 Cal. App. 803

SOUTHERN PAC. CO. v. SHARP et al.

(Civ. 2069.)

(District Court of Appeal, First District, California. Sept. 4, 1917. Rehearing Denied by Supreme Court Nov. 2, 1917.)

Appeal from Superior Court, City and County of San Francisco; Edward P. Shortall, Judge.

Action by the Southern Pacific Company against William B. Sharp and another. From a judgment entered for defendants after demurrer sustained to the complaint, plaintiff appeals. Affirmed.

Frank McGowan and H. C. Booth, both of San Francisco, for appellant. Dorsey & Henderson, of San Francisco, for respondents.

KERRIGAN, J. As in the case of the same plaintiff against Ellen Dore et al., No. 2068, this day decided, 168 Pac. 147, the appeal is from a judgment entered in favor of the defendants after demurrer sustained to the complaint. It presents the same point as did that case, and the question was submitted and argued on the same briefs. The conclusion arrived at there is controlling here, and for the reasons stated in the opinion filed in that case the judgment here is affirmed.

We concur: RICHARDS, J.; BEASLY, Judge, pro tem.

34 Cal. App. 500

PEOPLE v. AVENA. (Cr. 382.)

(District Court of Appeal, Third District, California. Aug. 30, 1917.)

1. CRIMINAL LAW 🔑742(3)—QUESTION FOR JURY.

Whether the statements of state witnesses at the preliminary examination, contradictory of their testimony, so far impeach them as to render their testimony improbable or unbelievable, they explaining it by saying they had been told, and in this being corroborated, that if defendant, their father, was convicted, he would be sent to the penitentiary and they to the reform school, is a question for the jury.

2. WITNESSES 🔑396(1)—CREDIBILITY—CONTRADICTORY STATEMENTS—EXPLANATION.

Witness may explain why at the trial she changes her testimony from that given by her at the preliminary trial.

3. CRIMINAL LAW 🔑730(1)—TRIAL—AGREEMENT—CURE BY INSTRUCTION.

Any injury from misconduct of prosecuting attorney in closing argument in stating that in other states defendant would have been hung, and that all of what took place when defendant was brought to his office was not given in evidence, because objected to, will be deemed eliminated; the remarks being promptly objected to and the court instructing that they be disregarded.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Joe Avena was convicted, and appeals. Affirmed.

Richard P. Talbot, of Sacramento, for appellant. U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

CHIPMAN, P. J. On information filed by the district attorney of Sacramento county defendant was convicted of the crime of rape upon his 12 year old daughter, and was sentenced to 50 years imprisonment at Folsom. He appeals from the judgment of conviction and from the order denying his motion for a new trial.

Defendant invites attention to the following three points which he deems sufficient to call for a new trial: (1) That the verdict is contrary to the evidence; (2) errors of law committed by the trial court; (3) misconduct of the deputy district attorney.

[1] The facts testified to by the prosecuting witness and her sister were amply sufficient to justify the verdict. The point urged is that both these witnesses admitted that the testimony they gave at the trial was directly contrary to that given at the preliminary examination and that their testimony there given was false. The explanation given by them for this change in their testimony was that they had been told that if their father was convicted he would be sent to the penitentiary and they would be sent to the detention home or the reform school. There was evidence tending to show that some such representations were made to them, before testifying at the preliminary examination, as inducement to shield their father from the consequences of the unnatural act with which he was charged. It was for the jury to decide whether these contradictory statements, under all the circumstances and facts placed before the jury, so far impeached these witnesses as to render their testimony at the trial improbable or unbelievable. People v. Preston, 19 Cal. App. 685, 127 Pac. 660. There is nothing in the story told by the prosecuting witness, corroborated as it was by her sister, which is inherently improbable or would justify the reviewing court in interfering with the verdict of the jury. It is not without some significance that the learned judge who sat at the trial not only denied the motion for a new trial, but that the sen-

tence imposed amounted practically to life imprisonment, for defendant, 49 years of age, was given a 50 years' term of imprisonment.

[2] Lena Avena, sister of the prosecuting witness, testified to the act committed by her father. Upon her cross-examination counsel for defendant called her attention to her testimony given at the preliminary examination contradictory to her testimony she had just given at the trial. Upon redirect, the district attorney was permitted, over objection, to show that the witness had been told that she would be sent to the reform school or detention home if her father went to state prison. The court allowed this testimony on the ground that the witness was entitled to explain why she had changed her testimony. Some questions and answers in the course of the re-examination were objectionable, but the main object was to give the witness the opportunity of explaining why she had testified as she did at the preliminary. We see no error in this ruling. No other alleged error in the court's ruling is called to our attention.

[3] In his closing argument to the jury Deputy District Attorney Jones recapitulated the evidence as to what took place the morning following the act of their father; that the children "talked it over"; that "the mother was gone, and they told Mrs. Murphy and they told Mrs. Anastasio, and they or some one told Charlie," who telephoned to the officer; that the latter came, heard the story of the children, and arrested their father.

"Where was he treated wrong," asked Mr. Jones, "where was he treated with any harshness? Why, if it had been down in the state where Mr. Talbot (defendant's attorney) was born, if it had been down in the Southern States, you know what would have happened to that man. The neighbors around there would not have permitted him to have been brought up to the jail. They would have hung him right outside of that tent. Many a colored man has been.

"Mr. Talbot: If your honor please, the gentleman from Missouri will deny that they would have hung this man.

"The Court: Eliminate that, Mr. Jones.

"Mr. Talbot: They would have given him a fair trial. They would not have hung this man unless there was proof.

"Mr. Jones: No; they never have.

"Mr. Talbot: No; they would give him a fair trial.

"The Court: Just a moment, gentlemen.

"Mr. Talbot: He has got no right to go outside of this testimony.

"Mr. Jones: I am not going outside of the case. I am simply explaining what they would have done if it had been in your state.

"Mr. Talbot: Well, now, I assign that as error, and I ask that the jury now be instructed to disregard that part of the statement. * * *

"The Court: The jury will disregard it."

The district attorney then proceeded to state what took place in his office, and who were present when the defendant was brought there, at which time the court stenographer took down in shorthand what there occurred. In the course of the trial the district attorney had endeavored to introduce the statement there made by the defendant, but the court denied the offer. The district attorney continued:

"Now, gentlemen of the jury, the whole statement of what took place there has not been read to you, because they objected to it and would not permit it to be read.

"Mr. Talbot: Now, we object to that kind of argument here before this jury.

"The Court: The objection is sustained. Do not refer to that.

"Mr. Talbot: Trying to cloud the jury on the testimony.

"Mr. Jones: I am not trying to cloud the jury, sir. I have not got much time, but I will sit down and let you talk, if you want to.

"Mr. Talbot: I am objecting to the court; that is not proper argument before the jury.

"The Court: Well, I will instruct the jury to disregard any reference to the statement. It is not in evidence."

It is now contended that:

"The ruling of the trial court was absolutely insufficient to cure such willful misconduct."

The appellate courts are called upon too frequently, in reviewing criminal cases, to deal with the conduct of district attorneys who travel outside the record in their argument to the jury in order to bring about a conviction. Such course should never be necessary if the evidence is sufficient to warrant conviction; and, if it is not sufficient, no district attorney is warranted in demanding a conviction. Where, however, the misconduct is promptly called to the attention of the court and it is asked to instruct the jury to disregard the objectionable remarks of the district attorney and the court does so, the injury done is deemed to have been cured. We held, in People v. Ferrara, 31 Cal. App. 1, 159 Pac. 621, that to justify a reversal the misconduct of the district attorney must be flagrant and obviously prejudicial. We do not think that the alleged misconduct in the present case was of such persuasive character as to have led the jury to ignore the court's instruction to disregard it. People v. McRoberts, 1 Cal. App. 28, 81 Pac. 734.

The record shows that defendant was ably defended; that but a single error of the court in its rulings has been pointed out, and that one not prejudicial; that full and unobjectionable instructions were given the jury; and that the evidence accepted by the jury was amply sufficient to warrant the verdict rendered.

The judgment and order are affirmed.

We concur: BURNETT, J.; HART, J.

34 Cal. App. 489

Ex parte KOSTRIKEN. (Cr. 703.)

(District Court of Appeal, First District, California. Aug. 28, 1917.)

1. Criminal Law 🔑211(4)—Sufficiency of Complaint—Rape.

Where the complaint before the committing magistrate did not allege that prosecutrix was not the wife of accused, it failed to show the commission of the crime of rape.

2. Habeas Corpus 🔑29—Complaint—Evidence.

Where the complaint for rape did not allege that prosecuting witness was not the wife of accused, and the evidence did not show it, a writ of habeas corpus will be granted, and the petitioner discharged.

Application by William Kostriken for a writ of habeas corpus. Granted, and petitioner ordered discharged.

Ambrose Gherini, of San Francisco, and J. Edwin Lyons, for petitioner. Chas. M. Fickert, Dist. Atty., and A. L. O'Grady, Deputy Dist. Atty., both of San Francisco, for respondent. John D. Harloe, of San Francisco, for sheriff.

PER CURIAM. [1, 2] Upon this hearing for a writ of habeas corpus, the return to the writ previously issued shows that the petitioner was charged with, and held to answer for, the crime of rape, upon evidence which in part shows that, at the time of the alleged commission of the offense, the prosecutrix, a minor under the age of 15 years, was the wife of the petitioner. The return further shows that the complaint filed with the committing magistrate does not allege that the prosecutrix was not the wife of the petitioner at the time of the commission of the alleged rape. It follows that neither the complaint nor the evidence show the commission of an offense against the penal laws of the state, therefore the writ is granted, and the petitioner ordered discharged from custody.

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34 Cal. App. 487

WISSMAN v. CABANISS, Superior Court Judge. (Civ. 2217.)

(District Court of Appeal, First District, California. Aug. 27, 1917. Rehearing Denied Sept. 26, 1917. Rehearing Denied by Supreme Court Oct. 25, 1917.)

1. Judgment 🔑17(1)—Process to Sustain—Necessity for Personal Service.

Where a wife, in a proceeding between herself and her husband, was not personally served with process, the decree was entirely ineffectual to decide any property rights between the parties.

2. Depositions 🔑8—Right to Take—Action between Husband and Wife.

A wife having a right to bring an action against her husband had the statutory right in preparing for trial to cause his deposition to be taken.

3. Depositions 🔑64(4)—Right to Direction of the Superior Court to Answer.

Where plaintiff, taking defendant's deposition in preparing for trial of her action, asked questions pertinent to the issues raised in the case and to be tried, she had a right to have the questions answered, and, if defendant refused to answer, she had a right to a direction of the superior court that they should be answered.

4. Depositions 🔑64(4) — Jurisdiction to Direct Witness to Answer—Ouster.

The superior court could not oust itself of jurisdiction to direct defendant husband, whose deposition plaintiff wife was taking in the exercise of her statutory right to prepare for trial, to answer a question pertinent to the issues raised by the pleadings by an erroneous holding that in a former action between the parties the question of their property rights had been determined.

Petition for writ of mandate by Mary C. Wissman against George H. Cabaniss, Judge of the Superior Court. Writ directed to issue.

Haven & Athearn, of San Francisco, for petitioner. H. G. W. Dinkelspiel and Frank W. Hooper, both of San Francisco, for respondent.

PER CURIAM. Petition for writ of mandate. The court is of the opinion that this writ should issue.

[1, 2] As to the effect of the decree in the former proceeding, we are of the opinion that it was entirely ineffectual to decide any property rights between the husband and wife by reason of the fact that the wife was not personally served with process. In that proceeding the court was without jurisdiction to determine the question of property rights in the absence of personal service. That being so, the wife had a right to bring the action out of which this proceeding arose, and she had the statutory right in preparing for the trial of that action to cause the deposition of the defendant to be taken.

[3] At the taking of that deposition she asked questions which were pertinent to the issues raised in the case and to be tried therein; she had a right to have those questions answered, and in case the witness refused to answer, she had a right to the direction of the superior court that the question should be answered. A refusal on the part of the superior court to exercise its power in aid of that right amounted to a denial of justice to her to the extent that it deprived her of the statutory right which she had to prepare for trial by the taking of this deposition.

[4] The court could not oust itself of jurisdiction to direct the witness to answer a question which was pertinent to the issues raised by the pleadings by holding—as we think clearly against the law—that in the former action the question of property rights had been determined. That matter seems to us so clear that we are of the opinion that the court in this present matter had no discretion to refuse the order which the plaintiff sought to compel the witness to answer, and that its refusal amounted to the ousting

of itself from jurisdiction in the matter, and hence was the proper subject of a writ of mandate.

The writ will issue as prayed for.

(34 Cal. App. 483)

JANSSON v. NATIONAL S. S. CO.

(Civ. 2129.)

(District Court of Appeal, First District, California. Aug. 27, 1917.)

1. NOTICE 🔑9—CODE PROVISIONS—WRITTEN NOTICE.

Where notice of a fact is required to be given under the various provisions of the Code, written notice is usually intended, in view of Code Civ. Proc. § 1010, providing that "notices must be in writing."

2. NEW TRIAL 🔑116(2)—TIME FOR PROCEEDINGS—NOTICE OF ENTRY OF JUDGMENT—SUFFICIENCY.

Under Code Civ. Proc. § 659, providing that notice of intention, to move for new trial must be filed within 10 days after notice of entry of judgment, actual knowledge of entry of judgment is not sufficient to start the time running within which notice of intention to move for a new trial must be filed, but, unless waived, a written notice of entry must be given.

3. NEW TRIAL 🔑116(2)—NOTICE OF ENTRY OF DECISION—WAIVER.

A motion or other proceeding by a party with reference to a decision by which he seeks to protect his own interest against the other party and obtain relief which could be granted only in view of a decision is a waiver of notice of entry of such decision.

4. NEW TRIAL 🔑116(2) — ENTRY OF JUDGMENT—WAIVER OF NOTICE.

A stipulation to correct a memorandum of costs is not a waiver of written notice of entry of the judgment required by Code Civ. Proc. § 659.

5. NEW TRIAL 🔑116(2) — ENTRY OF JUDGMENT—NOTICE OF—SUFFICIENCY.

A notice of assignment to plaintiff's attorney of a portion of a judgment, served on defendant, signed by plaintiff, and not by his attorney, is not sufficient notice of entry of judgment under Code Civ. Proc. § 659.

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Hjalmar A. Jansson, sometimes known as Hjalmar A. Johnson, against the National Steamship Company, a corporation. Judgment for plaintiff. From an order denying his motion to strike from the files a notice of intention to move for a new trial, plaintiff appeals. Affirmed.

W. C. Cavitt, of San Francisco, for appellant. Chickering & Gregory, of San Francisco, for respondent.

KERRIGAN, J. This is an appeal by the plaintiff from an order denying his motion to strike from the files of the court a notice of intention to move for a new trial served and filed by defendant, plaintiff's motion being grounded upon the contention that the notice was not served or filed within the time provided by section 659 of the Code of Civil Procedure as it read at the time the motion was made. As the result of the trial herein the plaintiff recovered a verdict against the defendant on or about the 3d day of February, 1915, for the sum of $3,000. Thereafter, to wit, on the 5th day of February, 1915, a paper was served upon the defendant which, after reciting that for a valuable consideration received the plaintiff assigned to his counsel, Mr. W. C. Cavitt, an undivided one-half interest in the judgment herein, also stated that:

> "Said judgment was entered on the 4th day of February, 1915, in Judgment Book 48 at page 125 in the office of the county clerk of the city and county of San Francisco. Dated February 5, 1915. [Signed] Hjalmar A. Jansson."

Thereafter, and on the 6th day of February, 1915, plaintiff served and filed a memorandum of his costs and disbursements incurred in the action. Two days later the respective attorneys of the parties entered into a written stipulation which provided for a correction in the memorandum of costs, and which was filed with the clerk of the court on February 10, 1915. On the 24th of the same month the defendant served and filed a notice of intention to move for a new trial, which is the notice that plaintiff sought to have stricken from the files. The motion being denied, plaintiff takes this appeal.

[1, 2] Section 659 of the Code of Civil Procedure so far as it relates to the matter in hand provided at the time of the filing of said notice that the party intending to move for a new trial must, within ten days after receiving notice of the entry of judgment file with the clerk and serve upon the adverse party notice of his intention. It is claimed by the plaintiff that the stipulation above mentioned, correcting the memorandum of costs and disbursements, and the notice of assignment of a portion of the judgment, referring as it does to its entry, must be regarded as written notice of the entry of judgment sufficient to set in motion the time within which defendant was required to serve and file its notice of intention to move for a new trial. There is no doubt that where, under the various provisions of the Code, notice of a fact is required to be given, written notice is usually intended. Section 1010, Code Civ. Proc. It is also true that in the case of the entry of judgment actual knowledge of such entry is never sufficient to start the time running within which notice of intention to move for a new trial must be filed, and that unless facts appear of record which constitute a waiver thereof the written notice required by section 659 must be given. Forni v. Yoell, 99 Cal. 173, 33 Pac. 887; Gardner v. Stare, 135 Cal. 118, 67 Pac. 5; Hughes Mfg. & L. Co. v. Elliott, 167 Cal. 494, 140 Pac. 17. "The rule would therefore seem to be that written notice of filing of decision is in all cases required, unless waived by facts appearing in the records, files, or minutes of the court; and it follows that

actual notice or knowledge, other than by written notice, is insufficient in any case unless it appears, from facts thus evidenced that written notice was waived." Mallory v. See, 129 Cal. 356, 61 Pac. 1123.

[3] A motion in court or other proceeding by a party with reference to a decision, which presupposes his knowledge that it has been made, and by which he seeks to protect his own interest against the other party, would be regarded as a waiver of his right to require written notice of the decision. An application for a stay of execution, it has been held, constitutes a waiver of such written notice, for the reason that the motion is based upon the fact that the decision had been rendered. In other words, the moving party obtained relief from the court which could only have been granted in view of the fact that the judgment had been rendered. Gardner v. Stare, 135 Cal. 118, 67 Pac. 5.

In Forni v. Yoell, supra, no written notice of decision appears to have been given by the prevailing party (the plaintiff), but the defendant filed a notice of intention to move for a new trial. This notice was served and filed more than ten days after the denial of a motion made by defendant to dismiss the action upon the ground that:

> "The findings and decision of the court upon final submission of this action were filed February 27, 1890, and the party plaintiff thereby entitled to judgment has ever since neglected to demand and have the same entered for more than six months since the filing of said findings and decision."

In that case it was held that the defendant, having based a motion on the fact that a decision had been rendered in the case, must have been deemed to have thereby waived written notice of the decision provided for in section 659 of the Code of Civil Procedure.

[4] As to the stipulation in reference to the cost bill, we are unable to see how the defendant's action in entering into it can be regarded as a waiver of his right to receive written notice of the entry of the judgment. The stipulation does not even contemplate that the judgment had been entered, and no relief was obtained by defendant which was necessarily based upon the theory that such entry had been made. The stipulation, we think, did not constitute a waiver of notice of the entry of judgment required by the section of the Code above referred to.

[5] It is the further contention of the appellant that the written notice required by this section was in fact given, this contention being based upon the fact that the notice of assignment of a portion of the judgment served by plaintiff upon the defendant, containing, as it does, a reference to the entry of the judgment, must be held to constitute the written notice thereof contemplated by the section referred to.

It will be observed that this notice was not signed by the attorney of record for the plaintiff, but by the plaintiff himself. Apparently it was designed and purported only to give notice to the defendant that an interest in the judgment had been assigned to plaintiff's counsel. But, as was said by the learned judge of the trial court in passing upon this question:

> "Even assuming that such paper was intended to apprise defendant's counsel of the fact and date of the entry of judgment herein, it was wholly inoperative for that purpose. Where an attorney is retained in an action to represent a party litigant, all statutory notices and legal proceedings therein must be signed or inaugurated by the attorney of record alone. If in this instance a notice of intention to move for a new trial had been signed by the defendant corporation, or, if such notice had been signed by the attorney of record for the defendant herein, but had been served upon the plaintiff Jansson personally, the motion thus attempted to be inaugurated would be unavailing, and would be dismissed upon motion of the adverse party. From which it would seem to conclusively follow that a notice necessary to start the statutory period of time wherein the adverse party must institute a legal proceeding must be signed by the attorney of record for the party on whose behalf such notice was given."

For the reasons given the order appealed from is affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

34 Cal. App. 538

RIVERSIDE COUNTY v. ALBERHILL COAL & CLAY CO. et al. (Civ. 2327.)

(District Court of Appeal, Second District, California. Sept. 5, 1917.)

1. Highways ⚿42—Necessity—Determination as to.

Where a county board of supervisors takes all the steps required by Pol. Code, §§ 2681–2710, relating to condemnation for roads, it is conclusive as to place of and necessity for the roads, and Code Civ. Proc. § 1241, as amended 1913, providing that when land is condemned there must be a necessity therefor, in no way qualifies such rule.

2. Highways ⚿42—Necessity—Decision of Supreme Court.

A decision of the Supreme Court that after hearing required by Pol. Code, §§ 2681–2710, relating to condemnation of roads, determination of the board to establish a road is conclusive as to necessity for and location of road, is binding as to the same facts which Code Civ. Proc. § 1241, as amended in 1913, declares essential.

3. Eminent Domain ⚿19—Condemnation—Necessity.

A road as established under Pol. Code, §§ 2681–2710, relating to condemnation for roads, is a public road regardless of the number of persons using it.

4. Eminent Domain ⚿262(4) — Review — Questions of Fact—Amount of Damages—Condemnation for Roads.

In condemnation proceedings for a road, the findings of the trial court as to amount of damages cannot be disturbed on appeal, where the evidence was conflicting.

Appeal from Superior Court, Riverside County; F. E. Densmore, Judge.

Condemnation for a road by the County of Riverside against the Alberhill Coal &

Clay Company, a corporation, and the Los Angeles Pressed Brick Company, a corporation. Judgment for plaintiff. From the judgment and an order denying its motion for a new trial, the defendant Los Angeles Pressed Brick Company appeals. Affirmed.

Collier & Craig, of Riverside, for appellant. W. A. Purington and Lyman Evans, both of Riverside, for respondent.

JAMES, J. The defendant Los Angeles Pressed Brick Company, a corporation, appeals from the judgment and from an order denying its motion for a new trial. The action was brought on behalf of the county of Riverside to enforce condemnation of a strip of land for public road purposes. Acting under the authority of the provisions of article 6, chapter 2, of the Political Code, as those provisions are embodied in section 2681 et seq., the board of supervisors of plaintiff county made an order directing the district attorney to prosecute this action. All of the steps taken, from the filing of a petition by freeholders, including hearing on report of viewers, and the fixing of damages by the board of supervisors, were sufficiently alleged. The answer of appellant made no issue as to any of those allegations. The principal matters urged in defense by its answer refer to the alleged inadequate amount of damages. The defendant did, however, assert that there existed no public necessity for the road; that the same was in truth and in fact for the convenience of a certain clay manufacturing company. The trial court found that all of the allegations of the complaint were true. It is the contention of appellant that it should have appeared by the allegations of the complaint that the board of supervisors had in a formal way by resolution declared the existence of the public necessity for the laying out of the road and the taking of appellant's property. This contention is based upon the condition of the law as found in section 1241 of the Code of Civil Procedure, where it is declared that before property may be taken by condemnation it must appear that the taking is necessary to the use claimed, and that provision further declares as follows:

> "Provided, when the legislative body of a county, city and county, or an incorporated city or town, shall by resolution or ordinance, adopted by vote of two-thirds of all its members, have found and determined that the public interest and necessity require the acquisition, construction or completion, by such county, city and county, or incorporated city or town, of any proposed public utility, or any public improvement, and that the property described in such resolution or ordinance is necessary therefor, such resolution or ordinance shall be conclusive evidence; (a) of the public necessity of such proposed public utility or public improvement; (b) that such property is necessary therefor, and (c) that such proposed public utility or public improvement is planned or located in the manner which will be most compatible with the greatest public good, and the least private injury."

The provisions to which reference has just been made were incorporated in the section mentioned by amendment enacted by the Legislature in 1913. It is admitted by appellant that prior to the adoption of this amendment, under proceedings like those had for the opening of the road here involved, it was unnecessary to have proof made as to the existence of the necessity which justified the public in taking private lands. It was so held in County of San Mateo v. Coburn, 130 Cal. 631, 63 Pac. 78, 621. The board of supervisors of the county of Riverside was acting under special provisions authorizing the laying out of a public road. Those provisions made necessary the viewing of the proposed route, fixing of damages, and a hearing on the report of the viewers at which nonconsenting landowners had the right to appear and give testimony. The right existed in the board of supervisors, after such hearing, to approve or not to approve the report of the viewers. In other words, all matters affecting the project of opening the road were there to be tried and settled. In County of San Mateo v. Coburn, supra, our Supreme Court said:

> "There is no room in the present case for any question as to the character of the use for which the condemnation of the land is sought. It needs no argument to show that a highway or public road is a public use. * * * Whether a public highway is demanded in any particular region, as well as its location and extent, are also matters of a political or legislative character (citing cases). In the Political Code of this state, section 2681 et seq., the Legislature has established a tribunal for determining these questions, and has provided for notice to all persons interested therein, and given them an opportunity to be heard. If this tribunal proceeds in accordance with the provisions of these sections, it acquired jurisdiction to determine these questions, and its determination is not subject to collateral attack."

[1-4] The effect of that decision is to hold that there is a determination made by the board of supervisors where its authority is regularly pursued, both as to the necessity for the establishment of a public road and the necessity to take the particular land of the property owners. We do not perceive how the amendment of 1913 made to section 1241, Code of Civil Procedure, either adds to or qualifies any of the provisions of the article before mentioned. The Supreme Court having declared that the provisions of that article made the determination of the board of supervisors after hearing conclusive, that determination must still be held conclusive of the same facts which the amendment to section 1241 declares essential. If, looking at section 1241, we say that before property can be taken the necessity for the taking must be shown, we must also say that this showing is fully made when it appears that the board of supervisors regularly pursued the various steps and proceedings outlined in the Political Code. The defendant admitted that all of such steps were properly taken, by failing to make denial thereof. The determination made by the board we think

was conclusive of all questions as to the propriety of locating the road in the particular place it was, as well as of the necessity for its establishment. The road as established would be a public road regardless of the number of persons using it. Madera Ry. Co. v. Raymond Granite Co., 3 Cal. App. 668, 87 Pac. 27. As to the question of the amount of damages, the evidence was conflicting, and the findings of the trial judge cannot be disturbed for that reason.

From a careful examination of the record submitted, we find no error warranting a reversal of the judgment or order.

The judgment and order are affirmed.

We concur: CONREY, P. J.; SHAW, J.

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34 Cal. App. 513

PEOPLE'S WATER CO. v. PERKINS.

(Civ. 2130.)

(District Court of Appeal, First District, California. Sept. 1, 1917. Rehearing Denied Oct. 1, 1917. Denied by Supreme Court Oct. 29, 1917.)

1. PUBLIC LANDS ⟹41—LAND SUBJECT TO GRANT—EVIDENCE.

Introduction, by claimant through a railroad grant, of official maps of the department of the interior showing the lands in question to be public lands, and also showing the outlines of the Mexican grants in their vicinity, were sufficient to show prima facie that the land was public land, and it was not necessary to show affirmatively that the lands were not within the limits of some other grant.

2. PUBLIC LANDS ⟹117—PATENTS—COLLATERAL ATTACK—PRIOR GRANTS.

A patent under the homestead laws is not a good defense in ejectment as against one claiming under a prior railroad grant, a patent being open to collateral attack where the land was already granted.

Appeal from Superior Court, Contra Costa County; H. D. Gregory, Judge.

Action by the People's Water Company against Charles L. Perkins. Judgment for plaintiff, and defendant appeals. Affirmed.

T. F. Bachelder, of Oakland, for appellant. T. M. Bradley and Harry E. Leach, both of Oakland, for respondent.

RICHARDS, J. This is an appeal from a judgment in favor of plaintiff in an action for ejectment, and from an order denying the defendant's motion for a new trial.

The premises in question are located in the county of Contra Costa, and lie within the limits of the odd-numbered sections of government land embraced within the terms of the congressional grant of such lands to the Central Pacific Railroad Company, of which the plaintiff and respondent herein is the successor in interest. The defendant opposed two contentions to the right of the plaintiff to recover in this action, neither of which was sustained by the trial court. The first of these was the contention that the lands in question were originally embraced within the limits of the Mexican grant known as the Romero grant; but the record discloses that the so-called Romero grant was claimed by the brothers Romero to have been made to them by Gov. Michel Torino in the year 1844, which claim was presented to the commissioners for the settlement of private land claims in California under the act of March 3, 1851, and was rejected by said commissioners in the year 1853 upon the ground that no such grant had ever been issued, and that upon appeal to the district court and afterwards to the Supreme Court of the United States this decision was affirmed, the final decision of the latter tribunal being given in the year 1863, some time before the act of Congress granting the Central Pacific Railroad Company the odd-numbered sections of the public domain, embracing the lands in question. It follows that at the time of such grant these lands were not within the limits of any existing Mexican grant, and were therefore subject to the congressional grant to the Central Pacific Railroad Company.

[1] In this connection the appellant insists that the plaintiff was not entitled to recover for the reason that it did not affirmatively show that the lands were not within the limits of some other grant, but this contention we find to have no merit. The plaintiff introduced in evidence the official maps of the Department of the Interior, showing the lands in question to be public lands, and also showing the outlines of the Mexican grants in their vicinity. These maps were sufficient, taken with the railroad grant and the conveyance by the railroad to it, to establish prima facie the plaintiff's case.

[2] The only other point urged by the defendant and presented upon this appeal consisted of the proof of the issuance to him of a patent under a homestead entry made by him long subsequent to the date of the original railroad grant, his contention being that the action of the commissioner of the Land Office of the United States in the issuance to him of said patent constituted a final determination that the lands were at the date of his homestead entry and patent public lands and open to such entry. He cites in support of this contention two cases, viz., Steel v. St. Louis Smelting Co., 106 U. S. 447, 1 Sup. Ct. 389, 27 L. Ed. 226, and Johnson v. Towsley, 13 Wall. 72, 20 L. Ed. 485. An examination of these cases, however, shows that, when fully read they do not go to the extent of supporting the appellant's contention; but, on the contrary, give application to the doctrine for which the appellant contends to such lands only as in fact form part of the public domain at the time of their proposed appropriation under the homestead and pre-emption laws. In the case of Smelting Co. v. Kemp, 104 U. S. 636, 26 L. Ed. 875, the Supreme Court of the United States

clears its decisions of all confusion upon this point in the following language:

> "Of course when we speak of the conclusive presumptions attending a patent for lands we assume that it was issued in a case where the department had jurisdiction to act and execute it; that is to say, in a case where the lands belong to the United States. * * * If they had previously been disposed of the department would have no jurisdiction to transfer them, and its attempted conveyance of them would be inoperative and void. * * * We may therefore assume as the settled doctrine that if a patent is absolutely void upon its face, or the issuance thereof was without authority or was prohibited by statute, or the state had no title, it could be impeached collaterally in a court of law in an action of ejectment."

There are numerous other authorities sustaining this doctrine.

It follows that there is no merit in the appellant's contention that he acquired any rights superior to those of the plaintiff's predecessor by virtue of his homestead patent, and hence that he has presented no sufficient defense to the plaintiff's suit.

Judgment and order affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

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34 Cal. App. 524

CLARK v. FORBES, Justice of the Peace, et al. (Civ. 2278.)

(District Court of Appeal, Second District, California. Sept. 4, 1917.)

1. JUSTICES OF THE PEACE 🔑194(1)—REVIEW, WRIT OF—REMEDY BY APPEAL.
Writ of review from the superior court does not lie to review a judgment of a justice from which an appeal may be taken.

2. APPEAL AND ERROR 🔑122 — APPEAL ON QUESTIONS OF LAW — APPEARANCE TO OBJECT TO JURISDICTION.
Defendant may have the benefit of an appeal on questions of law alone, where he has appeared specially to object to the jurisdiction of the court over him as a party defendant, and where his appeal is confined to that one question.

3. APPEARANCE 🔑9(4)—FILING OF DEMURRER AS GENERAL APPEARANCE—SUBMISSION TO JURISDICTION.
The filing by defendant of demurrer to the complaint in justice court based on the ground that the court had no jurisdiction of the subject-matter of the action constituted a general appearance whereby defendant submitted himself to the jurisdiction.

4. CERTIORARI 🔑70(4)—DENIAL OF WRIT OF REVIEW—RECORD ON APPEAL.
Where the justice's return to writ of review from the superior court is not shown in the transcript on appeal from the superior court's judgment denying application for writ of review, the appellate court is without a record authorizing reversal of the superior court's judgment.

5. JUSTICES OF THE PEACE 🔑208(2)—REVIEW, WRIT OF — PROCEEDINGS — RETURN AS ANSWER.
The justice's return to writ of review from the superior court constitutes the answer as well as the evidence, and an "answer" filed in the proceeding could not, in the absence of stipulation, be used to raise any issues.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Application for writ of review by James D. Clark against Frank S. Forbes, as Justice of the Peace, and John E. Lacey and Ellen Lacey, his wife. From judgment denying his application, plaintiff appeals. Affirmed.

William Lewis, of Los Angeles, for appellant. Walter Gould Lincoln, of Los Angeles, for respondents.

CONREY, P. J. Appeal from judgment. The plaintiff appeals from a judgment denying his application for a writ of review. The judgment sought to be reviewed was rendered by respondent Forbes as justice of the peace of Los Angeles township in Los Angeles county, in an action wherein John E. Lacey et al. were plaintiffs and James D. Clark was defendant. That judgment was rendered on the 25th day of May, 1916. The petition for writ of review was filed in the superior court within 30 days thereafter, which therefore was within the time in which an appeal might have been taken from the judgment.

[1] The writ of review does not lie to review a judgment from which an appeal may be taken. Appellant claims that he had no right of appeal of which he could take advantage, because by taking an appeal he would submit to the jurisdiction, and the point upon which he relies is that the justice's court did not have jurisdiction of the person of him, the said James D. Clark, in that action. The decisions cited and relied upon by him are In re Clarke, 125 Cal. 388, 58 Pac. 22; Nisbet v. Clio Mining Co., 2 Cal. App. 436, 83 Pac. 1077; Security Loan & Trust Co. v. Boston, etc., Co., 126 Cal. 418, 58 Pac. 941, 59 Pac. 296.

[2] Those cases merely hold that an appeal involving the merits of an action carries with it a submission of the appellant personally to the jurisdiction of the court. They do not contravene the rule that a defendant may have the benefit of an appeal on questions of law alone, where he has appeared specially for the single purpose of objecting to the jurisdiction of the court over him as a party defendant, and where his appeal is confined to that one question. In Olcese v. Justices' Court, 156 Cal. 82, 103 Pac. 317, the Supreme Court said:

> "This court has never recognized the right of a petitioner * * * to review the judgment of a justice's court after appeal taken and determined in the superior court. It has reviewed the judgment of a justice's court only under such exceptional circumstances as those indicated in Elder v. Justice's Court, 136 Cal. 364 [68 Pac. 1022], where petitioner's power to appeal was lost by reason of the fact that he was never notified of the day set for trial, or the rendition of judgment against him."

In the present case it is clear that at the time when he commenced this proceeding he had the right, and the knowledge which gave him the opportunity to exercise that right, to appeal from the judgment. Therefore he is not entitled to a writ of review.

[3] It further appears by the petition here-

in that the demurrer filed by Clark, to the complaint in the justice's court, was based not only upon the ground that the court had no jurisdiction over the person of the defendant Clark, but also upon the ground that the court had no jurisdiction of the subject-matter of the action. The filing of such a demurrer constituted a general appearance whereby the defendant submitted himself to the jurisdiction of the court. Roberts v. Superior Court, 30 Cal. App. 714, 720, 159 Pac. 465, and cases there cited; Remsberg v. Hackney Mfg. Co., 164 Pac. 792.

[4, 5] The judgment, denying the application for a writ of review, recites that the court had before it a full and complete return of the justice's court, to an "alternative writ" theretofore issued. By its judgment the superior court sets aside the said "alternative writ of review" and denies the "application for the peremptory writ." We are not familiar with the terms "alternative" and "peremptory" as applied to writs of review. The justice's return is not shown in the transcript. For this reason alone this court is without a record which would authorize a reversal of the superior court's judgment. The "answer" filed in this proceeding by the so-called respondents Lacey was a superfluous document, and could not (in the absence of any stipulation) be used to raise any issues in this case. "The return to the writ constitutes the answer, as well as evidence." Stumpf v. Board of Supervisors, 131 Cal. 364, 63 Pac. 663, 82 Am. St. Rep. 350; Donovan v. Board of Police Commissioners, 32 Cal. App. 392, 163 Pac. 69. Treating the judgment of the superior court as in effect an affirmance of the judgment of the justice's court, the judgment of the superior court, from which petitioner appealed, is affirmed.

We concur: JAMES, J.; SHAW, J.

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34 Cal. App. 527

REZ et al. v. SUMMERS. (Civ. 1906.)

(District Court of Appeal, Second District, California. Sept. 4, 1917.)

1. TRIAL 🔑396(3)—FINDING OUTSIDE OF ISSUES.

Where defendant's answer did not set forth facts showing that the case was one in which liquidated damages might be enforced, a finding that it would be impracticable or extremely difficult to fix the actual damage was outside of the issues.

2. LANDLORD AND TENANT 🔑184—DEPOSIT OF SECURITY—RECOVERY.

Under lease giving lessor right to terminate for failure to pay rent, and providing that in case of fire or earthquake, if it is impossible to restore the building within 60 days, the security of $800 is to be returned to the lessee, where pursuant to notice to pay delinquent rent or vacate, the lessee vacated, the lease was terminated, and the money deposited as security could be recovered by the lessee, less any damage suffered by the lessor by reason of the lessee's fault; the receipt for the $800 reciting that it was received in full payment of the rent for the last two months of the term.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by Hannah Rez and another against Emma A. Summers. Judgment for defendant, and plaintiffs appeal. Reversed.

Edward Dietrich, of Los Angeles, for appellants. Jones & Weller, of Los Angeles, for respondent.

CONREY, P. J. Appeal from the judgment. The plaintiff Hannah Rez obtained from the defendant a written lease of certain real property, for a term of 3½ years, beginning on the 24th day of September, 1914. The lessee was to pay an annual rental of $4,800, payable in installments of $400 per month in advance. It was agreed that:

> "If the lessee shall fail to pay the rent reserved herein promptly as the respective installments thereof become due and payable, * * * the lessor herein shall have the right to terminate this lease and to re-enter upon the demised premises and remove all persons and property therefrom, in which event said lease shall be canceled and the said lessor shall be entitled to retain all moneys paid by the lessee herein to her hereunder."

It was also agreed that:

> "In case of a fire, or earthquake, and if it is made impossible to restore the building within sixty days to its former condition, then the security of $800.00 is to be returned to the lessee by the lessor."

On the said 24th day of September, 1914, the lessor executed and delivered to the lessee a receipt for the sum of $800 as being in full payment for the rent of said premises for the last two months of the term mentioned in said lease. On the 24th day of September, 1914, the lessee paid to the lessor, besides said payment or deposit of $800, the sum of $400 due that day. The only other payment made was the sum of $250 paid on account of the installment due October 24th. On the 1st day of December, 1914, the lessor served upon the lessee a notice to pay the sum of $550 rent then delinquent, or to vacate the leased premises within three days. Pursuant to that notice, the lessee vacated the premises on the 3d day of that month.

This action is prosecuted to recover the sum of $650 (besides interest), which the lessee claims should be returned to her out of the $800 received by the lessor as above stated. If the plaintiffs are entitled to recover at all, the true balance will be a matter of computation, with which we need not concern ourselves at present. Judgment was entered in favor of the defendant, and from that judgment the plaintiffs appeal. We have stated the facts as they appear by the findings of fact. It is stipulated that no oral evidence was submitted by either party in the superior court.

[1] In its last so-called finding of facts in the case, the lower court said:

> "From the nature of the case, it would be impracticable, or extremely difficult to fix the actual damage caused to the defendant by rea-

son of the breach of said lease by the said plaintiff.”

This finding was based solely upon a supposed presumption arising, as the court said, “from the nature of the case.” But there is no such presumption. “When a tenant fails to pay rent as provided in the lease, the amount of damage is not extremely difficult to fix, and it certainly is not impracticable to fix the amount of such damage.” Jack v. Sinsheimer, 125 Cal. 563, 58 Pac. 130. Although the defendant Summers claims that the contract was one providing for liquidated damages, her answer did not set forth any facts showing that the case is one in which an agreement for liquidated damages may be enforced. The finding last above noted was outside the issues of fact as presented for the court's determination. In Long Beach City School District v. Dodge, 135 Cal. 401, 67 Pac. 499, the Supreme Court quoted Civil Code, §§ 1670, 1671, which relate to the matter of agreements, determining in advance the compensation to be made in the event of a future breach of a contract obligation, and commented thereon as follows:

> “The first of these sections having declared all contracts fixing liquidated damages in advance to be void, except as provided in the next section, it is clearly incumbent upon the party seeking to recover upon such agreement to show by averment and proof that his case is within the exception, for without an allegation bringing his case within the exception the complaint in that regard is insufficient; the presumption being, in the absence of such allegation, that such agreement is void.”

In the case at bar, as now before us, the agreement of the parties concerning the $800 received by the lessor from the lessee must be ascertained by the terms of the receipt given, read together with the terms of the agreement, which were a part of the lease and which we have quoted. From these sources, it appears that the sum of $800 was received by the lessor as being in full payment for the rent for the last two months of the term. But the payment was not absolute and unconditional, since it was also agreed that in certain contingencies this money would be returned to the lessee, and in that part of the contract the $800 was referred to as “security.”

[2] The lessee having become delinquent by nonpayment of installments of rent which were due, the lessor elected to demand that the lessee pay those installments or vacate the premises. In response to that demand the lessee did vacate the premises. Thereby the lease was terminated, and no further rent can accrue thereunder; but the lessor, upon proper pleadings and proof, has the right to recover such damages as she may have suffered by reason of the lessee's breach of the contract.

In Tiffany on Landlord and Tenant, § 323, several cases are cited, declaring the rule to be that where money has been deposited by the lessee with the lessor to secure the payment of the rent, the tenant can recover from the landlord the excess of the amount of the deposit above the damage suffered by reason of the tenant's default, when the landlord has recovered possession by reason of such default, “it being in such case presumed, it seems, in the absence of evidence to the contrary, that by reason of his recovery of possession the landlord does not suffer on account of the nonpayment of installments of rent falling due after such recovery.” The rule so stated seems reasonable, and is here adopted.

The judgment is reversed.

We concur: JAMES, J.; SHAW, J.

(34 Cal. App. 541)

PEOPLE v. GASSER. (Cr. 541.)

(District Court of Appeal, Second District, California. Sept. 5, 1917.)

1. CRIMINAL LAW 🔑1036(2)—IMPROPER TESTIMONY—TIMELY OBJECTION.

Where the gist of the statements by the prosecutrix to her mother was given in answer to questions to which no proper objection was made, complaint that such testimony was improperly admitted is not well taken.

2. WITNESSES 🔑40(1)—COMPETENCY OF CHILDREN—STATUTE.

Under Code Civ. Proc. § 1880, subd. 2, children under ten years of age are not incompetent witnesses, unless they appear incapable of receiving just impressions of the facts respecting which they are examined or of relating them truly.

3. WITNESSES 🔑40(1), 79(3) — COMPETENCY OF CHILD — EVIDENCE — QUESTIONS FOR COURT.

It was for the trial court to determine whether prosecutrix, seven years old, was competent to testify, and where, before objection, she responded to questions with apparent understanding and intelligence, it cannot be said that anything was shown tending to establish incompetency.

4. WITNESSES 🔑79(2) — INCOMPETENCY OF CHILD—BURDEN OF PROOF.

The burden of showing the incompetency of a child as a witness rested on the defendant.

5. CRIMINAL LAW 🔑656(3) — REMARKS OF COURT — SUSTAINING OBJECTION TO EVIDENCE.

The court's remark in sustaining an objection to a question “she has given the date three or four times” was not prejudicially erroneous as indicating that the judge considered that sufficient proof had been made of any essential fact.

6. CRIMINAL LAW 🔑1043(2) — REVIEW—NECESSITY OF OBJECTION AND EXCEPTION—REMARK OF COURT.

The record not showing specific objection or exception made to the remark of the court, counsel is not in a position to insist upon his objection on appeal.

7. CRIMINAL LAW 🔑665(1)—EXCLUSION OF WITNESSES—DISCRETION OF COURT.

It is within the discretion of the trial court to refuse to exclude witnesses not under examination during the trial.

8. CRIMINAL LAW 🔑673(5) — EVIDENCE OF OTHER OFFENSES—INSTRUCTIONS.

In a prosecution under Pen. Code, § 288, for committing the lewd and lascivious act with a female child, the court did not err in instructing that testimony had been introduced tending to prove other acts than those relied on for conviction, for the purpose only of proving the lewd and lascivious disposition of defendant and his disposition to commit acts of that character, and not to prove distinct offenses.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Joe Gasser was convicted of the crime defined by Pen. Code, § 288, and appeals from a judgment of imprisonment and an order denying his motion for a new trial. Judgment and order affirmed.

Joseph F. Seymour, Jr., of El Centro, for appellant. U. S. Webb, Atty. Gen., and Robert M. Clarke, Deputy Atty. Gen., for the People.

JAMES, J. Appellant was convicted of the crime defined in section 288 of the Penal Code. It was alleged that he committed the lewd and lascivious act with a female child. The little girl was seven years of age at the time of the commission of the alleged offense. She resided in the county of Imperial with her mother. There was testimony given by more than one witness which furnished strong evidence in proof of the charge made in the information. Defendant's appeal is taken from a judgment of imprisonment and an order denying his motion for a new trial. In view of the strong character of the evidence introduced against the appellant, it is plain that upon the facts no miscarriage of justice has resulted. The errors complained of must be viewed in the light of that condition which the record shows. We will not attempt to discuss in detail the many objections presented in the 76-page brief of the appellant, but will consider only those which present questions fairly debatable.

[1] The evidence of statements made by the girl to her mother after the commission of the alleged offense was not improperly admitted. After several objections had been made, the district attorney remarked that he would be very glad to ask the witness what the child had said, but he added:

> "I think we are only permitted to show the general character of the complaint. I am willing to ask her exactly what the little girl told her, if counsel wants me to. I might try it that way."

The district attorney then asked directly what the little girl had said, and the answer was made (and no objection interposed thereto) that the little girl had told the witness that "Joe had played naughty with her." The gist of the statements made by the prosecutrix was given by the witness in answer to questions to which no proper objection was made. Counsel's complaint that such testimony was improperly admitted is therefore not well taken.

[2-4] Further contention is made by the appellant that the court should not have received the testimony of the prosecutrix, who was at the time but seven years of age. After the witness had answered preliminary questions as to her name, age, place of residence, and her acquaintance with several persons named, appellant's counsel objected on the ground that the witness was not shown to be competent. The court overruled the objection. Children under ten years of age are not incompetent witnesses unless they appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly. Subd. 2, § 1880, Code Civ. Proc. It was for the trial judge to determine as to whether the witness who appeared before him was competent to testify. Before objection was made, she had responded to questions of the district attorney with apparent understanding and intelligence, and it cannot be said that, where the trial judge was observing the witness and listening to her manner of testifying, anything was shown which would tend to establish the incompetency of the infant to truly testify. People v. Dunlop, 27 Cal. App. 464, 150 Pac. 389. The burden of showing the incompetency of the child as a witness rested upon the defendant. People v. Holloway, 28 Cal. App. 218, 151 Pac. 975.

[5, 6] On cross-examination of the mother of the prosecutrix the witness was interrogated at some length as to the date of the commission of the alleged offense, and the court finally, sustaining objection to a question, remarked: "I sustain the objection. She has given the date three or four times." We do not think that this remark of the trial judge was prejudicially erroneous as indicating to the jury that the judge considered that sufficient proof had been made of any essential matter involved. The witness had fixed a date in her testimony theretofore given, and the remark of the court only indicated that fact, which must have been already very apparent to the jury. The record does not show that counsel made specific objection or exception to the remark of the court. He is therefore not in a position to insist upon his objection here. People v. MacDonald, 167 Cal. 545, 140 Pac. 256.

[7] It was within the discretion of the trial court to refuse to exclude the witnesses not under examination during the trial. People v. McCarty, 117 Cal. 65, 48 Pac. 984; People v. Nunley, 142 Cal. 441, 76 Pac. 45.

[8] It is next asserted that the court erred in the giving of this instruction:

> "The prosecution has selected acts testified to by the witnesses as having been committed by the defendant on August 16, 1916, and has elected to rely on proof of such acts for a conviction in this case. Testimony has been introduced by the prosecution tending to prove other acts of lewd and lascivious conduct of the defendant toward Alice Burcki, prior to the acts relied upon for conviction. This evidence is introduced for the purpose of proving the lewd and lascivious disposition and tendency of the defendant to commit lewd and lascivious acts. This evidence is not introduced to prove

distinct offenses, but corroborative evidence tending to support the one specific offense for which the defendant is being tried."

It is claimed that this instruction is similar to one given in People v. Harlan, 29 Cal. App. 603, 156 Pac. 980, and which was held to be erroneous. The parallel does not exist. The instruction in the Harlan Case advised the jury that evidence of other offenses was introduced "for the purpose of proving the illicit relations of the defendant" with the prosecutrix. That instruction was further declared erroneous, in that it in effect advised the jury that complete proof had been made of such other acts. The instruction here given does not agree with the instruction given in People v. Harlan, for the court here told the jury only that testimony tending to prove such other acts was competent for the purpose of proving the lewd and lascivious disposition of the defendant, and was corroborative evidence merely to that extent.

We think that none of the other contentions made by appellant for reversal are deserving of specific discussion. We have examined all of them, and are satisfied that the defendant was justly convicted upon ample proof.

The judgment and order are affirmed.

We concur: CONREY, P. J.; SHAW, J.

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34 Cal. App. 534

BELLINGHAM BAY LUMBER CO. v. HOPKINS. (Civ. 2140.)

(District Court of Appeal, First District, California. Sept. 5, 1917. Rehearing Denied by Supreme Court Nov. 2, 1917.)

1. MECHANICS' LIENS ⚷164(1)—PORTION OF CONTRACT PRICE AVAILABLE TO MATERIALMEN—STATUTE.

Where a building contract provided the owner should pay the contractor 75 per cent. of the actual value of work and materials, the other 25 per cent. being retained until completion, not the amount paid the contractor, who abandoned the work, but the total value of the work and materials placed on the land before abandonment, was the proper amount for the court to take as basis for the calculation provided in Code Civ. Proc. § 1200, as it stood at the time the rights of the parties attached, to ascertain the portion of the contract price available to materialmen and applicable to the satisfaction of their liens.

2. COURTS ⚷91(1) — DECISION OF SUPREME COURT—BINDING FORCE.

The rule announced by the Supreme Court as to the proper interpretation to be placed upon a statute must be applied by the trial court and the appellate court, when applicable to the case at bar.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by the Bellingham Bay Lumber Company against E. W. Hopkins. There was judgment for defendant. From an order granting plaintiff new trial, defendant appeals. Order affirmed.

McGraw & Barry, of San Francisco, for appellant. Wm. M. Cannon and J. E. Reardon, both of San Francisco, for respondent.

RICHARDS, J. This is an appeal from an order granting a new trial. The action was one to foreclose a materialman's lien. The facts of the case were these:

On or about January 22, 1909, the defendant, E. W. Hopkins, as the owner of a lot in San Francisco, entered into a written contract with Webster-Mace Construction Company as a contractor for the erection of a building thereon. The contract price was $81,200, payable as follows: Seventy-five per cent. of the value of the labor performed and materials installed during each month was to be paid on the 1st day of the succeeding month until final acceptance of the building, and the remaining 25 per cent. of the contract price was to be paid 35 days after such acceptance. The contractor commenced to work upon the building under this contract, but on May 27, 1909, before completion thereof abandoned its contract. Prior to the time of said abandonment the plaintiff herein had furnished the contractor lumber, to be used and which was actually used in the building, amounting at agreed prices to the sum of $2,515.48, of which amount there was an unpaid balance of $1,590.38 at the time of such abandonment, for which the plaintiff duly filed its claim of lien. Up to the time of the abandonment of the contract the defendant had made progress payments to the contractor pursuant to its terms amounting to $30,643.95, which sum represented 75 per cent. of the actual value of the labor performed and materials installed up to the date of the abandonment of the contract. The amount of the material delivered and on the ground at the time work ceased and the contract was abandoned was of only nominal value. Subsequently the owner proceeded with the completion of the building in accordance with the original plans and specifications, and actually and reasonably expended thereon the sum of $53,565.50.

Upon the trial of the case the court made a finding based upon the foregoing facts, and upon the construction which it then placed upon section 1200 of the Code of Civil Procedure, to the effect that:

> "At the time of said abandonment by said contractor the value of the work and material already done and furnished, including materials then actually delivered and on the ground, estimated as near as may be by the standard of the whole contract price, was less than the sum of $30,643.95."

And accordingly it rendered judgment against the plaintiff upon the theory that there was no fund in the defendant's possession from which the plaintiff's claim of lien could be satisfied. Upon motion for a new trial the court became convinced that the evidence was insufficient to sustain the foregoing finding, and accordingly granted the motion for a new trial upon that ground, and ordered a retrial as to that single issue. It is the correctness of this latter ruling which is challenged upon this appeal.

[1] We are of the opinion that the trial court acted correctly in its order granting the motion for a new trial upon the ground stated. During the trial of the cause the court apparently fell into a twofold error with respect to this particular matter. In the first place the court, in making its estimate as to the value of the actual work and materials on the premises at the time of the abandonment of the contract, took as its basis for its valuation the amount of money which had been paid to the contractor on account of such work and materials up to said date; but the court apparently overlooked the fact that this amount represented but 75 per cent. of the actual value of such work and materials, the other 25 per cent. thereof being retained by the owner under the terms of the contract, and hence that the total value of the said work and materials would be $40,858.60, which would be the proper amount which the court should have taken as the basis for the calculation provided for in section 1200 of the Code of Civil Procedure, as it then stood, for the purpose of ascertaining the portion of the contract price available to materialmen and applicable to the satisfaction of their liens in cases of this character.

The second error into which the court fell was in the construction given by it of section 1200 of the Code of Civil Procedure in arriving at its conclusion that there was no amount in the owner's possession available for the payment of the plaintiff's claim. Section 1200 of the Code of Civil Procedure, as it existed at the time the rights of the parties in the present case attached, read as follows:

> "In case the contractor shall fail to perform his contract in full, or shall abandon the same before completion, the portion of the contract price applicable to the liens of other persons than the contractor, shall be fixed as follows: From the value of the work and materials already done and furnished at the time of such failure or abandonment, including materials then actually delivered or on the ground, which shall thereupon belong to the owner, estimated as near as may be by the standard of the whole contract price, shall be deducted the payments then due and actually paid, according to the * * * contract and the provisions of sections 1183 and 1184, and the remainder shall be deemed the portion of the contract price applicable to such liens."

The Supreme Court in the recent case of Ganahl Lumber Co. v. Weinsveig, 168 Cal. 668, 143 Pac. 1025, has construed this section of the Code in its application to cases involving the abandonment of contracts for the erection of buildings, and requiring the adoption of its method of calculation for the purpose of ascertaining the fund, if any, in the hands of the owner available for the settlement of materialmen's liens. Upon the trial of this cause the court adopted an interpretation other than that determined by the foregoing case as the basis for its aforesaid finding; and its order granting a new trial was predicated upon its change of view resulting from its acceptance of the rule of construction of said section of the Code announced in the Ganahl Case.

[2] The appellant herein undertakes to argue that the Supreme Court was in error in its views expressed in that case as to the proper interpretation to be placed upon section 1200 of the Code of Civil Procedure, and that the rule therein announced should be departed from by this court in the instant case. But it is not for us to make that departure, and it would therefore be a waste of effort to follow counsel for the appellant through an exhaustive analysis of cases in this and other jurisdictions for the purpose of determining whether the construction adopted by the Supreme Court of the section of the Code in question was the proper one. It is the construction which must be applied by the trial court and this court to the case at bar, and, having thus adopted and applied it, the trial court was not in error in granting a new trial.

We find no merit in any other of the points urged upon this appeal.

Order affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

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34 Cal. App. 495

PEOPLE v. CLAYTON. (Cr. 388.)

(District Court of Appeal, Third District, California. Aug. 30, 1917.)

1. Criminal Law 🔑1130(4) — Appeal — Abandonment—Failure to File Brief.

Where an appeal from a conviction of crime was placed on the April calendar and called April 9, 1917, and appellant given 30 days to file opening brief, respondent 10 days to reply, appellant 10 days, cause then to stand submitted, and May 9th appellant was given 10 days from date in which to file opening brief, but he failed to do so, and did not ask for further time, the appellate court will assume that he has abandoned his appeal, and may affirm the judgment and order denying motion for new trial without examining into the mer

2. Larceny 🔑55 — Sufficiency of Evidence.

In a prosecution for grand larceny, evidence *held* to warrant conviction.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

George Clayton was convicted of grand larceny, and from the judgment and an order denying his motion for new trial, he appeals. Judgment and order affirmed.

See, also, 165 Pac. 37.

Ralph H. Lewis, of Sacramento, and Grover W. Bedeau, of Marysville, for appellant. U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

CHIPMAN, P. J. Upon information charging defendant with the crime of grand larceny he was found guilty as charged. He appeals from the judgment of conviction and from the order denying his motion for a new trial.

[1] The cause was placed on the April calendar, and was called on April 9, 1917, and appellant given 30 days to file opening brief, respondent 10 days to reply, appellant 10 days, cause then to stand submitted. May 9th appellant was given 10 days from that date in which to file opening brief. Appellant has filed no brief, and has not asked for further time in which to do so. We must assume that he has abandoned his appeal, and hence we are authorized to affirm the judgment and order without examining into the merits of the appeal. We have, however, given the record careful examination, and find therein no ground for reversal.

The prosecuting witness, one Equals, arrived at Sacramento about 8 o'clock p. m. on October 3, 1916, and took rooms at the Western Hotel, on K street between Second and Third streets. After a hasty toilet in his room he betook himself to the bar of the hotel to spend the evening. He had about $18 in his pocket, from which store he drew not lavishly but with some liberality in treating the frequenters of the bar, all of whom were strangers. Among them was defendant, who drank with Equals several times. About 10 o'clock Equals had become somewhat intoxicated, and concluded it was about time to seek the open air, although he testified that he had full control of his mental faculties, albeit his legs were a bit unsteady. He went out onto K street having, as he testified, two $5 gold pieces in one of his trousers' pockets, and $5 in silver in the other. He also had a knife in one trousers' pocket and a corkscrew, which latter he said he had carried for two years, in the other. Defendant and another man left the saloon at the same time and joined Equals in his quest for fresh air. Together they walked west toward Second street and along Second north and turned into an alley after going a block or two. Equals was a stranger in the city, not familiar with the streets, and did not know just where they went. After entering the alley 20 or 30 feet, these men seized Equals roughly, one holding him while the other went through his pockets and took all the money he had, a knife and a corkscrew. One of them then knocked him down and left him unconscious. About this time Police Officer Addison was on the south side of I street between Front and Second, and, looking down the alley, saw three men enter at the other end from J street and stop about 30 feet from J street. His suspicions were aroused, and he walked down the alley towards the men to see what they were doing, and presently saw them engaged, "and it looked like there was a scuffle, three men together." Addison went towards them and saw two of these men walking out of the alley toward J street. He passed Equals lying on the ground and followed these two men, overtaking them "close to K street." One of the men ran and the other, Clayton, Addison arrested. He took him to the Tremont Hotel between First and Second, and "rang for the patrol wagon." Clayton was put into it, and Equals was picked up and also put in it, and the wagon was driven to the police station, where defendant was searched and there was found in his pockets $15.30, consisting of two $5 gold pieces and the balance in silver. A corkscrew was also found in his pocket, which Equals at once recognized and identified by marks on it which he described. While defendant was in the patrol wagon the driver saw him make some motion as though putting something under the seat and, on going out and examining where defendant sat, found a knife, which he brought into the office and asked defendant if it was his. He said it was not, and Equals identified it as his. Equals also declared that Clayton had stolen his money to which Clayton replied: "You are mistaken, old man; I never saw you before."

[2] The bartender at the Western testified that he knew Clayton, and that the latter drank with Equals the night of the "stand-up" several times and left the bar room when Equals did. The evidence warranted the jury in believing Equals' testimony that Clayton was one of the two men who robbed him.

Defendant testified in his own behalf. He admitted being with Equals in the bar, talking and drinking with him, but denied that he was one of the men who went with him after leaving the saloon. His testimony was that, coming out of the bar, he went east up K street to go to a movie show, and, finding it was too late, he turned back, dropped into a restaurant for a sandwich, came out, and was on his way back along K street when a man came up to him and asked for a match, and just then the officer came up, the other man ran, and he was himself then arrested. He testified, that he got the corkscrew in a "wholesale house" in San Francisco, but he could not remember the name of the firm or the street where he obtained it. On cross-examination he admitted that he had been twice convicted of robbery, once in Washington and once in Pennsylvania.

We find among the records a transcript certified by the official reporter which purports to set forth all the rulings of the court and other matters to which objection was made at the trial. This transcript was afterwards supplemented, on order of this court, by a complete transcript. We have examined the alleged errors as shown by the first transcript, but find none of sufficient gravity to warrant a reversal.

The judgment and the order are affirmed.

We concur: HART, J.; BURNETT, J.

35 Cal. App. 90

ROYAL INDEMNITY CO. v. INDUSTRIAL ACC. COM'N et al. (Civ. 2225.)

(District Court of Appeal, First District, California. Oct. 22, 1917. Rehearing Denied by Supreme Court Dec. 20, 1917.)

Petition by the Royal Indemnity Company for a writ of review upon an award by the Industrial Accident Commission. Writ dismissed, and award affirmed.

Watt, Thornton & Watt and H. B. M. Miller, of San Francisco, for petitioner. Chris. M. Bradley, of San Francisco, for respondents.

PER CURIAM. Petition for a writ of review upon an award made by the Industrial Accident Commission.

The petitioner issued a policy of insurance covering the individual liability of one of two persons jointly engaged in farming, and contends in support of its objection to the award of the commission that the applicant in whose favor it was made was employed by a copartnership consisting of the two persons referred to, so that the applicant's claim against the assured is not one covered by the policy; but we are satisfied—it being conceded that the finding of the commission is in effect a finding of a joint and several obligation—that there is evidence sustaining such finding.

The writ is therefore dismissed, and the award affirmed.

176 Cal. 342

In re WATSON.

WATSON v. WATSON.

(Sac. 2641.)

(Supreme Court of California. Oct. 19, 1917.)

1. Insane Persons 🔑2—Evidence of Incompetency.

Where a woman 78 years old having nine children conveyed land constituting about one-tenth in value of her property to a son living near her and who had been attending to her business affairs in the expectation, but without any binding promise, that he would provide a home for her, the conveyance was not evidence of incompetency requiring the appointment of a guardian.

2. Insane Persons 🔑2—Evidence of Incompetency.

Evidence *held* insufficient to show that a woman 78 years old, who had conveyed part of her property to one of her children, was incompetent, though she was suffering from some physical infirmities incident to her advanced years.

3. INSANE PERSONS ⚷30—APPOINTMENT OF GUARDIAN—GROUNDS.

Under Code Civ. Proc. § 1763 et seq., authorizing the appointment of a guardian for any person incapable of taking care of himself and managing his property, the fact that the property of a woman 78 years old, who had conveyed some of her property to one of her children, might be made more productive and the contending claims of the various children better harmonized by keeping her estate intact during her lifetime did not justify the appointment of a guardian, where her mental faculties were not impaired to such an extent as to make her unable to properly manage and take care of her property or to render her liable to imposition by artful or designing persons.

In Bank. Appeal from Superior Court, Stanislaus County; W. H. Langdon, Judge.

Proceeding by L. A. Watson for the appointment of a guardian of Sarah A. Watson, an alleged incompetent person. From an order appointing a guardian, the alleged incompetent appeals. Reversed.

Hawkins & Hawkins, of Modesto, for appellant. Griffin, Carlson & Boone, of Modesto, for respondent.

SLOSS, J. The superior court of Stanislaus county made an order adjudging Sarah A. Watson to be incompetent, and appointing a guardian of her estate. From this order the alleged incompetent appeals.

The principal contention of the appellant is that the evidence is insufficient to support the finding of incompetency. Our study of the record has satisfied us that there was no substantial testimony showing that Mrs. Watson's mental faculties were impaired to any such extent, if at all, as to justify the court in taking the management of her property out of her hands, and subjecting it to the control of a guardian.

Mrs. Watson was a widow, 78 years of age, the mother of six sons and three daughters. She was residing on a six-acre tract of land near the city of Modesto. Here she lived with her son, Walter Watson, who was the owner of an adjoining parcel of three acres. Mrs. Watson owned a number of pieces of farming land in the states of North Dakota and Minnesota, of the aggregate value of $50,000 or $60,000. Her husband had died some 7 years before this proceeding was begun, and for some time after his death her daughter, Mrs. McLain, had lived with her. Mrs. McLain moved to her own home, and some time later Walter Watson brought his family from Minnesota to California, and took up his abode with his mother. This occurred about 3 years before the filing of the application for letters of guardianship. In October, 1916, Mrs. Watson conveyed to her son, Walter, for a consideration of $200, the six-acre tract upon which he and she were living. The land was worth from $4,000 to $6,000, and it is not pretended by any one that the sum paid was regarded as an adequate consideration for a sale. Indeed, it is apparent that Mrs. Watson and her son did not view the transaction as a sale for a price in money alone. The evidence indicates that the grantor desired to give to her son, Walter, some inducement for remaining on the place, and that she expected to have a home there with him. She seems to have had the belief that some money consideration was necessary to the validity of a conveyance of real property. Except for the payment of the $200, the transfer was really a gift, made in the expectation (though without any binding promise) that the donee would provide a home for his mother. The idea that Mrs. Watson was mentally incompetent does not seem to have occurred to any one until she made the conveyance under discussion. The recording of the deed came to the attention of some of the grantee's brothers and sisters, and caused dissatisfaction and ill feeling, which speedily culminated in the institution of this proceeding.

[1] The respondent relies in large part upon this transfer as evidence of incompetency. But we do not think it can fairly be given any such effect. The evidence was clear that Walter, ever since taking up his residence in California, had been attending to his mother's business affairs, and that he had her full confidence. There is no ground for even a suspicion that this confidence was not justified. It was admitted that he had always treated his mother with filial kindness. In view of the conditions, an absolute gift of this property, constituting about one-tenth, in value, of Mrs. Watson's holdings, would have afforded no occasion for surprise—still less, for any inference of want of capacity on the part of the donor. So far as the evidence shows, the conveyance was the product of her own free volition, and was not induced by any persuasion or pressure on the part of Walter. There was nothing in the evidence to warrant a conclusion that in transferring this land she was not acting rationally.

[2] The remaining evidence relied on to show incompetency was exceedingly weak. Mrs. Watson herself was called as a witness and examined at considerable length. Her testimony, read as a whole, shows that she had a clear and distinct knowledge of her property interests, and a very definite understanding of her relations to her children, and of their claims upon her. She was able to enumerate and describe her various property holdings and the income derived from each. Her total gross annual income was about $1,700. She was not, it is true, able to state just what the net income was, or to give in detail the expenditures required for taxes and other charges against the property. But, in view of fact that these matters were,

to a large extent, being attended to by her son Walter, no inference unfavorable to her mental capacity could fairly be drawn from this circumstance. Indeed, on the whole, it appears to us that her knowledge of her affairs was at least as extensive and accurate as that of the average person who has confided the management of his business interests to a trusted agent. She was suffering from some physical infirmities incident to her advanced years, such as deafness, rheumatism and bronchitis. But there is nothing to show that the clearness of her mind had been impaired in any substantial degree. Much is made of the circumstance that she was unable to recall the provisions of a will which she had made at some time not disclosed by the evidence. But this is of trivial consequence when it is considered that at the time of the hearing her own testimony showed, as above stated, a very complete knowledge of what her property was, and what she was doing and desired to do with it.

One or two of her children testified that they thought she was not competent to look after her affairs. But this testimony was not supported by any good reason. It was founded principally upon the circumstance that she had made the conveyance to her son Walter.

[3] From the remarks of the trial judge, incorporated in the record, it would appear that he thought that Mrs. Watson's property might be made more productive, and that the contending claims of the various children could be better harmonized by keeping her estate intact during her lifetime. But these purposes, however desirable in themselves, do not afford any justification for appointing a guardian. Mrs. Watson's children had no vested right to an equal division of her estate. She was the owner of the property. It was her right to manage it as she pleased, either personally or through agents of her choice, and to dispose of it as she saw fit, unless her mental faculties were impaired to such an extent as to make her unable to properly manage and take care of it or to render her liable to imposition by "artful or designing persons." The appointment of guardians for insane and incompetent persons is authorized by sections 1763 et seq. of the Code of Civil Procedure. The proper construction of these sections was discussed at some length in Matter of Coburn, 165 Cal. 202, 131 Pac. 352, and there is no occasion to repeat what we there said. We may, however, quote, as appropriate to the present case, this sentence from the opinion in Estate of Schulmeyer, 171 Cal. 340, 153 Pac. 233:

> "Generally speaking, an adult person has the right to control his own person and affairs, and that right should not be taken from him, except upon a showing of the statutory grounds warranting a restriction of his liberty of action for his own protection."

We have tried to demonstrate that, in the present case, the required showing was not made.

We have not forgotten that the weight of evidence is for the trial court, and that the finding made below is to be sustained on appeal wherever there is any evidence which, with the aid of legitimate inferences, may fairly be thought to support it. But we are satisfied that there is no such evidence here. The showing is manifestly weaker than that made in Matter of Coburn, supra, or Estate of Schulmeyer, supra, or, so far as we are advised, in any other case in which a finding of incompetency has been held to have support in the evidence.

The order is reversed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; VICTOR E. SHAW, Judge pro tem.; MELVIN, J.; HENSHAW, J.

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176 Cal. 313

BURGE v. ALBANY NURSERIES, Inc.

(S. F. 7628.)

(Supreme Court of California. Oct. 16, 1917.)

1. SALES 🔑434—ALLEGATION OF BREACH OF WARRANTY—SUFFICIENCY.

In an action for a breach of warranty in the sale of fruit trees, the complaint, although wanting in the statement of any specific facts which prevented discovery of the breach at the time of delivery, or before the suckers began to grow as alleged, was sufficient against a general demurrer, where it alleged that plaintiff did not know and had no means of ascertaining whether the trees were grafted on myrobalan roots, either at the time of delivery or afterwards until the roots threw out such suckers; such allegations showing that discovery was prevented until the time mentioned.

2. APPEAL AND ERROR 🔑1040(10)—HARMLESS ERROR — OVERRULING DEMURRER — UNCERTAINTY OF PLEADING.

Unless it can be seen that the overruling of demurrers for uncertainty in complaint caused injustice to the defendant in the result of the trial, an error in that respect will not be cause for reversal of the judgment.

3. APPEAL AND ERROR 🔑1040(10) — HARMLESS ERROR—OVERRULING OF DEMURRER.

Where defendant obtained from the allegations all the information necessary to enable him to conduct the trial and present his defense, overruling his special demurrer was without prejudice.

4. SALES 🔑445(5)—BREACH OF WARRANTY—QUESTIONS FOR JURY.

Whether plaintiff when planting fruit trees purchased from defendant could by the use of ordinary care have discovered that the trees were not grafted upon myrobalan roots as warranted, *held* a jury question.

5. APPEAL AND ERROR 🔑999(1)—REVIEW—VERDICT.

Where it cannot be said as a matter of law that plaintiff did not use due diligence in discovering the breach of warranty, the Supreme Court cannot set aside the verdict thereon.

6. SALES 🔑440(4)—BREACH OF WARRANTY—DAMAGES.

Where it was a jury question whether by diligence breach of warranty as to the kind of roots upon which the tree sold were grafted could have been sooner discovered by the buy-

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

er, the court did not err in admitting evidence tending to show the difference between the value of the land when the discovery was actually made by plaintiff and its value if planted with the kind of trees warranted, in view of Civ. Code, § 3300, providing that damages for breach of an obligation are measured by the amount which would compensate the party aggrieved, and section 3313 providing that the measure of damage for breach of warranty of quality is the excess of the value which the property would have had "at the time to which the warranty referred" had the warranty been complied with over its actual value at that time.

7. TRIAL 🔑243—INSTRUCTIONS—DIFFERENT THEORIES OF RECOVERY.

Where the jury had to determine the facts upon two theories, instructions as to the measure of damages on both theories were not objectionable as inconsistent.

8. SALES 🔑261(6)—FRUIT TREES—GUARANTY.

That the contract described trees sold as "on myrobalan roots" of itself constituted a guaranty that the trees should be grafted on myrobalan roots.

9. SALES 🔑261(6) — CONTRACT — CONSTRUCTION—"STOCK GUARANTEED TRUE TO NAME."

The reasonable construction of the penciled clause in a contract of sale of fruit trees, "Stock guaranteed true to name," is that such guaranty applies to all names descriptive of the trees wherever they appeared in the contract, and as the term "on myrobalan roots" constituted a part of such description the guaranty is to be understood as a warranty that the trees should be as described in the contract; that is, on myrobalan roots.

10. EVIDENCE 🔑450(8) — PAROL TESTIMONY AFFECTING CONTRACTS—AMBIGUITY.

There being no ambiguity in the contract as to the meaning of the words "guaranteed true to name," it was not error to refuse to allow testimony to the effect that such guaranty applied only to the varieties of trees, and not to the variety of roots upon which trees were to be grafted.

Department 1. Appeal from Superior Court, Napa County; Henry C. Gesford, Judge.

Action by A. E. Burge against the Albany Nurseries, Incorporated. Judgment for plaintiff, and defendant appeals. Affirmed.

Wallace Rutherford, of Napa, for appellant. L. E. Johnston, H. L. Johnston, and Clarence N. Riggins, all of Napa, for respondent.

SHAW, J. This is an appeal by the defendant from a judgment in favor of the plaintiff.

The complaint alleges that by a certain written contract incorporated therein, the defendant sold to the plaintiff 1750 French and Imperial prune trees grafted on myrobalan roots, guaranteed to be of that kind; that the trees were delivered to plaintiff in December, 1910; that they were in fact grafted upon peach roots; "that plaintiff did not know, and had no means of ascertaining, whether or not the trees were as ordered by him, and as guaranteed by the defendant at the time of their delivery as aforesaid, and relied, in accepting them, solely upon said warranty and representations of defendant that all of said prune trees were on myrobalan roots"; that so believing, plaintiff planted all of said trees on his farm in Napa county in the spring of 1911; that he did not know, and had no means of ascertaining, whether or not said trees were on myrobalan roots, until the spring of the year 1913, when suckers from the roots disclosed the fact that they were grafted on peach roots and not on myrobalan roots; that said trees were purchased by him to plant on said farm, the soil whereof is unsuitable for the growth of trees grafted upon peach roots, but is suitable for trees grafted upon myrobalan roots; that the value of the plaintiff's land at the time he discovered that said trees were on peach roots would have been $100 per acre greater if it had been planted to prune trees on myrobalan roots, than it was at that time as planted to prune trees on peach roots. Judgment was prayed for $2,569. The myrobalan is a variety of wild plum tree.

The first point urged in support of the appeal is that the complaint does not state a cause of action. In support of the objection it is urged that the measure of damages for a breach of such warranty is the difference between the value of prune trees grafted on myrobalan roots and the value of prune trees on peach roots, such values to be determined at the time of delivery, unless some cause existed which prevented the discovery of the breach of warranty until some future time, and that there are no sufficient allegations of the existence of any such cause, nor any allegations that there was any difference between the value of trees on myrobalan roots and trees on peach roots, in December, 1910, when said trees were delivered.

[1] While the complaint is wanting in the statement of any specific facts constituting a cause preventing the discovery at the time of delivery, or before the suckers began to grow, as alleged, we think it contains enough to stand against a general demurrer for want of facts. The statements that the plaintiff did not know and had no means of ascertaining whether or not the trees were grafted on myrobalan roots, either at the time of delivery or afterwards, until the spring of 1913, when the roots threw out suckers, are general allegations that there was a cause existing which prevented such discovery until the time last mentioned. If the defendant desired more particular information on that point he should have demurred specially on the ground of uncertainty or ambiguity. The demurrer contained several specifications of uncertainty, but none of them related to this point.

[2, 3] The demurrer for uncertainty specifies that it cannot be ascertained from the complaint what the value of the plaintiff's farm was per acre prior to the planting of

the trees, since the planting of the trees, nor at the time of the filing of the complaint, nor in 1913 at the time of the discovery that the trees were on peach roots. Demurrers for uncertainty are usually of small importance, and unless it can be seen that the overruling thereof caused injustice to the defendant in the result of the trial, an error in that respect will not be cause for reversal of the judgment. The real objection on this point is that the allegation that the plaintiff's land would have been worth $100 per acre more if the trees had been on myrobalan roots than it was worth with the trees on peach roots, is only a conclusion of law, and that the value of the land on peach roots and on myrobalan roots, respectively, should have been alleged directly. Whatever criticism may be indulged upon this method of pleading, we have no doubt that the defendant obtained therefrom all the information necessary to enable him to conduct the trial and present his defense. The main inquiry upon the trial related to the difference in value of the land in 1913, when the discovery was made, planted to trees on peach roots as it was, from its value as it would have been if the trees had been grafted on myrobalan roots. The defendant suffered no prejudice by the alleged uncertainty.

[4, 5] The most important point in the case arises over the claim of the defendant that the plaintiff, if he had exercised reasonable care, would have discovered at the time of planting the trees, in April, 1911, that the trees were grafted on peach roots and not on myrobalan roots. The testimony of plaintiff himself was that at the time of the planting of the trees, in April, 1911, he took the trees out of the trenches in which they had been "heeled in"; that in so doing he saw the roots of almost all of the trees, and that he found four or five peach pits clinging to the little fibrous roots of the trees; that this disturbed him and created in his mind a suspicion that the trees were not on myrobalan roots. At that time he had no knowledge of the difference in appearance between the two kinds of roots. He immediatly inquired of the men who were planting the trees for him, and was informed that they also did not know the difference. Thereupon he called upon Mr. Edgman, who was the defendant's agent for the sale of the trees, and who had made the sale of these trees to Mr. Burge, told him about the peach pits, and was advised by Edgman not to worry about it, that the trees were on myrobalan roots; that the defendant would not send anything not on myrobalan roots just as ordered; that he (Edgman) knew they were, and that the peach pits had probably stuck to the roots while in the nursery after they were uprooted for shipment, since all sorts of pits were usually lying about nursery yards. With this assurance the plaintiff was satisfied and made no further investigation. On this subject the court instructed the jury that if they should find that plaintiff did not discover, and could not by reasonable diligence have discovered, that the trees were not on myrobalan roots, until the spring of 1913, then they should estimate the damages according to the difference in values established by the evidence at that time; that ordinary care or reasonable diligence does not exclude all negligence, but is that degree of care which is exercised by ordinarily prudent persons under the same or similar circumstances, and that they should not find that plaintiff should have discovered the breach of warranty when he found the peach shells on the roots, unless they further found that an ordinarily prudent person would have discovered the fact under the same or similar circumstances, and that to that end they should consider all the facts and circumstances of the case shown by the evidence, including the relations between plaintiff, and defendant and its agents, any representations that may have been made by him to them, and the degree of knowledge required to distinguish the peach root from the myrobalan root, and the plaintiff's experience therein at the time. This instruction is not complained of, and we think it correctly states the law. It further appeared from the evidence that the plaintiff had had no previous experience in the planting or cultivation of trees of any kind; that the main difference in appearance between myrobalan roots and peach roots was a slight difference in color, the myrobalan root having a somewhat reddish tinge, and the peach root a yellowish tinge. The question whether a man has been careful or negligent in such circumstances is peculiarly a question for the jury. It is seldom that negligence of this character can be predicated upon facts as a matter of law, and unless this can be done the Supreme Court cannot set aside the verdict of the jury on that ground. In view of the facts above related we are satisfied that in the present case the question is one for the jury, and that this court cannot disturb its decision.

[6] The theory of the plaintiff upon the trial was that the time of the actual discovery of the peach roots in April, 1913, was the time for the estimate of values upon which the measure of damages was to be computed. The defendant contended that the time of ascertaining the damages was either the time of delivery, or the time when the plaintiff discovered the peach pits clinging to the roots in April, 1911. The case is not to be distinguished on this point from Shearer v. Park Nursery Co., 103 Cal. 415, 37 Pac. 412, 42 Am. St. Rep. 125. The Civil Code provides that the measure of damages for a breach of warranty of quality of personal property is the excess of the value which

the property would have had "at the time to which the warranty referred, if it had been complied with, over its actual value at that time." Section 3313. It also provides that damages for breach of an obligation are measured by the amount which would compensate the party aggrieved for all the detriment proximately caused thereby, or which in the ordinary course of things would be likely to result therefrom. Civ. Code, § 3300. In the Shearer Case, where fruit trees were sold with a warranty of quality as to the variety, the breach was not discoverable at the time of planting, nor until the trees began to bear fruit. The court held that the phrase, "the time to which the warranty referred," in section 3313, should be construed in such cases to mean "the time when the breach thereof is, or with due diligence might be, discovered by the purchaser," and that the proper method of ascertaining such difference, when the discovery could not be made until after the trees were planted, would be to take the difference at the time of discovery, between the value of the land as planted to the trees delivered, and the value such land would then have had if it had been planted with trees of the kinds warranted by the seller. This case is approved in Germain Fruit Co. v. Armsby Co., 153 Cal. 590, 96 Pac. 319. The defendant objected to all the evidence tending to show the difference in value of the land in April, 1913, when the discovery was actually made. The soundness of the objection of necessity would depend upon the question of fact whether by due diligence the breach might have been sooner discovered. As this was a question to be determined by the jury, it necessarily follows that the court did not err in overruling the objection and admitting the evidence. The question of fact, as to when the discovery might have been made by reasonable diligence, was properly submitted to the jury by the instruction.

[7] There is no real conflict in the instructions. They express two theories; one upon the hypothesis that the discovery could not with diligence have been made prior to April, 1913, the other upon the theory that the plaintiff did not exercise reasonable diligence in following up the suspicion he had at the time of the planting. Inasmuch as the jury had to determine the fact upon which these theories depended, it was proper that they should have instructions as to the measure of damages upon both theories.

[8-10] The defendant claims that there was no warranty that the trees delivered should be trees grafted upon myrobalan roots. This contention is without foundation. The description of the trees contained in the contract declared that they should be "on myrobalan." The contract was upon a printed form, and a clause therein authorizing the seller to substitute other varieties for those ordered was erased, and below the description were inserted in pencil the words "Stock guaranteed true to name." The fact that the contract described the trees as "on myrobalan," of itself constituted a guaranty that the trees sold should be grafted upon myrobalan roots. Flint v. Lyon, 4 Cal. 21. The reasonable construction of the penciled clause, "Stock guaranteed true to name," is that such guaranty applied to all names descriptive of the trees, wherever they appear in the contract, and as the term "on myrobalan" constituted a part of such description, the guaranty is to be understood as a warranty that the trees should be as described in the contract; that is, on myrobalan roots. There was no ambiguity in the contract as to the meaning of the words "guaranteed true to name," and it was not error for the court to refuse to allow testimony by persons engaged in the nursery business, to the effect that such guaranty applied only to the varieties of trees, and not to the variety of roots on which the trees were to be grafted. These comprise all the points urged in appellant's brief. We find no substantial error.

The judgment is affirmed.

We concur: SLOSS, J.; LAWLOR, J.

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176 Cal. 309

HOARE v. GLANN. (S. F. 7554.)

(Supreme Court of California. Oct. 16, 1917.
Rehearing Denied Nov. 15, 1917.)

1. MUNICIPAL CORPORATIONS 🔑353 — COMPLETION BY CONTRACTOR AND ASSIGNOR—USE OF MATERIALS—LIABILITY.

Where a contract for paving work in a town provided that, if the contractor did not perform it satisfactorily, the town might complete the work, and that material along the work should become its property, and might be used without allowing the contractor anything therefor, and the contractor assigned the contract to defendant, with a provision that, if defendant failed to perform the work to the town's satisfaction and the town so notified the contractor, the defendant's interest should cease and the contractor might terminate the assignment and complete the work, and defendant abandoned the work, the contractor, in completing it as directed by a resolution of the town, was not acting as its agent, but under the contract, and hence was liable for his appropriation of material purchased of him by the defendant and lying along the street.

2. ACTION 🔑28—WAIVER OF TORTS—ACTION ON CONTRACT.

In such case, the assignee might waive the wrong committed by the contractor and assignor in appropriating the material without the assignee's consent, and claim as under an implied contract for its value as it lay upon the street.

Department 1. Appeal from Superior Court, Marin County; Edgar T. Zook, Judge.

Action by P. H. Hoare against Nathaniel P. Glann, in which, after his death, Merrie A. Glann, executrix, was substituted as defendant, with counterclaim by defendant. From a judgment for plaintiff, and from an order denying her motion for new trial, defendant appeals. Judgment and order reversed.

Henry Conlin, of San Francisco, and E. B. Martinelli, of San Rafael, for appellant. B. D. Marx Greene and J. A. Elston, both of Berkeley, for respondent.

SHAW, J. The defendant appeals from the judgment and from an order denying her motion for a new trial.

The action was begun in the lifetime of Nathaniel P. Glann. The complainant states a cause of action against him for the recovery of $4,463.24, alleged to have been due from him to the plaintiff, for crushed rock sold and delivered by plaintiff to said Glann. After the trial, but before the decision below, Glann died, and the defendant, as administratrix of his estate, was duly substituted as defendant. The answer alleged as a counterclaim against the plaintiff that the plaintiff was indebted to Glann in the sum of $6,590.64 for crushed rock belonging to Glann, appropriated and used by said plaintiff, upon which, after deducting the amount due to the plaintiff upon the account sued on by him, there remained a balance of $2,127.40, for which the defendant asked judgment against the plaintiff.

The court found that the money was due to the plaintiff from the decedent for the rock sold by plaintiff to said decedent in his lifetime, as alleged in his complaint, but that the plaintiff had not appropriated or used any rock belonging to said decedent, and was not indebted to decedent, and that nothing was due upon the counterclaim. Judgment was thereupon given for $4,463.24 due upon the plaintiff's claim.

The facts are as follows: The plaintiff entered into a contract with the town of Larkspur for the paving of a street in said town. After making the contract, Hoare assigned the same to said Nathaniel P. Glann. The agreement of assignment provided that Glann was to perform the work required by said contract, and that if he failed to prosecute the work to the satisfaction of the engineer of the town of Larkspur, or the board of trustees thereof, then, upon written notice to Hoare from said board that the contract was not being properly performed, the interest of Glann in the contract should cease, and that Hoare might thereupon inform the board that the assignment had been terminated and immediately proceed to complete the work himself. There was an oral agreement between Glann and Hoare, at the time of the assignment, that Glann should purchase from Hoare the crushed rock to be used in performing the contract, to be delivered by Hoare on the cars at Petaluma at the price of 80 cents per ton. In pursuance of the assignment Glann entered upon the performance of the contract and did a large amount of work thereunder. Under the oral agreement he purchased from Hoare a large quantity of crushed rock, which was delivered to him at Petaluma, and by him carried from Petaluma to the place of work, along the streets, ready for use. He had not paid therefor in full, and the amount sued for in the complaint was the balance unpaid upon the rock so purchased. Glann had also procured rock from others, and some of this rock had been delivered for use on the street. When Hoare took charge of the work, after the default of Glann, a large quantity of this rock lay along the line of work ready for use. There was evidence tending to prove that the value of this rock, in place, as it lay ready for use, was $6,590.64, as alleged in the counterclaim. After partly completing the work Glann was notified by the town board that the work was not being done to the satisfaction of the engineer, and the board also gave written notice to Hoare that the contract was not being properly performed. The board refused to allow Glann to proceed, and directed that Hoare should complete the work under the original contract with the town. Hoare proceeded to complete the work after taking charge thereof, and used in such completion the whole of the rock so provided by Glann therefor, and lying along the line of the work.

The court below made findings to the effect that Hoare had not appropriated, taken, or used any rock or other property belonging to Glann, and held that Glann was not entitled to anything on account of the rock provided by him along the street and used by Hoare in the completion of the improvement. The original contract with the town of Larkspur provided that if Hoaré, the original contractor, failed to perform the work to the satisfaction of the town authorities, the town itself could take possession thereof and proceed to complete the work, and that if it did so the material provided for its completion by the contractor and delivered upon and along the work should become the property of the town, and could be used by it in such completion without allowing the contractor anything therefor. The court below was of the opinion that when Hoare took charge of the work to complete the contract he did so as agent of the town of Larkspur, that he was entitled to all the rights of said town, and that in using the material already provided by Glann he was not appropriating the property of Glann to that use, but was taking property which belonged to the town of Larkspur, and that he owed Glann nothing therefor.

[1, 2] We think the court was mistaken as to the legal effect of the facts proven and admitted to be true. It is clear from the evidence that the transaction by which Hoare took over from Glann the further prosecution of the work and completed it himself was a mere carrying out of the terms of the agreement between him and Glann for the assignment of the original contract. When Glann was discharged by the town board from the further prosecution of the work, the board passed a resolution referring to the terms of

the assignment of the original contract by Hoare to Glann, and to the fact that said assignment had terminated by reason of the notice previously given by the board to Hoare and Glann, and stating that by the terms of the original contract Hoare was still bound to perform the work required thereby; that he had offered to do so, and that in the opinion of the board it was for the best interests of the town and Hoare that he should be directed to do so, and thereupon it directed Hoare to proceed forthwith to complete the work under his original contract. It was in pursuance of this resolution that Hoare completed the work. His status upon beginning the work anew was precisely the same as if he had never made an assignment to Glann. The town did not undertake the performance of the work itself, as the original contract provided that it might do, but instead thereof directed the original contractor Hoare, to perform his contract in accordance with its terms. The forfeiture of the rock provided by Glann for the work and delivered along the line of the street, as provided by the original contract, was not enforced by the town, and did not take place. It follows that the town never acquired any right to said rock, and that Hoare, upon again taking up the work, did not succeed to any rights of the town to the rock provided by Glann. With respect to Glann and Hoare, the rock so provided was the property of Glann. Hoare had no legal right to appropriate it to his own use, except with Glann's consent. The title to the rock sold to Glann had completely passed to Glann at the time Hoare appropriated it. Glann thereupon had the right to waive the wrong committed by Hoare in appropriating the rock without Glann's consent, and to claim as under an implied contract for the value thereof as it lay upon the street. The court should have made findings in accordance with the evidence upon the facts set forth in the counterclaim, and should have allowed the defendant the reasonable value of the material in place at the time it was appropriated by the plaintiff.

The judgment and order are reversed.

We concur: SLOSS, J.; LAWLOR, J.

176 Cal. 347

TAYLOR v. ALBION LUMBER CO.

(S. F. 7350.)

(Supreme Court of California. Oct. 19, 1917. Rehearing Denied Nov. 15, 1917.)

1. MASTER AND SERVANT 🔑278(10) — INJURIES TO SERVANT—NEGLIGENCE—EVIDENCE—SUFFICIENCY—EXCAVATION.

Evidence *held* sufficient to show negligence on the part of the master in putting deceased at work drilling an old shot hole in which all of the dynamite had not been exploded.

2. MASTER AND SERVANT 🔑189(2) — INJURIES TO SERVANT—FELLOW SERVANTS—VICE PRINCIPALS—FOREMEN.

A foreman employed to superintend the work who had authority to direct deceased at his work represented the master, and his negligence was that of the master.

3. DEATH 🔑32 — ACTION FOR BENEFIT OF MOTHER.

The mother or personal representative of a deceased employé has a right of action under Code Civ. Proc. § 377, for death by wrongful act, and is not confined to the remedy under Civ. Code, § 1970, providing for damages for the benefit of dependent parents of a deceased employé.

4. DEATH 🔑32 — ACTION FOR BENEFIT OF MOTHER—NONRESIDENT ALIEN.

That the mother of the deceased employé killed by negligence of the foreman was a nonresident alien was immaterial on the question of right of action for her benefit under Code Civ. Proc. § 377.

5. WAR 🔑11—"ALIEN ENEMY."

An alien enemy is one with whose country the United States is at war.

[Ed. Note.—For other definitions, see Words and Phrases, Alien Enemy.]

6. WAR 🔑10(2)—ALIEN ENEMIES—RIGHTS.

The rights of a nonresident alien enemy are merely suspended until the cessation of hostilities.

7. WAR 🔑10(2)—ALIEN ENEMIES—RIGHT OF ACTION.

Where an employé was killed three years prior to participation of the United States as a belligerent in the war against Germany, and the deceased's mother was an alien, resident in Austria-Hungary, to which the declaration of war had not been extended, an appeal from a judgment dismissing the action will not be dismissed on the ground that she was an alien enemy, since that would perpetually bar the mother from pursuing her claim, but the judgment of dismissal will be reversed.

In Bank. Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by John Taylor, as administrator of the estate of Anton Bozich, deceased, against the Albion Lumber Company. From a judgment of dismissal, plaintiff appeals. Reversed.

T. E. K. Cormac and Wal J. Tuska, both of San Francisco, and Thomas & Thomas, of Ukiah, for appellant. Mannon & Mannon, of Ukiah, and L. A. Redman and Redman & Alexander, all of San Francisco, for respondent.

ANGELLOTTI, C. J. The decedent, Anton Bozich, also known as Anton Bozic, while acting in the course of his employment by the defendant on March 25, 1911, received injuries which caused his death within a few days thereafter. Upon the theory that the injuries causing death were due to the negligence of defendant, this action was brought by the administrator of his estate, on behalf of his mother Helena Bozic, alleged and shown to be his sole heir at law, and alleged to be wholly dependent upon him for subsistence and support, and damaged by his death. When at the trial plaintiff concluded his case, a motion for a nonsuit was made by defendant substantially on the grounds:

First, that section 1970, Civil Code, vests no right of action in a nonresident alien; second, that the statute provides for the recovery for the benefit of dependent parents only, and that the evidence fails to show that Helena Bozic was a dependent parent within the meaning of that section; third, that there was a total insufficiency of the evidence to show any negligence on the part of defendant, etc. The learned judge of the lower court indicated that he thought the third ground not well taken, and the first ground well taken, but granted the motion on the second ground, viz. that there was no sufficient showing of dependency to go to the jury. Judgment was accordingly given that the action be dismissed. We have here an appeal by plaintiff from such judgment.

[1, 2] We are of the opinion that a sufficient case for the jury was made in so far as the third ground of the motion was concerned, viz. insufficiency of the evidence to show any negligence, etc., on the part of the defendant. It was admitted that one Walter Kirry was the foreman employed to superintend the work being done by deceased at the time of the accident, occupying a position superior to him and empowered to direct him in his work and give him orders in connection therewith, and that deceased was subject to his orders. Deceased and a fellow workman named Kuharic were engaged in drilling holes for dynamite charges in connection with some blasting that was being done in building a road. On the day before the happening of the accident they had drilled some holes. The evidence tended to show that after they had left work for the night, Kirry charged the same with dynamite and set off the blasts. For some reason all of the dynamite in one hole did not explode. The next morning when the men returned to work the hole was found filled with earth, while the rock around was cracked. There was testimony to the effect that Kirry instructed them to clean out and deepen the hole for the purpose of another blast, telling them that the night before he had put some dynamite in the hole and lit and exploded it—that the dynamite he had placed therein had been exploded—that the explosion was very weak because he had put in too little powder. There was evidence further tending to show that the two men had no reason to doubt the statement that the hole was free of unexploded dynamite. They proceeded to clean out the hole, first with a spoon to remove the loose dirt, and then, because they could accomplish nothing further with the spoon, using a drill, which one held while the other struck it with a hammer. The drill came in contact with the unexploded dynamite, and the explosion followed. Accepting this evidence as true, which we must do in considering the merits of the motion for a nonsuit, it appears that Kirry set these men at this dangerous task, not only without warning them of any danger of an explosion, but with the express assurance that there was no such danger because he himself had exploded the dynamite the night before, and that the failure of the blast was due to the fact that he had not put in enough dynamite. Certainly the jury would be warranted in concluding that Kirry was negligent in this matter. His negligence would be the negligence of his employer, the defendant, for in this matter he was the representative of his employer, and not a mere fellow servant. See Foley v. California Horse Shoe Co., 115 Cal. 194, 47 Pac. 42, 56 Am. St. Rep. 87. We think the observation of the trial judge to the effect that plaintiff had made a sufficient case for the jury in so far as this ground of the motion was concerned was well based.

[3] As to the second ground of the motion. The case appears to have proceeded to this point upon the theory that the only right in the mother of deceased to damages for the death of her son, although such death was caused by the neglect of his employer, is such right as is given by section 1970, Civil Code. That section provides for an action in the cases covered thereby, by the personal representative of the employé, for damages for the benefit, in the absence of wife or children, of "dependent parents" of the employé. It was claimed by defendant and held by the trial court that there was no sufficient showing of dependency on the part of the mother. This was the very point made in the case of Gonsalves v. Petaluma & Santa Rosa Railway Co., 173 Cal. 264, 159 Pac. 724, where dependency was not shown, and where it was claimed, in view of the provisions of section 1970, Civil Code, that such a showing was essential to a recovery for the benefit of a parent. Undoubtedly this would be true if the parent's right is to be determined solely with reference to such section. But it was held in that case that section 377, Code of Civil Procedure, giving a right of action to the heirs or personal representatives of a person, not a minor, whose death is caused by the wrongful act or neglect of another, against such person, or if such person be employed by another who is responsible for his conduct, then also against such other person, in which action "such damages may be given as under all the circumstances of the case may be just," was not in any way superseded by the provisions of section 1970, Civil Code, and that a personal representative of a deceased employé might successfully maintain the action provided by section 377, Code of Civil Procedure, in every case where a right existed independent of certain amendments to section 1970, Civil Code, made in the year 1907. Stats. 1907, p. 119. It was pointed out that these amendments greatly modified the earlier rules touching the assumption of risks and nonliability for injuries occasioned by the negligence of a fellow servant, giving a right of recovery in such cases under circumstances where no such right before existed. It was said:

> "Section 1970 of the Civil Code is to be construed with section 377, not as superseding it, and so construed it means, as declared in Pritchard v. Whitney Estate Co., 164 Cal. 564, 129 Pac. 989, that where section 1970 *has created* rights of action growing out of the relationship of employer and employé, *which rights of action did not formerly exist* (the italics are ours), such rights of action by the representative of an employé who has lost his life may be prosecuted for the benefit of the class limited and designated in the section itself."

As to other rights of action, viz. those not created by the amendments to section 1970, Civil Code, but which existed prior to such amendments, the limitations of section 1970, Civil Code, have no effect. In that case the cause of action was founded on the employer's neglect in furnishing the employé a safe place in which to work, and it was held that such a cause of action was not one created and given by section 1970, Civil Code, but one that had always existed under section 377, Code of Civil Procedure, and that consequently proof of dependency on the part of the parents was not essential to a recovery.

There can be no doubt that in the matters constituting the basis of plaintiff's claim, Kirry was acting as the representative of his employer. Just as in the Gonsalves Case, the alleged negligent omission was in the matter of using reasonable care in furnishing to the employé a safe place in which to work. The employer cannot escape liability by a delegation of such a duty to another employé. The foreman to whom the duty was delegated here was the representative of the employer, and any negligence on his part was the negligence of the employer. See Foley v. California Horse Shoe Co., supra; Skelton v. Pacific Lumber Co., 140 Cal. 511, 74 Pac. 13, and cases there cited. The Gonsalves Case explicitly decides that for such negligence section 377, Code of Civil Procedure, has always given an action, and that it is not a cause of action created by section 1970, Civil Code. The action given by section 377, Code of Civil Procedure, is one for the benefit of "heirs" of the employé, and lies, regardless of their condition as to dependency, for any pecuniary loss they may suffer by reason of the death. See Hillebrand v. Standard Biscuit Co., 139 Cal. 236, 73 Pac. 163. As said in Sneed v. Marysville, etc., Co., 149 Cal. 710, 87 Pac. 379:

> "This pecuniary loss may be either a loss arising from the deprivation of something to which such heirs would have been legally entitled if the person had lived, or a loss arising from a deprivation of benefits which, from all the circumstances of the particular case, it could be reasonably expected such heirs would have received from the deceased had his life not been taken, although the obligation resting on him to bestow such benefits on them may have been a moral obligation only."

The second ground of motion for nonsuit was without merit.

[4] That the mother is a nonresident alien is, in our opinion, altogether immaterial. Certainly section 377, Code of Civil Procedure, makes no exception in this regard. Whether section 1970, Civil Code, fails to cover the case of a nonresident alien, the question raised by the first ground of the motion for a nonsuit is immaterial here in view of the fact that the action may be sustained as one under section 377, Code of Civil Procedure, but we are not to be understood as intimating that section 1970, Civil Code, excludes such an alien. The complaint in this case alleged all the facts essential to the cause of action created by section 377, Code of Civil Procedure, and the evidence made a sufficient prima facie case in that regard. Under these circumstances we may not shut our eyes to this and affirm the judgment which is obviously erroneous, simply because counsel for plaintiff have not relied on this section. It is only just to them as well as to the learned judge of the trial court to note that the Gonsalves Case was not decided by this court until after the trial of this cause and the writing of the briefs upon which the cause was originally submitted for decision upon the appeal.

[5-7] In the petition for a hearing in this court after decision by the District Court of Appeal, it was suggested that the appeal must be dismissed because the mother of deceased is a subject and resident of Austria-Hungary, and hence, it is claimed, a nonresident alien enemy. An alien enemy is one with whose country the United States is at war. 2 Corpus Juris, 1043. The judgment appealed from was given on June 11, 1914, nearly three years prior to the beginning of our participation as a belligerent in the present war, and of course the record here shows nothing in this behalf. There has, as yet, been no declaration by either nation of a state of war between the United States and Austria-Hungary, our declaration being limited to Germany. We may concede that a state of war may in fact exist between two nations without any official declaration to that effect by either nation. Whether such is the existing situation as between the United States and Austria-Hungary we do not feel called upon to determine on this appeal. Even if we could properly conclude upon the record and the facts of which we can take judicial notice that a state of war does exist between the two governments, and that the mother is a nonresident alien enemy within the meaning of the rule precluding actions and recoveries by or for persons in that class, a dismissal of plaintiff's appeal would not be proper. Those facts would not warrant a forfeiture of the mother's right of action. The rights of a nonresident alien enemy are simply suspended until the cessation of hostilities. See Hutchinson v. Brock, 11 Mass. 119. Also, 40 Cyc. p. 328, and notes. A dismissal by us of the appeal would be in effect an affirmance of the judgment against the mother, perpetually barring her from pursuing her claim. The judgment against her is erroneous. It should be reversed and the cause remanded to the lower court,

where defendant will be at liberty to urge such objections in this regard, by plea or otherwise, as it sees fit.

The judgment is reversed.

We concur: SLOSS, J.; SHAW, J.; MELVIN, J.; HENSHAW, J.; LAWLOR, J.

(176 Cal. 333)

KIRTLEY v. PERHAM et al. (S. F. 7046.)

(Supreme Court of California. Oct. 18, 1917. Rehearing Denied Nov. 15, 1917.)

1. SALES 🔑391(7)—DESTRUCTION OF PROPERTY—RIGHTS OF BUYER.

The buyer of newspaper routes, who was to collect money due from subscribers and pay the newspaper proprietors whatever should be due them out of such collections and who, after the newspaper had ceased publication, offered to restore the routes and demanded a rescission, was entitled to recover the money paid the seller as part of the price, less the profits he had realized from the property while he had possession, and to be relieved from the payment of the remainder of the purchase price.

2. SALES 🔑61—CONSTRUCTION OF CONTRACT—EXECUTORY SALE.

An agreement whereby defendants in consideration of a certain sum agreed to sell, and the buyer agreed to purchase, certain newspaper routes, with the right to collect money due from subscribers and to pay over all amounts properly receivable by them out of the collections, was an executory agreement to sell the routes, to be executed by a final transfer upon payment of the full purchase price.

3. SALES 🔑262½ — NEWSPAPER ROUTES — WARRANTY OF CONTINUANCE OF PUBLICATION.

Under such agreement there was no warranty that the publication of the newspaper should continue.

4. SALES 🔑150(2)—SPECULATIVE CONTRACT—ASSUMPTION OF RISK—NEWSPAPER ROUTES.

The rule that, where the parties knowingly enter into a speculative contract, they are supposed to calculate the chances and assume risks, in the absence of fraud, and that neither party can obtain relief if without his fault the facts upon which the agreement is founded turn out differently from what was expected, does not apply to an executory sale of newspaper routes, as there was nothing more in the nature of a speculation as to the result, or as to the newspaper's continued publication, than in any other case of sale of property which may perish or become extinct.

5. APPEAL AND ERROR 🔑909(5)—PRESUMPTIONS—SELLER'S RIGHT.

Under an executory contract for the sale of property, described as certain newspaper routes for the delivery and service of the newspaper, it would be presumed, in the absence of anything to the contrary in the contract or in the record, that the right sold was a right which the seller had acquired under a contract which the publisher could not revoke.

6. JUDGMENT 🔑234 — PARTIES — STATUTORY PROVISIONS.

In an action to recover money paid by purchaser of certain newspaper routes after the newspaper had discontinued publication, it was alleged that one defendant received part of the money as trustee under a certain will, and also as guardian of one of the beneficiaries under the will, and also asked judgment against one of the beneficiaries individually. Before the action was brought, the interests of the parties defendant had changed. *Held*, that a judgment dividing the amount due among the defendants according to their respective interests, as shown at the time of the trial, was not a fatal variance, and within the power of the court to render, under Code Civ. Proc. §§ 578–580.

7. APPEAL AND ERROR 🔑1170(12) — HARMLESS ERROR—FORM OF JUDGMENT.

An immaterial variance between the allegations and the findings and judgment did not constitute cause for reversal of the judgment, in view of Const. art. 6, § 4½, providing that no judgment shall be set aside or new trial granted for any error of procedure, unless such error resulted in a miscarriage of justice.

In Bank. Appeal from Superior Court, City and County of San Francisco; Marcel E. Cerf, Judge.

Action by C. A. Kirtley against George L. Perham and others, with counterclaim by defendants. Judgment for plaintiff, and defendants appeal on the judgment roll. Affirmed.

A. A. Sanderson and Tum Suden & Tum Suden, all of San Francisco, for appellants. Samuel M. Shortridge, Wm. M. Abbott, and Wm. M. Cannon, all of San Francisco, amici curiæ. O'Connor & Schwartz, of San Francisco, for respondent.

SHAW, J. The defendants appeal from the judgment, upon the judgment roll alone.

The complaint, as a cause of action against the defendants, alleges that they are jointly indebted to the plaintiff in the sum of $4,599.38, for money jointly had and received by the defendants, to and for the use of the plaintiff, and that said sum of money remains unpaid. The defendants, in addition to the answer denying the indebtedness alleged in the complaint, filed a pleading which they denominate a cross-complaint, but which, more accurately speaking, is a counterclaim; it being a cause of action arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim. Code Civ. Proc. § 438. The main questions presented for decision arise upon the facts set forth in the cross-complaint and the findings of the court thereon.

The money had and received by defendants for which the plaintiff sues was money paid by plaintiff to defendants as part of the price of certain personal property sold by the defendants to the plaintiff in accordance with the terms of a written agreement between them. His claim is that while he was in possession of the property under the agreement of sale, but before the price became due and before he received title to the property sold to him, the property itself, without his fault, ceased to exist, and that as a consequence he was relieved from the obligation to pay the remainder of the price, and became entitled to recover from the defendants the money he had paid thereon, less the profits he had realized from the property during the time he had the possession and use thereof.

The defendants in their counterclaim allege a cause of action for the recovery of the part of the purchase price of the property which had not been paid to them by the plaintiff. They proceed upon the theory that, in the case of a sale of personal property upon an agreement whereby the possession is delivered to the buyer before the price is to be paid, the fact that the property sold is lost, destroyed, or ceases to exist, without fault on their part, before payment is due, does not excuse the buyer from his promise to pay the entire price agreed upon, although the title in the meantime is, by the terms of the contract, to remain in the seller. They also contend that in the present case the title, as well as the possession, was tranferred to the buyer at the time of the execution of the agreement.

The court below held with the plaintiff upon these propositions, refused any relief upon the counterclaim of the defendants, and gave judgment for the plaintiff for the sums he had paid upon the price, less the profits realized, as above stated.

Mr. Williston, in his treatise on Sales, says that where goods sold are delivered to the buyer, but title is retained by the seller until the price is paid, inasmuch as the buyer has the immediate use of the goods, he must stand the loss from subsequent ordinary deteriorations, and that "it seems properly to follow that, if the goods are accidentally destroyed or injured, the buyer must stand the loss; that is, he must pay the price in full at the time agreed. The decisions upon the point are in conflict, but the weight of authority sustains the view here expressed." Williston on Sales, § 304. The defendants rely on this doctrine.

[1, 2] We need not review the authorities said to be in conflict, or examine into the merits of the diverse arguments therein. In this state the question is settled in favor of the plaintiff and in accordance with the decision of the court below. Discussing the case of a sale of personal property to be delivered in the future, where the property, without fault of the vendor, has perished in the interval, the court in Potts v. Benedict, 156 Cal. 334, 104 Pac. 432, 25 L. R. A. (N. S.) 609, says:

> "The liability to pay the price in such a case, notwithstanding failure to deliver possession, rests upon the fact that the purchaser was the owner of the property at the time of its destruction. It is elementary in the law of sales that, in the absence of special agreement to the contrary, the risk accompanies the title, and that when a present unconditional sale is actually consummated and the title has passed, the property is thenceforth at the risk of the buyer, so far as accidental destruction by fire, etc., is concerned, even though possession thereof has not been delivered" (citing cases). "Where there is a mere agreement to sell, and title therefor has not passed, the loss falls on the vendor for the same reason. In such a case the vendor is excused from the performance of his contract under the rule we have discussed by reason of the destruction of the thing, but he cannot retain money already paid on account of the proposed purchase, or recover moneys remaining unpaid."

The decisions in Smith v. Phœnix Ins. Co., 91 Cal. 323, 27 Pac. 738, 13 L. R. A. 475, 25 Am. St. Rep. 191, Tyson v. Wells, 2 Cal. 122, Hewlet v. Flint, 7 Cal. 265, Girdner v. Beswick, 69 Cal. 118, 10 Pac. 278, Conlin v. Osborn, 161 Cal. 666, 120 Pac. 755, Peatland v. Edwards, 23 Cal. App. 405, 138 Pac. 257, and Waltz v. Silveria, 25 Cal. App. 719, 145 Pac. 169, are to the same effect. The textbooks state the same rule. 35 Cyc. 343; 24 Am. & Eng. Ency. of Law, 1045; 2 Mechem on Sales, § 1413; 3 Page on Contracts, § 1370. And Mr. Williston himself in section 301 states the general rule to be that the loss in such cases falls on him who has the title at the time. And in section 164, on the same subject, he says:

> "If the property is destroyed or injured before the time when it was agreed the title should pass, the buyer cannot be compelled to pay the price, and if he has paid the price in advance it may be recovered."

It is not disputed in this case that the property sold under the agreement, with the exception of an unimportant portion thereof, which the court finds had no substantial value, ceased to exist about two years after the execution of the agreement, without fault of either party. The property, as described in the record, consisted of the right to deliver a morning newspaper published in San Francisco, known as the San Francisco Call, to subscribers residing upon certain streets in San Francisco. The right, as described in the agreement, was either a permanent right or one which was to continue to exist for an indefinite period in the future. Nothing was said therein, or anywhere in the record, as to the term of its continuance. The agreement is dated August 31, 1911, and according to the record it was executed and delivered about September 21, 1911. The publication of the San Francisco Call was permanently discontinued on September 1, 1913, and thereupon the right to deliver the same to subscribers, which was the subject of the agreement of sale, necessarily ceased to have any value whatever and in fact ceased to exist. Publication of the paper has never been resumed.

From the principles above stated, as established by our decisions, it follows that if we assume that the title to this right remained in the sellers, by virtue of the terms of the agreement, at the time such publication was discontinued, the loss must fall upon the defendants, and the plaintiff was entitled to recover the sum which he had already paid on the price thereof. It is necessary, therefore, to determine the effect of the agreement with respect to the transfer of title and the time when the same was to pass to the buyer. The agreement declares that:

> "This contract of sale and the sale of said property herein provided for, and the terms and conditions hereof, are made subject to the approval and confirmation of the superior court of

the city and county of San Francisco, state of California, wherein the estate of said Abbie L. Randall, deceased, and the guardianship of said Laurence George Randall, said minor, are pending."

It shows that Perham entered into the agreement as the executor of the estate of Abbie L. Randall, deceased, and as guardian of Laurence George Randall, a minor, and that the defendant, William Edgar Randall, executed it in his own behalf. The agreement of sale was confirmed by the superior court for Perham, as executor, on September 14, 1911, and for Perham, as guardian, on September 21, 1911, and thereupon it became effective as of its date. It states that the vendors, for the sum of $8,000, to be paid to them by said C. A. Kirtley, "hereby promise and agree to sell" to Kirtley, and that Kirtley "hereby agrees to purchase from" the vendors, the property described. It recites that $2,500 was paid in cash on the price, and it provides that Kirtley should have three years from the date of the agreement within which to pay the balance, with the privilege of paying thereon, at any time or times, sums of $100 or more; that if he failed to pay the full price, or in other particulars failed to perform his covenants in the agreement expressed, the amount paid by him should be forfeited, and the agreement should thereupon become null and void; that upon the fulfillment by him of his covenants, and the payment by him of the full price, the vendors agree to execute to Kirtley a proper bill of sale, conveying to him "all the right, title, and interest" of the vendors, "in and to the delivery and service of said newspapers." It further provides that "the possession of said newspaper route and routes, and each of them, shall be, and each of them is hereby, placed with" said Kirtley, and that during the life of the contract and agreement, the delivery and service of said Call newspaper over said routes should be made by Kirtley in compliance with the rules and regulations regarding the same, promulgated and demanded by said newspaper, and that Kirtley should collect the moneys due from subscribers, and pay to the newspaper proprietors all thereof properly due and receivable by them out of said collections. The contract also included the right to serve and deliver, within the territory prescribed, another newspaper known as the California Demokrat. This newspaper has not ceased publication, but the court found that the right to deliver the same formed no material part of the consideration of the plaintiff's purchase, and that the plaintiff was willing to restore that right to the vendors or their successors in interest. It appears that before the beginning of the action the plaintiff offered to restore the same to the vendors and demanded a rescission.

From these provisions of the agreement it is clear that it constituted nothing more than an executory agreement to sell to Kirtley the property described therein, and that the title thereto was to remain in the vendors until Kirtley had paid the full price fixed for the property, and had in the meantime performed all the other covenants of the agreement to be performed by him, and that only upon such performance was the title to be transferred to him. The fact that the agreement declares that it was entered into subject to confirmation by the superior court does not alter its character. The effect of that provision was that it did not become an effective agreement until such confirmation was procured, and the result was that, when the proposed agreement was confirmed, it took effect as an executory agreement only, and that by virtue of its terms it related back to its date for the purpose of fixing the time of the inception of the right of possession by Kirtley and the time for the payment of the price. The agreement constitutes an executory contract of sale, to be completed and executed by a final transfer upon payment of the price. The delivery of possession of the property to Kirtley—that is to say, the turning over to him of the duty of delivering the newspapers and collecting the subscriptions—did not transform the transaction into a completed sale. It is a well-settled proposition that an agreement of sale may transfer the right of possession to the vendee without transferring to him the title. Such was the effect of this agreement. The case, therefore, comes within the rule stated in Potts v. Benedict, supra, that upon an executory agreement of sale, where title is retained in the vendor, although possession is given to the buyer, the loss entailed by the destruction or extinction of the subject-matter, without fault by either party, falls upon the vendor, and that he cannot recover any balance of the purchase price remaining unpaid, and is liable to the buyer for the repayment of the portions of the price previously paid. The authorities, so far as we are advised, do not declare that the buyer in such a case, if he has received possession of the property, can keep the profits received by him prior to its destruction or extinction, where he seeks recovery of advances on the price, and we think equity and justice demand that he should account to the vendor therefor. The court below, therefore, properly deducted the profits from the amounts paid by Kirtley upon the price.

[3] It is suggested that as there was no warranty that the publication of the Call should continue, and, as neither party could foresee its discontinuance, the rule stated in Potts v. Benedict should not apply. There is no force in this argument. In the case of the sale of a horse there may be no warranty as to its length of life, and no one could foresee the time of its death, yet the rule that the loss follows the title applies to such sales. Girdner v. Beswick, supra. No distinction of this character can be made.

[4] Defendants invoke the rule stated in

Pomeroy's Equity Jurisprudence (section 855), quoted and approved in Colton v. Stanford, 82 Cal. 388, 23 Pac. 16, 16 Am. St. Rep. 137, that where parties knowingly enter into a speculative contract—one in which they intentionally speculate as to the result—"they are supposed to calculate the chances, and they certainly assume the risks," where there is no actual or constructive fraud, and neither party can obtain relief if, without his fault, the facts upon which the agreement is founded "turn out very different from what was expected or anticipated." This doctrine does not apply to cases of sales of personal property made under the circumstances shown in the present case. There was nothing more in the nature of a speculation as to the result, or as to the continuance of the publication of the Call, exhibited in the record, than there is in any other case of the sale of property which may die, perish or become extinct.

[5] Since the filing of the closing brief of the appellant, prior to the first submission of the cause, a number of additional briefs have been filed by the attorneys for the parties, and by attorneys appearing amici curiæ in behalf of other parties who claim to be interested in the questions involved. In these briefs it is contended that the subject-matter of the sale was nothing more than a personal agency for the delivery of newspapers for the publishers thereof, which was either not transferable or, if it could be transferred, that the transfer was complete when the publishers of the Call accepted Kirtley as such agent, and allowed him to perform the required service. There is nothing in the record to show how or from whom the plaintiffs acquired the property which the agreement purports to sell. It is there termed "property," and it is described as "all those two certain 'San Francisco Call' newspaper routes for the delivery and service of said newspaper" along the streets specified, including also the right to serve and deliver said "Demokrat" over said routes. It is certainly a legal possibility that the vendors could have possessed an unqualified and unconditional right to serve and deliver said newspapers along those streets for a definite term of years extending beyond the duration of this agreement of sale, under a contract which the publishers could not revoke, except for good cause. Such a right is assignable. There is nothing to the contrary in the agreement of sale or in the record. Hence in aid of the judgment we must presume that the right sold was of that character.

[6, 7] It is further claimed that there is a fatal variance between the allegations of the complaint and the findings and judgment. That there is a variance must be conceded. The complaint charged that the defendants jointly received the money sued for, and prayed judgment against Perham in two distinct capacities: First, as trustee under the will of Abbie L. Randall, deceased, for William Edgar Randall and Laurence George Randall; and, second, as guardian of Laurence George Randall—and also against William Edgar Randall individually. The judgment follows the conclusions of law, and is for $1,199.96, against Perham as trustee under the will of Abbie L. Randall and Laurence George Randall, jointly, for $1,199.96 against Laurence George Randall alone, and for $2,399.92 against William Edgar Randall. The explanation is as follows:

At the time the agreement of sale was made, a one-half interest in the property sold belonged to the estate of Abbie L. Randall, a one-fourth interest to Laurence George Randall, a minor, and one-fourth to William Edgar Randall, an adult, and Perham was executor of said estate and guardian of Laurence. The money paid on the price was, of course, held in the same proportions. The agreement purports to be a joint agreement of sale by all the interested parties, and it does not state whether their ownership is joint or several. Their ownership was in fact a common ownership; the interests being as above stated. The three parties interested as vendors each were to receive the benefit of a like interest or share in the money paid on the price; and, under section 1659 of the Civil Code, the implied promise to repay it, upon which the complaint is based, must be deemed to be joint and several. It was therefore permissible to sue them jointly. Before the action was begun the one-half interest in the property belonging to the estate of Abbie L. Randall, presumably including this money, was distributed to Perham, as trustee for the benefit of said William and Laurence, who were sons of said decedent, and the one-half thereof due to William, being a one-fourth interest in the proceeds of the property sold, had been delivered over to William by said trustee. At the time of the trial and judgment, therefore, William held a one-half interest in the money sued for, Laurence held a one-fourth interest therein, and the other one-fourth was held by Perham as trustee for the use and benefit of Laurence. The total sum found due to plaintiff being $4,799.80 the court divided it according to the respective interests, and gave judgment against each defendant for his proportion thereof.

While this may be a technical variance, so far as the mere form of words is concerned, it is not fatal. It was clearly within the power of the court to give such judgment under the provisions of sections 578, 579, and 580 of the Code of Civil Procedure, and as it was in accordance with the facts, and beneficial, rather than prejudicial, to the defendants, it does not constitute a cause for a reversal of the judgment. Const. art. 6, § 4½. It would perhaps have been more correct to have provided in the judgment that, so far as the judgment was against Perham, it was payable only out of the assets in his hands as trustee for Laurence. But this point is not suggested, and it is to be supposed that it was not considered of any importance. We find no error in the record of sufficient consequence to warrant a reversal.

The judgment is affirmed.

We concur: SLOSS, J.; MELVIN, J.; HENSHAW, J.; LAWLOR, J.

176 Cal. 359

McCANN v. CHILDREN'S HOME SOC. OF CALIFORNIA et al. (L. A. 3976.)

(Supreme Court of California. Oct. 19, 1917. Rehearing Denied Nov. 15, 1917.)

1. CORPORATIONS 🔑29(1)—ATTACKING VALIDITY OF INCORPORATION—PERSONS ENTITLED.

Under Civ. Code, § 358, providing that the due incorporation of any company claiming in good faith to be a corporation and doing business as such or its right to exercise corporate powers shall not be inquired into collaterally in any private suit to which such de facto corporation may be a party, but that such inquiry may be had at the suit of the state on information of the Attorney General, where the persons attempting to incorporate a society carried on business and exercised the powers of a corporation, it was a de facto corporation, and the validity of its organization could not be inquired into collaterally in a private suit because the articles of incorporation were not verified.

2. CORPORATIONS 🔑34(3) — ESTOPPEL TO DENY CORPORATE ORGANIZATION.

The grantor, under a deed describing the grantee as a corporation duly organized, was estopped as against the corporation to deny that it was legally organized.

3. APPEAL AND ERROR 🔑882(17)—INVITED ERROR—FINDINGS.

Where the amended complaint alleged that a society which attempted to incorporate in 1891, and which agains incorporated in 1908, had continuously since 1891 exercised all the powers and functions of a corporation, plaintiff could not complain that the court found this fact as alleged by him.

4. CORPORATIONS 🔑499—ACTIONS—RIGHT TO DEFEND—CONDITIONS PRECEDENT.

Under Civ. Code, § 299, requiring every corporation to file a copy of its articles of incorporation in the county in which its property is located, and providing that any corporation failing to comply therewith cannot maintain or defend any action or proceeding in relation to such property until such articles are filed, a de facto corporation which filed its articles of incorporation after the commencement of an action against it, and the filing of an amended complaint, but before the filing of its answer, was entitled to defend the action.

5. CORPORATIONS 🔑387(2)—POWER TO ACQUIRE LAND—RIGHT TO QUESTION POWER.

Under Civ. Code, § 595, providing that no religious, social, or benevolent corporation may own or hold more real estate than may be necessary for its business and objects, not to exceed six lots in any city or town, nor more than 50 acres in the country, provided that any such corporation having the care, custody, control, and maintenance each year, upon an annual average of not less than 100 orphans, etc., shall be entitled to own and possess not to exceed 160 acres in the country, a conveyance of 80 acres of land to a children's home society carrying on the work of finding homes for dependent children and supervising the care of children so placed was not void on its face, and its validity could not be questioned in litigation between the corporation and private persons.

6. CORPORATIONS 🔑577 — PERFECTING ORGANIZATION—IDENTITY OF ORGANIZATIONS.

Where persons attempting to incorporate a society in 1891 thereafter carried on business as a corporation until 1908, when it was discovered that the original filing of articles was invalid for want of verification, whereupon they filed new articles of incorporation and took the other necessary steps to form a corporation under the same name as that formerly used, the new corporation then formed was a continuation of the existing de facto corporation, and the two organizations were identical.

7. APPEAL AND ERROR 🔑1011(1)—QUESTIONS OF FACT—CONFLICTING EVIDENCE.

Where, though there was evidence tending to show that a grantor was of unsound mind, this was met by contradictory evidence creating a substantial conflict, a finding that the grantor was of sound mind could not be questioned on appeal.

8. APPEAL AND ERROR 🔑231(6)—RESERVATION OF GROUNDS OF REVIEW—NECESSITY OF SPECIFIC OBJECTIONS.

Conceding that it was improper to permit an expert to give his opinion that a grantor was of sound mind after stating that he heard or read all of the evidence introduced by the adverse party, the objection on this ground was not preserved for review where the objection made in the court below was on general grounds.

9. EVIDENCE 🔑558(8)—OPINION OF EXPERT—CROSS-EXAMINATION.

On cross-examination of an expert witness it was not permissible to read a lengthy hypothetical question and a lengthy answer thereto given by a different witness on a former trial, and ask the witness whether the answer so given was correct.

10. EVIDENCE 🔑558(6)—OPINION OF EXPERT—CROSS-EXAMINATION.

A hypothetical question asked an expert on cross-examination was improper where it assumed facts not in evidence.

In Bank. Appeal from Superior Court, Santa Barbara County; Curtis D. Wilbur, Judge.

Action by Frank McCann, as administrator of Electus Serls, deceased, against the Children's Home Society of California and others. From a judgment for defendants, and an order denying a new trial, plaintiff appeals. Affirmed.

John T. Ryan, of San Francisco, and Joseph Scott, of Los Angeles, for appellant. A. E. Merrill, of Hollywood, Will D. Gould, of Los Angeles, and Wm. G. Griffith, of Santa Barbara, for respondents.

SLOSS, J. The administrator of the estate of Electus Serls, deceased, brought this action to set aside certain deeds made by his intestate, and to obtain a decree that those claiming under said deeds have no title to the property therein described.

On October 28, 1904, Electus Serls was the owner of a tract of land near Lompoc, Santa Barbara county, containing 80 acres. On that day he made and delivered a deed, purporting to convey said tract to the defendant, Children's Home Society of California, reserving to himself a life interest in the property. There was no money consideration. This deed described the grantee as "a corporation duly organized under the laws of the state of California." The said Children's Home Society of California was a charitable or benevolent organization, carrying on the work of finding homes for dependent children and supervising the care of the children so placed. In December, 1891, the persons conducting this organization had attempted to form a corporation under the provisions of title 12 of part 4 of division first of the Civil Code (section 593 et seq.). Articles of incorporation were filed in the office of the county clerk of the county of Los Angeles, a copy thereof filed in the office of the secretary of state, and a certificate of incorporation issued. Thereupon said Children's Home Society of California carried on business as a corporation until 1908, when it was discovered that the original filing of articles was invalid for want of the verification required by section 594 of the Civil Code. Wall v. Mines, 130 Cal. 27, 62 Pac. 386. Thereupon the persons then conducting the affairs of the society filed new articles of incorporation, and took the other necessary steps to form a corporation, under the name of Children's Home Society of California. On April 18, 1908, Serls executed two additional deeds, the one, covering 50 acres of his farm, to the corporation which had just been organized, and the other, covering the remaining 30 acres, to Julius A. Brown. Each of these deeds, like the one of 1904, reserved a life interest to the grantor. Brown, the grantee of the 30 acres, was the president of the Children's Home Society, and he took the conveyance for the benefit of the society. The land was thus conveyed in separate parcels because of the provisions of section 595 of the Civil Code, limiting the quantity of land to be owned or held by religious, social, and benevolent corporations. The defendant J. W. De Wolfe claimed as grantee of Children's Home Society of California and of Julius A. Brown.

The complaint, after setting up the facts surrounding the original attempt to incorporate, and the later incorporation, charged that a certified copy of the articles of incorporation had not been filed in the county of Santa Barbara, where the property was located, as required by section 299 of the Civil Code. It further alleged that, at the time of making said deeds, Serls was of unsound mind, and that the execution of each of said deeds was procured by the exercise of undue influence upon him.

The court found against the allegations of incompetency and undue influence. It found that, from the time of the filing of the certified copy of the first articles of incorporation, in December, 1891, and the issuance of the certificate of incorporation, said association had exercised all the powers of a corporation under the laws of the state of California, and that, on March 23, 1911 (after the commencement of this action), a duly certified copy of said articles of incorporation was filed in the office of the county clerk of the county of Santa Barbara. It found that the second incorporation took place as hereinbefore recited, and that a copy of said second articles was duly filed in the office of the county clerk of Santa Barbara county on March 23, 1911. The findings set forth the making of the three deeds here assailed, and that the Children's Home Society of California and Julius A. Brown, on June 17, 1910, executed to J. W. De Wolfe conveyances of the 50 and 30 acre tracts attempted to be conveyed by Serls in 1908. It was further found that the two deeds given by Serls in 1908 were ineffectual because of the prior conveyance of all of said land by the deed of October 28, 1904. On these findings the court gave judgment that plaintiff take nothing by the action, that J. W. De Wolfe is the owner of said real property, and that the plaintiff has no right, title, or interest therein. The plaintiff appeals from the judgment, and from an order denying his motion for a new trial.

If the court was right in its conclusion that Serls had divested himself of all interest in the property (except the life estate, which terminated on his death) by the conveyance of October 28, 1904, there is, of course, no occasion to inquire whether the plaintiff showed any good ground for attacking the deeds of 1908, or the subsequent deeds to De Wolfe. The plaintiff, as administrator, stands in no better position than Serls himself would have occupied. It being established that the estate has no interest in the property, the appellant is not concerned with the correctness of the decree determining the title to be in the respondent De Wolfe.

[1, 2] We pass, for the moment, the questions arising on the charges of incompetency and undue influence. There is no merit in the appellant's contention that the defect in the original attempt at incorporation prevented the deed of 1904 from having operative effect. It may be conceded that at the date of this conveyance Children's Home Society of California was not a lawful or de jure corporation. Wall v. Mines, supra. There can be no doubt, however, and, indeed, the appellant concedes, that the exercise by the incorporators of the powers of a corporation created a de facto corporation. It is thoroughly settled that where there is a de facto corporation, the validity of its organization cannot be inquired into collaterally in a private suit, but may be questioned only by the state. Civ. Code, § 358; Spring Valley Water Wks. v. San Francisco, 22 Cal. 434; Bakersfield T. H. Ass'n v. Chester, 55 Cal. 98; Weaverville W. R. Co. v. Board of Supervisors, 64 Cal. 69, 28 Pac. 496; Lakeside Ditch Co. v. Crane, 80 Cal. 181, 22 Pac. 76; Los Angeles Holiness Band v. Spires, 126 Cal. 541, 58 Pac. 1049; Robinson v. Blood, 151 Cal. 504, 91 Pac. 258. Fur-

thermore, the conveyance made by Serls in 1904 described the grantee as a corporation duly organized. It is established law that "one who deals with a corporation as existing in fact is estopped to deny as against the corporation that it has been legally organized." Close v. Glenwood Cemetery, 107 U. S. 466, 477, 2 Sup. Ct. 267, 27 L. Ed. 408; Fresno Canal Co. v. Warner, 72 Cal. 379, 383, 14 Pac. 37; Yancy v. Morton, 94 Cal. 558, 29 Pac. 1111; Camp v. Land, 122 Cal. 167, 54 Pac. 839; 10 Cyc. 245; 2 Cook on Corporations (7th Ed.) § 637. Accordingly, plaintiff cannot avail himself of any defects in the attempted formation of the corporation with which he dealt.

[3] It is contended, next, that upon the filing of the new articles of incorporation in 1908, the activities of the former organization ceased. Several conclusions are sought to be drawn from this asserted circumstance. But, on the record before us, we must take the fact to be contrary to appellant's claim. The court found that the original association had continuously, since the filing of articles in 1891, exercised all the powers and functions of a corporation. The amended complaint so alleged, the averment being denied by the answer. The finding, therefore, was in support of the appellant's own allegation, and he is in no position to complain of the action of the court in finding that the fact was as averred by him. Riverside Land Co. v. Jensen, 73 Cal. 550, 15 Pac. 131; Eaton v. Rocca, 75 Cal. 93, 16 Pac. 529; Samonset v. Mesnager, 108 Cal. 354, 41 Pac. 337. It must be taken as established, for the purposes of this appeal, that the grantee named in the deed of 1904 was continuing to act as a corporation up to the time this litigation was instituted. We do not intend to intimate that, even if it had ceased to perform corporate functions in 1908, its status as a de facto corporation could, by reason of that fact alone, be questioned by any one except the state. See Robinson v. Blood, supra.

[4] The right of the de facto corporation to defend this litigation is assailed upon the ground of its failure to comply with the provision of section 299 of the Civil Code, requiring every corporation to file a copy of its articles of incorporation in the county in which property held by it is located. The section declares that any corporation failing to comply with any of its provisions "cannot maintain or defend any action or proceeding in relation to such property, * * * until such articles of incorporation * * * are filed." It appears that a copy of the articles was filed in the office of the county clerk of Santa Barbara county on March 23, 1911. This was after the filing of the amended complaint in this action, but prior to the filing of the answer thereto. Assuming that section 299 has any application to the case of a de facto corporation, which (as appellant claims is the case here) has never filed valid articles of incorporation, we think the filing on March 23, 1911, was sufficient to authorize the defense of this action. In cases where the corporation is plaintiff, it is settled that a filing of a copy of the articles of incorporation after the commencement of the suit, and before the filing of a plea directed to this defect, will entitle the corporation to maintain the action. Cal. Sav. & Loan Soc. v. Harris, 111 Cal. 133, 43 Pac. 525; Ward Land, etc., Co. v. Mapes, 147 Cal. 747, 82 Pac. 426. Upon like grounds, it should be held that where the certified copy is filed before the defendant makes answer, the right to defend the action is not affected. As was said in the Harris Case, supra:

> "The failure to file this certified copy does not impose upon the corporation a loss or forfeiture of its property, or impair or deprive it of any cause of action or defense it may have in reference to such property."

The provision against maintaining or defending an action was enacted, says the court in the same case—

> "for the purpose of enforcing a compliance by the plaintiff with a statutory requirement. It is limited by its terms 'until' such compliance has been had, and when its object has been effected, its terms prescribing a penalty should be strictly construed and in favor of the corporation."

[5] The point that the corporation was without authority to take and hold the land described in the deed of 1904 is not good. Under section 595 of the Civil Code, corporations of the kind which the de facto corporation assumed to be are empowered to hold property "acquired in any manner," but are prohibited from holding more real estate than may be necessary for the business and objects of the association, not exceeding six lots in any city or town, nor more than 50 acres in the country. There is a proviso that, in certain contingencies, such corporation may own and possess up to 160 acres of land in the country. The appellant claims that the land conveyed by his intestate was not necessary for the purposes of the corporation, and that the conditions authorizing a holding in excess of 50 acres did not exist. But these questions cannot be raised in a litigation between the corporation and private persons. The statute does not declare that any conveyance of land in excess of the statutory limit shall be void, nor does it prescribe any penalty for a violation of its provisions. Although the deed described a tract of 80 acres, it did not show upon its face that it conveyed a greater amount of land than the corporation was authorized to take. Under some circumstances, the holding might have extended to 160 acres, and evidence aliunde was required to show that these conditions did not exist. It is against the policy of the law to permit such inquiry to be made except in proceedings instituted by the state against the corporation. "Although a corporation may be disabled or forbidden from holding land

at all, or from holding land except for particular purposes, or from holding land beyond a prescribed limit, yet if it does hold land in the face of such disabilities or prohibitions, its title will be good except as against the state alone, and it will be deemed to have a good title until its title is invalidated in a direct proceeding instituted by the state for that purpose." 5 Thompson on Corporations, § 5795; 3 Cook on Corporations (7th Ed.) § 694; 7 R. C. L. 567. While there are decisions of contrary import (see, for example, Matter of McGraw, 111 N. Y. 66, 19 N. E. 233, 2 L. R. A. 387), the great preponderance of authority supports the rule as just declared. A few citations will suffice. Union Nat. Bk. v. Matthews, 98 U. S. 621, 25 L. Ed. 188; Cowell v. Col. Springs Co., 100 U. S. 55, 25 L. Ed. 547; Jones v. Habersham, 107 U. S. 174, 2 Sup. Ct. 336, 27 L. Ed. 401; Reynolds v. Crawfordsville First Nat. Bk., 112 U. S. 405, 5 Sup. Ct. 213, 28 L. Ed. 733; Fritts v. Palmer, 132 U. S. 282, 10 Sup. Ct. 93, 33 L. Ed. 317; Am. Mortgage Co. v. Tennille, 87 Ga. 28, 13 S. E. 158, 12 L. R. A. 529; Kohlruss v. Zachery, 139 Ga. 625, 77 S. E. 812, 46 L. R. A. (N. S.) 72; Barnes v. Suddard, 117 Ill. 237, 7 N. E. 477; De Witt Co. Nat. Bk. v. Mickelberry, 244 Ill. 77, 91 N. E. 86, 135 Am. St. Rep. 304; Hanson v. Little Sisters, 79 Md. 434, 32 Atl. 1052, 32 L. R. A. 293; note to Page v. Heineberg, 94 Am. Dec. 382. A like conclusion was reached by this court in Natoma W. & M. Co. v. Clarkin, 14 Cal. 544. In deciding that case Field, C. J., used this language, which has often been quoted:

> "Whether or not the premises in controversy are necessary for these [the authorized] purposes, it is not material to inquire; that is a matter between the government and the corporation, and is of no concern to the defendants. It would lead to infinite inconveniences and embarrassments, if, in suits by corporations, to recover the possession of their property, inquiries were permitted as to the necessity of such property for the purposes of their incorporation, and the title made to rest upon the existence of that necessity."

The same reasons preclude inquiry into the question whether the corporation has met the conditions which authorize it to hold country land in excess of 50 and not more than 160 acres. Under these views, there is no occasion to consider whether section 596, relied on by respondents as fortifying their claim that title passed by the deed of 1904, is applicable to corporations of the kind here involved, or whether, as appellant urges, this section refers only to "friendly societies and pioneer associations."

[6] Throughout his brief the appellant insists upon treating the organization which attempted to file articles in 1891 as an entity separate and distinct from the corporation which was formed in 1908. In discussing the legal points made, we have gone upon the assumption that this position was well founded. It is proper to say, however, that the real situation disclosed by the evidence is that the same persons who were conducting the organization from 1891 to 1908 filed articles of incorporation in the latter year for the purpose of correcting the defects in the attempted incorporation of 1891. In fact, the new corporation was a continuation of the then existing de facto corporation, and we are satisfied that if the question were material here, there would be no substantial difficulty in perceiving and declaring that the two organizations were in reality identical.

[7] Having disposed of these technical objections to the right of the Children's Home Society to take title under the deed of 1904, we come to the points urged in connection with the charge of unsoundness of mind and undue influence. We shall not summarize the evidence on these issues. It is enough to say that there was abundant testimony to support the finding of the court that Serls, at the time of making his first deed, was of sound mind and capable of understanding the nature and effect of his acts and of said deed. True, the plaintiff introduced evidence of contrary tendency. This was, however, met by contradictory evidence, so that the situation presented is simply the familiar one of a substantial conflict of evidence, in the face of which this court is not authorized to question the finding of the court below. Granting the sufficiency of the showing to support the finding of the grantor's soundness of mind, there was virtually no evidence tending to prove the exercise of undue influence.

[8-10] The appellant claims that the court erred in a number of rulings on the admission and rejection of evidence. A physician, having qualified as an expert, after stating that he had heard or read all of the evidence introduced on behalf of the plaintiff, was allowed, over objection, to give his opinion that the grantor was of sound mind. It may be conceded that this is not a proper method of eliciting the opinion of an expert. People v. Le Doux, 155 Cal. 535, 555, 102 Pac. 517. But the particular objection which counsel now urges was not stated in the court below, the objection being on general grounds. Apart from this, we are unable to see from an examination of the record that any substantial prejudice could have been worked by the form in which the question was put to the witness. On cross-examination of the same witness, the plaintiff put to him a hypothetical question, covering about four pages of the printed record, together with a purported answer to such question covering over two pages of the record, and asked him whether the answer so given was correct. Apparently the question had been propounded to, and the answer given by, an expert witness on a former trial of the case. The counsel putting the question on this trial stated that his purpose was "to ascertain the qualifications of the witness." The court sustained an objection to the question, and we think it was right in so doing. It is difficult to see how an answer would have tended to accomplish counsel's avowed purpose. In any other aspect the question was manifestly improper, for the reason, among others, that it assumed facts not in evidence.

Various other points are made, but we think none of the rulings assailed, if erroneous, of sufficient consequence to have substantially affected the result of the trial. We shall not take the time to go into these matters in greater detail.

We find no substantial error in the record. The judgment and the order denying a new trial are affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; MELVIN, J.; HENSHAW, J.

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BASHAM v. SOUTHERN PAC. CO. et al.

(Sac. 2253.)

(Supreme Court of California. Oct. 17, 1917. Rehearing Denied Nov. 15, 1917.)

1. Railroads 🔑348(6)—Injuries at Crossing—Negligence of Fireman—Sufficiency of Evidence.

In an action against a railroad for death of one driving a wagon at a crossing, evidence *held* insufficient to prove negligence of the fireman neglecting to signal the engineer to apply the emergency brake, after he saw decedent and realized, or should have realized, that he probably would not stop before going on the crossing.

2. Railroads 🔑327(11)—Injuries at Crossing—Duty to Stop, Look, and Listen.

It was the duty of one driving a wagon toward a railroad crossing, in the exercise of ordinary care, when approaching the track, even at the slow speed of three miles an hour, to stop, look, and listen for the approach of trains.

3. Railroads 🔑338—Injuries at Crossing—Duty of Road's Employés.

When a person is approaching a place of danger on a railroad, and all the warnings of the danger have been given that reasonable care requires, those in charge of the engine, seeing him thus acting, are not obliged to presume that he will continue in his approach, when he obviously could stop and avoid it with the least care at any time; but they may presume that he will exercise his faculties, and use reasonable care for his own safety.

4. Railroads 🔑338—Injuries at Crossing—"Last Clear Chance."

The doctrine of last clear chance assumes that both parties have been guilty of negligence, the combination of which produces the danger, and places the injured party where he cannot extricate himself, and that such predicament is known or should be known to the other party; and it is not until this takes place that the duty of additional care devolves upon the person causing the injury, and he cannot rely upon dullness to excuse him from knowing that the other party was not warned of danger, as he must be held to know this when the circumstances of which he had knowledge are such as would create in the mind of a reasonable man the belief, or reasonable fear, that the other party was in such a precarious situation.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Last Clear Chance.]

5. Railroads 🔑346(5)—Injuries at Crossing—Last Clear Chance—Burden of Proof.

In an action for the death of a driver at a railroad crossing, the testimony showing beyond question that decedent was guilty of inexcusable want of care in placing himself in peril, the burden of proving that defendant road, after seeing him in such a position, failed to take proper care to avoid injuring him, was on plaintiff.

6. Railroads 🔑348(6)—Injuries at Crossing—Last Clear Chance—Sufficiency of Evidence.

Evidence *held* insufficient to show that defendant's train crew failed to do all that reasonably ought to have been done to avert the collision, as soon as it was, or should have been, apparent that decedent was not stopping his team in a place of safety.

7. Railroads 🔑335(1)—Injuries at Crossing—Contributory Negligence.

Where the negligently fast speed of a train, and the negligent inattention of one driving a wagon toward a crossing, each contributed to and caused a driver's death in collision, and each continued actively to contribute to that result up to the moment of collision, the railroad was not liable for the death.

Angellotti, C. J., and Lorigan and Lawlor, JJ., dissenting.

In Bank. Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by Eva M. Coffey, as administratrix of the estate of O. A. Coffey, against the Southern Pacific Company, a corporation, and F. Gehrman. From a judgment for plaintiff, defendants appeal; Mary T. Basham, duly appointed administratrix on the death of Eva M. Coffey, after taking of the appeal, having been substituted as plaintiff. Judgment reversed.

L. L. Cory, of Fresno (Henley C. Booth, of San Francisco, of counsel), for appellants. F. W. Henderson, of Merced, and F. G. Ostrander, of Oakland, for respondent. E. W. Camp, of Los Angeles, Frank Karr, of San Francisco, and A. S. Halsted, James E. Kelby, and A. R. Baldwin, all of Los Angeles, amici curiæ.

SHAW, J. This action was begun by Eva M. Coffey, as administratrix of the estate of her deceased husband, O. A. Coffey, to recover damages caused by the death of her husband, alleged to have been the result of negligence of the defendants. The verdict was given for the plaintiff, and the defendants appeal from the judgment. After the taking of the appeal Eva M. Coffey died, and Mary T. Basham was duly appointed as administratrix of said estate, and she has been substituted as plaintiff herein.

The accident occurred in the City of Merced, on the main track of the Southern Pacific Railroad, at the crossing of R street. The deceased was traveling on R street from the north toward the south, toward said crossing, at the time the train approached the city of Merced. He was in a farm wagon, driving two horses, and leading two others which were hitched to the rear of the wagon bed. The bed was what is called a grain wagon bed, composed of timbers and planks set upon the running gears, and not extending above the wheels. He was sitting about one-third of the way back from the front of the bed, either on a box or on some sacks. The horses were gentle and entirely under control. They were walking at the rate of about three miles an hour. As the train neared the crossing of R street the engineer whistled for the crossing at the usual place. The train had previously been going at very great speed to make up some lost time, having made up nine minutes of the time in the preceding 14 miles. The track had a very slight down grade at that place, and at a point one mile from the station at Merced, the steam had been shut off, and the train was running on its momentum. After shutting off the steam the brakes were applied at intervals to slacken the speed. At a point from 800 to 1000 feet from R street, the engine whistle was blown for the R street crossing. The fireman was engaged in looking ahead for obstructions upon the track, and giving directions to the engineer regarding them; the engineer was managing the machinery of the locomotive and brakes. These were their respective duties. At that time the fireman saw Coffey approaching the track on R street, leaning forward, with the reins in his hands. The fireman said to the engineer, "Blow your whistle; there is a fellow coming over here and I don't know whether he sees us or not." The engineer then gave several sharp, short blasts of the whistle, as a warning of danger to attract the attention of Coffey. The train was then proceeding at a speed variously estimated at from 15 to 30 miles an hour, and its speed was slackening as it proceeded. At the rate of 30 miles an hour it would take 18 seconds to reach R street. At the time the fireman first saw Coffey, he (Coffey) was about 100 feet from the main track on which the train was running. He continued to approach the track without increasing his speed, in the same attitude, until the team had reached a point some 20 or 30 feet from the track, and the engine was within about 150 or 200 feet from the crossing. Coffey was then giving no sign that he observed the train, or that he intended to stop before driving upon the track. That instant the fireman for the first time realized that he might not be aware of the approaching train. He cried to the engineer, "Hold her; that guy ain't going to stop." The engineer immediately applied the emergency brake and stopped the train as quickly as it could be done. Coffey made no move indicating his knowledge of the approaching train, until his horses had stepped upon the track; then, seeing his danger he arose in the wagon bed, grasped a pitchfork, and began striking the horses to hurry them up. He failed to get across and the engine struck the rear wheels of the wagon, the collision resulting in his death.

It is not seriously disputed that the engine was running at a rate of speed that amounted to negligence at that point in the city of Merced, nor is it seriously disputed that Coffey was guilty of almost gross negligence in going upon the track without having observed the coming of the train, without stopping to listen for its approach, and without hearing the sharp blasts of the whistle to indicate danger. Admitting negligence by the defendants, it must be also admitted that the negligence of the deceased contributed to the accident, and would prevent a recovery unless it can be said that there was sufficient evidence to sustain a finding that, after the fireman had discovered the approach of Coffey, and had realized that he was probably not intending to stop before going upon the track, or when, as a reasonable man, from the conduct of Coffey the fireman should have realized that he was either unaware of his danger or indifferent thereto and did not intend to avoid it, the fireman himself neglected to give the signal to the engineer to apply the emergency brake, and that because of this neglect the accident happened.

[1, 2] We do not think it can be said that the evidence is sufficient to prove such negligence by the fireman. It was the duty of Coffey, in the exercise of ordinary care, when approaching the railroad track, even at the slow speed at which he was going, to stop and look and listen for the approach of trains. His rate of travel was so slow that it is obvious that he could have stopped at almost any moment, up to the time when his horses came within the line of travel of the railroad cars, and by so doing have avoided all danger. At the distance of 20 feet from the track, and from that time until he reached it, he could have seen the train if he had simply turned his head in that direction, and could have stopped his team within a very few feet. The fireman had a right to assume that he would stop before reaching the track, until his conduct gave reason to believe that he would not, and until that moment the fireman cannot be said to have been guilty of negligence in failing to call for the emergency brake.

[3] When a person is approaching a place of danger, and all the warnings of the danger have been given that reasonable care requires, those in charge of the dangerous engine, seeing him thus acting, are not obliged to presume, and it cannot be said that they act unreasonably in not presuming, that the person will continue in his approach until he gets into the very place of danger, when it is obvious that he could at any time, with the least care, stop and avoid it.

[4] The doctrine of the last clear chance assumes that both the plaintiff and the defendant have been guilty of negligence, the combination of which produces the danger,

and places the injured party in a predicament from which he cannot extricate himself, and that this predicament is known, or should be known, with the knowledge actually possessed, to the other party. It is not until this takes place that the duty of additional care devolves upon the person causing the injury. The person thus causing the injury cannot rely upon dullness to excuse him for not knowing that the other party was not aware of danger. He must be held to know this when the circumstances of which he has knowledge are such as would create in the mind of a reasonable man a belief, or a reasonable fear, that the other party was in such precarious situation. Thompson v. Los Angeles, etc., Co., 165 Cal. 748, 134 Pac. 709; Harrington v. Los Angeles, etc., Co., 140 Cal. 523, 74 Pac. 15, 63 L. R. A. 238, 98 Am. St. Rep. 85; Everett v. Los Angeles, etc., Co., 115 Cal. 125, 43 Pac. 207, 46 Pac. 889, 34 L. R. A. 350. The persons thus operating a train have the right to presume that the other party will exercise his faculties and use reasonable care for his own safety.

In Holmes v. South Pacific, etc., Co., 97 Cal. 168, 31 Pac. 834, the facts were that, as the train approached, the injured person was walking alongside of the track, and very close thereto. Just before it reached him, the alarm whistle was sounded, and he stepped upon the track and was killed. The bell was ringing all the time. The court said that the persons in charge of the train were not guilty of negligence in not sooner sounding the alarm whistle, and that, "as the deceased was a man of mature years, and nothing to indicate that he was not able to take care of himself—as he was in fact—the engineer might reasonably believe that he knew of its approach, and would, in obedience to the ordinary instinct for self-preservation, move away from the track before being overtaken by the engine." And with respect to the last clear chance, the court said (97 Cal. page 170, 31 Pac. page 836):

> "The defendant was not the only one who could have prevented the accident, but on the contrary, if the deceased had himself used ordinary care at the time, he could not possibly have been harmed by defendant's locomotive, which was confined to the narrow track upon which it ran. Up to the very moment that he was struck by the engine, it was within his power to escape the injury which he received by simply moving to a place of safety upon the sidewalk, and he would have realized the necessity for such action on his part but for his own negligence at the time in not looking or listening for the approach of the train."

Upon the facts, the court applied the principle that the doctrine of the last clear chance "cannot govern where both parties are contemporaneously and actively in fault, and by their mutual carelessness an injury ensues to one or both of them."

In Green v. Los Angeles, etc., Co., 143 Cal. 31, 76 Pac. 719, 101 Am. St. Rep. 68, the injured person was walking along a path which ran across the track, and was approaching the track thereon at the time the defendant's locomotive came along. The path crossed the track at an angle of 30 degrees, and her course was on the path in the direction which caused her face to be turned partly away from the approaching train. The court says that the findings, in effect, declare:

> "That the engineer saw Bessie Green approaching the track along a path which crossed it; that she gave no evidence of knowledge of the approach of the train; and that, notwithstanding such fact, the engineer did not slacken or lessen the speed of the train, or attempt to give said Bessie Green warning of his approach. But during all this time, it will be observed, Bessie Green was in a position of absolute safety; she was not upon the defendant's track, but walking upon the pathway approaching it. There was nothing to indicate to the engineer that she would leave that place of safety and put herself in one of danger. The mere fact that she gave no evidence of a knowledge of the approach of the train while walking along the pathway towards the track did not indicate to the engineer that she was about to place herself in a position of peril. It is a matter of common observation that thousands of people daily cross in front of trains and approach crossings for that purpose, without giving any indication that they are aware of the coming of the train. They proceed, determining for themselves whether they have sufficient time to make the crossings safely or not, solicitous only for their personal safety, and giving no indication to the engineer whether they will hazard the risk of crossing, or pause until the train passes by, or in any manner indicating that they are aware of the approach of the train, or are concerned about it. * * * There is nothing to indicate that, as far as the engineer knew or could have known, Bessie Green might not have been perfectly well aware of the approach of the train and still have given no indication or manifestation of that knowledge. The law cast upon her the duty of looking to see, when approaching the point of danger, whether there was a train in sight which might prevent her crossing the track in safety, and the engineer had a right to assume that she had taken the precaution which the law required to insure her own safety, was aware of the situation, and being in a place of safety would remain there and not pass to a point of danger."

The facts in this case are closely similar. Coffey's horses were approaching the train in a slow walk, they were under control, and did not appear to be in the least excited. The train was necessarily making considerable noise; it had just previously given several short, sharp blasts, to indicate danger; it is conceded that the bell was ringing. Coffey could have stopped his horses within four feet of the track without being in danger, and doubtless could have accomplished the stop within a space of two or three feet before reaching that point; and the fireman had the right to assume, until the conduct of Coffey indicated the contrary, that he knew of the approaching train and would stop before driving into its path. The fireman himself testified that:

> "Time and again you will see a team driving along and they pay no attention to your signals. They will come up and stop in the clear of the track, and wait for you to go by."

This testimony accords with what the court says is common knowledge in the quotation just made. There is no evidence to contradict these facts, and no circumstances which throw doubt upon them.

There was, to be sure, some discrepancy in the figures given by the different witnesses regarding the relative locations of the train and the wagon at the moment when the warning signal was first sounded. Such variations in estimates of distances are neither unusual nor surprising. But, giving to the respondents the full benefit of the testimony offered by them, we think the record was not such as to warrant a conclusion that the facts were materially different from our statement of them. Granting that the train may have been less than 800 feet from the crossing when the warning signal was given, and that the fireman's estimates of Coffey's location were not exactly accurate it appears from a fair consideration of the entire record, that the warning signals were sounded when Coffey was still in a place of safety. The "last clear chance" doctrine can have no possible application, unless there was evidence tending to show that the fireman neglected to take steps which due care would have required, when he saw the team and wagon in a position which would have indicated to a reasonable man that Coffey was already in danger, or was immediately about to enter the danger zone. The testimony established beyond question that Coffey was guilty of inexcusable want of care in placing himself in peril.

[5] The burden of proving that the defendant, after seeing him in such a position, failed to take proper care to avoid injuring him, was on the plaintiff. She seeks to sustain this burden by pointing to the testimony by one or two witnesses, to the effect that the horses were already on the track when the danger signals were blown, and that the train was then within 150 or 200 feet of the crossing. This testimony, vague and uncertain at best, is contradicted not only by that of other witnesses on both sides, but by the inherent probabilities of the situation. Even if it be accepted as sufficient to form the basis of a finding, it does not meet the needs of the plaintiff's case, unless supplemented by evidence that the fireman was at fault in not then doing what a reasonably careful man would have done to avert the impending collision. It is argued to this end that the testimony of the fireman and the engineer shows that the fireman did not call for the application of the emergency brake until some period of time had elapsed after the giving of the warning signal. During this interval, it is said, the fireman failed to take any steps to slow the train so as to permit Coffey to cross in safety. The argument thus made assumes the truthfulness of the fireman's testimony with respect to the directions to the engineer to blow the whistle and apply the brakes. It assumes, on the other hand, that he did not testify truthfully to the conditions existing when he gave the respective orders. The hypothesis is that the brakeman told the engineeer, in effect, that a man was approaching the track, and that a whistle should be blown to warn him to stop, when he saw the man already on the track, or so near as to make it plain that he would presently be on it. If the situation was as testified to by the fireman, his statement to the engineer was in accord with the facts, and his conduct was reasonable and intelligible. If the situation was as plaintiff now claims, the fireman's direction to the engineer was obviously futile and meaningless. It would require an unduly strained construction of the evidence to hold that the jury was warranted in accepting the part of the fireman's testimony which described what he did, and rejecting that part which gave purpose and sense to his actions. Moreover, if the fireman's second warning was so soon after the first, and when the train was so near the crossing as this theory implies, the discovery that Coffey was going to cross the track must have come too late, and when it was made the collision had already become inevitable. The failure to discover it sooner might, in that case, constitute original negligence, but it would not be a ground for applying the doctrine of the last clear chance.

[6] The record convinces us that there is no substantial evidence that the train crew failed to do all that reasonably ought to have been done to avert a collision, as soon as it was, or should have been, apparent that the driver was not stopping his team in a place of safety.

[7] With respect to the engineer who was operating the train and Coffey, the negligently fast speed of the train, and the negligent inattention of Coffey, each contributed to and caused the injury, and each continued actively to that result up to the very moment of the collision, thus bringing the case within the rule stated in Holmes v. South Pacific, etc., Co., supra. The plaintiff cannot recover for an injury so caused.

With regard to the last clear chance doctrine, it cannot be said that the fireman was guilty of negligence in failing sooner to realize that Coffey was probably oblivious of his danger. The staccato notes of the danger whistle just then sounded, as the evidence shows, had attracted the attention and aroused the alarm of almost every one in the vicinity, although none of them had as much need or occasion to be alert thereto as Coffey. The bell of the engine was continuously ringing. The moving train itself must have made considerable noise. The horses were in a slow walk. The lines were in Coffey's hands. The horses were under his control. He could have come to a standstill in a second. Under all these circumstances, it would be extremely unreasonable for any one to suppose that he was unaware of the approaching train, and did not intend to stop before reaching the track, as he could easily have done, and as is the frequent custom. When the fireman did, nevertheless, begin to entertain a fear that Coffey was inattentive, he at once gave the urgent order to the engineer to stop. It cannot be said either that he did realize the danger sooner, or that, in reason, with his knowledge, he had cause to realize it sooner. Hence the last clear chance doctrine never came into operation, and the case comes within the scope of the case of Green v. Los Angeles, etc., Co., supra.

This conclusion renders it unnecessary to determine the other questions presented by the record and argued in the briefs. The evidence was insufficient to support the verdict.

The judgment is reversed.

We concur: HENSHAW, J.; SLOSS, J.; MELVIN, J.

ANGELLOTTI, C. J. (dissenting). I dissent.

I concur in what is said in the opinion on the question of the negligence of the deceased, and I have no objection to the statements as to the law in regard to the last clear chance doctrine. But it does seem to me, after a full consideration of the record, that the evidence was such as to sufficiently support the conclusion of the jury and trial judge that facts existed which make the railroad company liable under the last clear chance doctrine, and that the reversal of this judgment is in violation of our well-settled rule that this court will not interfere with the conclusion of the jury and trial court on questions of fact where the evidence is substantially conflicting.

There was much testimony as to the giving of the warning signal, and, so far as its character is concerned, there is no conflict in the evidence. The short, sharp blasts of the locomotive apparently attracted the attention of and alarmed the whole neighborhood. But on the question of the distance of the locomotive from the crossing at the time the first of these blasts was sounded, as well as on the question of the distance of Coffey therefrom, there is much conflict in the evidence, some of the testimony being substantially to the effect that the locomotive was within 200 feet and Coffey just beginning to cross, while other testimony was to the effect that he was then within about 20 feet of the track, the fireman's testimony placing him still further away. Of course, with the testimony conflicting on these points, the jury were not bound to accept as correct the evidence of the engineer and fireman that the warning was given as much as 800 feet west of R. street. They might fairly conclude, in accord with the evidence to that effect, that the train was then only 200 feet from the crossing, and that Coffey, at least so far as the heads of his horses were concerned, was already practically within the danger zone. According to the evidence of the fireman, Coffey showed no indication of knowledge of the approaching train until the front wheel of the wagon was about to go over the north rail, but sat with his head down, jogging along at the same gait, until that time. This situation is absolutely inconsistent with any theory that the danger blasts were sounded at as great a distance from R street as 800 feet, for it is incredible that Coffey would not have heard them, and certainly the jury may fairly have concluded that he did hear them when they were blown, and as soon as he could get at it adopted the only course apparent to him of avoiding a collision. That Coffey was not asleep is evidenced by the testimony that he had driven out around the projecting car on Track No. 5. It is undisputed that the locomotive struck the rear wheel of the wagon, which was some 20 feet from the heads of the horses. The jury may well have concluded that there was no increase in Coffey's rate of speed at any time before being struck, for although at the very last he did his best to urge his team forward, there was testimony that at least one of the led horses at the rear held back, and in the nature of things it would take a moment or two for the horses at the rear to respond to the sudden start of the horses in front, even if they did not hold back because frightened by the train, which was then so near at hand. At that rate he would have traveled in five seconds only about 22 feet. I think it is apparent from the record that there is sufficient support for a conclusion by the jury that the danger blasts were not commenced until the train was within 200 feet of the crossing, and that at that time Coffey was already in a position of danger. Indeed, it is my opinion, after an exhaustive consideration of the record, that the substantial weight of the evidence is to this effect.

If this was apparent to the fireman, or should have been apparent to him as a reasonable man with the knowledge he actually had, it was incumbent on him to do what he could then reasonably do to avoid the threatened injury. For the consequences of any neglect on his part in this regard, defendant railroad company would be liable under the last clear chance doctrine. It must be accepted as sufficiently established by the evidence of both fireman and engineer that the fireman did not call upon the engineer to stop the train or reduce the speed immediately upon the giving of the danger blasts, and that there was no application of the emergency brake for some appreciable time thereafter. It is obvious that the difference of even a second in the application of the brake would have so reduced the speed as to have avoided a collision with any part of the wagon.

In view of the testimony of the fireman that Coffey was constantly under his observation, except for a second or two when his view was obstructed by cars, from a point where he was 100 feet from the track until the time of the collision, I do not see how it can fairly be held that there was no sufficient support for a conclusion by the jury that at the time the danger blasts were commenced the fireman had actual knowledge of facts from which he should have concluded, as a reasonable man, that Coffey was already, owing to his ignorance of the approach of the train, in a position of danger; that even if his advancing horses' heads were not even then within the space that would be covered by the overhang of the locomotive as it passed, they would inevitably be within such reach in a second or two at most; that the situation was such that Coffey, for some reason, had been without knowledge of the approach of the train, and that the time was so short that he could not be brought to a realization of his dangerous position in time to enable him to stop his team clear of all danger; and that the only hope of avoiding injury lay, not only in endeavoring to attract his attention by the danger blasts, but also in reducing the speed of the train as much as possible. If this be so, the question was one for the jury. Of course, Coffey could be in a position of great peril although his horses' heads were not, as yet, actually within three or four feet of the northerly rail. See Harrington v. Los Angeles, etc., Co., 140 Cal. 520, 74 Pac. 15, 63 L. R. A. 238, 98 Am. St. Rep. 85. If he was actually in such a position, and that fact was apparent to the fireman, and the fireman, nevertheless, failed to use what, under the circumstances, would be ordinary care to avoid the threatened injury, and the exercise of such care would have avoided the injury, all of which the jury had the right to conclude from the evidence, the failure to use such care must be held to be the sole cause of the injury, notwithstanding the previous negligence of Coffey. Such previous negligence ceased to be a factor in the eyes of the law as soon as Coffey was, to the knowledge of the fireman, actually in a position of peril, and he failed to use ordinary care to avoid the accident. I have in mind the well-settled rule that ordinarily the circumstances are such that one operating a train has the right to assume that one walking or riding towards a railroad track is able to and will care for himself by taking all necessary precautions to observe the approach of the train, and that he will not place himself on the track at such a time as to be injured thereby. See Green v. Los Angeles, etc., Ry. Co., 143 Cal. 44, 76 Pac. 719, 101 Am. St. Rep. 68; Lambert v. Southern Pacific R. R. Co., 146 Cal. 236, 79 Pac. 873. But, of course, there is no room for any such assumption where the circumstances are such as to show that the person approaching is already in such proximity to the track as to reasonably raise the question whether he will be able to get out of the way of the train. See Harrington v. Los Angeles Ry. Co., supra; Everett v. Los Angeles, etc., Ry. Co., 115 Cal. 125, 43 Pac. 207, 46 Pac. 889, 34 L. R. A. 350.

I am therefore of the opinion that in view of the last clear chance doctrine, as was held by the learned district court of appeal, the verdict against defendant railroad company has sufficient support in the evidence.

We concur: LORIGAN, J.; LAWLOR, J.

176 Cal. 304

ZENZ et al. v. INDUSTRIAL ACCIDENT COMMISSION et al. (Sac. 2714.)

(Supreme Court of California. Oct. 16, 1917.)

Commerce 🔑27(4)—"Interstate Commerce"—Transportation of Mail—"Common Carrier by Railroad."

The interstate transportation of mail by a railroad under a contract with the federal government is "interstate commerce," and covered by the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1916, §§ 8657–8665]), which imposes liability for injury to employés engaged in interstate commerce on every "common carrier by railroad," since the quoted expression is used in its generic definitive sense, to designate the class of employers subject to the act, and where an employer is within the designated class, and is engaged in interstate commerce, it is immaterial whether it is so engaged as a common carrier or as an agency of the government.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

In Bank. Proceeding under the Workmen's Compensation Act (St. 1913, p. 279) by Cyriakus Zenz and others to obtain compensation for the death of Frederick Albert Zenz. Compensation was denied, and the claimants petition for a writ of review. Order to show cause discharged, and proceedings dismissed.

Cushing & Cushing, of San Francisco, Hatton & Scott, of Modesto, and Erwin E. Richter, of San Francisco, for petitioners. Chris. M. Bradley, of San Francisco, for respondent Commission. E. W. Camp, Robert Brennan, U. T. Clotfelter, Paul Burks, and M. W. Reed, all of Los Angeles, for respondent Atchison, T. & S. F. Ry.

ANGELLOTTI, C. J. The petitioners, alleged dependents of Frederick Albert Zenz, deceased, who received injuries in the course of and arising out of his employment by the Atchison, Topeka & Santa Fé Railway Company, which caused his death, sought from the Industrial Accident Commission an award against the railway company under the Industrial Compensation Act. After a hearing the commission found that the injury arose out of and happened in the course of employment, while the injured employé was performing service growing out of and incidental thereto, in the following manner:

"While delivering pouches of mail from the depot at Riverbank to a train he was run down by another train."

It, however, dismissed the proceeding for want of jurisdiction; the railway company having pleaded and established to the satisfaction of the commission that the injury occurred while deceased was employed by the railway company in interstate commerce, and that, therefore, by reason of the act of Congress relating to the liability of common carriers by railroad to their employés, the act generally known as the federal Employers' Liability Act, the commission was without jurisdiction.

On the application of petitioners an order to show cause why a writ of certiorari or other appropriate writ should not issue was made. Answers have been filed both by the commission and the respondent railway company, and the matter has been submitted upon such petition and answers. It appears that the commission also found as follows:

> "That at said time the defendant was a common carrier by railroad engaged in commerce between different states of the United States and said Frederick Albert Zenz was engaged by the defendant in such commerce; that this commission is therefore without jurisdiction in this proceeding."

It was stipulated at the hearing before the commission that the occupation of deceased—

> "was that of a call boy and delivering United States mail from the defendant's depot to defendant's trains and vice versa, taking United States mail from defendant's trains to defendant's depot, and that, while in the performance of this duty of carrying United States mail from the defendant's depot to defendant's train, the deceased employé met with injuries, causing subsequent death."

It is not disputed, as set up in the answers, that the railway company was a common carrier by railroad engaged in interstate commerce, operating trains between the state of California and other states of the United States, and that the train to which decedent was delivering the mail at the time of his injury was an interstate train engaged in interstate commerce, which had stopped at Riverbank on its way to its destination in the state of California. It is further set up in each of the answers that evidence was produced before the commission to the effect that the article being handled by the decedent at the time and place of injury, viz., United States mail, consisted in part of communications and mail destined to points without the state of California.

The real contention of petitioners, as stated in their petition, is that, inasmuch as the carriage in regard to which the employer was engaged, in so far as any service of deceased was concerned, at the time he received his injury, was the carriage of United States mail, it was not and could not be, with respect to such service, a common carrier engaged in interstate commerce, within the meaning of the act of Congress referred to, with the result that, such act having no application, the jurisdiction of the Industrial Accident Commission was complete. "If the federal statute was applicable, the state statute was excluded by reason of the supremacy of the former under the national Constitution." St. Louis, etc., Ry. v. Seale, 229 U. S. 156, 33 Sup. Ct. 651, 57 L. Ed. 1129, Ann. Cas. 1914C, 156. If the federal statute was not applicable, the Industrial Accident Commission had jurisdiction.

Basing their claim upon certain decisions to the effect that a railroad company in carrying United States mail is not, with respect to such service, acting as a "common carrier," with the corresponding rights and liabilities of that relation, but is, in that particular service, serving as an agency of government (see Atchison, etc., Ry. Co. v. United States, 225 U. S. 640, 32 Sup. Ct. 702, 56 L. Ed. 1236; Bankers' Mutual Casualty Co. v. Minneapolis, etc., Ry. Co., 117 Fed. 434, 54 C. C. A. 608, 65 L. R. A. 397; Banking Co. v. Lampley, 76 Ala. 357, 52 Am. Rep. 334; Boston Insurance Co. v. Chicago, etc., Co., 118 Iowa, 423, 92 N. W. 88, 59 L. R. A. 796), it is urged by petitioner that the federal Employers' Liability Act can have no application here. It is urged by counsel that the act applies only to such service as is being performed by the railroad company under such circumstances as make it a "common carrier," with all the resultant legal rights and obligations, with relation to the person for whom the service is performed. The language of the act is:

> "That every common carrier by railroad while engaging in commerce between any of the several states or territories * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employé, to his or her personal representatives," etc.

No one of the cases cited by learned counsel for petitioners arose under the federal Employers' Liability Act, and cannot be taken as authority upon its proper construction. The first case cited (Atchison, etc., Ry. Co. v. United States, supra) had to do solely with the question of the relations of the carrier of mail to the government, its rights and liabilities in regard thereto, and it was held that with relation to the government it was not "acting as a common carrier, with corresponding rights and liabilities," but as an agency of the government under contract with the government. In the other cases the litigation involved the question of the liability of the carrier to senders and addressees of mail matter. It was held that the carrier of mail was not, with respect to senders and addressees of mail, "a common carrier," with corresponding rights and liabilities, but, with regard to them, was acting solely as a government agency. We think this distinction, so important when we are considering the question of the rights and obligations of the railroad carrier with relation to the government, and the senders and addressees of mail, is unimportant here. In enacting the federal Employers' Liability Act Congress was endeavoring to cover the whole field of the relations between carriers by railroad engaged in interstate commerce and their employés, with respect to their obligations to the employés, and the remedies of the latter for any violation of those obligations. Whether in a particular case one primarily engaged in the business of a common carrier is carrying particular goods in that capacity rather than as a mere agent or under some other kind of contract is of importance only as relates to his obligations and liabilities to those for whom he carries, a matter having no real pertinency to the subject-matter of this legislation. To our minds, the expression "common carrier by railroad" was used simply to designate the class of employer subject to the act, and, as put by counsel for respondents, "in the generic definitive sense" as including only common carriers "by railroad" as distinguished from common carriers by other means of transportation. If the employer is primarily engaged in the business of transporting passengers and freight for hire by railroad as a common carrier, it comes within the act, as to its railroad of course, provided always that it is subject to the act only while engaged in interstate commerce, and only on account of injuries or death suffered by an employé while he is employed by such carrier in such commerce. That the Atchison, Topeka & Santa Fé Railroad Company was primarily a "common carrier by railroad," actually engaged in its business as such at the time of the accident, is not questioned. The remaining question is, then, whether in the matter of the transportation of this mail it was engaged in interstate commerce, entirely regardless of whether it transported such mail, so far as its relations with the government are concerned, as a common carrier or as an agency of the government.

We think there can be no serious question, in view of the decisions, that the transportation of mail between different states and territories is interstate commerce. It was said in the case of Pensacola Tel. Co. v. Western Union Tel. Co., 96 U. S. 1, 24 L. Ed. 708, that:

> "Since the case of Gibbons v. Ogden, 9 Wheat. 1, 6 L. Ed. 23, it has never been doubted that commercial intercourse is an element of commerce which comes within the regulating power of Congress. Post offices and post roads are established to facilitate the transmission of intelligence."

In that case it was held that the transmission of intelligence by electricity is interstate commerce. The transmission of wireless messages between states is held to be interstate commerce (Marconi Wireless Tel. Co. v. Com., 218 Mass. 558, 106 N. E. 310, Ann. Cas. 1916C, 214), as is also the transmission of information between states through the mails by correspondence schools (International Textbook Co. v. Pigg, 217 U. S. 91, 30 Sup. Ct. 481, 54 L. Ed. 678, 27 L. R. A. [N. S.] 493, 18 Ann. Cas. 1103). There can be no doubt that the transmission of letters or parcels by a railroad for an express company between states is interstate commerce.

We are of the opinion that the fact that the transportation of mail is for the federal government can make no difference in this respect. When mail is transported from one state to another, such transportation is interstate commerce, although the carrier be acting under contract with the government and as one of its agencies. This was expressly decided by the Supreme Judicial Court of Massachusetts in the recent case of Lynch v. Boston & M. R. R., 227 Mass. 123, 116 N. E. 401.

It follows, from what we have said, that the Industrial Accident Commission did not err in its conclusion that it was without jurisdiction to make an award in this matter.

The order to show cause is discharged, and the proceeding dismissed.

We concur: SHAW, J.; HENSHAW, J.; MELVIN, J.

176 Cal. 300

KLUMPKE v. ALL PERSONS, etc.

(S. F. 7535.)

(Supreme Court of California. Oct. 13, 1917.)

1. TRUSTS ⚷110—CONSIDERATION—EVIDENCE—GIFTS—CONSTRUCTIVE TRUST.

Evidence *held* sufficient to support a finding that the real consideration for a deed to a wife was love and affection, and that same was a valid gift, and not a constructive trust, although the deed recited a consideration of $10, which was never paid.

2. TRUSTS ⚷44(2)—HUSBAND AND WIFE—CONVEYANCES OF LAND.

Evidence *held* sufficient to support a finding that a deed of the homestead to the wife was not a trust in the husband's favor after her death.

3. APPEAL AND ERROR ⚷854(1)—FINDINGS OF FACT—GROUNDS OF FINDINGS.

Where the memorandum of the court below does not state its reason for a finding, on appeal it will be upheld, if there is any reasonable ground on which it can be supported.

Department 1. Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by John G. Klumpke under the McEnerney Act (St. Ex. Sess. 1906, p. 78) against all persons, etc. Judgment for certain defendants, and plaintiff appeals. Affirmed.

See, also, 139 Pac. 1062.

R. H. Countryman, of San Francisco, for appellant. McCutchen, Olney & Willard, J. M. Mannon, Loewy & Loewy, Elmer Westlake, and McGowan & Westlake, all of San Francisco, for respondents.

SHAW, J. Plaintiff began an action under the so-called McEnerney Act to declare and establish his title to a parcel of land in San Francisco. Certain persons, claiming to be devisees of Bernardina Klumpke, the deceased wife of said plaintiff, appeared and opposed the plaintiff's claim of title. The judgment was that the plaintiff was not the owner of the property, and that the said devisees were the owners thereof. The plaintiff has appealed from said judgment.

The findings declare, among other things, that the land was acquired by plaintiff in 1881, as his separate estate, and prior to his marriage to Bernardina Klumpke; that in February, 1889, the plaintiff by a grant, bargain, and sale deed conveyed said land to his wife, Bernardina; that said deed stated a consideration of $10, but that in fact there was no consideration therefor, other than love and affection; that he and his wife resided on the land from that time until her death, on November 1, 1902, and that plaintiff thereafter continued to reside thereon until the beginning of this action, using it as his home; that by her last will, which has been duly probated, said Bernardina Klumpke devised said land to respondents; and that they, and not the plaintiff, own the same.

[1] Appellant claims that the finding that the consideration of the deed was love and affection only is contrary to the evidence. We think it was supported by sufficient evidence. Klumpke was appointed executor of the estate of his said wife. In his inventory of said estate he declared under oath that the land belonged to his wife at the time of her death. In many other papers sworn to by him, and filed by him in the course of the administration of said estate, he repeated, either expressly or by implication, the statements that this land was the property of the estate of his said wife. On the other hand, he testified at the trial that the deed of 1889 was not intended by him as a gift to his wife, but was intended by him to convey it to her to be held as community property, and that no money or other valuable consideration therefor was given or rendered by his wife. Upon this and other testimony of the plaintiff his counsel contend that the land was held by his wife until her death, upon either a resulting or a constructive trust for his use, or as the community property of the marriage. The court below was not bound to accept the plaintiff's sworn statements at the trial as the truth, rather than his repeated statements to the contrary, made under oath during the administration of her estate. There were many circumstances proven at the trial, which we need not here state more fully, from which the court might have concluded that his testimony at the trial was not to be credited at all, and that his statements as executor declared the truth. We must therefore hold that the finding in question was supported by the evidence.

[2] The appellant assigns as error an alleged ruling of the court striking out testimony of the plaintiff and another witness, Mrs. Horgan, purporting to relate conversations with Bernardina Klumpke after the execution of the deed of 1889, and conversations between her and plaintiff at the time of, before, and after its execution, regarding the consideration thereof, the reasons for its execution, and the understanding between the two concerning the same. The testimony, when offered, was admitted subject to a motion to strike out to be subsequently made. The motion was made and the ruling reserved.

The testimony of the witness Mrs. Horgan, though vague and indefinite, tended in some degree to prove that Klumpke conveyed the land to his wife, in order that, if he died before his wife, she would have the property free from interference from his children by a former wife. She had no children. The testimony of Klumpke himself was to the effect that he told his wife that he would execute the deed in order to make the land community property, so that she would have an interest in it if she survived him. He said he informed her that in that event she would take a one-third interest in it, but that if he survived her she would have no interest in the property, but that he would then take it through her will, which she had previously made, devising all her property to him. He also said that she did not promise that she would not afterwards change her will, and, further, that the agreement between them at the time of the execution of the deed was that she was to have a one-third interest in the land if she survived him, but that if he survived her she was to have no interest.

The record does not show that the court struck out this testimony, as claimed. It shows that the court considered it, so far as it tended to show that there was no gift from the husband to the wife, and so far as it tended to show a resulting or constructive trust in the wife in favor of the husband with respect to the land, and held it incompetent so far as it tended to vary the terms of the deed as a conveyance of the title. As to the trust, the court said that the evidence was insufficient to create any trust in favor of the husband, because it did not appear therefrom that the wife had agreed to do anything respecting the land, or that she omitted doing anything which she had agreed to do. We need not decide whether this view is correct or not. We have already considered the effect of the deed as a gift, and of the testimony of the husband tending to show the contrary. The same considerations apply to the evidence introduced to prove a trust, and the holding as community property. That of Mrs. Horgan was vague and unsatisfactory. That of the plaintiff was contradictory in itself, in some respects absurd in its statements of his belief as to the law, and altogether of a character to engender suspicion of its truth. The court was not bound to accept it, but could take, as more trustworthy and as better evidence, his voluntary statements under oath that the land belonged to his wife at her death.

[3] The memorandum filed in the court below as to its views concerning the insufficien-

cy of the evidence to establish a trust does not purport to state all the reasons for the findings against the plaintiff. On appeal this court must uphold it, if there is any reasonable ground on which it can be supported. It is therefore to be presumed that the court below discredited this evidence and accepted the previous admissions of the plaintiff as the truth. This comprises all the substantial questions arising in the case. We find no substantial errors in the record.

The judgment is affirmed.

We concur: SLOSS, J.; LAWLOR, J.

(34 Cal. App. 504)

MAGINNIS v. HURLBUTT. (Civ. 1676.)

(District Court of Appeal, Third District, California. Aug. 30, 1917.)

1. QUIETING TITLE 🔑44(1) — BURDEN OF PROOF.
Plaintiff, in action to quiet title, has the burden to establish title otherwise than by relying on the weakness of defendant's title.

2. QUIETING TITLE 🔑44(4) — EVIDENCE—SUFFICIENCY.
Evidence *held* insufficient to establish title of plaintiff in action to quiet title.

3. WATERS AND WATER COURSES 🔑111—PATENT—PRESUMPTIONS.
Prima facie a patent to lands adjoining a lake conveys only the land described.

Appeal from Superior Court, Lake County; M. S. Sayre, Judge.

Action by J. H. Maginnis against Emeline W. Hurlbutt. Decree for plaintiff, and order denying motion for new trial, and defendant appeals. Reversed.

Ornbaun & Fraser, of San Francisco, for appellant. C. M. Crawford, of Lake Port, for respondent.

CHIPMAN, P. J. Plaintiff brings the action to quiet title to certain lands of which he claims to be the owner and entitled to possession. The complaint was filed December 1, 1913. The land is described as situated in the county of Lake and bounded and described as follows:

> "Fraction in S. ½ of N. E. ¼ and fraction in N. ½ of S. E. ¼ and fraction in N. E. ¼ of S. W. ¼ of section 36, all in T. 14 N., R. 9 W. M. D. M.; and more particularly described in field notes of the survey thereof as follows: Beginning at a point on the meander line of Clear Lake, in front of section 36, in T. 14 N., R. 9 W. M. D. M. 25.24 chains east of the quarter section corner between sections 35 and 36 and run east 14.76 chains, to center of section; thence north 5.66 chains to margin of Clear Lake; thence along margin of lake, south 63¼ degrees east 9.42 chains; thence north 57½ degrees east 5.47 chains; thence north 78½ degrees east 5.16 chains; thence south 65 degrees east 7 chains; thence south 7¼ degrees west 11.99 chains, to meander line of Clear Lake; thence following the meander line north 80 degrees west, 23 chains; thence north 70 degrees west 15.77 chains, to the place of beginning, containing 30.56 acres."

In her amended answer, defendant denies plaintiff's ownership or right to possession of the land, and admits that she claims an interest therein. For separate answer and defense, she alleges that for more than 15 years continuously next preceding the commencement of this action, she and her predecessors in interest have been and now are in the open, notorious, and exclusive possession of the property in dispute, and during all of said time have paid the taxes levied and assessed against the property. For still further separate answer and defense defendant alleges that she deraigns title through a certificate of purchase for said land from the state of California to Hosea B. Guernsey, and through a patent from the state of California to Nathaniel Hurlbutt, and by a deed of said Hurlbutt to Emeline W. Hurlbutt, defendant herein.

The cause was tried by the court without a jury, and the following findings of fact were made: That each and all of the allegations of the plaintiff's complaint are true, and each and all of the allegations of the defendant's answer are untrue. The court specifically found that the defendant has not any estate, right, title, or interest whatever in said land; that she has not for more than 15 years continuously, or at all, next preceding the commencement of this action, "possessed in any manner or to any extent the said land * * * or any part thereof; and that neither the said defendant nor her predecessors have ever been in the adverse possession of, or possessed the said premises adversely to the said plaintiff, to any extent, or for any length of time, whatever, or at all." The court also found specifically that defendant did not deraign title to said land, or any part thereof, through a certificate of purchase, as alleged in the answer, or through any other of the sources stated in defendant's answer.

As conclusion of law the court found that the plaintiff "is now, and was at the time of the filing of the complaint herein, had been for a long time prior thereto, the owner of, and entitled to the possession of, the lands and premises described in the complaint, and of the whole thereof, and is entitled to judgment herein forever quieting his title thereto," and a decree was accordingly entered.

Defendant moved for a new trial on the following grounds: (1) Irregularities in the proceedings of the court, and abuse of discretion by which defendant was prevented from having a fair trial; (2) insufficiency of the evidence to justify the decision; (3) that the decision was against law; (4) errors in law occurring at the trial and excepted to by the defendant. The motion was denied, and defendant appeals from the judgment and from the order denying her motion for a new trial.

Plaintiff claims title through one John C. Fishel, to whom the United States issued patent dated August 1, 1871, to lands therein described as follows:

> "Lots one, two, three, and four and the southeast quarter of the southwest quarter of section thirty-six (36) in township fourteen (14) north of range nine (9) west Mount Diablo meridian in district of lands subject to sale at San Francisco, California, containing (138) one hundred and thirty eight acres"

—which is the aggregate acreage of the four lots exclusive of the land in dispute. Plaintiff claims that these lands border on Clear Lake, and that the meander line of the lake coincides with the said northerly boundary of lots 1, 2, 3, and 4, as shown on map or plat introduced in evidence by plaintiff. Plaintiff claims title to the land lying between said meander line and low-water mark on the shores of said lake, consisting of 30.56 acres. Fishel, the patentee, conveyed the lands to Elijah Reeves by the description given in the patent. By decree of distribution in the estate of Elijah Reeves, the land passed to his widow, Martha C., who, on October 13, 1886, conveyed the property to plaintiff by the same description and also conveyed to him certain contiguous land. Defendant introduced in evidence in support of her title a certificate of purchase of the state of California to Hosea B. Guernsey, dated July 24, 1889, 14 years prior to the commencement of the action. The description of the land given in the said certificate is as follows:

> "Fraction in S. ½ of N. E. ¼, fraction in N. ½ of S. E. ¼ and fraction in N. E. ¼ of S. W. ¼ of section 36 in township No. 14 north, range No. 9 west Mount Diablo meridian, containing 30.56 acres."

This description apparently refers to land lying north of the said so-called meander line.

On October 8, 1900, said H. B. Guernsey assigned said certificate to his wife, Lizzie Guernsey, and she, on November 14, 1903, assigned the same to N. Hurlbutt, describing the land as in the certificate of purchase. On November 20, 1904, the state issued a patent to N. Hurlbutt which was introduced in evidence and purports to grant, bargain, and sell to him the land mentioned in said certificate and in the patent by the same description as given in the certificate, further reciting:

> "And more particularly described in the field notes of said location as follows" (continuing as hereinbefore quoted from the complaint. After the words, "containing 30.56 acres," is the sentence: "Run by the true meridian, magnetic variation 17° 29′ east").

This description is the same as is shown on the plat introduced in evidence as correctly describing the land in controversy. On October 14, 1912, Nathaniel Hurlbutt conveyed the land to his wife, Emeline W. Hurlbutt, by the same description as given in the state patent.

The contention of plaintiff was at the trial and now is, and the court so found, that the patent to Fishel conveyed not only the acreage contained in said lots 1, 2, 3, and 4, but also conveyed all the land lying between the said meander line and low-water mark on said lake, and that through mesne conveyances plaintiff became and is now the owner thereof.

Appellant now urges that she has title by virtue of a valid state patent under the act of March 24, 1893 (Stats. 1893, p. 341), found as a part of the codification of that act in section 3493m of the Political Code. She also makes claim of title by adverse possession, and that plaintiff has lost all right by laches. Section 1 of said act provides as follows:

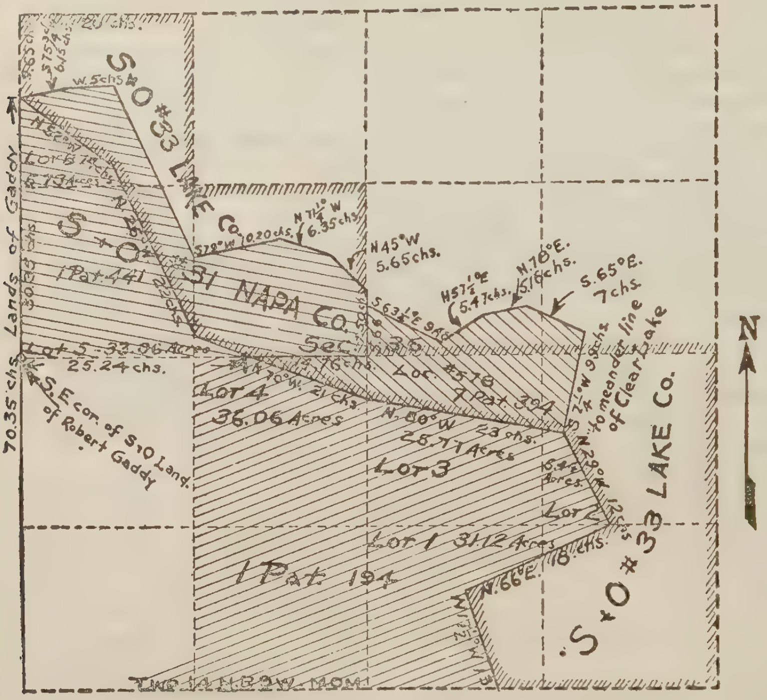
> "Any person desiring to purchase any of the lands now uncovered or which may hereafter be uncovered by the rescission or drainage of the waters of inland lakes, and inuring to the state by virtue of her sovereignty, or the swamp and overflowed lands not segregated by the United States, must make an application therefor to the surveyor general of the state" (stating the facts to be included in the application and describing the land by legal subdivisions, or by metes and bounds if the legal subdivisions are unknown).

Section 2 of the act provides that upon filing the application when the land has not been sectionized, the surveyor general must authorize the county surveyor of the county where the whole or the greater portion of the land lies to survey the same, and he shall make an actual survey thereof. This act seems to deal with two classes of lands: First, those uncovered by the recession or drainage of the waters of inland lakes "and inuring to the state by virtue of her sovereignty"; and, second, as to swamp and overflowed lands not segregated by the United States. The state patent recites that it was issued under an act of the Legislature of the state entitled "An act regulating the sale of the lands uncovered by the recession or drainage of the waters of inland lakes, and unsegregated swamp and overflowed lands, and validating sales and surveys heretofore made," approved March 24, 1893.

We do not find it necessary to consider defendant's alleged title by adverse possession. Neither need we pass upon the point raised that plaintiff is estopped by his laches from maintaining the action. Some facts of more or less significance are found in affidavits read at the hearing of the motion for a new trial which cannot now be considered for the reason these facts were not shown at the trial.

[1, 2] The burden was upon plaintiff to establish title which he could not do by relying on the weakness of defendant's title. Sears v. Willard, 165 Cal. 12, 130 Pac. 869. In our opinion the evidence is insufficient to establish title in plaintiff to the land in dispute. The United States patent to Fishel, through whom plaintiff claims title, calls for certain lots 1, 2, 3, and 4 and the S. E. ¼

of S. W. ¼ of section 36, T. 14 N., R. 9 W. Plaintiff introduced in evidence, as stated by counsel, "for purposes of illustration, and of showing the relative position of the land in controversy, to surrounding lands and to Clear Lake, the following map":


20 chs.
9.65 ch.
S 75¾ 6.15 chs.
W. 5 chs.
S. O. #33 LAKE Co.
Lands of Gaddy
Lot 6 17 chs.
8.73 Acres
S. O. #31 NAPA CO.
1 Pat. 441
30.00 chs.
S 78° W 10.20 chs.
N 71¼° W 6.35 chs.
N 45° W 5.65 chs.
Sec. 36
Lot 5 - 33.96 Acres
25.24 chs.
S. E. cor. of S. O. Land of Robert Gaddy
70.35 chs.
Lot 4
36.06 Acres
21 chs.
N 57½° E 5.47 chs.
N. 70° E. 5.16 chs.
S. 65° E. 7 chs.
S 63½° E 9.48
Loc. #578
4 Pat. 394
N. 80° W 23 chs.
28.77 Acres
Lot 3
to meander line of Clear Lake
S 7¼° W 9.5 chs.
N 29° E
6.42 Acres
Lot 2
Lot 1 31.12 Acres
18 chs.
N. 66° E.
1 Pat. 194
S. O. #33 LAKE Co.
N

This map purports to show the meander line of the lake and the boundary of lots 1, 2, 3, and 4 thereon. The map shows the continuation of this meander line through section 36 and crossing the west line of the section 9.65 chains from its northwest corner. From the map it appears that there is a swamp and overflowed land location, No. 33, lying east of this meander line and east of lots 1 and 2. West of the disputed land and lying on both sides of the meander line of the lake marked on the map is swamp and overflowed land location No. 31. This land in location 31 was patented to Elijah Reeves by the state and was conveyed to plaintiff by the same deed which conveyed to him lots 1, 2, 3, and 4 of section 36. The disputed land lies between these two locations, and is marked location 578. Apparently all three of these locations are swamp and overflowed land locations. The land embraced in location 31, now owned by plaintiff, consisting of 78.12 acres, is about equally divided by the so-called meander line of the lake. The lands lie on both sides of this meander line.

Witness Neal testified that he made the map introduced in evidence; that he was familiar with the land in dispute and adjoining lands and that the map "is a true representation of the land in controversy, and its surroundings"; that the land "borders on Clear Lake," and that "Clear Lake is a navigable body of water about 25 miles long and an average of 5 or 6 miles wide." Upon the foregoing evidence plaintiff rested his case.

Plaintiff introduced no government field notes or official plats establishing the location of the meander line of the lake or that the land described in the Fishel patent was meandered by Clear Lake. The statement of witness Neal that the land "borders on Clear Lake" is not sufficient to show the location of the meander line of the lake. The map introduced by plaintiff locates the only meander line shown as running through the middle of a tract of land which plaintiff claims as swamp and overflowed land under a state patent, and some of this land is directly adjacent on the north and some directly adjacent on the west to the land in dispute. We think this map wholly insufficient to establish the location of the meander line of the lake and the northerly boundaries of the lots patented to Fishel. Plaintiff claims under the statute, section 830, Civil Code, which provides that:

> "Where land borders upon a navigable lake or stream, where there is no tide, the owner takes to the edge of the lake or stream, at low water mark."

Plaintiff introduced no evidence to establish the edge of the lake at low-water mark to which he claimed the right to hold under the Fishel patent, nor was there any evidence that the land in dispute lies between such low-water mark and the said meander line of the lake. Nor was evidence introduced as to the character of the land in dispute—whether or not uncovered by recession of the lake or whether or not swamp and overflowed. Conceding that this meander line was established, the concession would carry no presumption that the land claimed by plaintiff was part of the lots mentioned in said patent.

[3] The edge of the lake at low-water mark in front of these lots as designated in the Fishel patent may or may not extend to and follow the lines marking the boundaries of the land in dispute. A glance at the map will show it to be highly improbable that the boundaries of the disputed tract bear any relation to "the edge of low-water mark" of the lake. Lots 1, 2, 3, and 4 are fractional parts of the section with acreage of each given. Prima facie the patent conveys only the land described. In Niles v. Cedar Point Club, 175 U. S. 300, 20 Sup. Ct. 124, 44 L. Ed. 171, it was claimed that the fact that a meander line was run amounts to a determination by the land department that the surveyed fractional sections bordered upon a body of water, navigable or nonnavigable, and that, therefore, the purchaser of these fractional sections was entitled to riparian rights. The court said:

> "But there is no such magic in a meandered line. All that can be said of it is that it is an irregular line which bounds a body of land, and beyond that boundary there may be found forest or prairie, land or water, government or Indian reservation."

And it was held, in Chapman v. Bigelow, 77 Ark. 343, 92 S. W. 534, that where land is claimed through riparian rights, the burden is on the claimant to show the character or condition of the land before he will take beyond the meander line. The principle of these cases is that the meander line is not conclusive of rights to land lying beyond it and outside of the described land. It is quite conceivable that there may be bodies of land beyond "the edge of the lake at low-water mark," properly classable as swamp and overflowed land, along the borders of Clear Lake. The state has proceeded upon this assumption; plaintiff holds state title to such land immediately adjoining the land in controversy. Before we should feel justified in disturbing these titles, we should have clear and convincing proof that the law compels it.

The judgment and order are reversed.

We concur: BURNETT, J.; HART, J.

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34 Cal. App. 567

SAWYER v. BERGER. (Civ. 2161.)

(District Court of Appeal, Second District, California. Sept. 6, 1917.)

OFFICERS 🔑100(1)—SALARIES—DIMINISHING DURING TERM.

Under county charter providing that salaries of constables, etc., shall be fixed by the board of supervisors prior to election and shall not be increased or diminished during the term, where plaintiff township constable was elected in November, 1914, and thereafter duly qualified, and at noon on the 4th day of January, 1915, entered upon the duties of his office for the term beginning that day the supervisors could not, by ordinance passed after noon of such day, change his salary; the adoption of the charter not suspending Pol. Code, § 4237, subd. 15, as to salary.

Appeal from Superior Court, San Bernardino County; H. T. Dewhirst, Judge.

Mandamus proceeding by Jedd F. Sawyer against S. G. Berger. Writ issued, and defendant appeals. Affirmed.

T. W. Duckworth, Dist. Atty., and John L. Campbell, both of San Bernardino, for appellant. Henry M. Willis and William Guthrie, both of San Bernardino, for respondent.

CONREY, P. J. In this case a writ of mandamus issued to the defendant Berger as auditor of the county of San Bernardino requiring him to issue to the plaintiff a warrant on the treasurer of San Bernardino county in the sum of $75 for plaintiff's salary for the month of May, 1916, as constable of Upland township. The defendant appeals from the judgment.

On November 3, 1914, the plaintiff was elected to said office of constable. Thereafter he duly qualified and at noon on the 4th day of January, 1915, entered upon the duties of the office for the term beginning that day. Ever since the date last mentioned he has been the duly elected, qualified, and acting constable of Upland township. He is entitled to the salary claimed by him, amounting to $75 per month in accordance with the provisions of section 4237 of the Political Code, unless the salary to which he is entitled was reduced to the sum of $65 per month by virtue of an ordinance of the board of supervisors of the county of San Bernardino, which ordinance was "passed, adopted and approved as an urgency measure," after noon on the 4th day of January, 1915, which was the first Monday after the first day of that month. By the terms of that ordinance the compensation of constables in the various townships in the county of San Bernardino was declared to be a fixed salary, and it was provided that the constable in and for Upland township should receive $780 per annum. The monthly installments of such salary would be $65. Upon due proceedings had as permitted by section 7½ of article 11 of the Constitution of the state of California, a charter for the county of San Bernardino was adopted at the general election of November, 1912, which charter was duly approved by the Legislature in April, 1913. Stats. of 1913, p. 1652. By article 3, § 3, of the charter it is provided that the salaries of justices of the peace and constables shall be fixed by the board of supervisors, and that such salaries need not be uniform. Other provisions of the charter, pertinent to the present inquiry, are the following:

> Article 7, § 1: "In all cases in which the board of supervisors are authorized by law or by this charter to fix the compensation of any officer, such salary shall be fixed prior to the election or appointment of such officer, and shall not be increased or diminished during the term for which such officer shall be elected or appointed."
>
> Article 7, § 6: "This charter, in so far as it relates to the nomination and election of supervisors and township officers, shall take effect and be in force from and after the time of its approval by the Legislature, and as to all other matters it shall take effect and be in force from and after 12 o'clock noon, of the first Monday after the first day of January, 1915."

Article 7, § 5, referring to persons in office "at the time this charter goes into effect," says:

> "Nor shall anything in this charter be construed as changing or affecting the compensation of any such officer during the term for which he shall have been elected."

Counsel for appellant contend that until the adoption by the board of supervisors after noon of January 4, 1915, of an ordinance prescribing the salary for the office held by respondent, there was no salary attached to that office. With that proposition we do not agree. Section 7½ of article 11 of the Constitution, under which the San Bernardino county charter was framed, contains the following declaration:

> "Whenever any county has framed and adopted a charter, and the same shall have been approved by the Legislature, as herein provided, the general laws adopted by the Legislature in pursuance of sections 4 and 5 of this article, shall, as to such county, be superseded by said charter as to matters for which, under this section it is competent to make provision in such charter, and for which provision is made therein, except as herein otherwise expressly provided. * * *"

Sections 4 and 5 referred to in the foregoing quotation are the sections under which the Legislature is directed to provide for township organizations, and is authorized to regulate the compensation of township officers. The general law establishing the compensation of the office here in question was the law contained in section 4237, subdivision 15, of the Political Code. That section provides a schedule of salaries which, as applied to Upland township, amounts to $75 per month for services rendered in criminal cases, together with the right of the constable to receive and retain for his own use such fees as are allowed by law for services performed by him in civil actions. At noon of January 4, 1915, when the plaintiff's term of office began, the provisions of that statute were in force in the county of San Bernardino notwithstanding the adoption of the county charter. The matter involved was one for which the charter had made no provision which could be effective at that moment. From and after that time, whenever it chose to do so, the board of supervisors could adopt an ordinance fixing the salaries of constables, but until the taking effect of such ordinance the salary established by general law remained in force.

The board of supervisors promptly used its authority to pass a salary ordinance. We may assume the validity of that ordinance, since it is not attacked in this case. The only question remaining to be determined here is whether or not the change of salary applies to the plaintiff in this case. It does not so apply, since the charter itself declares that the salary of his office shall not be changed or affected, under its provisions, during the term for which he was elected.

The judgment is affirmed.

We concur: JAMES, J.; SHAW, J.

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34 Cal. App. 571

STERILIZATION CO. OF CALIFORNIA v. TUCKER (WILKINSON, Intervener).

(Civ. 2138.)

(District Court of Appeal, First District, California. Sept. 7, 1917. Rehearing Denied by Supreme Court Nov. 6, 1917.)

CORPORATIONS ⟹80(11) — AGREEMENT TO PURCHASE CORPORATE STOCK—SUFFICIENCY OF EVIDENCE.

In a corporation's suit for the full amount of the contract price of its shares alleged to have been contracted to be purchased by plaintiff, evidence *held* to support the trial court's finding that the contract in question was not executed between the defendant and another as agent of plaintiff corporation, and that defendant was induced to execute it and to deposit certain oil stock with a third person, intervener, in reliance upon certain of his representations which were positive assertions of that which was not true or not warranted by his information.

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by the Sterilization Company of California, a corporation, against A. J. Tucker, wherein Guy Wilkinson intervened. From a judgment that plaintiff and intervener take nothing, and an order denying their motions for a new trial, they appeal. Judgment and order affirmed.

Jos. K. Hutchinson, of San Francisco, for appellant Sterilization Company of California. Nat. Schmulowitz, of San Francisco, for appellant intervener. Purcell Rowe, of San Francisco, for respondent.

LENNON, P. J. This is an appeal from a judgment that plaintiff and intervener take nothing, and from the order denying plaintiff's and intervener's motions for a new trial.

Plaintiff's complaint alleged the execution of a contract between the plaintiff and the defendant, by the terms of which plaintiff was to sell and the latter was to purchase 64,650 shares of the plaintiff's capital stock; the repudiation of the contract by the defendant, and plaintiff's election to hold said shares of its capital stock for the benefit of the vendee and sue for the full amount of the contract price. The trial court found, in effect, that the contract in question was not executed between defendant and plaintiff, and the only question raised by plaintiff on this appeal involves the sufficiency of the evidence to support that finding.

The record discloses in part that defendant Tucker entered into an agreement with one Hanus to buy 64,650 shares of the capital stock of the Sterilization Company of California at 50 cents per share, and deposited with one Wilkinson, the intervener, 10,000 shares of the capital stock of the Pantheon Oil Company as security for his performance of the said contract. He entered into the agreement at the solicitation of Wilkinson, who represented to him that he (Wilkinson) was the owner of certain patented rights, which were of great value in treating citrus fruits with a gas; that he had organized the Sterilization Company for the purpose of employing the patent in California, and had entered into a contract with the corporation plaintiff to sell it certain machines. Wilkinson made the further representations to defendant that Hanus had undertaken to finance the Sterilization Company, for which he received about two-thirds of the company's stock, but that he was about to fail in his undertaking, in which case the Sterilization Company would be unable to keep its contract with Wilkinson, and that Wilkinson was in a position to take any right that Hanus or the Sterilization Company had in reference to the gas process. To protect Hanus and enable him to perform, Wilkinson requested defendant to carry on his negotiations through Hanus.

While there is evidence to the effect that Hanus was the secretary and managing agent of the Sterilization Company with power to contract for it, on the other hand, there is evidence to support the finding of the trial court that Hanus was not the agent of the corporation in the execution of the contract in question. Thus it was shown that defendant dealt with Hanus solely as the agent of Wilkinson; that defendant's negotiations from the first were had with Wilkinson; that, in addition to being secretary to the Sterilization Company, Hanus was working for Wilkinson and had his offices with Wilkinson; that Wilkinson himself dictated the terms of the contract and drew up the letter embodying those terms, which letter was addressed to Hanus, not to the corporation, and the letter accepting those terms was signed by Hanus. These two letters, in effect, constituted the contract in controversy. Furthermore, the evidence shows that the Sterilization Company, between November 9, 1911, and November 21, 1911, during which period the transaction in question was negotiated and concluded, did not have more than approximately 33,000 shares of stock in its treasury, and consequently was not in a position to sell to defendant the 64,650 shares of stock in question.

The fact that the evidence shows without any substantial conflict that Hanus was the owner in his own right of but 33,333 shares of the stock which was the subject-matter of the contract, and that the remaining 31,317 shares stood in his name and were held by him merely in trust for the Sterilization Company for promotion purposes, will not suffice to disturb the trial court's finding that Hanus did not execute the contract in question as the agent of the Sterilization Company. While this fact might tend to show that Hanus had made an unauthorized disposition of the stock held by him in trust, yet under all of the circumstances of the transaction it would not compel the conclusion that the contract was entered into by Hanus in his capacity as agent of the Sterilization Company. Wilkinson, as intervener, sought to quiet his alleged title to the 10,000 shares of Pantheon Oil Company's stock, deposited with him by the defendant as a security for the faithful performance of the terms of the contract in controversy. The execution of the contract, however, was alleged by the defendant to have been induced by the false and fraudulent misrepresentations of Wilkinson, the intervener.

The findings of the trial court that defendant was induced to execute the contract in controversy and to deposit the 10,000 shares of oil stock with the intervener, in reliance upon certain representations of the intervener, which were positive assertions of that which was not true and not warranted by the information possessed in that regard by him, are supported by the evidence, and these findings, in turn, support the judgment against the intervener.

The judgment and order are affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

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34 Cal.App. 584

MARTIN v. SHARP & FELLOWS CONTRACTING CO. (Civ. 1889.)

(District Court of Appeal, Second District, California. Sept. 11, 1917.)

1. PARTNERSHIP ⚷55 — EXISTENCE — SUFFICIENCY OF EVIDENCE.

In a contractor's suit to recover a balance due defendant corporation, for which the work was done, setting up payment to a third person, whom it claimed was plaintiff's partner, evidence *held* to justify the court's finding that no partnership existed, but that the third person's status, aside from a leasing of mules and equipment, was that of one who in consideration of half the net profits loans a certain amount to enable another to prosecute work.

2. PARTNERSHIP 🔑13—EXISTENCE OF RELATION—STATUTE.

Under Civ. Code, § 2395, defining a partnership as the association of two or more persons to carry on business together and divide its profits, where a third person, in consideration of half the net profits from a contract, loaned plaintiff a sum of money to enable him to prosecute the work, the fact that after all the money had been advanced, when the work was largely completed, and the possibility of loss appeared negligible, the third person agreed, on plaintiff's giving him security for payment of the money advanced, to bear half of any loss incurred, did not change the relation between plaintiff and the third person into one of partnership, since a mere participation in profit and loss does not necessarily constitute a partnership.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Partnership.]

3. PAYMENT 🔑4—PAYMENT OF LOAN—JUSTIFICATION.

Though a corporation which had let a contract to plaintiff knew that a third person was loaning plaintiff money with which to prosecute the work, that fact could not justify the corporation in assuming payment of such loan to the third person, in the absence of authority so to do from plaintiff, or an order of court justifying the action.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by James Martin against the Sharp & Fellows Contracting Company, a corporation. From a judgment for plaintiff, and an order denying its motion for new trial, defendant appeals. Affirmed.

Isidore B. Dockweiler and Thomas A. J. Dockweiler, both of Los Angeles (Wilbur D. Finch, of Los Angeles, of counsel), for appellant. W. N. Goodwin, Hunsaker & Britt, Le Roy M. Edwards, and Samuel Poorman, Jr., all of Los Angeles, for respondent.

SHAW, J. Action to recover a balance of $1,487.09 for work and labor done by plaintiff as a subcontractor of defendant. Judgment went for plaintiff, from which, and an order denying its motion for a new trial, defendant appeals.

It appears that defendant, exacting a bond conditioned to protect it from loss in so doing, paid the sum in question, concededly earned by plaintiff in the performance of the work under the terms of a contract made by him with defendant, to one John Mulligan. The defense interposed by answer to plaintiff's recovery thereof was: First, that the payment so made to Mulligan was pursuant to an assignment of such balance made by plaintiff; and, second, that Mulligan was a partner of plaintiff and as such entitled to receive and receipt for moneys due the copartnership.

[1] With regard to the assignment, the evidence conclusively shows, as found by the court, that plaintiff did, on March 31, 1913, assign to Mulligan any and all sums of money due or to become due to him on account of the work and labor the performance of which was called for by his said contract with defendant; that said assignment was made to secure the payment of certain indebtedness then due from plaintiff to Mulligan, all of which indebtedness, long prior to the time of the payment made by defendant to Mulligan, was liquidated and fully paid; due notice of which facts was, in writing, given defendant, with instructions, likewise in writing to pay said balance to no one other than to plaintiff. In his presentation of the case on appeal, counsel for appellant does not, and indeed, in our opinion, could not, upon the facts stated, urge the making of the assignment as justifying defendant in making payment of said sum to Mulligan. His chief contention is that plaintiff and Mulligan were partners, as to which fact, however, the court made an adverse finding. It is to the alleged want of evidence to support this finding that appellant directs his argument.

[1, 2] While the evidence touching the subject is conflicting, it tends strongly to establish the following facts: Defendant had a contract for the grading of a line of railroad, a subcontract to do a part of which work it let to plaintiff, whose equipment of stock and tools it seems was inadequate for the purpose, and he was likewise without sufficient funds at the commencement of the work to prosecute the same. Mulligan had been engaged in railroad construction, and was a man of some means, and his brother Dave Mulligan owned a lot of mules and railroad construction equipment which the evidence tends to show were in fact controlled by John Mulligan. Both the Mulligans expressed a desire that plaintiff should obtain a contract of sufficient size and importance to enable him to use the Mulligan equipment during the winter, and John Mulligan, as an inducement to plaintiff to accept the contract for the work and hire the mules and equipment of the Mulligans at $25 per pair per month, plaintiff to receive a like sum for the use of such mules owned by him as he might contribute in the performance of the work, agreed to advance to him such moneys as he might require in the early prosecution of the work and until he received installments of his contract price, due at intervals upon estimates of work done in the progress thereof, in consideration of which John Mulligan was to have one-half of the net profits derived from the contract. Plaintiff and defendant alone were parties to the contract, Mulligan in no way being recognized therein, and it appears that he took no part or interest in the making of the contract or the performance of the work, other than on occasions of infrequent visits when he manifested an interest in the management and use of his work stock. Upon entering into the contract, in January, 1913, plaintiff commenced the work, and up to March, 1913, Mulligan advanced to him some $8,000, in evidence of which plaintiff executed and delivered to him a promissory note therefor. Early in March, months

before the work was completed, differences arose between plaintiff and Mulligan, due in part to prior transactions between them involving a $2,500 note maturing March 1st, and Mulligan insisted upon plaintiff at once repaying the advances he had made, and on March 3d wrote him a letter, saying, "I wish you would arrange to clear up with me altogether," and further saying:

> "I think, when I am paid back the money I furnished to start the business, that there will not be enough left to pay up everything *unless you have quite a little bank account of your own.*" (Italics ours.)

On March 31st a meeting was had between plaintiff and Mulligan, resulting in an extension of time being granted plaintiff for the payment of two notes for $2,500 each, then due, given by plaintiff to Mulligan for the purchase price of stock, and an assignment from plaintiff to Mulligan of moneys due or to become due from defendant on account of the grading contract, which it was agreed should not be presented save upon notice of intention so to do being first given to Martin. At the same time an agreement was executed by them, reciting that plaintiff had the grading contract; that Mulligan had furnished certain money in the prosecution thereof, and that to secure Mulligan "against any bills that may be contracted by the said James Martin," the latter had given the written orders referred to for money due him, and providing that upon completion of the work an accounting should be had, and "any balance that may be due after all bills incurred by this contract (so made by plaintiff with defendant) have been liquidated, is to be divided equally between the parties to this agreement," and any deficiency "liquidated equally by the parties hereto." These and other facts which the evidence tended to prove and the reasonable inferences deducible therefrom justify the conclusion, as found by the court, that no partnership existed between Mulligan and plaintiff, but that his status, aside from leasing the mules and equipment, was solely that of one who, in consideration of one-half of the net profits, loaned plaintiff (not to a copartnership) a certain sum of money to enable him to prosecute the work. The fact that, after all the money had been advanced, the work largely completed, and the possibility of a loss appearing negligible, Mulligan agreed, upon plaintiff giving him security for payment of the money so advanced, to bear one-half of any loss incurred does not change the situation. By section 2395, Civil Code, a partnership is defined to be:

> "The association of two or more persons, for the purpose of carrying on business together, and dividing its profits between them."

Under this definition, a mere participation in profit and loss does not necessarily constitute a partnership. There must be such a community of interest as empowers each party to make contracts, incur liabilities, manage the whole business, a right which, upon the dissolution of the partnership by death of one, passes to the survivor, and not to the representatives of the deceased. Dwinel v. Stone, 30 Me. 384. To like effect are Coward v. Clanton, 122 Cal. 451, 55 Pac. 147, Vanderhurst v. De Witt, 95 Cal. 57, 30 Pac. 94, 20 L. R. A. 595, and Nofsinger v. Goldman, 122 Cal. 609, 55 Pac. 425, in the former of which it is said that profit sharing is not the true test of partnership. The association must be for the purpose of *jointly carrying on the business.* Mulligan was not interested in the conduct of the business, except in so far as it affected the profits, one-half of which he was to receive for the use of the money, not advanced to the partnership but *loaned to Martin.*

[3] It is next claimed that the evidence shows that plaintiff by his acts and conduct led defendant to believe that a partnership existed between him and Mulligan, and that, so believing, defendant paid the sum in controversy to Mulligan as plaintiff's partner. The doctrine of equitable estoppel, which appellant seeks to invoke, finds no support in the record, which is barren of any evidence of representations or acts on the part of plaintiff calculated to lead defendant to believe that such partnership existed. Moreover, there is an absence in the answer of any allegations constituting an estoppel as to plaintiff. Such theory is wholly inconsistent with the fact that plaintiff notified defendant to make payment to no one but himself; that all estimates and payments made thereon, other than the one in controversy, were made to plaintiff; that the accounts were kept with plaintiff; that defendant's manager testified that in their business it was their practice to have all persons with whom they dealt and looked to sign the contract where they were known; in addition to all of which, defendant, as a condition of making the payment in question, exacted from Mulligan a bond to protect it from any loss by reason of so making the payment. While defendant, as Martin testified, knew that Mulligan was loaning him money with which to prosecute his work, such fact could not justify it in assuming payment of such loan, in the absence of authority so to do from plaintiff, or an order of court justifying such action.

There are no other errors requiring notice.

The judgment and order appealed from are affirmed.

We concur: CONREY, P. J.; JAMES, J.

34 Cal. App. 570

TUCKER v. WILKINSON. (Civ. 2139.)

(District Court of Appeal, First District, California. Sept. 7, 1917. Rehearing Denied by Supreme Court Nov. 6, 1917.)

FRAUD 🔑58(1)—MISREPRESENTATIONS—FINDINGS—SUFFICIENCY OF EVIDENCE.

Where the complaint for false and fraudulent representations, claimed to have been the inducing cause of plaintiff's execution of a contract with defendant, stated a cause of action for fraud, evidence amplifying in detail the allegations of fraud, and in substantial accord therewith, is sufficient to support the findings of fraud.

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by A. J. Tucker against Guy Wilkinson. From a judgment for plaintiff, defendant appeals. Affirmed.

Jos. K. Hutchinson, of San Francisco, for appellant. Purcell Rowe, of San Francisco, for respondent.

PER CURIAM. This is an appeal from a judgment in favor of the plaintiff for damages, alleged to have resulted to him from certain alleged false and fraudulent representations, which were claimed to be the inducing cause of the execution of a certain contract between the plaintiff and defendant.

The briefs filed upon behalf of appellant presented several points for a reversal of the judgment, but, during the discussion of the case between the court and counsel for the appellant upon oral argument, it was conceded that none of the points made, save the alleged insufficiency of the evidence to support the trial court's findings of fraud, were well taken, and it was stipulated in open court that only the latter point need be considered and decided.

Since the oral argument we have again reviewed the evidence adduced at the trial, and, upon the question of its sufficiency to support the findings mentioned, it will suffice, we think, for us to say that we find there is much evidence in the record which although amplifying in detail the allegations of fraud set out in the complaint, is nevertheless in substantial accord therewith; and it being conceded that the misrepresentations pleaded in the complaint suffice to constitute a cause of action for fraud, it follows that the evidence supports the findings.

Judgment appealed from is affirmed.

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34 Cal. App. 574

BLUM v. SIMPSON. (Civ. 2146.)

(District Court of Appeal, First District, California. Sept. 7, 1917.)

LIBEL AND SLANDER 🔑120(1) — RIGHT TO NOMINAL AND PUNITIVE DAMAGES—INJURY IN BUSINESS.

Where defendant, engaged in distribution of circulars, in the course of a conversation with a customer of plaintiff, who was in the same business, called attention to the fact that police officers had complained to him as to the manner in which circulars advertising the customer's business were being circulated, there being a mere relation of the fact, and it making no impression whatever on the customer, who testified that he would continue to deal with the plaintiff, the latter was not entitled to nominal and punitive damages against the speaker for the alleged slander.

Appeal from Superior Court, Alameda County; Wm. S. Wells, Judge.

Action by J. Blum against L. C. Simpson. From a judgment for defendant, plaintiff appeals. Affirmed.

L. A. Blum and M. D. Wolff, both of San Francisco, for appellant. Dunn, White & Aiken, of Oakland, for respondent.

KERRIGAN, J. This action was for slander. Plaintiff is engaged in the business of house to house distributing of circulars and advertising matter throughout the county of Alameda and elsewhere. Defendant is engaged in a similar business. In support of his action for damages, plaintiff claims that defendant called upon a certain firm, one of plaintiff's customers, and without being in any way requested, volunteered information to one of the members thereof which was derogatory to the character and business ability of plaintiff, and which tended directly to injure plaintiff's reputation, and to shake the confidence the members of such firm had in plaintiff, and which further tended to cause to plaintiff irreparable loss. Judgment went for defendant, and plaintiff appeals.

There are no specifications of error, but it is insisted that the evidence entitled plaintiff to at least nominal and punitive damages and costs. We cannot so conclude. The evidence shows that defendant called upon a firm known as Smith Bros. to solicit work, and during the course of a conversation had with one of the members of the firm called attention to the fact that police officers in Oakland and Berkeley had complained to defendant concerning the manner in which circulars advertising Smith Bros.' business were being circulated, believing that defendant was doing the distributing. That the police officers had complained to defendant is not disputed; and the record fails to show that the defendant did anything more than merely relate the fact during the course of the conversation. There is no evidence to show that this statement resulted in any damage to the plaintiff; but, on the contrary, it affirmatively appears that it made no impression whatever on John Smith, to whom it was made, for he testified that he had confidence in the plaintiff and would continue to deal with him as he had theretofore. Plaintiff sustained no loss by reason of the statement, nor was he in any manner prejudiced by it.

Judgment affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

34 Cal. App. 599

PEOPLE v. CRANE. (Cr. 387.)

(District Court of Appeal, Third District, California. Sept. 11, 1917. Rehearing Denied by Supreme Court. Nov. 8, 1917.)

1. EMBEZZLEMENT 🔑44(2) — WEIGHT AND SUFFICIENCY OF EVIDENCE—TIME OF FORMING INTENT.

Evidence showing that defendant, the guardian of certain minors, induced their mother to become their guardian by representations that he could loan the funds of the wards at a higher rate of interest if some one else was guardian, that after her appointment he turned the funds over to her and they were immediately redelivered to him, and that he subsequently deposited them in an account in his wife's name, on which both he and his wife were authorized to draw checks, and subsequently drew checks thereon, reducing the deposit to a comparatively small amount, supported a conviction for embezzlement, as the jury were not bound to conclude that he formed the intent to appropriate the money to his own use before receiving it from the mother, but were justified in concluding that such intent was not formed until after he received the money, so that he was guilty of embezzlement, instead of larceny.

2. EMBEZZLEMENT 🔑49—VERDICT—IMPLIED FINDINGS.

A verdict finding defendant guilty of embezzlement was equivalent to an implied finding that defendant did not intend to steal the funds of the wards until after he received them from the mother.

3. EMBEZZLEMENT 🔑35—ISSUES, PROOF, AND VARIANCE — NATURE OF PROPERTY EMBEZZLED.

Evidence that defendant received a draft from a guardian for the purpose of loaning the proceeds of the draft, that he deposited it in an account in his wife's name on which he and his wife were authorized to draw checks, and that checks were subsequently drawn against the account, reducing it to a comparatively small sum, warranted a conviction for embezzlement of money, as alleged, as against the objection that it showed an embezzlement of the draft, rather than money.

4. CRIMINAL LAW 🔑564(7) — WEIGHT AND SUFFICIENCY OF EVIDENCE—VENUE.

Such evidence warranted the jury in finding that the embezzlement was committed in the county in which the draft was deposited, and not in the county in which it was delivered to defendant.

5. EMBEZZLEMENT 🔑11(1) — ELEMENTS OF OFFENSE—DEMAND AND REFUSAL.

A demand for the return of property or money intrusted to a bailee or trustee, followed by a refusal to return the property or money, is merely evidence of an embezzlement; and where there is other proof of the felonious conversion of the money or other property, a demand and a refusal are not essential elements of the crime.

6. EMBEZZLEMENT 🔑36 — MATTERS TO BE PROVED—TIME OF OFFENSE.

Evidence showing that the crime of embezzlement was committed within the statutory period within which an indictment or information for such offense may be found or filed supported a conviction, without proof of the precise time of the commission of the embezzlement.

7. EMBEZZLEMENT 🔑10—ELEMENTS OF OFFENSE—CAPACITY IN WHICH MONEY IS RECEIVED.

If, as the jury found, a guardian delivered money to her attorney, for which he gave his notes, on the clear and specific understanding or agreement that the money was to be loaned to some other party, and the notes were given as evidence of good faith or as security for the faithful execution of the trust, and the return of the money and accumulated interest upon the falling due of the notes, the relation between the guardian and the attorney was not that of debtor and creditor, but of a fiduciary character, so that the attorney's conversion of the money to his own use constituted embezzlement.

Appeal from Superior Court, San Joaquin County; John Hancock, Judge.

H. Stanley Crane was convicted of embezzlement, and he appeals. Affirmed.

Walter F. Lynch, of Stockton, for appellant. U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

HART, J. Appellant was convicted, in the superior court of San Joaquin county, of the crime of embezzlement, and was sentenced to 10 years' imprisonment in the state prison. He appeals from the judgment, and from an order denying his motion for a new trial.

The information charged that, on or about the 17th day of November, 1915, defendant, as the agent, servant, and employé of one Harold King, embezzled the amount of $569.50, the property of said Harold King. On May 4, 1914, one John King died in San Joaquin county, leaving an estate therein, and leaving surviving him a widow, Matilda King, and six children, three by his said widow and three by a former wife, the sister of said Matilda. Of these children, four were minors; their names being, respectively, Harold W., a son by the first wife, and Edna V., Edward L., and Enid King, issue of the second marriage. On June 1, 1914, defendant was appointed administrator of the estate of John King, deceased, and, on February 24, 1915, he was appointed guardian of said minor children. He filed an account of his guardianship on October 23, 1915, which showed a balance in his hands, to the credit of said minors, of $1,494.97. Said account was settled on November 15, 1915, and the resignation of the defendant as guardian was accepted. On the following day Matilda King was appointed guardian of said minors, and on November 17th receipted to appellant for said sum of $1,494.97. On September 10, 1915, defendant wrote a letter to Miss Ethel L. King, a daughter of John King by his first marriage, who was a school-teacher at Los Banos, stating that he would call upon her shortly and talk over the guardianship matter with her. Pursuant to said letter he called upon said Ethel in the latter part of September. She testified that the following conversation occurred between them:

> Defendant told her he had seen her aunt (who was also her stepmother), Matilda King, at Salinas, where she was residing. "Mr. Crane wanted to lend the money out at 8 per cent., and I told him I didn't want it loaned out at 8 per cent., you couldn't get good security at 8 per cent.; and he said he knew a place where he

could get good security, and I still objected, and he said that, well, to make it doubly secure, he knew that the security he could get was good enough, but to make it doubly secure, he would give his note, too. And he led me to believe that he was still acting as the guardian of the estate, although it was going to be transferred over to my aunt; and I asked him why he couldn't do that without transferring the guardianship over to my aunt, and he said that he could not do it—he could do it as my aunt's attorney, but he could not do it while he was guardian of the estate. * * * He told me to write and advise my aunt to become the guardian of the estate, so that he could act as her attorney and lend this money out to some one else. I wrote her and told her that Mr. Crane had done our business before, and that it was all right to let him go on and tend to the business the way he wanted to, as he was guardian—he told me he was guardian now, and he ought to be able to look after the interests of the children as he thought best while he was guardian, and if we didn't do it the way he wanted to he would turn the money over to the courts, and they would get practically all of it; * * * the lawyers would get it all. Q. Did Mr. Crane at any time say anything at all about him borrowing the money himself? A. No; he did not. He was always going to borrow it for some one else. He was merely going to give his note as double security."

On September 27, 1915, defendant wrote Mrs. Matilda King, at Salinas, stating that he had called on Ethel King and had suggested:

"By reason of the fact that you could put out the money belonging to the four minor children at 8 per cent. interest, that it would be better to have you appointed guardian at Salinas and then I could attend to all the other matters for you thereafter. I told Miss Ethel that I would have you appointed guardian without any expense to you in the matter. After going over the matter fully with Miss Ethel, she agreed with me that it would be to the advantage of the four minors to have you appointed guardian, and she said that she would write you on Tuesday and advise you to act in this matter according to my advice."

He suggested that he would go to Salinas the following week with the necessary papers. Other letters from defendant to Ethel King were introduced in evidence, in one of which appears the sentence:

"I received a card from Mrs. King a few days ago, saying that she would write me as soon as she had heard from you and had received your advice."

And, on November 4, 1915, he wrote that he was going to Salinas "next Tuesday, at which time I will have Mrs. King appointed guardian."

Mrs. Matilda King testified that defendant called upon her in Salinas twice, once in the latter part of September and again on November 10, 1915. As to the conversation occurring at the first visit, Mrs. King testified:

"He told me that he wanted to appoint me guardian over the children, and I asked him why; and he said that to loan out the money, as him being a lawyer he couldn't loan it out; I asked him why that was; because, he said, he was a lawyer, because he was the guardian over them, that he could not loan it out. * * * He said he could loan it out for 8 per cent., while the bank was only paying 4. * * * He said it was lying idle in the bank, wasn't bringing any interest in at all. * * * I thought it was a good idea, because it would be earning more for the children, as he said he could loan it out at 8 per cent."

As to what transpired on November 10th, Mrs. King said that she gave defendant $600 of her own money to be by him loaned at 8 per cent. Defendant handed Mrs. King a draft, dated November 9, 1915, for $1,494.97, the amount shown to be due from him to the minors. This draft was drawn by the San Joaquin Valley Bank, of Stockton, on the Wells Fargo Nevada National Bank, of San Francisco. Mrs. King indorsed it, and immediately returned it to the defendant, whose indorsement also appears upon it under that of Mrs. King. The testimony of the cashier of the Commercial and Savings Bank of Stockton was that the draft was deposited in that bank on November 16th to the credit of the account of the wife of defendant, but that the account was so arranged that either the defendant or his wife could check against it. The cashier further testified that immediately before and at the time the deposit was made as indicated there was an overdraft in the account of the Cranes of $451.77; that said overdraft was credited from the draft deposited by Crane, leaving in the account the sum of $1,043; that this amount, through checking against it, was, on the following day—November 16, 1915—reduced to the sum of $820; that from time to time thereafter until the 18th day of December, 1915, the account, with small deposits added thereto at different times, was so drawn upon that, on the date last mentioned, there remained in the account the sum of $38.74 only. A perforation in the draft shows that it was paid on March 18th. Mrs. King testified that defendant delivered to her four promissory notes, each signed by him, dated November 17, 1915, and made payable to the order of Matilda King, with interest at 8 per cent. per annum. The first of said promissory notes was for the sum of $569.50 (the amount charged in the information to have been embezzled from Harold King) and was payable on April 2, 1919. Each of the remaining notes was for the sum of $344.50, being payable, respectively, in 1921, 1926, and 1929. Mrs. King testified that Harold would become of age on April 2, 1919, the date of the maturity of the first note, and that the other three minors would become of age, respectively, at the dates when the remaining notes would mature. Asked concerning the conversation between herself and defendant on his second visit to her, Mrs. King said:

"He was going to loan the money out at 8 per cent. for the children, and he asked me if I had any to loan out. Q. How did he come to give the notes, how did that happen? A. He said he would give me his personal notes for the money. Q. Now, did he say he was borrowing this himself, or going to take it from you to loan to somebody else? A. He said he was going to loan it out; he didn't say he was borrowing it for himself; that he would loan it out at 8 per cent."

There is some conflict in the record regarding the precise time at which the second conversation above referred to and the delivery of said instruments occurred. While Mrs. King testified that the date was November 10th, her receipt to defendant is dated November 17th, and the notary public, before whom she acknowledged her signature thereto and before whom she took the oath of office as guardian, testified that November 17th was the date upon whhich he took her acknowledgments, though the oath of office contained the certificate that it was "subscribed and sworn to before me this 16th day of November, 1915." The notary also said that Mr. Crane was present with Mrs. King on November 17th, when she acknowledged said instruments. Mrs. King stated that she noticed the notes were "dated ahead." The testimony of the defendant, given upon the examination of the case before a magistrate, was that he delivered the draft and the promissory notes to Mrs. King on November 17th and that the conversation testified to by her was held on the same day. As seen, the draft was deposited in the bank at Stockton on November 16th. However, as no point is made as to any discrepancy in the dates, we will make no attempt to reconcile them.

A reversal is urged on these several grounds: (1) That the evidence shows that the crime, if any at all was committed, is larceny and not embezzlement; (2) that there was and is a variance between the allegations of the information and the proof, in that, if the crime of which the defendant was convicted was committed at all, the evidence discloses that it was the embezzlement of a draft, and not of money, as charged; (3) that the crime charged, if committed, was committed in Monterey, and not in San Joaquin, county, hence the court below was without jurisdiction to try the accused; (4) that the crime of embezzlement is not consummated until a demand for a return of the property or money is made upon the bailee or trustee, and that the evidence fails to show that any such demand was made; (5) that the evidence shows that, the defendant having given Mrs. King his promissory notes for the money, the relation of debtor and creditor was thus created between the parties as to said money, and that therefore there can be no embezzlement by the mere failure or refusal by the defendant to pay said notes or repay said money; (6) that the failure to prove the precise time at which the alleged embezzlement occurred is fatal to the verdict and judgment.

The information is based on section 506 of the Penal Code, which is as follows:

"Every trustee, banker, merchant, broker, attorney, agent, assignee in trust, executor, administrator or collector or person otherwise intrusted with or having in his control property for the use of any other person who fraudulently appropriates it to any use or purpose not in the due and lawful execution of his trust, or secretes it with a fraudulent intent to appropriate it to such use or purpose, * * * is guilty of embezzlement."

[1, 2] 1. As to the first of the above enumerated propositions for which a reversal is urged, the theory of the defendant is that, if any crime was committed by him in the transaction from which this prosecution arises, it is larceny by trick and device, and the argument in effect is: That, if the defendant conceived a corrupt motive and purpose in the transaction, it must have been before he finally obtained possession of the money under the circumstances above indicated, and that his resignation as guardian of the minor children, his suggestion and procurement of the appointment of Mrs. King to that office, and thereupon his turning of the money over to her, followed by his insistence that she redeliver the money to him upon the pretext or representation that he could and would let it out at a high rate of interest, and the giving of his notes for the money, tended to disclose, if any crime at all, larceny by trick and device.

It may be conceded that the evidence is such that a verdict convicting the defendant of grand larceny might legally be sustained. In other words, it might well and justly be inferred from the evidence that the means resorted to by the defendant to secure a redelivery to him of possession of the money constituted a scheme through which a previously conceived intent to steal the money might the more readily be executed. But the evidence is not so conclusive upon that proposition as to compel no other conclusion, or to force the conclusion that, from the very beginning of the transaction from which this prosecution directly ensues, the defendant formed or had formed the intent feloniously to steal or appropriate the money to his own private or personal use or purposes. The evidence, so far as the intent of the defendant was concerned, or as to when, if at all, the felonious intent was by him formed to appropriate the money to his own use, is necessarily circumstantial, and, under it, the jury could justly and consistently have arrived at either one of two conclusions, viz.: (1) That the defendant had, by trick and device, obtained possession of the money with the intent to appropriate it to his own personal use, which would constitute his crime that of larceny; or (2) that he had no such intent when first he obtained redelivery of the possession of the money to misappropriate it or divert it from the purpose for which it was so transferred to his possession, but that, having obtained such possession for a specific purpose, which was to be for the benefit of the owner, he unlawfully, and contrary to the terms of his trust, himself used the money or diverted its use to his private purposes.

The court, in language of singular perspicacity, explained to the jury the essential elements of the crime of embezzlement, as defined by section 506 of the Penal Code, and further instructed them that the evidence should be such as to show beyond a reasonable doubt that all those elements were present in the act of the defendant in the handling of the money; otherwise, their verdict should be one of acquittal. Thus, it is manifest, the issue whether the act and the intent of the defendant, as shown by the evidence, did or did not constitute the crime of embezzlement, was squarely put up to the jury, and their verdict of guilty of embezzlement as charged necessarily implies that the jury concluded, after a consideration of the evidence by the light of the instructions, that the evidence disclosed the commission of the crime of embezzlement and not that of larceny. As is well suggested by the Attorney General, there may be a number of implied findings embraced within the general finding of guilty of the crime as charged, and in this case, in which there were no special findings made, one of the findings necessarily implied is that the defendant did not intend to steal the draft, or its equivalent in money, at or before the time he received it, but that his intention to embezzle it, or appropriate it to his own private use, was conceived and became existent after he received the possession of it. As in effect above declared, the fact as to the precise point of time at which the defendant conceived or formed the intention to take the money and use it for his own purposes was one of the essential issues submitted to the jury, and the finding of that fact is necessarily comprehended within the general finding of guilty as charged.

The case of People v. Lewis, 141 Cal. 543, 75 Pac. 189, is interesting in connection with the question of the effect of a general verdict in a criminal case in which, as here, either one of two inconsistent conclusions upon some vital fact might with perfect legal propriety be arrived at and sustained. In that case the defendant was charged with and convicted in the superior court of Alameda county of the crime of taking away a female under the age of 18 years from her father, without his consent, for the purpose of prostitution. Pen. Code, § 267. Her father lived in San Benito county, from where the defendant took the girl to Alameda county, in which the venue of the crime charged was laid in the information. The principal point in the case involved the challenging of the jurisdiction of the superior court of Alameda county to try the case. In support of that point it was claimed that the evidence showed that, if the defendant committed the offense, it was committed entirely in San Benito county, and that therefore the superior court of Alameda county had no legal authority to try the case. Although the Supreme Court held that the offense defined by said section 267 is complete when there is a taking for the purpose of prostitution, and that the actual placing of such female in a house of prostitution is not by the statute made an essential element of the crime, the point as to jurisdiction was not sustained, the court saying that if the evidence was such as to compel the conclusion that the defendant took the girl from her father in San Benito county, with the intent to use her for the purposes of prostitution, it would then be necessary to hold that the offense was wholly committed in said county, and that no crime within the venue of the superior court of Alameda county would be shown, but that the evidence was such as to sustain the finding of the jury "to the effect that at the time the girl was given into the charge of defendant by her father there was no intent on defendant's part to use her for purposes of prostitution, and that such intent was not conceived by him until some time after their arrival in Alameda county, while the girl was still in his actual charge, committed thereto by the father for a proper purpose." So in this case, if the evidence compelled the conclusion that the crime of larceny and not that of embezzlement had been committed, a much different situation would confront us, but, as shown, and as is plainly true, the evidence is such as amply to support the verdict as found and at the same time is such that it might perhaps properly be held sufficient to sustain a verdict of guilty of larceny had such a result been reached by the jury.

[3] 2. The claim that there is a further variance between the information and the proof in that the information charges the embezzlement of money and the evidence shows that the defendant did not receive money but a bank draft, cannot be sustained. It is true that the defendant in the first instance received a draft for the money in Monterey county; but it is also true, as has been seen, that he deposited the draft in the name of his wife in a bank at Stockton immediately after he had received it, and thus it became a part of his account in said bank, available for his and his wife's purposes. In substantial effect, it became cash or money the moment he deposited the draft in his wife's name, for it was kept there subject to be paid out on the checks of either himself or his wife. In the case of People v. Whalen, 154 Cal. 472, 98 Pac. 194, where the defendant had been convicted of obtaining money by false pretenses, and where it was made to appear that the prosecuting witness had given the defendant a check for a certain sum of money, a similar point was urged, and the court said:

> "It may be conceded that, if nothing more had been shown than the giving of the check, it would not prove the charge of having obtained the money; but we think the jury were fairly justified in concluding from the entire evidence that the check thus given was cashed by the de-

fendant and the money obtained thereon. * * * There was nothing disclosed by the evidence to indicate that the defendant experienced any difficulty or delay in obtaining payment of the check. The facts concerning the payment of the money were all elicited upon the examination in chief of the two witnesses. There was no cross-examination on that subject, nor any attempt, at any stage of the case, to show that the check had not been paid in the usual course of business."

In this case, the testimony of the bank cashier discloses that the defendant and his wife, after the draft was deposited in the latter's name by the former, checked against their account, of which the draft had been made a part, until said account was reduced to the sum of $38.74. That the draft was in fact turned into cash, and the cash used by the defendant for his own private purposes, it seems to us the evidence unquestionably shows.

[4] 3. The jury were justified by the evidence in finding that if embezzlement of the money was committed by the defendant such crime was committed in San Joaquin, and not in Monterey, county, as the defendant contends. Without considering whether, in any event, the venue of the alleged crime was in San Joaquin county by virtue of the provision of section 781 of the Penal Code, providing that "when a public offense is committed in part in one county and in part in another, or the acts or effects thereof constituting or requisite to the consummation of the offense occur in two or more counties, the jurisdiction is in either county," a conclusive reply to the contention is that, as has been shown, the undisputed, and, indeed, the indisputable, evidence discloses that the act of depositing the draft in the bank in the name of the wife of the defendant by the latter occurred in the city of Stockton, in San Joaquin county, and that, from this circumstance, the jury were justly warranted in concluding that the intent thus to misappropriate the money was formed in San Joaquin county. As is obviously true, no one can look into the human mind and interpret its operations, and, quite obviously, the intent with which an act is done, or the time at which such intent is conceived and formed, can be learned only from external circumstances so connected with the act itself as to afford reasonable ground for a reasonably definite inference as to the nature of the intent, if any, which accompanied the act, and as to the time, approximately, that such intent took on a definite form in the mind of the person committing the act. The intent may be formed, practically, concurrently with the commission of the act. In this case, there is no particular circumstance, except the fact of securing possession of the draft under the circumstances above shown, tending to indicate that the defendant, when he received the draft in Monterey county, intended to handle the money available on the draft in a dishonest way, or that his intention with respect to the transaction was then corrupt or dishonest. On the other hand, the act of depositing the draft in the bank at Stockton in such manner as to facilitate the withdrawal of the money thereon by his wife and himself does, as stated, constitute a circumstance tending to disclose that he formed the criminal intent with respect to the draft or money in San Joaquin county. Of course, these observations are not to be understood as implying a negative of the proposition, above stated, that the evidence, taken in its entirety, might be held to be sufficient to sustain a verdict of grand larceny in this case, if such a verdict had been returned.

[5] 4. The contention that no embezzlement of the money could take place without a demand by the owner for its return having been previously made upon the defendant is untenable. A demand for the return of property or money intrusted to a bailee or trustee, followed by a refusal to return the property or money, is not itself an element of the crime of embezzlement, but constitutes mere evidence of embezzlement. It is true that a demand, followed by a refusal, is sometimes indispensable evidence of embezzlement; but it is the fraudulent and felonious conversion of the money or other property that constitutes the offense, and that may often be proved without a demand. People v. Bidleman, 104 Cal. 608, 38 Pac. 502; People v. Royce, 106 Cal. 173, 37 Pac. 630, 39 Pac. 524; People v. Gordon, 133 Cal. 328, 65 Pac. 746, 85 Am. St. Rep. 174; People v. Ward, 134 Cal. 301, 304, 66 Pac. 372; People v. Goodrich, 142 Cal. 216, 220, 75 Pac. 796; People v. Fisher, 16 Cal. App. 271, 275, 116 Pac. 688; Wharton's Criminal Law, § 1030.

The cases—particularly those cited from our own Supreme Court—do not, as we understand them, hold that a demand for a return of the money or property, followed by a refusal to return it, is an essential prerequisite to the consummation of the crime of embezzlement. In the case of People v. Tomlinson, 66 Cal. 344, 5 Pac. 509, cited here by the defendant, it appeared that a party having no interest whatever in the money intrusted to the defendant, and of the embezzlement of which the accused was convicted, made a demand on the latter to return the money to its owner. The court very properly held, not that a demand by the owner upon the defendant to return the money and a refusal by the latter to return it constituted essential acts in the completion of the offense of embezzlement, but that the demand made in that case and upon which the prosecution relied to prove the felonious conversion was not made by the party to whom the money belonged, nor by the evidence shown to have been upon his authority or for him. The other California cases cited by the defendant are People v. Wyman, 102 Cal. 556, 36 Pac. 932, People v. Royce, 106 Cal. 177, 37 Pac. 630, 39 Pac. 524, and People v. Page, 116 Cal. 396, 48 Pac. 326.

These cases hold, as the cases first above referred to declare, that the fact of demand and refusal is only an evidentiary matter, and constitutes mere proof of the unlawful and felonious conversion, and in some cases may, as before stated, be indispensably necessary to the proof of the crime; but none of them holds that where, as in this case, there is other proof than that of demand and refusal sufficient to establish the felonious conversion of the money or other property intrusted to the defendant, it is essential to the consummation and establishment of the crime to show that there had been a demand made upon the defendant by the owner of the money or property for a return thereof and a refusal by the defendant to comply with such demand.

[6] 5. The objection that the conviction cannot be upheld, because the precise time at which the alleged embezzlement was committed was not proved, is without legal force. The evidence shows that the alleged crime was committed within three years before the filing of the information, which is the statutory period within which an indictment or information charging an offense of the character of the one charged here may be found or filed (Pen. Code, § 800), and it was sufficient to show that the crime was committed at any time within the period of limitation as prescribed by the section named.

[7] 6. The last point urged is, as above shown, that, as to the money alleged to have been embezzled, the relation of debtor and creditor subsisted between the defendant and Mrs. King. This proposition proceeds from the fact, as shown, that the defendant, upon receiving the draft, executed and delivered to Mrs. King his several promissory notes for the same, payable at different times, or when her minor children, to whom some of the money represented by the draft belonged, arrived, respectively, at their majority. But the answer to the proposition is to be found in Mrs. King's testimony, which the jury evidently, and, indeed, presumptively, accepted and believed, that the money was not in fact loaned to the defendant, but was delivered over and intrusted to him with a clear and specific understanding or agreement between them that the money was by the defendant to be loaned to some other party at a high rate of interest, and that the defendant's promissory notes, voluntarily made and delivered by him, were to be only in the nature of evidence of the good faith of the transaction, or, in effect as stated by him, as security for the faithful execution of his trust and his final discharge therefrom by the return of the money and the accumulated interest upon the falling due of said notes. At no time, according to the testimony of Mrs. King, did the defendant claim, represent, or pretend that he was to receive the money for his personal use, but, on the contrary, at all times declared and represented to Mrs. King, that, in securing the money, his only purpose and sole intention were to loan the money to some other party, so that the minor children might derive some benefit from it before they were entitled to receive it; Mrs. King, as seen, further testifying that upon that representation and understanding alone she turned the draft over to the accused. Thus the jury were legally at liberty to find, as certainly they did find, that the relation created in the transaction between the defendant and Mrs. King was of a fiduciary character—that is, that the money was delivered to and held by him in trust for the benefit of Mrs. King, as the duly appointed and acting guardian of the minor children of herself and deceased husband, and was not loaned to the accused or delivered to him to be applied to his personal uses and purposes.

After a most painstaking examination of the record, and the points pressed upon us for a reversal, we have not been able to discover any error justifying interference with the judgment and the order appealed from, and they are accordingly affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

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34 Cal. App. 516

PEOPLE v. HAACKE. (Cr. 393.)

(District Court of Appeal, Third District, California. Sept. 3, 1917. Rehearing Denied Oct. 3, 1917.)

1. Criminal Law 🔑404(3)—Bottles of Liquor as Evidence.

In a prosecution for selling liquor, where it appeared that bottles of wine, purchased of defendant by a stool pigeon, were turned over to the constable, who placed them, just as received, in a trunk at his home, and removed them only when necessary to produce them before the grand jury and at the trial though the trunk was rarely locked, and all of the constable's family had access to it, and the bottles passed through the hands of several other persons, each of whom testified he had not altered the contents, the bottles were admissible in evidence, the constable testifying positively that he never changed their contents, that there were no indications that they had been tampered with, and that it appeared to him to be the same stuff.

2. Criminal Law 🔑865(1) — Coercion of Jury.

Where the judge, after the jury requested that the expert testimony be read to them again, stated that he took it to be a good sign that they were still working at the verdict, and had not concluded they could not agree, and that the court would be there until about 15 minutes after 9, and that, if they had agreed at that time, the court would accept their verdict and discharge them that night, the language used by the judge was not improper as coercing the jury to return verdict.

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

William Haacke was convicted of selling alcoholic liquor in no-license territory, and from judgment of conviction and an order denying his motion for new trial, he appeals. Judgment and order affirmed.

Charles Kasch and J. C. Hurley, both of Ukiah, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

BURNETT, J. The defendant was charged by indictment by the grand jury of the county of Mendocino with the crime of selling alcoholic liquor in no-license territory. He was thereupon duly tried and convicted of the offense charged. He moved for a new trial, which motion was denied, and he was thereupon sentenced to pay a fine of $500 and to imprisonment in the county jail for a term of six months. Defendant prosecutes this appeal from the order and the judgment.

But two points are urged by appellant: (1) That the court erred in overruling objections to the admissibility of evidence, and (2) that the court was guilty of misconduct, in that it made a statement to the jury which had the effect of thereafter bearing improperly upon their verdict.

[1] Briefly the facts appear as follows: It being suspected that defendant Haacke was "blind-pigging," one William Lair was employed by Mr. Vann, the constable, to purchase liquor from defendant. Two bottles, securely wrapped in newspaper, of what was supposed to be wine and sold as such were purchased and promptly turned over to Mr. Vann. This occurred on July 23, 1916. Vann placed the bottles, just as he received them, in a trunk at his home, and removed them only when it was necessary to produce them before the grand jury and at the trial. It appears that the trunk was rarely locked, and that all of Vann's family had access to it. It does not appear that any one else had access to the trunk. The hearing before the grand jury was held in December, 1916, and the trial had on January 18, 1917. Upon the offer of the two bottles, together with their contents, in evidence, objection was made by defendant that no foundation had been laid, that there was no preliminary showing that the contents were the same on the day of trial as when originally taken. An examination of the record, however, discloses sufficient evidence to justify the admission of the bottles. Though Vann admits that his wife and children "could" have got at the bottles, the clear inference from his testimony is that they did not. He testifies positively that he never changed the contents; that the original paper was still around the bottles just as when they were purchased; that there were no indications whatever that the bottles had been tampered with; and that it appeared to him to be the same "stuff." Though the bottles passed through the hands of several other persons, each took the stand and testified that he had not altered the contents. At most defendant shows a mere possibility for one to have molested the bottles. But as declared in Tebbe v. Smith, 108 Cal. 101, 41 Pac. 454, 29 L. R. A. 673, 49 Am. St. Rep. 68:

> "The law cannot guard against a mere possibility, and no judgment of any of its courts is ever rendered upon one." While the bottles "should be admitted only after clear and satisfactory evidence of their integrity, yet, when they have been admitted, this court will not disturb the ruling, unless we in turn are as well satisfied that the evidence does not warrant it." Tebbe v. Smith, supra.

[2] The utterance of the judge, which is claimed to have improperly influenced the verdict appears from the following:

> "Court: Gentlemen, have you agreed upon a verdict?
>
> "Foreman: No, sir; some of the members of the jury would like to hear the testimony of the expert witnesses read. (At this time the reporter read the testimony of the experts.)
>
> "Court: Is there anything else, gentlemen?
>
> "Foreman: That's all, I think.
>
> "Court: Well, I take this to be a good sign that you are still working at it, haven't concluded you couldn't agree, and so keep working at it, gentlemen, and agree if you can and the court will be here till about 15 minutes after 9, gentlemen, and if you have agreed at that time the court will accept your verdict and discharge you to-night. You may retire now."

Defendant claims that the reasonable inference from these words is that the jury were threatened with a night in the jury room unless they reached a verdict by 9:15, and that in that respect they were coerced. We cannot agree with defendant's interpretation. It is not an unusual thing for a judge to tell a jury at what time of night he is going home, so that they may know when he is available if they wish to call him during the night. There is nothing in the language used by the judge which would indicate to the jury that he had a fixed and definite conviction in regard to the verdict or which would create the impression that he thought the jury ought to convict upon the evidence before them. He appears merely to have expressed satisfaction at the effort being made by the jury to reach a fair verdict.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

34 Cal. App. 613

HOUTS v. FIRST TRUST & SAVINGS BANK et al. (Civ. 2148.)

(District Court of Appeal, First District, California. Sept. 12, 1917.)

1. HUSBAND AND WIFE 🔑249—COMMUNITY PROPERTY.

Where a husband and wife joined in a deed to O., immediately gave the wife a lease for 40 years, which was not recorded, and transferred the property to a corporation owned by the husband, O. receiving no consideration, the property became community property.

2. HUSBAND AND WIFE 🔑221—MORTGAGES 🔑154(3)—DWELLING HOUSE—OCCUPANCY OF WIFE AS NOTICE OF CLAIM.

Where record title to a dwelling place of husband and wife was in a corporation owned by the husband, a mortgagee is not called upon to investigate the rights of the wife in such property to make her a party to the foreclosure action; the husband being the head of the family, and the dwelling being in his possession in the eyes of the world.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by Jessie E. Houts against the First Trust & Savings Bank, a corporation, and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Jas. P. Sweeney, of San Francisco, for appellant. Gibson & Woolner, of Oakland, for respondents.

RICHARDS, J. This is an action in which the plaintiff sought to restrain the defendants from enforcing a writ of assistance for the eviction of herself from the possession of the premises involved in the action.

The facts of the case were these: Prior to January 7, 1907, the plaintiff and her husband, W. A. Houts, were the owners of the premises in question and occupied the same as their family residence. On the above date they joined in a deed to the property to one Edward O'Gara upon the understanding between themselves and their grantee that he would at once execute a lease thereof to the plaintiff for the term of 40 years at the nominal rental of $1 per annum, and, apparently, upon the further understanding that he would presently convey the property to a corporation known as the Traders' Investment Company. The said O'Gara immediately executed said lease, delivering the same to the plaintiff, who in turn gave it to her husband, who put it away in his safe deposit box. This lease was never recorded. A few days later O'Gara conveyed the property to the Traders' Investment Company. There was no consideration moving to O'Gara for any of these transactions, and the Traders' Investment Company was simply a name or mask under cover of which said W. A. Houts, husband of the plaintiff, conducted some portions of his business. Having thus acquired the title to the property the Traders' Investment Company proceeded to mortgage the same to the defendant First Trust & Savings Bank for a loan of $9,500. This loan not being repaid the mortgagee brought an action to foreclose its mortgage, to which action the said W. A. Houts and his wife, the plaintiff herein, were not made parties, and in due course of the proceedings obtained a judgment of foreclosure directing a sale of the property, at which sale the said mortgagee became the purchaser thereof for the amount of the judgment debt, and, the time for redemption having expired, received a deed to the premises. During all of this time the said W. A. Houts and his wife had been occupying the premises as their residence, but without disclosing to any one, and particularly to the mortgagee, the fact of the existence of the plaintiff's lease, up to the time when the latter sought to enforce its right of possession by the eviction of Houts and his wife from the property; whereupon the present action was instituted to restrain the enforcement of the writ of assistance issued in that behalf. The trial court held the transaction by which the claims of the plaintiff as to her right of possession under said lease arose to be fraudulent, and refused the plaintiff the relief she sought.

[1, 2] We are entirely satisfied that the trial court committed no error in its ruling in this regard. Whether W. A. Houts and his wife held the title to the property prior to January 7, 1910, as community property or in the relation of tenants in common is immaterial, for the reason that when they joined in a deed conveying it to O'Gara upon the understanding that he was to transfer it to the Traders' Investment Company—which was simply another name for W. A. Houts—it then lost its former quality and became community property, and for the further and perhaps better reason that the property was the family dwelling place, and as such was in the possession of W. A. Houts, the head of the family; and whatever occupancy the plaintiff had therein amounted merely to the possession of the property not by herself but by her husband to the eyes of the outside world. This being so, the First Trust & Savings Bank when it took the mortgage upon the property was in no wise put upon notice that the plaintiff herein had or asserted any claim or interest in the premises adverse to the possession of her husband, and was not therefore required to investigate the nature of her occupancy as the wife of the apparent owner, nor was the said mortgagee required to make her a party to its foreclosure action in order that she might be bound by the judgment obtained therein.

In the present action the defendant First Trust & Savings Bank pleaded and proved in detail the foregoing facts, and the court found the transaction out of which grew the plaintiff's asserted lease to be fraudulent from its inception and said lease to be void.

A closely analogous case to the case at bar is that of Bush & Mallett Co. v. Helbing, 134 Cal. 676, 66 Pac. 967, wherein the Supreme Court held a similar transaction to be fraudulent and void. Upon the authority of that case, the judgment and order are affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

34 Cal. App. 615

RHOADES v. LYONS et al. (Civ. 1876.)

(District Court of Appeal, Second District, California. Sept. 12, 1917.)

1. HUSBAND AND WIFE 🔑255—COMMUNITY PROPERTY — SEPARATE PROPERTY TRANSACTION.

An automobile, bought by a wife out of her separate property, on a transaction in which the husband had no interest, was not community property, and was not subject to attachment in an action against the husband.

2. SALES 🔑476 — CONDITIONAL SALES — ASSIGNMENT OF CONTRACT—DEFAULT.

Where, on a conditional sale of an automobile, the vendor assigns his contract to another without knowledge of the purchaser, and payment of an installment is mailed to such vendor in time, the purchaser is not in default, although the assignee did not receive the installment on time.

3. REPLEVIN 🔑8(1)—RIGHT TO POSSESSION—LOST BEFORE TRIAL—EFFECT—PLEADING.

In an action for possession of personalty, the right of the plaintiff will be decided as of the date of commencement of the action, unless a supplemental answer is filed, showing plaintiff's subsequent loss of right.

4. SALES 🔑479(7)—CONDITIONAL SALE—LOSS OF RIGHTS AFTER COMMENCEMENT OF ACTION —PLEADING.

A defense, in the answer in an action for possession of personalty, that plaintiff had defaulted in payments thereon, does not entitle defendant to show defaults occurring subsequent to commencement of the action.

5. SALES 🔑479(8)—CONDITIONAL SALE—RECOVERY OF PROPERTY—FINDINGS.

In an action for possession by a seller on conditional sale, a finding that plaintiff was the owner and entitled to possession was a sufficient affirmative finding as to a defense that plaintiff had defaulted in installments due, as such finding was wholly inconsistent with such an averment.

Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by Minnie Rhoades against George Lyons and the Fletcher Collection Agency. Judgment for plaintiff, and defendants appeal. Affirmed.

Geo. P. Cook, of Los Angeles, for appellants. H. G. Bittleston and Robert Whitson, both of Los Angeles, for respondent.

CONREY, P. J. This is an action to recover possession of an automobile. Defendants appeal from the judgment. The record was prepared under the provisions of sections 953a and 953c of the Code of Civil Procedure. Accordingly we shall assume that counsel have inserted in their printed briefs all those portions of the record which they desire that we shall consider.

The plaintiff, Minnie Rhoades, is the wife of W. M. Rhoades. Defendant Lyons is a constable of Los Angeles township in Los Angeles county. On the 8th day of June, 1914, an action was pending in the justices' court of Los Angeles township by Fletcher Collection Agency, plaintiff, to recover from W. M. Rhoades money claimed to be due on a contract. In that action and on that day, and pursuant to a writ of attachment against the property of W. M. Rhoades, the automobile now claimed by the plaintiff, Minnie Rhoades, was seized by Lyons as constable and was by him taken from her possession. On July 8, 1914, Mrs. Rhoades commenced this action, which was tried on May 18, 1915. Thereafter the court entered judgment awarding possession of the automobile to Mrs. Rhoades, with the usual form of alternative judgment for the value of the property in case delivery thereof could not be had.

[1] As applied to the rights of the parties on July 8, 1914, the evidence is sufficient to support the court's finding that Mrs. Rhoades was entitled to the possession of the automobile. On June 8, 1914, when the property was taken by the constable, it was in her rightful possession under a contract of conditional sale made to her by one R. C. Haskett. All payments on that contract had been made by Mrs. Rhoades out of her own separate property and she had made the contract as a separate property transaction. Her husband, W. M. Rhoades, had no interest in the automobile and it was not community property. It follows that it was not subject to attachment in the action against W. M. Rhoades, and it was wrongfully taken from the possession of Mrs. Rhoades.

[2] On July 8, 1914, the rights of Mrs. Rhoades under her contract had not been impaired in any degree. To understand the situation it is necessary to mention some other facts. The Haskett-Rhoades contract provided for payment of the consideration in monthly installments, beginning on March 4, 1914, the date of the contract, and ending with the final payment due on December 4, 1914. The deferred payments were evidenced by promissory notes. Under date June 12, 1914, for a valuable consideration, Haskett executed a bill of sale purporting to transfer the automobile to one Herbert T. Brown. Nothing was stated therein concerning the Rhoades contract, but Brown knew the terms thereof and that the notes had been given. The contract seems to have been delivered by Haskett to Brown, for Brown had it in his possession the next day, but it does not appear that the notes were delivered to him. On June 13, 1914, for a valuable consideration, Brown execcuted to Fletcher Collection Agency a written assignment of the bill of sale and also a written assignment of the contract, and delivered therewith both of said assigned documents.

Mrs. Rhoades had duly paid all of the notes, to and including the note due on June 4, 1914. It does not appear that on the 2d day of July, 1914, Mrs. Rhoades had been informed by any one that Haskett had parted with his interest in the automobile or in the contract or in the notes; in fact, so far as appears, the notes were still in Haskett's possession. Acting upon the assumption that the next note was payable to Haskett, she sent to him on the 2d day of July a post office money order, payable to the order of Haskett for the amount of that installment. As the 4th day of July was Saturday, the payment could not be delinquent if made at any time on or before the 6th. Civ. Code, § 11. No objection was made to the money order as not the equivalent of legal tender of the money, nor is any question of that kind presented here. Upon receiving the money order Haskett sent it to Brown, who received it at least as early as July 6th and held it until July 9th. On that day Brown sent it back to Haskett, with a letter requesting that he indorse the money order and mail it to Fletcher Collection Agency. Instead of complying with that request, Haskett took the money order to the office of the attorney, who at that time was representing the plaintiff in this action. Thereupon that attorney, with Haskett and Mrs. Rhoades and her husband, went together to the office of the Fletcher Collection Agency, where they waited an hour for the manager of the agency to arrive. As he did not come, they then went away. No further payments of the notes appear to have been made. Upon the state of facts above shown, we are of the opinion that Mrs. Rhoades, when she commenced this action on July 8, 1914, had not defaulted on the July payment of her contract, and that she then had a good cause of action to recover from the defendants the possession of the automobile.

[3] But there is a further contention by appellants that the judgment should be in their favor, because at the time of the trial the right of possession of the disputed property had been lost by plaintiff and had passed to Fletcher Collection Agency. Appellants refer us to decisions holding that, even though one of the parties has the right to possession at the time of commencement of a possessory action, he cannot recover if such right of possession has ceased before trial. The cited cases are Bolander v. Gentry, 36 Cal. 105, 95 Am. Dec. 162, and Pico v. Pico, 56 Cal. 453. In Bolander v. Gentry the court said:

> "In order to maintain the action, a right to the possession must have existed in the plaintiff at the time of the commencement of the action. But, if before the trial of the action his right to the possession has ceased, and the defendant has been required to deliver, and has delivered, the property to the party entitled to its possession, we do not see why that fact may not be set up, so as to defeat a recovery of the possession, or the value of the property. O'Connor v. Blake, 29 Cal. 316. It might not defeat a recovery of the costs of the action, or damages accrued up to the time the contingency happened, but why not defeat a recovery of the possession, or the value, of the property? * * * Section 67 of the Practice Act provides that, 'where circumstances, occurring subsequently to the commencement of the action, render it proper, the same may be presented by supplemental pleadings, and issue taken thereon in the same manner as in the case of original pleadings.'"

In that case the facts upon which the claim of the defendant depended had been presented by a supplemental answer. The language used by the Supreme Court plainly implies that without such supplemental matter, the defendant's answer would be construed as corresponding to the allegations of the complaint in that it would relate to the time of filing the complaint. This is a just rule, since the plaintiff's right to recover depends upon the existence of the cause of action at the time of commencement of the action, without which plaintiff cannot recover. Section 464 of the Code of Civil Procedure, which most nearly corresponds to section 67 of the Practice Act, reads as follows:

> "The plaintiff and defendant, respectively, may be allowed, on motion, to make a supplemental complaint or answer, alleging facts material to the case occurring after the former complaint or answer."

[4] As we have determined above, the plaintiff at the time of commencement of this action was entitled to recover possession of the automobile. The only affirmative allegation contained in the answer of the defendants is:

> "That the said plaintiff leased and rented said personal property under a contract of conditional sale providing that the title thereto would not pass until same was fully paid for; that the said plaintiff never completed the payments provided for in said contract of sale, but defaulted in same prior to the commencement of this action and thereby forfeited all her right, title, and interest in and to the said personal property."

In that state of the pleadings the court was not called upon to find facts relating to transactions which may have occurred while the action was pending. The judgment is partly based upon finding II, which states:

> "That the plaintiff is, and at all times mentioned in the plaintiff's complaint was, the owner of and entitled to the possession of the automobile described in the plaintiff's complaint."

[5] Appellants contend that the judgment must be reversed because the court failed to make any finding upon the affirmative facts referred to in the foregoing quotation from their answer. There is no specific finding directed to that allegation, but an adverse finding thereon is necessarily implied in finding II above stated. Finding II could not be true if the plaintiff had defaulted in her payments prior to the commencement of this action, or if she had thereby forfeited all her interest in the property, and if (which was not alleged in the answer) the vendor, or any successor of him as such vendor, had exercised the option given him by the terms of the contract authorizing him to take possession of the automobile. Assuming that the affirmative matter pleaded was sufficient to constitute a defense, yet it was of a similar nature to that in Churchill v. Baumann, 95 Cal. 541, at page 545, 30 Pac. 770, 771, of which the court said:

> "This was not such new matter as is required to be specially pleaded, since neither its purpose nor effect was to discharge or avoid a cause of action theretofore existing, but to prove that

the alleged cause of action never did exist, by showing that the material allegation of injury and damage to the plaintiff was not true. Bliss on Code Pleading, § 352 et seq., and authorities cited. An affirmative finding of facts inconsistent with an averment, and from which it necessarily follows that the averment is not true, is a sufficient finding that the averment is not true. * * * In the case at bar, however, the averment of injury to plaintiff was specifically denied, and the facts found, being wholly inconsistent with the averment, are equivalent to a direct negative thereof, and are sufficient to support the judgment."

So here the allegations of the complaint covering the matter of the plaintiff's right to possession were specifically denied, and the facts found, being wholly inconsistent with the affirmative averments of the answer made in aid of those denials, are equivalent to a direct negative of such affirmative averments, and are sufficient to support the judgment.

The judgment is affirmed.

We concur: JAMES, J.; SHAW, J.

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34 Cal. App. 581

LOCKE v. COWAN et al. (two cases). (Civ. 2136, 2137.)

(District Court of Appeal, First District, California. Sept. 11, 1917.)

1. Municipal Corporations ⟹373(7) — Street Work—Enforcement of Lien.

A substantial compliance with jurisdictional requirements of the statutory provision for street work must be shown before the enforcement of a lien arising out of a contract for the doing of the work can be had.

2. Municipal Corporations ⟹373(7) — Street Work — Enforcement of Lien — Pleading—Statute.

As a matter of pleading, it is not essential to the statement of a cause of action for foreclosure of a lien arising out of a contract for the doing of street work to plead the particulars of the jurisdictional proceedings which are an essential prerequisite to making the contract, it being sufficient, under Code Civ. Proc. § 456, to plead such jurisdictional prerequisites in general terms and according to their legal effect, as by alleging that, "Upon and pursuant to due and legal proceedings had and taken by the council of the said city of S. R., a contract in due form and containing the matters and the conditions prescribed by law was made and entered into by and between the plaintiff and the said city for the doing of certain [described] work."

3. Municipal Corporations ⟹339(3) — Street Work—Resolution of Intention—Burdening Property Owner.

The requirement of a city's resolution of intention to have street work done that the contractor should exercise ordinary care to protect the public from danger imposed no obligation on him more onerous than his ordinary legal duty, and added nothing to his responsibility under the contract, and so could not have tended to increase the cost of the work, and thereby burden the property owners beyond the statutory requirements.

4. Municipal Corporations ⟹339(3) — Street Work—Resolution of Intention—Burdening Property Owner.

A clause of a city's resolution of intention to have street work done, requiring the contractor to execute a bond to the city in the sum of $1,000, running for three years after acceptance of the work by the council, conditioned to do the work according to plans and specifications, did not require the contractor to give a bond guaranteeing for three years the quality of the work done under the contract, the bond actually given and accepted having contained no reference to the time within which it was to run, so that the clause had no tendency to increase the cost of the bond for doing the work, and did not operate to increase the burden on the property owners along the line of the work.

Appeal from Superior Court, Sonoma County; Thos. C. Denny, Judge.

Actions by W. H. Locke against W. F. Cowan and E. C. Rand. From judgments for plaintiff, defendants appeal. Affirmed.

W. F. Cowan, of Santa Rosa, for appellants. Hilliard Comstock, of Santa Rosa, for respondent.

LENNON, P. J. These two actions were instituted in the superior court of the county of Sonoma by the plaintiff against the defendants for the foreclosure of certain assessment liens, arising out of street work performed in the city of Santa Rosa, pursuant to proceedings instituted by the city council under the provisions of the city charter. The plaintiff secured a judgment in each case, decreeing the foreclosure of the respective liens, from which the defendants have appealed in each case, and both cases are here upon a single record.

[1, 2] The demurrer to the plaintiff's complaint was properly overruled. Generally speaking, a substantial compliance with the jurisdictional requirements of the statutory provisions permitting and pertaining to the inauguration and performance of street work must be shown before the enforcement of a lien arising out of a contract for the doing of the work can be had. But as a matter of pleading, it is not essential to the statement of a cause of action for the foreclosure of such lien to plead the particulars of the jurisdictional proceedings which are an essential prerequisite to the making of the contract. It will suffice to plead such jurisdictional prerequisites in general terms and according to their legal effect. Code Civ. Proc. § 456. This was done in the cases before us by alleging that:

> "Upon and pursuant to due and legal proceedings had and taken by the council of the said city of Santa Rosa, a contract in due form and containing the matters and the conditions prescribed by law was * * * made and entered into by and between the plaintiff and the said city for the doing of certain [described] work."

This mode of pleading jurisdictional prerequisites in cases of this character has frequently been held to be sufficient. Pacific Paving Co. v. Bolton, 97 Cal. 8, 31 Pac. 625; Himmelman v. Danos, 35 Cal. 441; Williams v. Bergin, 127 Cal. 578, 60 Pac. 164; Gurnsey v. Northern California, etc., Co., 7 Cal. App. 534, 545, 94 Pac. 858.

The contention that the lien in suit in the second action expired before the commencement of that action is not sustained by the record, which shows that that action was instituted on July 1, 1914, and that the lien was filed for record July 16, 1913. The action, therefore, was commenced within the statutory time. City Charter § 81; Stats. of 1905, p. 896.

[3] The requirement of the resolution of intention to the effect that the contractor should exercise ordinary care during the performance of the work to protect the public from danger and accident imposed no obligation on him greater or more onerous than that ordinarily required of him by the law. This being so, it added nothing to his responsibility under the contract, and consequently could not have tended in any degree to increase the cost of the work and thereby burden the property owner beyond the statutory requirements. Blochman v. Spreckels, 135 Cal. 662, 665, 67 Pac. 1061, 57 L. R. A. 213; Woollacott v. Meekin, 151 Cal. 701, 91 Pac. 612.

[4] The same thing may be said of that clause of the resolution of intention which required the contractor to execute a bond to the city in the sum of $1,000, "conditioned to do said work and improvements according to said plans and specifications; said bond to run for the period of three years from and after the date of the acceptance of said work by the council. * * *" Conceding that the requirement of the resolution of intention that the bonds should run for three years was unauthorized by the city charter or the general law relating to street work, still we do not construe it to mean, as is contended, that the plaintiff, as contractor, was required to give a bond guaranteeing for three years the quality of the work done under the contract. The meaning and purpose of this provision of the resolution of intention is not readily apparent. In fact, it may be said to be without purpose, unless it was designed to cover the progress of particular portions of the work, which might be completed from time to time, prior to the completion of the entire work called for by the contract, which, perchance, might continue for a period of three years. But, however that may be, it is evident, from the fact that the bond actually given and accepted contained no reference to the time within which it was to run, that neither the city council nor the plaintiff as contractor construed and considered the provision in question to be an essential requirement of the bond. And that such provision was not intended to be a requirement that the bond should contain a three years' guaranty of the work to be performed under the contract is made evident, we think, by the fact that the bond given did not guarantee nor purport to guarantee the work beyond the time of its completion.

The provision in question, not being a requirement that the plaintiff would give a bond guaranteeing the work for three years, had no tendency to increase the cost of plaintiff's bond for the doing of the work, and consequently did not operate to increase, improperly or otherwise, the burden of taxation of the property owners along the line of the work. This disposes of all of the points made upon this appeal which we deem worthy of discussion.

The judgment in each case is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

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34 Cal. App. 621

NORTON v. LEWIS, County Auditor.

(Civ. 2437.)

(District Court of Appeal, Second District, California. Sept. 12, 1917.)

1. COUNTIES ⚷43—OFFICERS—"NEGLECT" TO QUALIFY—SALARY—"FAIL."

Under Pol. Code, § 907, providing that, "whenever a different time is not prescribed by law, the oath of office must be taken, subscribed, and filed within thirty days after the officer has notice of his election or appointment," and section 947, providing that "every official bond must be filed in the proper office within the time prescribed for filing the oath," and section 996, subd. 9, providing that an office becomes vacant upon refusal or neglect to file the official oath or bond within the time prescribed, where a supervisor, whose term expired January 8, 1917, and who was re-elected on November 7, 1916, and given notice thereof 20 days later, did not file his official bond until February 28, 1917, or take his oath until April 23, 1917, the office was vacated, and he was thereafter holding under the extended term, and only entitled to the salary provided for such term; the word "neglect," in section 996, being used in the sense of "fail."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Fail; Neglect.]

2. OFFICERS ⚷92—SALARIES—DE FACTO AND DE JURE OFFICERS.

Pol. Code, § 936, permitting de facto officers to receive salary while title to the office is being contested, does not apply where there is no contest; and petitioner, holding under an extended term, is not entitled to salary, unless he is a de jure officer.

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Petition for a writ of mandamus by Richard H. Norton against Walter A. Lewis, Auditor of Los Angeles County. Judgment denying petition, and petitioner appeals. Affirmed.

Gesner Williams and Vere Radir Norton, both of Los Angeles, for appellant. A. J. Hill, Co. Counsel, and David R. Faries, Deputy Co. Counsel, both of Los Angeles, for respondent.

PER CURIAM. Petitioner appeals to this court from a judgment denying his petition for a writ of mandate. Respondent claims that petitioner is entitled to a salary of only $250 per month ($3,000 per year), and that petitioner is merely holding over as incumbent of a term which began in January, 1913. Petitioner claims that he is in office for a term beginning on the first Monday after the 1st day of January, 1917, and that therefore his salary, as established by law, is $5,000 per year. Counsel for respondent, in their brief, have furnished us with a copy of the opinion written by Hon. Curtis D. Wilbur, judge of the superior court, wherein he stated the reasons for his decision. As that opinion contains a full and correct statement of the law as we understand it to be, it is hereby adopted as expressing the views of this court. The opinion is as follows:

"The petitioner was elected a member of the board of supervisors at a salary of $3,000 per annum and mileage for a term of four years, expiring January 8, 1917. Thereafter, on November 7, 1916, he was re-elected for a four-year term. He did not file his official bond until February 28, 1917, nor did he take the oath of office until April 23, 1917, although he received notice of his election on November 24, 1916. Section 907, Political Code, provides: 'Whenever a different time is not prescribed by law, the oath of office must be taken, subscribed, and filed within thirty days after the officer has notice of his election or appointment.' Section 947 of the Political Code provides: 'Every official bond must be filed in the proper office within the time prescribed for filing the oath.' Section 996, Political Code, provides: 'An office becomes vacant upon the happening of either of the following events before the expiration of the term. * * * Subdivision 9: His refusal or neglect to file his official oath or bond within the time prescribed. * * *'

"If any doubt existed as to the meaning of these provisions of the law they have been settled by a long line of decisions, commencing with Payne v. San Francisco, 3 Cal. 122. These decisions are collected in People v. Perkins, 85 Cal. 509, 511, 26 Pac. 245, 246, as follows: 'The first of the sections referred to (that is, section 907) provides that when a different time is not prescribed, the oath of office must be taken, subscribed and filed within 10 days after the officer has notice of his election or appointment, or when no such notice has been given, then within 15 days from the commencement of his term of office; and the other section provides that an office becomes vacant upon the happening of certain events, one of which is the refusal or neglect of one who is elected or appointed to an office to file his official oath or bond within the time prescribed. These provisions of the law are mandatory. The official oath or bond must be filed within the prescribed time or the right to the office becomes forfeited. Citing People v. Taylor, 57 Cal. 620; Payne v. San Francisco, 3 Cal. 122; People v. Brite, 55 Cal. 79; Hull v. Superior Court, 63 Cal. 174; People v. Hartwell, 67 Cal. 11 [6 Pac. 873]. See also Ball v. Kenfield, 55 Cal. 320, and People v. Perry, 79 Cal. 105 [21 Pac. 423].' In Lorbeer v. Hutchinson, 111 Cal. 272 [43 Pac. 896], it is said: 'The failure to qualify—if he did so fail—ipso facto created a vacancy. People v. Shorb, 100 Cal. 537 [35 Pac. 163, 38 Am. St. Rep. 310].'

"Petitioner herein contends that the proper construction of section 996 of the Political Code requires that the word 'neglect' should be given the significance ordinarily attached to the words 'negligently fail,' and that a mere failure, in the absence of a finding of negligence, would not create a vacancy. I think it plain, however, that the word 'neglect' is used in the sense of 'fail,' and the decisions of our Supreme Court uniformly so hold. In the case of People v. Taylor, 57 Cal. 620, the petitioner had, subsequent to his election, but after the time fixed by statute, filed his official oath and bond. The court there said: 'It is conceded that the relator, by reason of his failure to file his oath of office and official bond within 10 days after receiving notice of his election, is not, by virtue of said election, entitled to the office. Political Code, §§ 907, 947, 996.' This concession was no doubt made by reason of the previous decisions of the Supreme Court above referred to. The court, however, was required, notwithstanding the concession, to analyze the meaning and the effect of these provisions of the Code, and said: 'It is the duty of the court to give to this provision the force and effect which it was intended by the Legislature that it should have, if such intention can be ascertained; and we think that, without doing violence to the language of the statute, we may construe it to mean that the refusal or neglect of a person duly elected to an office to file his official oath or bond within the time prescribed by law creates a vacancy as soon as the term for which he is elected commences, which may be filled by the proper appointing power.'

"Counsel for petitioner states that he has found no case in which there has been an attempt made to cure the default on the discovery by the officer of the failure to file the oath or the bond in time. In the case of People v. Taylor, supra, it was said concerning the elected officer: 'Before the first Monday of March, 1880, he filed his oath of office and official bond. Neither the said oath or bond was filed within ten days after he received notice of his election, the time prescribed by law for filing them. On the 4th of March, 1880, the board of supervisors, deeming said office vacant, appointed Showers, the relator, to fill said vacancy.' It was under these conditions that it was said: 'It is conceded that the relator, by reason of his failure to file his oath of office and official bond within 10 days after receiving notice of his election, is not, by virtue of said election, entitled to the office.'

[1] "The cases in California too clearly hold that a failure to file an official oath and bond within time vacates the office to justify this court in construing the statute otherwise. The court is compelled to find both on the law and on the facts that the petitioner herein failed and neglected to qualify as provided by law, that he, therefore, holds his office as supervisor not by reason of his election thereto in November, 1916, but by reason of his election four years previous thereto and the statute which permits and requires him to remain in office until his successor duly qualifies. He is therefore holding under the extended term, due to the failure of his successor to qualify, and is entitled to the salary provided by law and by charter for such term. Rice v. National City, 132 Cal. 354 [64 Pac. 580].

[2] "It is suggested that the petitioner is holding de facto as to the second term, and therefore, under section 936 of the Political Code, is entitled to the salary for the new term as provided in the charter. So far as this proceeding is concerned the defect in this reasoning is, if it is correct, that the petitioner is not entitled to any salary at all, for in order to entitle him to receive a salary it is essential that he be a de jure officer. Section 936 of the Political Code, which in some instances permits a de facto officer to draw salary while his title to the office is being contested, does not apply to this situation, where there is no contest whatever over the office. It has been expressly so held by the Supreme Court. Bannerman v. Boyle, 160 Cal. 197 [116 Pac. 732]."

The judgment is affirmed.

34 Cal. App. 701

CRUSE v. ADAMS. (Civ. 2178.)

(District Court of Appeal, First District, California. Sept. 20, 1917.)

REPLEVIN ⚷103(4) — ALTERNATIVE JUDGMENT.

The alternative portion of judgment in replevin for defendant, who justified retention under mortgage, is properly for value of property, without regard to amount due on mortgage, not involved or litigated.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by W. E. Cruse against C. W. Adams. Judgment for defendant, and plaintiff appeals. Affirmed.

J. O. Traber and A. Ellenberg, both of Fresno, for appellant. Ernest Klette, of Fresno, for respondent.

PER CURIAM. This action was in claim and delivery to recover possession of certain personal property. Defendant admitted ownership in the plaintiff, but justified his retention of the property under a chattel mortgage executed by plaintiff. Upon the institution of the proceedings the sheriff took possession of the property and subsequently delivered the same to plaintiff.

The trial court rendered judgment in favor of the defendant for the return of the property, or, in the event that delivery thereof could not be had, then for the sum of $937.50, the value thereof.

It is the claim of the appellant that the alternative portion of the judgment represents a sum in excess of the amount due on the indebtedness existing between the parties and secured by the chattel mortgage. We have no means of determining this fact. That question was not involved in the action nor determined therein, which was purely possessory in its nature, and the only question litigated was the right to the possession of the property. The form of judgment was the only one authorized.

Judgment affirmed.

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34 Cal. App. 692

BAMBERGER-STERN CO. v. BAER. (Civ. 2088.)

(District Court of Appeal, First District, California. Sept. 19, 1917.)

APPEAL AND ERROR ⚷1010(1) — REVIEW — FINDINGS OF FACT.

Judgment will not be disturbed for insufficient evidence, there being some evidence supporting the findings, which support the judgment.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by the Bamberger-Stern Company against Hermine Baer. Judgment for plaintiff, and defendant appeals. Affirmed.

Henry A. Jacobs, of San Francisco, for appellant. Herrington & Clausen, of San Francisco, for respondent.

PER CURIAM. The judgment in this case was against the defendant upon a complaint for the purchase price of goods sold and delivered by the plaintiff to her. The findings of the trial court were to the effect that both the defendant and Joseph Baer, her husband, each ordered and each individually agreed to pay for the goods so sold and delivered; and the only point involved upon the appeal is the sufficiency of the evidence to support these findings as to the defendant. An examination of the record discloses some evidence supporting them in this particular; and, as they in turn support the judgment, it follows that this court will not disturb it.

Judgment affirmed.

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34 Cal. App. 699

THOMPSON v. SAN FRANCISCO GAS & ELECTRIC CO. (Civ. 2172.)

(District Court of Appeal, First District, California. Sept. 20, 1917.)

STATUTES ⚷72 — UNIFORM OPERATION — LIGHTING COMPANIES—CORPORATIONS AND OTHERS.

Civ. Code, § 629, imposing on corporations, but not on natural persons or firms, engaged in supplying to the public artificial light, penalty for noncompliance with demand for light, contravenes Const. art. 1, § 11, requiring all laws of a general nature to have a uniform operation.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Henry Thompson against the San Francisco Gas & Electric Company. Judgment for plaintiff, and defendant appeals. Reversed.

Leo H. Susman and Wm. B. Bosley, both of San Francisco, for appellant. Seth Mann and Henry Thompson, both of San Francisco, for respondent.

PER CURIAM. It is conceded that the judgment in this case, awarding the plaintiff the sum of $540, was made in accordance with the provisions of section 629 of the Civil Code. That section imposes a penalty upon corporations engaged in supplying illuminating gas or electric light (of which the defendant is one) for a failure to comply with its terms when a demand under certain conditions is made upon them to furnish such gas or electric light; but it will be observed that the section leaves free from such penalty natural persons and copartnerships conducting the same business who may be chargeable with a like omission. It was contended in the lower court and is contended here upon behalf of the defendant that because of this discrimination between corporations and natural persons and copartnerships the section of the Code in question is repugnant to section 11 of article 1 of the Constitution, which provides that "all laws of a general nature shall have a uniform operation." We think this contention must be sustained. The state has no more power to deny to corporations the equal protection of the law than to individual citizens; and there is no reason in law or in the nature of things why a natural person or firm engaged in the business of supplying to the public artificial light should not be subjected to exactly the same penalties as corporations so engaged. This proposition is supported, we think, by the cases of Johnson v. Goodyear Mining Co., 127 Cal. 4, 59 Pac. 304, 47 L. R. A. 338, 78 Am. St. Rep. 17, and Gulf, etc., Railway Co. v. Ellis, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666.

It follows that the section of the Civil Code under consideration as it then existed—it having apparently since been repealed—was unconstitutional, and, that being so, the penalty or liquidated damages which the judgment appealed from purports to allow to the plaintiff had no foundation in law; and, the court having found that no actual damage resulted to the plaintiff because of the omission of which he complains, and that finding not being assailed here, it follows that the judgment appealed from must be reversed; and it is so ordered.

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34 Cal. App. 656

JACOBI v. C. A. SMITH LUMBER CO. OF CALIFORNIA. (Civ. 2124.)

(District Court of Appeal, First District, California. Sept. 17, 1917. Rehearing Denied by Supreme Court Nov. 15, 1917.)

WHARVES ⚷21—PERSONAL INJURIES—QUESTIONS FOR JURY.

In an action for the death of a person falling into the water from a wharf rudely constructed with planks of uneven length and with a hole from 7 to 10 inches wide, evidence *held* insufficient to show, as a matter of law, that he knew of the condition of the wharf and was negligent in stepping into the hole or off the edge of the wharf, but to make his negligence a question of fact for the jury.

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

Action by Isadora Belle Jacobi against the C. A. Smith Lumber Company of California. From a judgment for plaintiff, defendant appeals. Affirmed.

Samuel Knight and F. E. Boland, both of San Francisco, for appellant. Clarence N. Riggins, of Napa, and J. E. Rodgers, of Martinez, for respondent.

PER CURIAM. The defendant, C. A. Smith Lumber Company, was the owner and in exclusive control of a wharf at Bay Point, on Suisun Bay, which was used for the loading of lumber upon vessels coming to that wharf from various points. The decedent—the husband of the plaintiff—brought to the wharf a schooner for the purpose of having it loaded with lumber which was to be taken to some inland point. He and his companions were in charge of the schooner, and arrived at the wharf upon a certain Sunday. The decedent had never loaded lumber from that wharf, at least not from that portion of it concerned in this case. During the Sunday on which they arrived, the crew, including the decedent, were in their boat resting and sleeping at least part of the day—just exactly how much does not very clearly appear—and on the following Monday morning began loading lumber upon the boat, which was brought down to or near the point where it was to be loaded upon trams of the defendant company which ran along a tramway near the edge of the wharf. The wharf itself seems to have been somewhat rudely constructed with planks of uneven length—the difference in some cases being as much as 13 or 14 inches—extending out beyond the tramway, and from a foot to two feet beyond the point where the cars themselves protruded over the tramway. There was also, it appears in the evidence, a hole in the wharf of some 7 or 8 or 10 inches wide extending to the track; at any rate, in addition to the shortness of the planks in general there was this hole which extended clear into the track. The decedent and his companion took the lumber from these cars as it was brought down to them on this day, and loaded it upon the boat. The point of loading on to the boat was not immediately opposite this hole in the wharf, but some little distance further down. During the operation of loading the decedent, according to the testimony of his associates, during the day was in the boat receiving the lumber from his associate who was upon the wharf. In the evening more cars were brought down, evidently with the idea that they were to be loaded on during the course of the evening and during the period when the tide was at a favorable height. It was during the course of loading these cars on in the evening, but while it was not yet dark, although in the twilight probably, that the decedent walked down along the wharf to where the last car was standing, and undertook to push it along the wharf to the point of loading; and it was while engaged in pushing this car along the wharf that he either stepped into the hole and lost his balance, or stepped upon a point where one of these short planks was. At any rate, just how he met his death does not clearly appear except that he did fall into the water. There is some evidence on the part of his associate that the car had been standing over the place where the hole in the wharf was. There is no evidence in the record that the decedent, at any time during the period that he was at the wharf, actually saw the hole in the wharf, or actually observed the shortness of the planks at the point where it is surmised that he fell overboard.

The defense to the action is contributory negligence; and we are asked by the appellant (defendant in the court below) to say as a matter of law from the evidence in the case that the decedent must be held to have known of the condition of the wharf; and consequently that he was guilty of contributory negligence in stepping either into the hole or off the edge of the wharf, and for that reason the plaintiff, his widow, cannot recover.

We do not feel justified in holding, upon the facts before us as above set forth, that contributory negligence is as a matter of law to be imputed to the decedent. None of the cases cited by the appellant go this far; and we feel that upon the foregoing facts this is a case for the application of the general rule that contributory negligence is a question of fact for the jury.

This being the only point in the case, it follows that the judgment must be affirmed; and it is so ordered.

(34 Cal. App. 589)

ELK GROVE UNION HIGH SCHOOL DIST. v. INDUSTRIAL ACC. COMMISSION OF STATE OF CALIFORNIA.

In re HOAG.

(Civ. 1696.)

(District Court of Appeal, Third District, California. Sept. 11, 1917. Rehearing Denied by Supreme Court Nov. 8, 1917.)

1. Master and Servant 🔑371—Workmen's Compensation Act—Injury Arising Out of Employment.

Under the Workmen's Compensation Act (St. 1913, pp. 279, 283), § 12, the question whether an injury occurred or arose out of and in the course of the employment, or was the direct result of willful misconduct, involves jurisdictional facts.

2. Master and Servant 🔑417(3) — Workmen's Compensation Act—Review by Certiorari.

An award of the Industrial Commission under the Workmen's Compensation Act, unsupported by evidence, will be set aside by the courts, on certiorari, as involving an act in excess of jurisdiction.

3. Master and Servant 🔑405(1) — Workmen's Compensation Act—Award—Sufficiency of Evidence.

To justify an award under the Workmen's Compensation Act, there must be sufficient competent evidence to support every jurisdictional fact essentially involved in the application for compensation.

4. Master and Servant 🔑371—Workmen's Compensation Act—Injury "Arising Out of the Employment."

Under the Workmen's Compensation Act, an injury arises out of the employment when there exists a causal connection between the conditions under which the work is required to be performed and the resulting injury.

5. Master and Servant 🔑373—Workmen's Compensation Act—Injury "Arising Out of the Employment."

A school-teacher received an injury "arising out of the employment," within the Workmen's Compensation Act, where she was injured in shoving over a heavy desk not in its accustomed place to enable her to get a book from a case, required to facilitate her school work.

6. Master and Servant 🔑380—Workmen's Compensation Act—Imprudent Acts.

A servant is not to be denied relief under the Workmen's Compensation Act because the injury has been superinduced by mismanaging the duties of his employment, unless it amounts to willful misconduct.

7. Master and Servant 🔑380—Workmen's Compensation Act — "Willful Misconduct."

A female teacher was not as a matter of law guilty of "willful misconduct," within the Workmen's Compensation Act, in shoving aside a 458-pound desk to get a necessary book from a case, and injuring her spine.

[Ed. Note.—For other definitions, see Words and Phrases First and Second Series, Willful Misconduct.]

Proceedings under the Workmen's Compensation Act by Edith L. Hoag to obtain compensation for personal injuries, opposed by the Elk Grove Union High School District, the employer. Compensation was awarded. Certiorari by employer to review the award of the Industrial Accident Commission of the state of California, A. J. Pillsbury, Will J. French, and Meyer Lissner, as members constituting such commission. Award affirmed.

H. B. Bradford, Dist. Atty., and J. R. Hughes, Deputy Dist. Atty., both of Sacramento (Stephen F. Otis, of Sacramento, of counsel), for petitioner. Christopher M. Bradley, of San Francisco, for respondents.

HART, J. Upon the application of the petitioner, a writ of certiorari was issued by this court for the purpose of reviewing an award entered by the Industrial Accident Commission upon findings in favor of the applicant, Edith L. Hoag, that she had suffered physical injury while engaged in her employment as a teacher of the petitioner, and that such injury arose out of and in the course of such employment.

The principal or most important question submitted for decision here is whether the evidence does or does not support the finding that the accident whereby the applicant sustained the physical injury for which she was awarded compensation by the respondents arose out of and in the course of her employment as a teacher of the petitioner, Elk Grove Union High School.

[1-3] Preliminarily to the examination of the question thus propounded, it may be well to restate the following legal propositions which have been settled by the decisions, with respect to the powers of the Industrial Accident Commission under the law creating that body: (1) That the question whether the accident causing the injury complained of occurred or arose out of and in the course of the employment of the applicant, as well as the question whether the accident was or was not the direct result of the willful mis-

conduct of the injured party, involve jurisdictional facts; (2) that an award by the commission which is unsupported by the evidence will be set aside by the courts, on certiorari, as involving an act in excess of the jurisdiction of the commission; (3) that to justify the upholding of an award, there must be sufficient competent evidence to support every jurisdictional fact essentially involved in the application for compensation. County of Modoc v. Industrial Accident Commission et al., 32 Cal. App. 548, 163 Pac. 685; Northwestern Pac. R. R. v. Industrial Acc. Com. et al., 163 Pac. 1000; Great Western Power Co. v. Pillsbury et al., 170 Cal. 180, 149 Pac. 35; Ocean Acc. & Guar. Co. et al. v. Industrial Acc. Com. et al., 173 Cal. 313, 159 Pac. 1041, L. R. A. 1917B, 336; Reck v. Whittlesberger, 181 Mich. 463, 148 N. W. 247, Ann. Cas. 1916C, 771; International Harvester Co. v. Ind. Acc. Com., 157 Wis. 167, 147 N. W. 53, Ann. Cas. 1916B, 330; In re Buckley, 218 Mass. 354, 105 N. E. 979, Ann. Cas. 1916B, 474; Employers' Assurance Corporation v. Industrial Acc. Com. et al., 170 Cal. 800, 151 Pac. 423; Fidelity & Deposit Co. v. Indus. Acc. Com. et al., 171 Cal. 728, 154 Pac. 834, L. R. A. 1916D, 903; Englebretson v. Indus. Acc. Com., 170 Cal. 793, 151 Pac. 421; Kimbol v. Indus. Acc. Com., 173 Cal. 351, 160 Pac. 150, L. R. A. 1917B, 595; Section 12, Workmen's Compensation, etc., Act; Stats. 1913, pp. 279, 283.

The uncontradicted testimony in this case reveals these facts: That the applicant, Miss Edith L. Hoag, had been employed by the trustees of the petitioner, Elk Grove Union High School District, as a teacher therein. Her duties were to teach three classes in history, one in English, one in cooking, and one in hygiene. The social activities of the students were carried on in the school building. These affairs consisted of literary and dramatic entertainments and dancing parties. When any of these social diversions was given, it was necessary, of course, to remove the desks, seats, tables, and other furniture used for the purposes of the school from their proper and accustomed positions in the room in which the entertainment was to take place. On the evening of the 2d day of June, 1916, a dancing party was held in one of the rooms of the school building. To obtain the most available space for that purpose, the desks, seats, etc., were moved to various parts of the room, some of them being placed in front of and against the cases in which the books used in the school were kept. These cases were in sections and were placed one on top of another and thus were made to form, practically, a single case.

On the opening of the school on the Monday morning following the occasion just referred to, the seats and desks were still in the positions in which they had been placed preparatory to the carrying on of the dance on the preceding Friday night. Miss Hoag arrived at the school building on said Monday something near half an hour prior to 9 o'clock a. m., at which hour the school was to open. She suggested to some of the boys who had gathered in the room that they proceed to replace the seats in their proper positions in the room. "They moved one," testified Miss Hoag. "I was superintending them and I saw that I did not know very much about it, * * * and then we decided to wait until Mr. Smith [principal of the school] came, and let him move the rest." Immediately after the boys had, upon her suggestion, ceased further attempt to replace the seats and desks, Miss Hoag, having occasion to examine a certain book preparatory to taking up her class that morning upon the subject treated by said book, went to the bookcase to procure the same. She discovered that she could not open the case and so procure the particular book she then desired without moving from in front of the case one of the sections of desk and seats which had on the previous Friday been placed there to facilitate the dancing party held in the room on that evening. She thereupon, unaided by any one, attempted to move the particular section which prevented her from opening the case, and for that purpose put her weight upon the desk and thus succeeded in moving it. Instantly she experienced a sudden, dull pain in her back, and from this she suffered for the remainder of the three weeks of the school term. Although she made no complaint of her injury to the principal of the school or to the trustees thereof at any time during the remainder of the term, she did complain of her pain to one of her associate teachers and a student at the school, and, after sustaining the injury, refrained from further active participation in the social affairs of the school in which, prior to the accident, she had quite uniformly taken a lively and prominent part.

The injury from which Miss Hoag suffered by reason of the accident was in the spine and technically described by Dr. Baldwin, a specialist in orthopedic surgery, as a "dislocation of a lumbar sacral articular joint" —that is, the displacement of one of the smaller joints between the sacrum and the lumbar vertebræ—an injury requiring the placing of the patient in a plaster of paris cast.

Miss Hoag testified that, on occasions when, for the purposes of the social functions of the school, the desks were removed from their proper places in the schoolroom, the students usually replaced them, sometimes assisted by Mr. Smith, the principal; that she never knew of the janitor performing that duty; that the teachers were not expected to remove the desks on such occasions, or having been moved, to replace them in their proper positions in the room; that it was no part of her work to move or replace the desks.

Robert Nicholls, a trustee of the petitioner, school district, and P. B. Smith, principal of the school at the time of the employment of Miss Hoag as a teacher, each testified that she was employed wholly as a teacher, and that the removal of the desks and the performance of like duties in connection with the management of the school were not included within the scope of her employment; that the school had a janitor whose duty it was to do all janitor work, "but this one act of moving the seats the janitor did not do because the seats were too heavy to move without help." There was other testimony given by the trustees and by the principal and one of the associate teachers of Miss Hoag, that it was not within the duties of the subordinate teachers to see that the desks, when removed from their accustomed places in the rooms, were replaced or to take a hand in moving them. In fact, it may be stated that the fact that no such duty was cast upon Miss Hoag or any of the teachers may be accepted as fully established in this case.

S. R. Gage, a trustee of the district, testified that, assisted by other members of the board of trustees, he weighed one of the sections of the seats and found it to weigh 458 pounds, and that all the other sections, save as to the number of seats of which they consisted (some consisting of five and others of seven seats), were in every respect precisely like the one weighed.

We have now given herein an abridged but accurate statement of all the facts brought to the attention of the accident board in this case.

[4] As to what we esteem the pivotal question in this case, viz. whether the injury, as the evidence shows it to have occurred, arose out of and in the course of the applicant's employment, it may well first be observed that, while, as has been well said in the cases, it is not easy to give a comprehensive definition of the words, "arising out of the employment," which shall actually embrace all cases within the act, and with precision exclude those not within its terms, it may nevertheless safely be laid down that an injury may be said to arise out of the employment when there exists a causal connection between the conditions under which the work is required to be performed and the resulting injury. Kiser's Workmen's Compensation Acts, pp. 73, 74, and cases cited in the footnotes. "A risk," continues the same author in the same connection, "is 'incidental to the employment' when it belongs to or is connected with what a workman has to do in fulfilling his contract of service. * * * There must be a causal connection between the employment and the injury, and the injury must be the rational consequence of some hazard connected with the employment." And at page 82 of the same work, the author announces this rule:

> "Where, at the time of the injury, the employé is engaged in a voluntary act not accepted by or known to his employer and outside of the duties for which he is employed, the injury cannot be said to be in the course of his employment."

[5, 6] The proposition here then is whether the evidence discloses a causal connection between the conditions under which the act culminating in the injury to the applicant was done and her employment as a teacher, or, in other words, was the act in the performance of which the injury was sustained reasonably within the contract of employment? We think the answer must be in the affirmative.

Recapitulating briefly and in a general way the facts as they were discovered by the undisputed evidence, we find the situation here to be this: That connected with the school and for its purpose a library of books appropriate and necessary to the profession of teaching is maintained in the school and located in a room adjacent to that in which the applicant instructed her classes; that, on the Friday preceding the Monday on which the accident occurred, the desks were, preparatory to the carrying on of a dancing party on that night, moved from their proper positions in the room, and some of them stacked up in tiers near and against the sectional cases constituting the bookcase; that, on the Monday morning following that social event, and before and at the time school was opened for the day, these desks had not been returned to their proper positions in the room, but were still stacked up against the case containing the books used by the teachers; that Miss Hoag was employed to teach some five or six branches of the school's curriculum, among which was medieval and modern history; that she had previously had assigned to the class in history certain references in medieval history which were to be taken up and recited that morning. She reached the schoolroom at about half past 8 o'clock a. m. on that day, and, desiring to refresh her memory upon the particular topics to which she was scheduled first to address her instruction that morning, went to the bookcase for the purpose of obtaining the book upon the text of which the lesson was to be founded. Finding the section of the case in which the book she desired and required for the prosecution of the work first in hand so barricaded by one of the sections of seats as to make it impossible for her to open the case and so procure the book, she put her weight on one end of the desk and thus succeeded in moving it from its position sufficiently to enable her to get into the case. In doing this act, she suffered the injury complained of. These are the simple facts of the case, and their mere statement is sufficient to demonstrate that the applicant not only did what she had a right to do, but did what her duty as a teacher in the school required her to do, if, as the evidence clearly warranted the accident board in inferring was true, the book she desired was necessary for her use that morning in properly and intelligently instructing the history class over which she had control. If, while in the act of opening the bookcase under the usual or normal conditions, her object being to procure a book necessary to be used by her in instructing her classes, she had suffered a physical injury, no one would be found to say that the injury would not be one arising out of and in the course of her employment. We can discern no difference in such a situation and the one presented here. The unusual or adverse conditions under which she attempted to perform that part of her duty were not of her own creation, and if, to discharge in a proper way her duty as a teacher, it was necessary, as was clearly so, for her to remove those unusual conditions, then as declared, she had the right and, indeed it was her duty, to do so, and the risk so taken, if any, was necessarily incidental to her employment. Therefore, in the act of removing the section of seats, her fault, if any, lay, not in the fact that she transcended the scope of her employment, but in the fact that she thus undertook a task, in furtherance of her duty, with which she found herself physically unable to cope. She might have acted imprudently in doing the act. She probably did. But a person is not to be denied compensation under the Compensation Act merely because his injury has been superinduced by mismanaging the duties of his employment, unless such mismanagement amounts to willful misconduct.

But counsel for the petitioner insist, and upon the proposition so urged they rest their entire argument against the validity of the applicant's claim that her injury was received out of and in the course of her employment, that, in moving the seats, Miss Hoag went beyond her duties and engaged in janitorial work—duties wholly foreign to her employment and which are peculiarly and exclusively those of a janitor. Counsel, according to our conception of the case as it was made by the proofs, have thus fallen into a misapprehension of the evidence. Of course, it is true and very clear that it was no part of the duty of the applicant to move the seats or desks about from one place to another in the schoolroom. But, manifestly, when injured, Miss Hoag was not so engaged. As the evidence plainly shows, she was, when hurt, merely endeavoring to move a section of seats, not to its proper or accustomed place in the room, but only a sufficient distance from its position against the bookcase to enable her to reach into the case and so procure a book required to facilitate her school work that morning. Some of the courts have gone so far as to hold that:

> "If a workman depart temporarily from his usual avocation to perform an act necessary to be done by some one for his master, he does not cease to be acting in the course of his employment." Hartz v. Hartford Faience Co., 90 Conn. 539, 97 Atl. 1020.

But in this case, as we have shown, we are not required to go that far. We may, and, as is obvious, do rest our conclusion upon the proposition that the evidence shows that the act in the performance of which Miss Hoag sustained the injury was necessary to the fulfillment of her contract of service.

Counsel for the petitioner place much reliance on the case of County of Modoc v. Indus. Acc. Com. et al., 163 Pac. 685 (decided by this court), as in support of their position that the act in the doing of which the applicant was injured was beyond the scope of her employment. They contend that between that case and this there is, as to the facts, a direct analogy. But it seems to us that the distinction between the two cases is marked and quite obvious. In the Modoc Case, the applicant, at the request of a fellow employé, engaged in doing an entirely different kind of work for the petitioner from that of the former, left the work which he was specially employed by the petitioner to do and temporarily took up the work of the said fellow employé. While thus temporarily engaged, the applicant met with an accident in which he sustained the physical injuries for which he claimed and was awarded by the accident board compensation. The award was properly annulled by this court. Thus readily it will be perceived that there is, with respect to the facts, no resemblance between that case and the present. And the facts in the case of Sherer & Co. v. Ind. Acc. Com. et al. (Sup.) 166 Pac. 318, also cited by the petitioner, are, in all essential particulars, similar to those existing in the case of the County of Modoc v. Ind. Acc. Co. et al., supra. Other cases cited by the petitioner may likewise be differentiated from the present case, but it is conceived to be unnecessary and unimportant to give them specific attention herein.

[7] The petitioner briefly urges the point that the award in this case cannot, in any event, be sustained, since it is patent, so the contention proceeds, in doing the act causing her injury, the applicant was guilty of willful misconduct. In Diestelhorst v. Indus. Acc. Com., etc., et al., 164 Pac. 44, this court, through Justice Burnett, exhaustively went into the question of what constitutes willful misconduct under the terms of the Workmen's Compensation Act. Many authorities are therein examined and numerous illustrations given of the application and nonapplication of the provision exempting an employer from liability because the injury for which compensation is sought is directly imputable to the willful misconduct of the claimant. We need not, therefore, enter into a discussion of that subject herein. It is enough to refer to that case and add that we perceive nothing in the act of the applicant herein, as said act is shown to have been done by the evidence, which would justify us in declaring, as a matter of law, that, in doing it, the applicant was guilty of willful misconduct. She did

or attempted an act which, under the circumstances, was quite the natural thing for her or any other person in like situation to do. As seen, it was necessary for her to have a particular book for her school work that morning, said book was in the bookcase, and the case was so obstructed by the desks that she could not get into it and procure the book without the removal of said obstruction. It is doubtless true, as one of the trustees testified, that the section of seats which she attempted to remove was of great weight, so much so, indeed, as to make it impossible, or at the least inconvenient, for her to handle and move it; but it must be kept in mind that she only attempted to shove the section aside, and did not undertake to lift the entire section. It may further be suggested, as only an obvious proposition, however, that a person of ordinary strength might with comparative ease move from its resting place one end of a heavy article of considerable length and still be wholly unable to lift the entire article from its resting place at one and the same time. Miss Hoag evidently conceived that she was of sufficient strength, by a shoving movement, and the application of whatever physical force she possessed, to shift the section away from the bookcase sufficiently to enable her to open it and procure the book, but she doubtless either overestimated her own strength or underestimated the ponderousness of the section, it not being shown that she had previous knowledge of either the actual or approximate weight of the article. As above suggested, in doing or attempting to do the act, she might have been guilty of a want of good judgment. She might, indeed, have been somewhat negligent in that she omitted to make some investigation, preliminarily to attempting to move the section, to ascertain whether she was capable of handling it without exposing herself to a dangerous physical risk; but, even so, under the evidence as it appears in this record, it would still be giving free rein to one's imagination to hold that her act amounted to willful misconduct within the meaning or contemplation of the Compensation Act.

Our conclusion is that the findings upon which the award was planted are supported by the proofs, and, accordingly, the award is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

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34 Cal. App. 549

PEOPLE v. BILLINGS. (Cr. 667.)

(District Court of Appeal, First District, California. Sept. 6, 1917. On Petition for Rehearing, Oct. 2, 1917. Rehearing Denied by Supreme Court Nov. 5, 1917.)

1. CRIMINAL LAW 🔑1159(3) — APPEAL — SCOPE OF REVIEW.

On appeal from a conviction upon conflicting evidence, the jury's determination as to the sufficiency of the evidence cannot be reviewed, in the absence of showing of the utter incredibility of the supporting evidence.

2. CRIMINAL LAW 🔑338(1)—EVIDENCE—ADMISSIBILITY.

The relevancy of proffered proof in a criminal case depends upon whether it tends to sustain a legitimate hypothesis of the guilt of the defendant, and an incidental fact is relative to the main fact in issue when, in accord with the ordinary course of events and common experience, the existence of the incidental fact, standing alone or when considered in connection with other established facts, tends to make the main fact in issue certain, but it is not necessary that it should bear directly upon the main fact in issue.

3. CRIMINAL LAW 🔑404(3)—EVIDENCE—ADMISSIBILITY.

In a prosecution for homicide by setting a bomb, it was proper to admit evidence of identification of cartridges picked up near the scene of and shortly after the explosion, and, when so identified, to admit such cartridges in evidence.

4. HOMICIDE 🔑174(6) — EVIDENCE — ADMISSIBILITY.

Evidence of cartridges being found in defendant's room of similar character and caliber to those found in and about the bodies of the victims was admissible.

5. CRIMINAL LAW 🔑404(3)—EVIDENCE—ADMISSIBILITY.

Though no ball bearings were found in the bodies of the victims, ball bearings found about the place of the explosion, which apparently constituted a part of the bomb, were admissible.

6. HOMICIDE 🔑338(2) — HARMLESS ERROR — EVIDENCE.

Accused was not prejudiced by introduction in evidence of a pistol found in his room, even if such evidence was improper.

7. WITNESSES 🔑376 — EXAMINATION — BIAS OR INTEREST.

It was not error to allow the state to show that its principal witness shortly after the explosion had made statements to the same effect as he made on trial, where the accused had attempted to show that such testimony was the creature of corruption and of recent fabrication.

8. CRIMINAL LAW 🔑1170½(5) — HARMLESS ERROR—EVIDENCE—BIAS OF WITNESS—ADMISSIONS.

Where the bias of a witness testifying to the alibi of a codefendant was admitted, there was no prejudicial error in permitting cross-examination which merely showed the possibility of bias, and so went no farther than the admission.

9. HOMICIDE 🔑338(3) — HARMLESS ERROR — EVIDENCE—ADMISSIBILITY.

There was no prejudice in allowing a police officer to state that he saw two of the defendants in another city three years before shake hands and hold a conversation, where accused admitted long-standing acquaintance.

10. HOMICIDE 🔑305—INSTRUCTIONS—"PRINCIPALS" AND ACCESSORIES.

An instruction that though another than defendant feloniously placed the bomb yet they should convict if defendant aided and abetted such person, was not antagonistic to instruction that it was the theory of the prosecution that defendant placed the bomb, where the evidence warranted a finding that defendant either personally placed it or aided the one who did, in view of Pen. Code, §§ 31 and 971, providing that all persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or not being present, have advised and encouraged its commission * * * are principals in any crime so committed.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Principal.]

11. Criminal Law ⚷720(9)—Trial—Argument of Counsel.

In a prosecution for homicide it was not improper for the prosecuting attorney to make statements upon their face purporting to be his deduction, made apparently in good faith from the evidence adduced at the trial.

12. Criminal Law ⚷1037(1) — Appeal — Preservation of Exceptions.

Error assigned to the statement of the district attorney that "it was easy to see why accused objected to the state's showing the nature of a previous conviction," was waived by failure to assign it as misconduct in the trial court.

13. Criminal Law ⚷722(2)—Trial—Argument of Counsel.

In prosecution for murder by setting a bomb, it was not misconduct for the district attorney to compare defendant's conduct while testifying to that of a hyena, and describe it as the cowardliest and most disliked animal in the world.

14. Criminal Law ⚷730(3)—Trial—Conduct of Counsel—Cure of Errors.

Where testimony for the state was refused, whereupon the district attorney offered to show that defendant had said that he was skilled in the making of bombs and had thrown them for hire, it was not error to refuse a request to admonish the jury to disregard such statement, where the court instructed that the jury were to consider only evidence admitted, and to disregard every impression or idea suggested by counsel to which objections were sustained.

15. Criminal Law ⚷938(1)—New Trial—Grounds—Newly Discovered Evidence—Cumulative Evidence.

A new trial will not be granted upon a showing of evidence which is merely cumulative, and tends to do no more than contradict some of the witnesses for the state.

On Petition for Rehearing.

16. Homicide ⚷236(1) — Evidence—Sufficiency.

Evidence *held* sufficient to sustain conviction of the offense of homicide by setting a bomb.

17. Criminal Law ⚷561(2)—Quantum of Evidence.

The mere fact that there is a conflict in evidence in a prosecution for homicide does not establish that there are two hypotheses, one consistent with guilt and the other with innocence, so as to create a reasonable doubt.

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Warren K. Billings was convicted of murder, and from the judgment and order denying motion for new trial he appeals. Affirmed. On petition for rehearing, petition denied.

Maxwell McNutt, of San Francisco, Jas. G. Lawlor, and E. H. Lomasney, of San Francisco, for appellant. U. S. Webb, Atty. Gen., for the People.

PER CURIAM. Near the hour of 2 p. m. on the afternoon of July 22, 1916, while a preparedness parade, formed for the purpose of displaying and developing the patriotic pride and spirit of the people of San Francisco, was passing at or about the intersection of Steuart and Market streets in that city, an explosion occurred at that point which resulted in the death of several persons and the wounding of two score more who were viewing the parade.

The defendant Billings and several other persons were subsequently jointly indicted and charged with the crime of murder. The defendant Billings was separately tried. He was convicted of the crime charged, and the penalty therefor, life imprisonment, was fixed by the jury.

After having reviewed the evidence adduced upon the whole case, which was wholly circumstantial, we are constrained to say that the contention of counsel for the defendant that the evidence does not sustain the verdict and judgment is not well taken, for it is rested solely upon a discussion of the weight of the evidence.

The contradictions and inconsistencies, if any, existing in the proof proffered and received in support of the people's case created no more than a conflict in the evidence, and it was the peculiar province of the jury, when weighing the evidence, to reconcile such contradictions and inconsistencies with what they conscientiously believed to be the truth as developed by the evidence adduced upon the whole case.

[1] It is the settled rule that the weight to be given to a conflict in the evidence—whether it appears in the case of the people or is made manifest by the proof proffered to support the defense—is a question to be determined in the first instance by the jury and, in the absence of a showing of its inherent improbability and utter incredibility, the determination of the jury is as matter of law conclusive upon this court. In other words, unless the evidence upon which a conviction rests appears to be so radically improbable as to amount to no evidence at all, we are not permitted to examine it merely to determine the preponderance of its probabilities.

The argument of counsel for the defendant made to us upon this phase of the case is doubtless but a repetition of his argument made to the jury at the trial of the case, but, needless to say, the sufficiency of the evidence in the presence of a conflict therein to support the verdict may not be tested on appeal by the weight which the members of this court might have given to it had they been sitting as jurors on the trial of the case. Measured by the rule under consideration we cannot say that the evidence does not support the verdict and judgment.

It was the theory of the prosecution that the explosion which caused the death of the deceased person, for whose murder the defendant was being tried, resulted from the discharge by a clock device of a shrapnel dynamite bomb which, concealed and carried in a suit case, was deposited by the defendant Billings on the sidewalk at the place of, and shortly before, the explosion. Two ball bearings of the kind used in automobiles and handfuls of loaded cartridges of varying calibers were picked up by bystanders immediately after the explosion, and bullets of varying caliber were found in the bodies of several victims of the explosion.

As circumstances tending to show the defendant's connection with the construction of the bomb, the prosecution offered, and the trial court permitted in evidence, proof of the following facts: That a pistol loaded with certain caliber cartridges and a large quantity of loose loaded cartridges of varying caliber, many of which corresponded in caliber with the bullets found in the bodies of the victims of the explosion, together with two automobile ball bearings, differing however in size from those found at the scene of the explosion, were discovered in the room of the defendant shortly after he was arrested.

[2] The objection made to this evidence, it seems to us, was directed merely against its weight. The relevancy of proffered proof in a criminal case depends upon whether or not it tends to sustain a legitimate hypothesis of the guilt of the defendant and, generally speaking, an incidental fact is relative to the main fact in issue when, in accord with the ordinary course of events and common experience, the existence of the incidental fact, standing alone or when considered in connection with other established facts, tends in some degree to make the main fact in issue certain. It is not necessary that such incidental fact should bear directly upon the main fact in issue, for it will suffice as a pertinent piece of proof if it can be said to constitute a link, however small, in the chain of evidence, and tends thereby to establish the existence of the main fact in issue. Moody v. Peirano, 4 Cal. App. 411, 88 Pac. 380.

[3] Hence any fact is relevant evidence which naturally tends to show the means and method employed in the commission of a crime, and therefore it was proper in the present case to admit evidence of the identification of the cartridges picked up near the scene of, and shortly after, the explosion and, having been so identified, they were rightfully admitted in evidence. 1 Michie on Homicide, pp. 856, 857.

[4] The fact that the cartridges found in the room of the defendant after the commission of the crime were of the same character and caliber of those found in the bodies of the victims of the explosion was admissible as tending in a measure to show that the defendant had the means at hand to commit the crime charged against him, in the manner and by the means which it was shown were employed to commit the crime. 1 Michie on Homicide, pp. 851, 855, 857, 859; 21 Cyc. 945.

[5] While it is true that no ball bearings were found in the bodies of the victims of the explosion, nevertheless the ball bearings admitted in evidence were found, immediately after the explosion, in the midst of other things which, when considered in connection with all of the circumstances shown in evidence concerning the character of the explosion and its effects, apparently constituted a part of the bomb and were therefore admissible as tending in some degree to show what were the constituent elements of the bomb. In this connection it may be noted that:

> "The tendency of modern decisions is to admit any evidence which may have a tendency to illustrate or throw any light on the transaction in controversy, or give any weight in determining the issue, leaving the strength of such testimony or the amount of such weight to be determined by the jury." Moody v. Peirano, supra.

[6] The presence in evidence of the pistol found in the defendant's room came in as a mere incident to the testimony which showed the result of the search of defendant's room and, conceding that it was improperly admitted in evidence, we cannot conceive how it could have prejudiced the defendant.

[7] The trial court did not err in its ruling permitting the prosecution to show in evidence that one McDonald, its chief witness, had made statements to several persons shortly after the explosion which were in substantial accord with his testimony given at the trial of the case. This proof was not proffered by the prosecution, nor permitted by the trial court, upon the theory, as counsel for the defendant contends, for the purpose of corroborating the testimony of the witness. The record shows that the evidence in question was offered and received for the purpose of showing that the testimony of the witness McDonald was consistent with statements made by him at a time when he was neither thought of, nor sought for, as a witness for the people. Its tendency was to rebut the inference which the defense sought to deduce from impeaching evidence, to the effect that the testimony of the witness as given at the trial was of recent fabrication and the creature of corruption, and therefore was rightly received. Comm. v. Jenkins, 10 Gray (Mass.) 485; Yarbrough v. State, 105 Ala. 43, 16 South. 758; Cal. Electric Light Co. v. Cal., etc., Co., 145 Cal. 124, 78 Pac. 372; Wharton's Criminal Evidence (10th Ed.) § 492; Wigmore on Evidence, §§ 1129, 1130.

Counsel for the defendant has not directed our attention to any particular portion of the record in support of his contention that the defendant, when testifying as a witness in his own behalf, was prevented by objection or otherwise from giving an account of the movements of his codefendants on the day of the explosion. Ordinarily this would suffice to warrant us in ignoring the contention, but it may not be amiss to say that an independent investigation of the record discloses no basis for the contention, nor for the further contention that the trial court erred in refusing to permit the defendant to show all of the facts and circumstances connected with the meeting of the defendant and his codefendant Mooney, which a witness for the prosecution testified occurred some three days prior to the explosion.

[8] Complaint is made of the cross-examination of Mrs. Belle Hammerberg, a witness for the defense, whose testimony in substance was that the codefendants Thomas Mooney and his wife, Mrs. Rena Mooney, were on the roof of a building situated a considerable distance from the scene of the explosion during the entire afternoon of the day of the preparedness parade. Substantially stated, the cross-examination of the witness consisted of an attempt to develop and diclose her interest in and bias for the defendants. It is now insisted that inasmuch as the witness had previously declared, and counsel for the defense had admitted, that she was greatly interested in the defendants, the prosecution was precluded from probing for the motives of her bias, and, in addition, that the real purpose of the cross-examination in the particular stated was to prejudice the jury against the defendant by creating the impression that the witness was suppressing evidence which, if revealed, would connect the defendants Mooney and Billings with the explosion. The cross-examination complained of resulted in showing nothing more than that the witness was interested in the defense, and that she had received "some papers" or a "parcel of papers" from Mrs. Rena Mooney some time during the early part of the month of May or June.

Conceding it to be the general rule that when the interest of a witness in the result of a case is developed or admitted, as was done in the present case, the cross-examination cannot be legitimately continued for the purpose of showing the motive for such interest, nevertheless we are not prepared to say that the facts developed upon such cross-examination resulted in prejudice to the defendant, for it will be noted that the district attorney failed in his avowed purpose to show that the witness had concealed the papers referred to and, further, that neither the character of nor the contents of those papers were disclosed by the cross-examination. In fact, the only hint of the character of their contents is to be found in the admission of counsel for the defendant, made during the course of an argument upon an objection to the cross-examination, that they related "to certain matters of correspondence affecting the car strike." Conceding that this admission was provoked by the exigencies of the situation, nevertheless, neither it nor the cross-examination itself revealed the particular car strike referred to, nor the details of the correspondence. It will thus be seen that the cross-examination complained of resulted in showing nothing beyond the fact that the witness was perhaps biased in favor of the defense, which fact was admitted by her and by counsel for the defendant and, consequently, it cannot be said that the error of the ruling permitting such cross-examination resulted in any prejudice to the defendant.

[9] No prejudice resulted from the ruling of the court permitting police officer Kramer, a witness for the prosecution, to testify that on one occasion during the year 1913 he saw the defendant Billings in the city of Sacramento shake hands with and hold a conversation with the defendant Mooney. The avowed purpose of this evidence was to show a long-standing acquaintance between the two men. Whether that fact had any tendency to corroborate the testimony of the witness McDonald to the effect that he saw the defendant and Mooney together at the scene of the explosion and shortly prior thereto is of but little, if of any, consequence, when considered in conjunction with the fact that counsel for the defendant announced in open court that "we concede that acquaintance long before and since that time."

Counsel for the defendant complains of and devotes a page of his brief to the alleged refusal of the trial court to give a certain requested instruction to the jury, but the record does not show that the instruction in question was not given. Moreover, the subject-matter of the requested instruction was sufficiently covered in the charge of the court.

[10] During the course of its charge the trial court instructed the jury to the effect that, even though the jury should find that some person other than the defendant had feloniously placed the bomb at the scene of the explosion which resulted in the killing of the deceased, but further found that the defendant willfully and unlawfully aided and abetted such person and assisted him to obtain, manufacture, or explode said bomb, then the defendant Billings was a principal in the commission of the crime.

This instruction is assailed and asserted to be erroneous upon the ground that it did not limit, nor attempt to limit, the jury to a finding that the defendant personally performed the physical act of depositing the bomb at the place where the crime was committed. This contention is made and based upon the theory that the jury should have been so limited, because the trial court had previously instructed them to the effect that it was the theory of the prosecution that a bomb was deposited by the defendant Billings at the place and with the intent and purpose charged in the indictment and, because of this, it is argued that the defendant could not be found guilty in the absence of evidence warranting a finding that he had personally placed the bomb "at the scene of the explosion, and hence murdered the deceased by direct means."

These instructions, in our opinion, were pertinent to the evidence adduced upon the whole case, which warranted the jury in its finding, implied from the verdict, that the defendant either personally placed the bomb at the scene of the explosion or aided and abetted the person who did. In this view of the evidence the instructions immediately under consideration were not antagonistic to and destructive of one another, for it is the law that:

> "All persons concerned in the commission of a crime, whether it be a felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or not being present, have advised and encouraged its commission, * * * are principals in any crime so committed." Pen. Code, §§ 31, 971.

[11] With reference to those portions of the argument of the district attorney to the jury which were protested and assigned in the court below as misconduct, coupled with a request for an appropriate admonition to the jury, the record shows that the first assignment related in part to statements of the district attorney which upon their face purport to be his deductions, made apparently in good faith from the evidence adduced at the trial. This was legitimate argument and could not properly be made the basis of an assignment of misconduct.

[12] The remaining portions of the district attorney's argument covered by the first assignment of misconduct relate to his assertion that "the reason why they (the defense) objected to us showing the particular felony he (the defendant) has been convicted of is obvious." The record, however, does not show that this statement was assigned as misconduct in the court below, and therefore the misconduct, if any, might well be deemed to have been waived. But, assuming that there was no waiver, and conceding the impropriety of the argument in the particular stated, it is difficult to conceive how the defendant could be prejudiced thereby in the face of the fact admitted by the defendant, while testifying as a witness in his own behalf, to the effect that he had suffered a felonious conviction in this state for carrying explosives.

[13] The second assignment of misconduct has reference to the fact that the district attorney, in his argument, asserted in effect that the defendant, while testifying, laughed like a hyena and apparently considered the charge against him a joke, and then proceeded to draw a comparison between the perpetrator of the crime and a hyena—"the cowardliest and most disliked animal in the world. * * *" Defendant's demeanor, while testifying as a witness, was a proper subject for the jury's consideration and while the record, as a matter of course, does not disclose what that demeanor was, nevertheless we are not permitted to assume that it was willfully or at all misrepresented by the district attorney. His comparison of the defendant's courage with that of a hyena, based as it was upon the assumption that the evidence showed him to be the perpetrator of the crime, obviously was peculiarly pertinent and therefore permissible, even though it did involve a denunciation of the defendant as the perpetrator of the crime, for as was said in the case of People v. Glaze, 139 Cal. 154, 72 Pac. 965:

> "A defendant on trial for murder is not entitled as of right to be spoken of as if he were an innocent man in an argument by the officer who is endeavoring to show that the evidence proves his guilt."

[14] Complaint is made of the failure of the trial court, upon request, to admonish the jury to disregard statements made by the district attorney when making an offer to prove by a witness present in the courtroom that the defendant had said that he was skilled in the making of bombs and had thrown them for hire. The objection to this offer was sustained, and, without regard to whether or not the proffered proof was relevant and competent, the district attorney was privileged, in good faith, to state what he expected to prove. In so far as the record shows, the offer in question was not made in bad faith and, it not appearing that the district attorney was guilty of pernicious and persistent misconduct throughout the trial of the case, we are of the opinion that the request for an admonition to the jury to disregard any suggestions contained in the offer was sufficiently complied with in the charge of the court, which, in part, instructed the jury that under their oaths they were "to take into consideration only such evidence as had been admitted by the court, and * * * disregard and discard * * * every impression or idea suggested by questions asked by counsel which were objected to, and to which objections were sustained."

[15] It is insisted that the trial court erred in denying the defendant's motion for a new trial grounded, in part, upon alleged newly discovered evidence. The alleged newly discovered evidence offered upon the hearing in support of the motion was, in our opinion, merely cumulative, and tended to do no more than contradict some of the witnesses who had testified for the People upon the trial of the case. It is a well-settled rule of law that newly discovered evidence of that character will not suffice to warrant the granting of a new trial.

Concluding this discussion of each and every point made in support of the appeal, we are constrained to say that a perusal of the record before us which contains the argument of counsel for defendant compels the conclusion that the defendant was accorded a fair trial before a fair judge and a fair jury, and this conclusion is confirmed by the concession of counsel for the defendant made in his closing argument to the jury wherein he said:

"We have had a fair trial—'We've had our trial, and must needs say a noble one.' We've had our trial and we proclaim to the world that it has been a fair and noble one. This jury was empanelled by a member of the district attorney's staff with absolute fairness and impartiality—a man who asked only what we asked, and only what we ask now—justice!"

The judgment and order denying a new trial are affirmed.

On Petition for Rehearing.

In their petition for rehearing of this cause, appellant's counsel repeat their arguments considered and passed upon in the opinion delivered in this case. Their petition in this respect presents nothing new. The propositions which they readvance were given careful consideration, and this court sees no reason to change the views which it has expressed upon them.

Concerning two matters, however, the petition makes a complaint which calls for response. The first of these is that appellant has contended that there is a "complete insufficiency of the evidence, admitting its entire truth for the purpose of the argument, to sustain a verdict of guilty of murder." It is said that this contention requires of this court something more than a declaration that the evidence is sufficient—it demands a presentation of the evidence which this court declares to be sufficient. As appellant's counsel thus urgently insist upon a statement of this evidence, it will be given.

The prosecution introduced evidence showing that a high explosive concealed in a suit case was, on the occasion of the preparedness parade in San Francisco, placed against a building at the southwest corner of Steuart and Market streets, about 20 feet from the corner of Market. The junction of Market and Steuart streets is near the ferry building at the foot of Market street. On Steuart street and other similar connecting streets at the lower end of Market street the units of the parade were to form and enter the parade which was programmed to proceed out Market street. Such a unit of the parade was standing on Steuart street. The sidewalks were crowded with innocent spectators. This infernal machine was so constructed that by a clock-work device it would explode at a given time. The time when this explosion actually took place was six minutes after 2 p. m. The force of the explosion was terrific. Men were blown from their horses and people "fell to the ground like matches." Nine or ten people lost their lives. Nearly fifty others were mutilated and mangled. The devilish ingenuity which constructed this infernal machine did not rest content with placing in it the explosive alone. It was filled with pistol cartridges, with pieces of iron pipe, and with steel balls like unto the ball bearings of automobiles. From the débris of the explosion and from the bodies of the dead and wounded many of these articles were discovered and introduced in evidence. So also were introduced in evidence bits of brown papier-maché from which cheap suit cases are made, and, in the language of appellant's counsel, "some clasps or locks or other things affecting the suit case." That this destruction of life and property was criminally caused by the criminal means indicated, the evidence leaves in not the slightest doubt.

The crime having thus been established, the next inquiry is, does the evidence sufficiently connect this defendant with the crime as the perpetrator or one of the perpetrators thereof? The fact that the suit case which exploded was placed by this defendant does not rest upon circumstantial evidence alone. A witness testifies directly to having seen the defendant with the suit case in his hand at about 10 minutes before 2 o'clock at Steuart and Market streets. The defendant was looking about him so that the witness thought that he had either stolen the suit case or was playing a joke. He was joined by another man at the door of the saloon. They looked at their watches. They looked at the clock on the nearby ferry building tower, and the defendant disappeared in the crowd on Steuart street. Another witness saw the defendant a few minutes later without a suit case near the corner of Mission and Steuart streets, less than one block away from the spot where the suit case had been placed. He heard the explosion. After this, and to prevent a panic, "the band was started up and played 'the colors'; and everybody took their hats off but the defendant and the man that was with him. A man in the crowd says, 'Take your hat off.' He paid no attention but he turned around and walked away." Numerous other witnesses saw this defendant with this suit case elsewhere in San Francisco about or after half past 1, and shortly before his presence at Steuart and Market streets. In particular he was seen with this suit case at 721 Market street, less than four-fifths of a mile distant from the junction of Steuart and Market streets. He was there seen by Herbert Wade, principal of a school in Hawaii, by Earl Moore, a police officer, by Peter Vidovich, a retired business man, by Mrs. Nellie Edeau, a dressmaker, and by Miss Sadie Edeau, her daughter. Mrs. Edeau further testifies that she saw him standing with a woman and a man, the defendant holding the suit case in his right hand and saying in an excited tone, "We have to make the ferry before two o'clock." Miss Estelle Smith, an attendant in a dentist office in the building at 721 Market street, saw and accosted the defendant just outside of the dental rooms. The defendant asked permission to go on the roof to take pictures, saying that he represented a San Francisco newspaper, the Chronicle. He looked worried and ill and said that the heat had made him sick. She went to pick up the suit case for him and he said, "My God, don't touch that." She jumped and said, "You scared me;" and he replied, "You will strain the lens in my camera." As he seemed distressed she asked him to go into the dental waiting room and sit down and he replied, "I can't take advantage of your kindness. I have friends waiting for me down stairs." Another witness, Rominger, testified that he assisted this defendant with this suit case to the roof of the building. The suit case was very heavy, weighing as much as 30 pounds. There was no photographer's outfit with the case—neither kodak nor tripod.

When the defendant was arrested his room was searched, and in his room was found a can of bullets and pistol cartridges like those placed in the infernal machine. Automobile ball bearings were also found in his room. The defendant admitted that this can and its contents were his property, and said that he "used them when it was thought necessary." Asked where he bought them, he said he did not remember.

More than this, it was proved that the defendant had suffered conviction and imprisonment in the courts of California for a felony of similar character, though resulting in no such direful consequences as the felony for which he was here put upon trial. He was convicted of carrying high explosives on a street car and suffered imprisonment for two years in the state penitentiary at Folsom. Further, it was shown that he had dynamite in his possession in the city of Sacramento, and after his arrest, when asked about it, said that he would not talk until he had seen his attorney. And, finally, the defense amounted to this: The defendant offered his own unsupported declaration against the testimony of all of these witnesses, that he never had a suit case in his possession upon the day of the parade, and also his own unsupported declaration, as against the testimony of these witnesses, that he was neither at nor in the neighborhood of 721 Market street, nor at nor in the neighborhood of Market and Steuart streets upon that day. He gives an account of his rambles about the city from about 1:15 p. m., when he left his lodging house, till about 3 p. m., when he entered a jitney, but during all that intervening time there is not one witness who testifies that he saw the defendant where the defendant says he was, so that the alibi, as against the positive and direct statement of disinterested witnesses, rests wholly upon the testimony of the defendant alone.

[16] To sum up, then, we agree with appellant's counsel in their first judgment on the case when they "proclaimed to the world" that the trial "had been a fair and noble one," and we wholly agree with the declaration of the learned Attorney General that "the evidence overwhelmingly establishes the guilt of the defendant."

[17] The second proposition which appellant's counsel urge upon our attention as having been omitted from the consideration of the case in the opinion handed down is, to quote their own language, the following:

> "The point was made by us that the evidence in this case showed that there were two hypotheses, one consistent with guilt and the other reasonably consistent with innocence, and that hence a reasonable doubt arose as a matter of law, and we were accordingly entitled to a reversal."

In plain English, this seems to mean that if A. testifies that he saw B. shoot C., and B. testifies that he was not at the place of the shooting, there necessarily arises "two hypotheses, one consistent with guilt and the other reasonably consistent with innocence," and therefore every defendant who offers evidence of an alibi must go free. The simple statement of the proposition shows its absolute unsoundness. But in addition to this, the law has disposed of this proposition against appellant's position in so many cases that even to cite them would seem to be superfluous. However, a few may be mentioned:

> "When there is evidence, therefore, to sustain the verdict, a question of law cannot arise." People v. Fitzgerald, 138 Cal. 40, 70 Pac. 1015.
>
> "If we can find any evidence in the record from which a rational inference might be drawn that defendant fired the fatal shot, our inquiry as to this feature can go no further." People v. Bond, 13 Cal. App. 182, 109 Pac. 154.
>
> "If the evidence which bears against the defendant, considered by itself, and without regard to conflicting evidence, is sufficient to support the verdict, the question ceases to be one of law * * * and becomes one of fact upon which the decision of the jury and the trial court is final and conclusive." People v. Emerson, 130 Cal. 563, 62 Pac. 1069.
>
> "Undoubtedly the defendant's own story exculpates him, but it was for the jury to say whether or not that story should be believed. The evidence was therefore sufficient to justify the verdict." People v. Rongo, 169 Cal. 75, 145 Pac. 1019.

The evidence adduced upon behalf of the people, having been accepted as the truth by a jury impanelled, as counsel for the appellant concedes, "with absolute fairness and impartiality," was sufficient in itself to support the verdict.

The petition for a rehearing is denied.

(34 Cal. App. 564)

TOWNSEND v. KEITH.

(District Court of Appeal, First District, California. Sept. 6, 1917.)

1. MUNICIPAL CORPORATIONS 🔑706(6)—CONFLICTING EVIDENCE—DIRECTING VERDICT.

When, in an action for personal injuries in collision with an automobile, the evidence was conflicting as to the cause of the collision and the conduct of the parties, it was proper to refuse to direct verdict for defendant.

2. DAMAGES 🔑166(1)—PERSONAL INJURIES—MATERIALTY.

In an action for injuries in collision with an automobile, where plaintiff's testimony showed plainly that his return to the hospital for a second time was for further treatment of the injuries he had sustained in the collision, and not for treatment for any intervening illness or injuries, plaintiff's testimony as to whether or not he had returned to the hospital a second time under the direction of the physician who was tending him was admissible.

3. EVIDENCE 🔑471(13) — OPINION — BEST SOURCE OF KNOWLEDGE.

Plaintiff's testimony as to whether, since the accident, he had had the use of the injured leg as he had had before was admissible; if the question called for opinion, it called for evidence of a material fact from the best source of knowledge.

4. DAMAGES 🔑101 — PERSONAL INJURIES — REASONABLE VALUE OF MEDICAL AND HOSPITAL SERVICE.

The correct measure of damage for personal injuries is the necessary and reasonable value of medical and hospital services rendered to plaintiff, rather than the amount paid for such services.

5. DAMAGES 🔑177 — PERSONAL INJURIES — VALUE OF MEDICAL SERVICES—EVIDENCE.

In an action for personal injuries, plaintiff's testimony as to what bills he had incurred on account of services rendered by his physician and for hospital treatment was admissible, being evidence of the reasonable value of the services.

6. APPEAL AND ERROR 🔑1064(1)—HARMLESS ERROR—INSTRUCTION.

Where the reasonableness of the medical and hospital expenses which plaintiff had incurred was not disputed by defendant on trial, the failure of the charge to limit the jury's finding to their reasonable value was not error prejudicial to defendant.

7. MUNICIPAL CORPORATIONS 🔑706(4) — INJURIES ON STREET — MATERIALITY OF EVIDENCE.

The court properly refused to permit plaintiff to be questioned as to what he had said concerning the damage done to defendant's automobile by the collision, the fact only, and not what plaintiff had said, being material.

Appeal from Superior Court, Alameda County; Wm. H. Waste, Judge.

Action by William C. Townsend against Charles W. Keith. From a judgment for plaintiff, defendant appeals. Affirmed.

Cary Howard, of Oakland, for appellant. Johnson & Shaw, of Oakland, for respondent.

LENNON, P. J. In this action the plaintiff sought and secured a judgment in the sum of $2,000 as damages for personal injuries which he sustained while riding a motorcycle which collided with an automobile, driven by the defendant in a direction opposite to that which the plaintiff was driving.

[1] The contention of counsel for the defendant that the evidence neither warranted the verdict nor supports the judgment is founded entirely upon a discussion of the weight of the evidence, and therefore must fail when confronted by a record which shows a substantial conflict in the evidence adduced by the whole case concerning the cause of the collision and the conduct of the parties thereto at the time thereof. The record shows that plaintiff rested his case upon substantial evidence which legally tended to support his cause of action, and therefore defendant's motion for a nonsuit was properly denied.

[2] The trial court did not err when it overruled the objection of the defendant to the question propounded to the plaintiff as a witness, which inquired whether or not he had returned to the hospital a second time under the direction of the physician who was attending him. A consideration of the plaintiff's testimony, immediately preceding the question objected to, shows plainly that the return of the plaintiff to the hospital for a second time was for further treatment of the injuries which he had sustained as the result of the collision, and not for treatment for any intervening illness or injuries.

[3] Equally without merit was the objection to the question propounded to plaintiff, namely: "Since the accident, have you had the use of the injured leg as you had before?" Assuming that the question called for the opinion of the witness, nevertheless it called for evidence of a material fact, which came from the best source of knowledge.

[4, 5] The court did not err in overruling defendant's objection to the question asked of plaintiff as to what bills he had incurred on account of services rendered by his physicians and for hospital treatment. While the correct measure of damage is the necessary and reasonable value of the services rendered, rather than the amount which may have been paid for such services, nevertheless the amount paid for the services is some evidence as to their reasonable value.

[6] The expenses incurred amount to approximately $200; i. e., $150 for physician, $10 for a specialist, $32 hospital bill, and $30 or $40 for medicines. This, on its face, does not seem to be unreasonable. The reasonableness of the expenses which plaintiff had incurred was not disputed by defendant on the trial, and therefore the failure of the trial court's charge to the jury to limit its finding to the reasonable value of the expenses incurred was not an error which prejudiced the defendant. Melone v. Sierra Ry. Co., 151 Cal. 113, 91 Pac. 522.

[7] There was no error in the ruling of the trial court refusing to permit the plaintiff to be questioned as to what he had said concerning the damage done to the defendant's automobile by the collision. The purpose of the question, it is claimed, was to show the condition of the defendant's automobile after the collision, which, it is argued, would have illustrated the force of the angle of contact, as well as the rate of speed and the probable direction of the colliding machines. This being the only purpose of the question, it was properly objected to, because it was only ma-

terial to know what the fact was, and not what the plaintiff may have said it was. Moreover, the defendant had testified, prior to the asking of the question objected to, fully and in detail, to the condition of his automobile after the collision, and this testimony remained uncontradicted.

The remaining assignments of error have less merit than those which we have just discussed.

The judgment appealed from is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

34 Cal. App. 804

PEOPLE v. WARNER. (Cr. 399.)

(District Court of Appeal, Third District, California. Oct. 8, 1917.)

Appeal from Superior Court, Modoc County; Clarence A. Raker, Judge.

George Warner was convicted of an offense, and he appeals. Reversed.

Jamison & Wylie, of Alturas, for appellant. U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

BURNETT, J. This case is identical in its facts with the case of People v. Lensen, 167 Pac. 406, recently decided by this court, and the same points are made upon this appeal for a reversal of the judgment and order denying defendant's motion for a new trial. An extended opinion, therefore, becomes unnecessary.

Upon the authority of the Lensen Case, the judgment and order are reversed.

We concur: **CHIPMAN, P. J.; HART, J.**

34 Cal. App. 712

FRASER v. INDUSTRIAL ACCIDENT COMMISSION et al. (Civ. 2221.)

(District Court of Appeal, First District, California. Sept. 24, 1917.)

Petition of Malcolm Fraser against the Industrial Accident Commission and another for writ of review. Writ denied.

William E. Billings, of San Francisco, and Hankins & Hankins, for petitioner. Warren H. Pillsbury, of Oakland, for respondent Industrial Accident Commission. Watt, Thornton & Watt, of San Francisco, for respondent Royal Indemnity Co.

PER CURIAM. The primary point presented by this petition, and which induced the issuance of the writ, was the allegation that the new evidence, which was received by the commission pursuant to stipulation, was not rebutted by the petitioner, because he was not given an opportunity to do so. Upon oral argument it is conceded that there is nothing in that point, so that is now out of the case.

The only remaining contention is the alleged insufficiency of the evidence to support the finding of the commission. A perusal of the record convinces us that the evidence in this respect is sufficient.

The writ is therefore denied.

176 Cal. 400

In re HARTENBOWER'S ESTATE.

WEISS et al. v. HARTENBOWER.

(L. A. 5200.)

(Supreme Court of California. Oct. 25, 1917.)

1. WILLS 🔑577—CONSTRUCTION—INTENT—COMMUNITY PROPERTY.

A clause in a will, "I hereby admit, state and declare that all my estate is community property. * * * Realizing that she is entitled to a full one-half of all of said estate, I intentionally make no further provision for her"—will be *held* to show an intention to give his wife half the estate, whether community property or not.

2. EVIDENCE 🔑80(1)—PRESUMPTIONS—FOREIGN STATUTE—COMMUNITY PROPERTY.

In the absence of any other showing in the record, it will be assumed that the laws of other states as to property acquired by persons during their marriage are the same as those of California.

3. EXECUTORS AND ADMINISTRATORS 🔑315(6)—DECREE OF DISTRIBUTION—JUDGMENT.

Where a residuary legatee petitions for a partial distribution, a decree declaring the widow's share to be one-half and the residuary legatees one-half, is an adjudication that cannot be attacked later on petition of the widow for distribution to her of her share, as to all who had legal notice.

Department **1**. Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

In the matter of the Estate of J. J. Hartenbower, deceased. Petition by Cynthia J.

Hartenbower for partial distribution, and objections thereto by Elsie Weiss, Dewitt Fowles, Roy Fowles, Florence Fowles Brown, Ethel K. Holland, and Frances C. Towle. From an order distributing a part of the estate to the petitioner, objectors appeal. Affirmed.

Stewart & Stewart, of Los Angeles, for appellants. I. W. Stewart, of Oxnard, and Edward M. Selby, of Los Angeles, for respondent.

SHAW, J. This is an appeal by the residuary legatees, or some of them, under the last will of the decedent from an order distributing a part of the estate to Cynthia J. Hartenbower, the widow of said decedent. The fourth clause of the will is as follows:

> "Fourthly: I hereby admit, state and declare that all of my estate is community property, having been acquired by me since my marriage with my said wife, Cynthia J. Hartenbower. Realizing that she is entitled under the laws of the state of California to a full one-half of all of said estate as her lawful share of said community property, I intentionally make no other or further provision for her, and the full one-half of said estate which I am entitled to dispose of by will I give, devise and bequeath as hereinafter provided."

The widow filed a petition for partial distribution claiming that she was entitled under this clause of the will to one-half of the estate. The appellants filed objections to such distribution on the ground that the will does not declare an intention to give the widow one-half of the estate, and that the property of the decedent was separate property, and that, consequently, the widow was entitled to only one-third thereof as heir of her husband.

Evidence was introduced on the trial showing that the deceased and his wife had resided after their marriage in Iowa and Kansas, and that the property owned by the decedent at his death was the proceeds of property acquired by them while living in the said states. No evidence was given, however, so far as the record shows, concerning the laws of those states respecting community and separate property of married persons. In behalf of the widow there was introduced in evidence a decree of the court previously made upon the application of one of the residuary legatees for a partial distribution of the estate in which proceeding notice was duly given and after hearing the court made its decree declaring that by the terms of the last will of said deceased said widow was entitled to a full one-half of all the property belonging to the said estate and remaining after paying the debts and expenses of administration, and that said residuary legatee was entitled to a one-fiftieth of the remaining one-half thereof.

[1-3] We are of the opinion that the fourth paragraph of the will was correctly construed by the court below in making the previous decree. Although said paragraph does not expressly declare the intention of the testator to devise to his widow one-half of the estate, the intention that she shall have that share appears by necessary implication from the language used. Even if we concede that the property was in fact the separate property of the decedent and not community property as he declares by his will, and that the heirs and legatees are not bound by his declaration that it is community property, the said clause of the will is equivalent to a declaration that she shall have the full one-half thereof. In addition, we will say that as the record stands we must assume that the laws of Iowa and Kansas concerning property acquired by persons during their marriage are the same as those of California, and hence that the property so acquired is community property as the testator declares. Furthermore, the previous decree, made after hearing to which all the parties were cited by due and legal notice, is an adjudication of the effect of the will. For these reasons we think the appeal is without merit, and that the decree of the court below was correct.

The order is affirmed.

We concur: SLOSS, J.; LAWLOR, J.

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176 Cal. 381

In re BAIRD'S ESTATE. HURD v. BROWN. BAIRD et al. v. SAME. (S. F. 7918.)

(Supreme Court of California. Oct. 20, 1917.)

1. PLEADING 🔑127(2) — ADMISSIONS — CONSTRUCTION AND OPERATION.

Where petitions for revocation of probate alleged that an order was made admitting to probate as and for the last will of B. and a codicil thereto two certain papers dated November 23, 1909, and February 9, 1912, respectively, and the answers expressly admitted these allegations, it must be taken as established that the codicil of February 9, 1912, was admitted to probate.

2. WILLS 🔑199—RE-EXECUTION BY CODICIL.

The due execution of a codicil whereby the testator ratified and confirmed his will in every respect in so far as it was not inconsistent with the codicil was equivalent to a re-execution of the will.

3. WILLS 🔑288(3) — CONTESTS — BURDEN OF PROOF—EFFECT OF PROBATE.

The admission of a codicil to probate established prima facie for all the purposes of a will contest that it was duly executed in the manner required by law by a testator who was competent and free from undue influence, and the burden of proof was on the contestants to establish its invalidity.

4. WILLS 🔑166(5) — UNDUE INFLUENCE — BURDEN OF PROOF—UNNATURAL WILL.

However unnatural a will may appear to be, and however much at variance with expressions by the testator as to his intentions, it may not be held invalid on the ground of undue influence, unless there be an actual showing of that sort of pressure which overpowered the mind and mastered the volition of the testator at the very moment of execution.

5. WILLS 🔑163(2) — UNDUE INFLUENCE — BURDEN OF PROOF — CONFIDENTIAL RELATIONS.

To impose on the beneficiary under a will the burden of proof to show that the will was not induced by coercion or fraud, a confidential relation between him and the testator is not sufficient, and there must be activity on his part in the preparation of the will.

6. WILLS 🔑160(1)—UNDUE INFLUENCE—EFFECT OF CODICIL.

The execution of a codicil to a will ratifying and confirming the will so far as not inconsistent with the codicil without any previous suggestion of such action by any one and entirely of the testator's own free will without influence or coercion rendered it immaterial whether the will was induced by undue influence, and hence where, in a will contest, there was no evidence of undue influence in the execution of a codicil, a nonsuit was properly granted, even though there was a prima facie showing of undue influence inducing the original will.

In Bank. Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Will contests in the matter of the Estate of Alfred Baird by Sarah Alice Hurd, and by Charles M. Baird and others against Samuel T. Brown, executor. From a judgment granting a nonsuit, the contestants appeal. Affirmed.

Charles R. Holton, of Whittier, and Stanley Moore, of San Francisco (Elliott Johnson, of San Francisco, of counsel), for appellants. W. P. Thompson and M. K. Harris, both of Fresno, for respondent.

ANGELLOTTI, C. J. Certain of the heirs of Alfred Baird, deceased, contested his will after probate, and they appeal from a judgment against them following the granting of proponent's motion for nonsuit.

By his will Alfred Baird sought to dispose of an estate valued at approximately $190,000. Baird had been the father of two sons and two daughters. These were B. M. Baird (commonly called Morgan Baird), Sarah Alice Hurd, Edwin Lewis Baird, and Florence Baird Keeler. Of these children Edwin Lewis Baird predeceased his father by many years, and at the latter's death there survived of this branch of the family four children of Edwin Lewis Baird, deceased, and one grandchild, who was the child of a deceased daughter. Two separate contests of the will of Alfred Baird were filed, one by Mrs. Hurd, his daughter, and another by his grandchildren and great grandchild representing Edwin Lewis Baird, deceased. Both contests were based originally upon allegations of improper execution of the will, unsoundness of the testator's mind, and undue influence which it was alleged B. M. Baird exercised upon the testator. The contests were tried together, and at the trial the contestants abandoned all attacks upon the validity of the will except that based upon the alleged undue influence. When the original will was executed, November 23, 1909, the testator's wife was living, and provision was made for her, to the extent of an income of $100 per month for her life. The surviving children of Edwin Lewis Baird, deceased, were given $1,000 each, and the infant child of the deceased child of said Edwin Lewis Baird the sum of $10. The only provision for testator's daughter, Sarah Alice Hurd, was one for the payment to her of $25 per month during her life, the testator saying, "I make this provision for my said daughter as the best method of protecting her from want during her life and because she has already received a good deal from me, all of which she has squandered." All the rest and residue was given to the son, B. M. Baird, and the daughter, Florence Keeler, to be divided equally between them, and said B. M. Baird was appointed executor without bonds. A codicil dated February 9, 1912, accompanied the will, the same making no change therein except to cancel the provision for the wife, she having died, and also to provide that Florence Keeler's share in the residue should be $2,000 less than the share of B. M. Baird.

[1-3] In view of the condition of the pleadings it must be taken as established that the codicil of February 9, 1912, was admitted to probate. The petitions for revocation of probate filed by the contestants allege that on December 14, 1914, an order was made admitting to probate "as and for the last will of said Alfred Baird, deceased, and a codicil thereto, two certain alleged papers * * * dated November 23, 1909, and February 9, 1912, respectively." The answers expressly admitted the truth of these allegations. The contest was as to both documents. In the codicil the testator stated that having on the 23d day of November, 1909, made his last will, he declared this to be a codicil to the same, and said, "I hereby ratify and confirm said will in every respect in so far as the same is not inconsistent with this codicil." If the codicil was duly executed, its execution was equivalent, of course, to a re-execution of the will. Its admission to probate necessarily established prima facie for all the purposes of the contest, that it was duly executed in the manner required by law by a testator who was competent, free from undue influence, etc. The burden of proof was on the contestants to establish its invalidity. It is plain, therefore, that unless the evidence introduced was of such a nature that it would have sufficed to legally support a conclusion of undue influence as to the codicil, there was no error in granting the motion for a nonsuit.

[4-6] Certainly there was no sufficient showing of undue influence as to the codicil. No showing at all was attempted as to the circumstances surrounding its execution. The authorities in this state are numerous to the effect that however unnatural a will may appear to be, and however much at variance with expressions by the testator as to his intention with regard to the natural objects of his bounty, it may not be held invalid on the ground of undue influence unless there be an actual showing of that sort of pressure

which overpowered the mind and mastered the volition of the testator at the very moment of execution. See Estate of Clark, 170 Cal. 418, 424, 149 Pac. 828; Estate of Carithers, 156 Cal. 422, 428, 105 Pac. 127; Estate of Gleason, 164 Cal. 756, 765, 130 Pac. 872; Estate of Kilborn, 162 Cal. 4, 120 Pac. 762; Estate of Lavinburg, 161 Cal. 536, 119 Pac. 915. This is the well settled general rule. There is a well-established exception to this rule upon which contestants rely here, to the effect that where one who unduly profits by the will as a beneficiary thereunder sustains a confidential relation to the testator, and has actually participated in procuring the execution of the will, the burden is on him to show that the will was not induced by coercion or fraud. As suggested in Estate of Higgins, 156 Cal. 261, 104 Pac. 8, a "presumption of undue influence" arises from proof of the existence of a confidential relation between the testator and such a beneficiary, "coupled with activity on the part of the latter in the preparation of the will." The confidential relation alone is not sufficient. There must be activity on the part of the beneficiary in the matter of the preparation of the will. See in this connection Estate of Ricks, 160 Cal. 461, 117 Pac. 532; Estate of Lavinburg, 161 Cal. 543, 119 Pac. 915; Estate of Higgins, supra; Estate of McDevitt, 95 Cal. 17, 33, 30 Pac. 101; Coghill v. Kennedy, 119 Ala. 641, 24 South. 459. The whole claim of contestants in this connection is that there was such activity on the part of B. M. Baird. Learned counsel practically admit that unless this claim is well based, no sufficient case was made. We may assume for the purposes of this decision that there was a sufficient prima facie showing to satisfy the law of the existence of a confidential relation between the testator and B. M. Baird, and that the latter did participate to some slight extent in procuring the execution of the will of November 23, 1909. Even as to this it is questionable if there was a sufficient showing to put the proponents to their proof. But there was not even any attempt to show any activity whatever on his part in relation to the preparation or execution of the codicil, and the record is absolutely destitute of evidence in this regard. There is nothing in the evidence inconsistent with the idea that the testator executed the codicil without any previous suggestion of such action by any one, and entirely of his own free will, without influence or coercion of any kind. The burden was on the contestants to show the contrary. This being the situation, it is immaterial that the evidence may have been sufficient to legally support a conclusion that the execution of the will on November 23, 1909, was induced by undue influence. The free and voluntary re-execution of the will by the testator on February 9, 1912, disposed of the objection on this ground.

It is said in the last brief filed by learned counsel for contestants that the codicil was not admitted to probate as a part of the will of deceased. This statement, as we have shown, is opposed to the allegations contained in their petitions for revocation. The question is one that is absolutely settled for all the purposes of this proceeding by the pleadings. There have been included in the clerk's transcript copies of the proceedings on the original probate, such as the testimony of subscribing witnesses, certificate of proof of will, order admitting will to probate, etc., and it is on these that contestants' attorneys rely for their claim that the codicil was not proved or admitted to probate. It may be doubted whether under the circumstances they constitute any proper part of the record on appeal. But considering them it is perfectly apparent that the will and codicil were filed as one instrument, and as such were annexed to the certificate of proof of will, and admitted to probate, as constituting the last will of the deceased. We are not privileged here to consider the nature of the testimony given on the original hearing, or to determine any question as to the sufficiency of such evidence to justify the action of the court in admitting the codicil to probate as a part of the will. So far as this contest is concerned, the due and free execution thereof is established, until the contrary is shown, by the judgment or order of the court admitting it to probate.

It follows from what we have said that a verdict in favor of contestants could not have been held to have sufficient support in the evidence, and that the trial court did not err in granting the motion for a nonsuit.

Complaint is made of certain rulings on evidence, but they all related to matters which could not affect the result in view of the failure to show any activity on the part of B. M. Baird in the matter of procuring the execution of the codicil. Without such proof contestants could not succeed, and none of the evidence or proffered evidence involved in any of these rulings had any reference to this matter. It is therefore unnecessary to discuss them.

The judgment is affirmed.

We concur: SHAW, J.; SLOSS, J.; MELVIN, J.; HENSHAW, J.; LAWLOR, J.

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176 Cal. 395

WAYMIRE et al. v. CALIFORNIA TRONA CO. et al. (L. A. 3834.)

(Supreme Court of California. Oct. 25, 1917.)

1. APPEAL AND ERROR 🔑616(2)—DISMISSAL—AUTHENTICATION OF AFFIDAVITS.

Appeal from dismissal of action for lack of diligent prosecution will not be dismissed because the affidavits used on the motion below are not authenticated by the trial judge; this not preventing examination of such of the record as is properly before the reviewing court.

2. APPEAL AND ERROR 🔑616(2)—RECORD—AUTHENTICATION OF AFFIDAVITS.

Though papers on appeal are prepared under Code Civ. Proc. § 953a, affidavits used on a motion below must be identified and authenticated by the trial judge, that they may be considered on appeal; the certificate of the clerk not being enough.

3. APPEAL AND ERROR 🔑571—CERTIFICATION OF PAPERS—MANDATE TO TRIAL JUDGE.

The remedy for refusal of the trial judge to certify papers for appeal is by writ of mandate.

4. APPEAL AND ERROR 🔑927(2) — PRESUMPTION—DISMISSAL.

The record showing it is incomplete and does not contain all the evidence on which the trial court acted, it must be presumed it justified the dismissal of action for lack of diligent prosecution; there not being sufficient evidence in the record to show abuse of discretion.

5. APPEAL AND ERROR 🔑926(4) — PRESUMPTION—EXCLUSION OF EVIDENCE.

It cannot be said that rejection of evidence was prejudicial, the record not containing all the matters on which the court acted in dismissing the action.

6. TRIAL 🔑388(1)—FINDINGS—ORDER AFTER MOTION.

Findings on an order made after motion are not required.

Department 1. Appeal from Superior Court, San Bernardino County; Frank F. Oster, Judge.

Action by R. Waymire and another against the California Trona Company and others. Action dismissed, and plaintiffs appeal. Affirmed.

Thos. O. Toland, of Los Angeles, for appellants. Perry Evans, of San Francisco, and Daley & Byrne, of San Bernardino, for respondents.

LAWLOR, J. This is an appeal by the plaintiff Waymire from an order dismissing the action in the lower court for lack of diligent prosecution, and from the judgment entered thereon.

The facts appearing in the order of dismissal show that on June 23, 1913, defendant California Trona Company filed in the United States Land Office, at Independence, Inyo county, Cal., its application for a patent to certain placer mining claims in San Bernardino county, and published notice of the application in the Randsburg Miner for 60 days, in accordance with section 2325, Revised Statutes of the United States (U. S. Comp. St. 1916, § 4622), and said 60 days expired on August 27, 1913. On August 25, 1913, plaintiffs filed their adverse claim, which must be filed during the period of publication, and which stayed all proceedings on defendant's application in accordance with section 2326 of the Revised Statutes of the United States (section 4623) until the controversy between the parties should have been settled by a court of competent jurisdiction, or the adverse claim waived. Such claim would be waived, according to the statute, by failure to file a complaint seeking a settlement of the right of possession within 30 days of making the adverse claim, or by failure to prosecute the action with reasonable diligence to final judgment. Plaintiffs filed their complaint in the superior court of San Bernardino county on September 24, 1913, but did not cause summons to be issued thereon until February 5, 1914, nor served until February 6, 1914. On January 30, 1914, defendant served and filed its notice of motion to dismiss the action for lack of diligent prosecution, together with an affidavit in support thereof. On February 9, 1914, when the motion was heard, plaintiffs filed two counter affidavits opposing the motion, and also filed the summons showing proper service as indicated above. After reading of the affidavits and the introduction of oral testimony by the plaintiffs, and argument of respective counsel, the court ruled that the plaintiffs had not been diligent in prosecuting their action as required by section 2326 of the Revised Statutes of the United States, and ordered the action dismissed.

The first point made by the respondent is that the appeal should be dismissed for defects in making up the record. The record on appeal is prepared under the alternative method, and consists of a "clerk's" and a "reporter's" transcript. The reporter's transcript, to which are attached the certificates of the reporter and the judge who heard the motion, contains only the oral testimony and the ruling of the court, together with the reporter's memorandum that the various affidavits that had been filed were read. The affidavits themselves do not appear in this transcript. They do appear in the clerk's transcript, together with the notice of motion to dismiss. The clerk's transcript has only the certificate of the clerk reciting that the papers included therein are true and correct copies of original records in his office. Respondent's contention is that the notice of motion and the three affidavits should have been included in the reporter's transcript, and not in the clerk's transcript, where they have no place. The affidavits are not authenticated by the certificate of the judge because they do not appear in the original reporter's transcript; neither does the certificate of the clerk identify the affidavits as having been used on the hearing of the motion. In fact, respondent argues, it cannot be properly ascertained from the record what affidavits were used or that the ones set out in the clerk's transcript, if used at all, are the only ones so used. From this the conclusion is urged that since all intendments are in favor of the action of the trial court, it must be assumed in this court that there was sufficient evidence, not appearing in the record, to sustain the order. All of this is included in respondent's brief in the form of a motion to dismiss the appeal. Appellant, in his reply brief, contends that the notice of motion and the affidavits are properly in the clerk's transcript, but if they should have been included in the reporter's transcript, then he asks leave of this court to amend, in accordance with rules 14 and 15 (119 Pac. xii). Respondent's brief pointing out the alleged defects in the record was served on the attorney for the appellant on July 11, 1914. On November 30, 1914, appellant presented to the trial court a supplemental reporter's transcript containing the notice of motion to dismiss, together with the three affidavits, as well as the complaint, summons, order of dismissal, reporter's certificate and clerk's certificate, and asked the judge who heard the motion to attach his certificate thereto authenticating the affidavits as those used by him on the hearing of the motion. The court refused to certify on the grounds that the alleged error in preparing the record was the fault of appellant or his attorney, and that in any event appellant had waited too long after receiving respondent's brief which pointed out the alleged defects. The record of the proceedings in the trial court on the request for the certificate of the judge is now before us, as well as the supplemental transcript filed without such certificate, and we are asked to consider such transcript as a part of the record on appeal should we decide that the original record is defective.

[1] We will take up first the respondent's motion to dismiss the appeal. The motion will be denied. There is no contention that the appeal was not regularly taken. The only objection is to the preparation of the record, in failing to include the affidavits in the reporter's transcript. This absence of a proper authentication by the trial judge precludes only the consideration of these particular papers, but does not forbid an examination of the record that is properly before us.

[2, 3] It has long been settled, with regard to the affidavits used on a motion, that they must be identified and authenticated by the trial judge before they can be considered by this court. The certificate of the clerk cannot take the place of the authentication by the judge. Nash v. Harris, 57 Cal. 242; Fish v. Benson, 71 Cal. 428, 432, 12 Pac. 454; Totten v. Barlow, 165 Cal. 378, 132 Pac. 749; Estate of Gamble, 166 Cal. 253, 256, 135 Pac. 970. This rule is now so well established that any further discussion of it is unnecessary. The same rule must be applied in cases arising under section 953a, Code of Civil Procedure. The judge alone is competent to certify to what was used on the motion. Hence there is no other way in which the appellant can present to us the affidavits in question. The supplemental proceedings to obtain the judge's certificate were had several years ago, and nothing has been done by appellant since then. His remedy was by writ of mandate to compel a proper authentication by the judge. It is clear that the supplemental transcript, without the judge's certificate, is of no avail whatever.

[4, 5] In this state of the record, the order of dismissal must be affirmed. The reporter's transcript contains oral testimony, and recites further that certain affidavits were used in the court below supporting and opposing the motion. What those affidavits contained is not before us. The record itself shows that it is incomplete, and that all of the evidence upon which the lower court acted is not before us. All intendments are in favor of the action of the trial court, and there is not sufficient evidence in the record to show that the discretion vested in him has been abused. The matters contained in the affidavits may be entirely ample to support the order. In Estate of Gamble, 166 Cal. 253, 256, 135 Pac. 970, 971, a similar defect in the record led to a like ruling, the court there saying:

> "The record is inexcusably defective. The presumptions of law are all in favor of the action of the court below. If error is claimed, the record on appeal must contain sufficient legal evidence of it, or we must disregard the claim. Some papers which perhaps might have been admissible as evidence are set forth, but there is no certificate of the judge and nothing to show that these papers were introduced in evidence, or that they were considered by the court below in determining the case. It is clear that upon this showing we cannot consider these papers or determine that the court did not correctly compute the net proceeds of the sale of the lot."

Certain errors in the rejection of offered testimony are pointed out. But in view of the fact that we have not before us all the matters upon which the trial court acted in granting the motion, we cannot say that its rulings, if error, were prejudicial.

[6] Appellant claims that the findings in this case were prematurely signed, because proposed findings were not served upon him five days before they were signed. It does not appear, however, that there were any findings, other than a review of the facts in the order of dismissal. The universal practice in this state is not to require findings on an order made after motion. See Waller v. Weston, 125 Cal. 201, 57 Pac. 892.

Order and judgment affirmed.

We concur: SHAW, J.; SLOSS, J.

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176 Cal. 369

BAINES v. ZEMANSKY, Registrar of Voters.
(S. F. 8505.)

(Supreme Court of California. Oct. 20, 1917.)

1. Mandamus 🔑3(1) — Existence of Other Remedy.

If the superior court has jurisdiction, upon any possible state of facts, to prohibit or enjoin a registrar of voters from proceeding with a recall petition, the Supreme Court, on an original mandamus proceeding, cannot inquire into writs or orders in such court concerning the same.

2. Prohibition 🔑6(2)—Registrars of Voters—Examining Recall Petitions.

Prohibition will not lie to prevent a registrar of voters from examining and certifying recall in the manner prescribed in San Francisco Charter, art. 11, c. 3, as, under Code Civ. Proc. § 1102, prohibition lies to arrest proceeding only "when without or in excess of jurisdiction."

3. Prohibition 🔑2—Ministerial Duties—Statutes—Constitutionality.

Code Civ. Proc. § 1102, as far as it purports to authorize prohibition against ministerial acts, is unconstitutional, prohibition being limited to judicial proceedings.

4. Mandamus 🔑3(1)—Void Prohibition—Defenses.

Prohibition directed against the examining and certifying of petition for recall in the manner prescribed by San Francisco Charter, art. 11, c. 3, being void, the writ is no defense on application in the Supreme Court for a writ of mandate to enforce such proceedings.

5. Municipal Corporations 🔑124(5)—Officers — Recall — Jurisdiction — Constitutionality.

Const. art. 11, § 8½, par. 4, conferring "plenary authority" to provide for "recall and removal" of officers, makes it competent for a charter to provide that an officer have the sole jurisdiction to decide the sufficiency of petitions for recall, and to exclude the superior court from revising or annulling such determination.

6. Municipal Corporations 🔑154—Officers — Tenure of Office — Termination—Presumptions.

Any person elected or appointed to office under a city charter is presumed to accept the same with the condition that his tenure may be terminated at any time in the manner prescribed in such charter.

7. Injunction 🔑114(2)—Recall Proceedings.

The officer against whom a recall petition is filed has a sufficient interest to entitle him in superior court to enjoin proceedings departing substantially from the mode prescribed, and to prevent fraud and fictitious signatures, where the charter or statute does not give the sole jurisdiction to some other tribunal.

8. Municipal Corporations 🔑124(5)—Officers—Recall — Decisions of Officers—Conclusiveness.

San Francisco Charter, art. 11, c. 3, construed as a whole, gives the registrar of voters exclusive final jurisdiction as to the sufficiency of the petition for recall as to legal requirements, and whether signatures are genuine, and he must make a determination in 15 days.

9. Municipal Corporations 🔑159(4)—Officers—Recall.

Under San Francisco Charter, art. 11, c. 3, relating to recall, the registrar of voters has authority to inquire into and take evidence, and, although his powers are limited, there is, nevertheless, a tribunal empowered to pass on the sufficiency of petitions for recall, and is sufficient.

10. Municipal Corporations 🔑124(5)—Officers—Recall — Proceedings—Who May Participate Therein.

Although, under San Francisco Charter, art. 11, c. 3, relating to recall, inquiry as to the genuineness of signatures to petitions for recall is limited by section 3 to call in the voter, the officer being recalled can question the genuineness of a signature and have the voter notified.

11. Mandamus 🔑76—Officers—Failure to Exercise Jurisdiction—Effect.

That a registrar of voters erroneously believed he had no duty to pass on the sufficiency of a recall petition and did not do so, does not affect his exclusive jurisdiction, or the right to mandamus to compel him to do acts.

In Bank. Application by Robert E. Baines for a writ of mandate to compel J. H. Zemansky, Registrar of Voters of the City and County of San Francisco, to examine a petition for the recall of Charles M. Fickert, as district attorney of said city and county, attach his certificate thereto, mail a copy to petitioner, and report the same to the board of election commissioners. Writ granted.

Grover O'Connor, George F. Snyder, Andrew J. Branagan, and Colman Schwartz, all of San Francisco (U'Ren & Beard, of San Francisco, amici curiæ), for petitioner. Thomas V. Cator, of San Francisco (James F. Brennan, of San Francisco, amicus curiæ), for respondent.

SHAW, J. This is a proceeding for a writ of mandate, to compel the registrar of voters of San Francisco to examine into the sufficiency or insufficiency of a petition filed with the board of election commissioners for the recall of Charles M. Fickert, as district attorney of said city and county, and thereupon to attach to said petition a certificate showing the result of such examination, mail a copy thereof to the person who filed the petition, and report the same to the board of election commissioners.

A recall petition against Charles M. Fickert was filed with the board of election commissioners, consisting of 232 sections, and bearing 15,214 names, purporting to be signatures of registered voters of said city and county, asking for the said recall. The number of legal signatures necessary to authorize a recall election in said city and county was and is 11,837. The registrar of voters proceeded thereupon to examine said petition and verify the signatures thereto. After such examination he attached to the petition a certificate stating that there were only 10,219 genuine signatures of registered and qualified electors of San Francisco thereto. Thereupon, within the 20 days allowed for that purpose, a supplemental petition was filed, embracing 120 sections with 5,104 additional signatures. The registrar then proceeded to examine said supplemental petition to verify the signatures thereon, and after completing his examination, ascertained and determined that there were 3,050 genuine signatures thereto. The two petitions taken together have, therefore, 13,269 signatures attached, and if such signatures are genuine and not subject to any other lawful objection, it is the duty of the registrar under the provisions of the San Francisco charter, as amended on January 24, 1917, not only to attach thereto his certificates, showing the result of his examinations, and mail a copy thereof to the persons who filed the petitions, which he must do whether there are enough signatures or not, but also to report the sufficiency of said petitions to the board of election commissioners, and exhibit to said board the certificates attached to said petitions. When he does this it becomes the duty of the board of election commissioners to call an election for a vote on such recall. Charter, art. 11, c. 5, §§ 1 and 2; c. 3, §§ 2 and 3; Stats. 1917, p. 1728.

The answer of the registrar admits the filing of the petition and supplemental petition aforesaid for the recall of Fickert, with the number of signatures as stated; that he has examined and determined as to the genuineness of such signatures, and as to the sufficiency of the two petitions as above stated, and avers that on August 30, 1917, before he had made or attached thereto his certificates of the result, and when he was ready and willing to do so, he was served with an alternative writ of prohibition, issued out of the superior court of the city and county of San Francisco in a proceeding in prohibition, begun by Charles M. Fickert against said registrar, commanding him to refrain from further action upon said recall petitions until the further order of the court; that on August 31, 1917, he was served with a restraining order of said superior court, made in an action begun therein by said Fickert in his own behalf as the officer against whom the recall petitions were filed, and also as a citizen and taxpayer of said city and county, which said order restrained him as such registrar from further action upon said recall petitions, until the hearing of the application for an injunction as prayed for in said action; and that said proceeding in prohibition, and said action for an injunction, are still pending in said superior court, and said alternative writ of prohibition and said restraining order still remain in full force and effect.

The registrar asserts his willingness to proceed with the recall petitions, and states that he believes the superior court was and is without jurisdiction to issue said writ and restraining order, and that he has made and presented to said court his objections to its jurisdiction of said matters, but that said court has not yet determined the merits of said objections.

Although he so believes that said superior court is without jurisdiction, he is unwilling to disregard or disobey its writs and orders in said cases, deeming it more orderly to test the matter in a regular way in a higher court. Therefore he submits to this court the questions whether or not the superior court has jurisdiction and lawful power to issue said writ and make said restraining order, and whether or not the same are void, and declares his readiness to do as this court shall order. Briefs on these questions have been filed in his behalf, and also for Mr. Fickert, and for the filers of said recall petitions.

[1] Under well-established principles of law it cannot be denied that, if the superior court has jurisdiction, upon any possible state of facts, to prohibit or enjoin the registrar of voters from proceeding with such recall petitions in the manner prescribed in the charter, the sufficiency of the petition or complaint upon which that court acts, so far as the facts stated therein are concerned, cannot be inquired into by this court in this collateral proceeding, but that, on the contrary, its writs and orders must be upheld so far as this case is concerned, and can only be questioned when presented by way of appeal after the final judgment of said court in the cause. If that court has jurisdiction, it may decide the wrong as well as the right in the matter, and its decision is binding on all other persons, officers, and courts, save upon an appeal to the court having appellate jurisdiction of the cause. The sole question for our consideration, therefore, is whether or not the court has jurisdiction of the subject-matter of said proceeding in prohibition and of said action for an injunction. For the solution of this question we must look to the provisions of the city charter, the allegations upon which the rights and orders were issued, and the general principles of law applicable to the subject.

The petition for the writ of prohibition and the complaint for the injunction in the superior court contained precisely the same allegations, except that the latter states that Fickert is a citizen and taxpayer of the city and county, and that the board of election commissioners, if said recall proceedings are continued, will immediately call an election to determine the matter of said recall; that the holding of such election would require an expenditure of the public moneys of said city and county to the amount of $50,000; and that for a proportional part thereof said Fickert is liable to be assessed by way of taxation. These additional allegations have no bearing on the question, unless they may give the plaintiff in the injunction suit a status which would enable him to maintain the action for injunction, if the court has jurisdiction of such action, as established by the other allegations of the complaint.

The petition for the writ of prohibition and the complaint for injunction are both predicated upon the theory that a number of the sections of which the petition is composed are false, fictitious, and forged. It is alleged that 33 sections of said petitions, containing 6,125 signatures, are fictitious and fraudulent, and are not entitled to be considered a part of the petition, and that without the said signatures the number remaining of genuine signatures is insufficient to authorize any recall election. The charter requires each section of a petition to be verified by the affidavit of the person who solicited the signatures thereto, to the effect that said section had not been at any time left where persons could sign it out of the presence of the said solicitor, that each signature was made in the presence of said solicitor and is the genuine signature of the person whose name it purports to be, and that the solicitor was at the time a duly qualified voter of San Francisco. Section 2, c. 3, art. 11. The charge of fraud consists of detailed statements alleging in substance that, with respect to each of the sections specified, the statements in each affidavit are untrue, in that the solicitor did not see the persons sign their names; that the signatures were made out of the presence of the solicitor; that many of the signatures are forgeries, the number not being stated; that such section was frequently out of the possession of the solicitor and where it could be signed by persons without the solicitor's knowledge, and, as to some of the sections, that the solicitor was not a qualified voter.

Section 2 of chapter 3, article 11, of the charter, further provides that when a recall petition, signed and verified in the manner specified in that section, is filed, no signature can be thereafter revoked, and that, "unless and until it be proven otherwise by official investigation by the registrar of voters, it shall be presumed that the petition filed conforms to all legal requirements, and contains the signatures of the requisite number of registered voters, and after an election based thereon, the sufficiency of such petition shall not be questioned." The important parts of section 3 relating to this question are as follows:

> "The registrar of voters shall have fifteen days after the filing of such petition, and the same time after receipt by him of a charter amendment petition in which to verify the same and certify the result thereof in the manner provided by this section. Within such time, the registrar of voters shall finally determine from the records of registration whether or not said petition is signed by the requisite number of electors entitled to vote. If any signature be called in question, the said registrar of voters shall mail notice to such purported signer, stating that his or her name is attached to such petition and citing him or her to appear before said registrar of voters forthwith, naming the time and place. Said citation shall inclose a blank affidavit, denying that the person signing such affidavit signed such petition, and said citation shall also contain a statement, that a blank affidavit denying that such person signed such petition, is inclosed, and that if such person does not desire to attend in person to deny his signature he may swear to such affidavit of denial before any officer authorized to take oaths, and mail the same to the registrar of voters, and that if he does not so attend and deny such signature in person, or by making and mailing such affidavit of denial, that his purported signature to such petition will be treated as genuine.
>
> "Unless said purported signer shall appear when cited and deny his signature under oath before said registrar, or his deputy, or unless the registrar of voters shall receive such sworn affidavit of denial of such signature, before the time when by this chapter the said registrar must, as aforesaid, make such final determination, such signature must be counted as genuine."

Section 3 further provides that upon the completion of his examination and determination of the petition and supplemental petition, if there be one, the registrar shall attach to the petitions his certificate showing the result of said examination; shall forthwith mail a copy thereof to the persons who filed the petitions; and that if he finds that the original petition or the original and supplemental petition, as the case may be, contains sufficient legal signatures to require an election to be held thereon, he shall report such sufficiency to the board of election commissioners and exhibit to them such certificates.

[2] With regard to the jurisdiction of the superior court to entertain prohibition against the registrar to prevent him from certifying the result of his completed examination of a recall petition, it is immaterial whether the functions of the registrar in determining the sufficiency of such petition are judicial or ministerial in character. If they are judicial, the charter gives him the power to make the examination and to certify his determination thereon, and in so doing the registrar does not act without jurisdiction, or exceed his jurisdiction, but acts wholly within and in accordance with the powers conferred upon him. Prohibition lies to arrest the proceedings of a tribunal, board, or person, only "when such proceedings are without or in excess of the jurisdiction" of such tribunal, board, or person. Code Civ. Proc. § 1102.

[3] If his duty in that behalf is only ministerial, it is well settled that prohibition is not the proper remedy to stay the action of a ministerial officer. Section 1102, as amended in 1881 (St. 1881, p. 20), purports to authorize prohibition against ministerial acts, but it has long been settled that jurisdiction in prohibition is, by the Constitution, limited to the arrest of judicial proceedings and does not lie to an officer or board exercising purely ministerial functions; that the Legislature cannot enlarge that jurisdiction, and hence that the amendment of 1881 purporting to confer that jurisdiction is invalid. Camron v. Kenfield, 57 Cal. 550; Farmers' Union v. Thresher, 62 Cal. 410; Hobart v. Tillson, 66 Cal. 211, 5 Pac. 83.

[4] In either alternative, therefore, the superior court was without jurisdiction to entertain the proceeding in prohibition to prevent the registrar from certifying the result of his examination, or from reporting the same to the election board, and the alternative writ issued to that effect is void, and does not constitute a defense to the present application for a writ of mandate.

It is proper to say here, with reference to the question of jurisdiction of both kinds, in prohibition and to enjoin, that we have before us no charge of fraud or willful misconduct on the part of the registrar himself. The question whether or not, if he fraudulently attempted to certify that a recall petition was sufficient when, on its face, it lacked the number of signatures required, or was otherwise fatally defective and insufficient, he could be prohibited or enjoined from so doing, is not presented, and we express no opinion upon it.

We now come to the question whether the superior court has jurisdiction to enjoin proceedings upon a recall petition which is sufficient upon its face, on the ground that it has been made to appear so by means of forged signatures of registered voters, or on the ground that the solicitors who circulated it were not qualified voters, or that the signers to the petition did not sign in the presence of such solicitors.

[5] The Constitution confers upon the city and county of San Francisco "plenary authority," subject only to the restrictions contained in article 11 thereof, to provide in its charter for the "recall and removal" of all officers of said city and county. Art. 11, § 8½, par. 4. It follows, therefore, that it is competent for the charter to provide that the question of the sufficiency of a recall petition, or of the legality or regularity of other proceedings in relation thereto, shall be determined by an officer specially authorized to do so, and to exclude the superior court from revising or annulling such determination. See Carter v. Superior Court, 138 Cal. 150, 70 Pac. 1067.

[6] Any person who is elected or appointed to an office is presumed to accept the same with the condition annexed that his tenure of the office may be terminated at any time in the manner prescribed by the charter. Matter of Carter, 141 Cal. 320, 74 Pac. 997.

[7] It must be conceded that, if the superior court has jurisdiction, the officer against whom a recall petition is launched has a sufficient personal interest to entitle him to maintain an action in equity, upon good cause, to enjoin proceedings upon such recall. Although he cannot claim exemption from such removal by recall, he has the right to demand that the proceedings therein do not substantially depart from the mode prescribed, and to insist that the officers do not perpetrate a fraud upon him by acting upon a ficititious petition supported by forged signatures. Matter of Carter, supra. A bill in equity to restrain the proceedings so attempted would seem to be an appropriate remedy to prevent the wrong, if no other tribunal is authorized to do so by the charter.

In discussing the question whether such provisions of a charter or statute are exclusive of the jurisdiction of superior courts in quo warranto or in proceedings to contest an election, Mr. Dillon says that the answer must depend upon the language in which the provisions are couched, and that, "where the legislative intent is clear that the action of the council in contested election cases shall be final, the court will not inquire into election frauds, since the council is the judge of this matter, as of others pertaining to the election." 1 Dill. Mun. Corp. (5th Ed.) § 381. It is obvious that the same principle must apply where the question is whether the superior court retains power to enjoin the holding of such election on account of frauds in proceedings relating to it. The decisions of the courts are not harmonious with respect to the language which will operate to take away the jurisdiction of courts in such matters, some holding that a provision that the council shall be "the judge of the election and qualifications" of its members is sufficient to oust the jurisdiction of courts, and others holding the contrary, but all agree that if the provision is that the council shall be the final judge of such election and qualifications, or words to that effect, no other tribunal can inquire into the matter. 1 Dill. Mun. Corp. (5th Ed.) § 377, and notes.

[8] Upon consideration of the several provisions of the charter of San Francisco, relating to recall petitions, we are satisfied that the intention was to make the registrar the exclusive judge of the sufficiency of such petitions in all particulars, and to exclude the courts from inquiry concerning them. One of the provisions above quoted is that, "unless and until it be proven otherwise by official investigation by the registrar of voters, it shall be presumed that the petition filed conforms to all legal requirements, and contains the signatures of the requisite number of registered voters." This necessarily implies that the registrar has exclusive power to investigate and determine that the presumption is removed, for it declares that such presumption continues until he has so determined. The subsequent provision in section 3 that within the time specified "the registrar of voters shall finally determine from the records of registration whether or not said petition is signed by the requisite number of electors entitled to vote," must be read in connection with the preceding section relating to the same subject. Though not well expressed, its meaning is that the registrar must complete his investigations as to the conformity of the petition to legal requirements, and as to the number of lawful signatures, and thereupon, and within the 15 days allowed, finally determine both propositions, and that his decision is final. If this be its meaning, it excludes jurisdiction of any other court or tribunal to inquire into those questions. The phrase "from the records of registration," following the words "finally determined" in the last passage, must be taken with some qualification. The passage is immediately followed by the provision that if any signature is called in question the registrar must mail notice to the purported signer, appointing a time for hearing him, and that the registrar may take the

evidence or affidavit of such voter on the subject. But that the registrar's decision upon such evidence as he may take is to be final upon both propositions, that is whether the petition conforms to all legal requirements, and whether it contains sufficient genuine signatures, is evident.

[9] The district attorney insists, however, and in this he is supported by the registrar himself, that the charter does not authorize the registrar to take or consider any evidence or facts not disclosed on the face of the recall petition and the records of registration, except the testimony or affidavits of the voters to whom he has mailed the notices as above mentioned. From this he argues that the charter provides no tribunal empowered to inquire into and determine as to forgeries and extrinsic frauds in contravention or evasion of the safeguards prescribed to prevent them, and sufficient upon the general principles of law and equity to nullify the proceedings, and, consequently, that as to such extrinsic frauds, the jurisdiction of equity to prevent injurious fraud remains unimpaired. We do not think the powers of the registrar in this inquiry are so narrow and perfunctory as is thus claimed. He is required to make an official investigation to determine whether or not the petition conforms to "all legal requirements." Among these requirements are that no person not a qualified and registered voter has the right to sign the petition; that such voter must make his signature to the petition in the presence of the solicitor; that no person who is not a qualified voter is competent to solicit signatures, or to make affidavit verifying the same, and that "all signing not made, numbered, and verified substantially in accordance with the requirements" shall be disregarded. The term "registered voter" is defined to mean a qualified voter whose name appears on the records of registration for the current or preceding year. If some of these requirements are wanting as to any signatures to the petition, such signatures should not be counted. If the entire petition, or some sections thereof, are merely fictitious creations by means of clever forgeries, gotten up by persons not authorized to do so, the registrar, upon ascertaining the fact, is authorized to reject or disregard them. He must have authority to inquire into it and to take such evidence as he can obtain in the brief time allowed him for investigation. His powers furnish some protection against frauds and forgeries. They may not be as complete or efficient as those of a court of equity, but the time must of necessity be short, in order to give the recall proceeding any practical value, and a tribunal with this summary jurisdiction is all that the conditions were deemed to allow. A tribunal is provided, and the incumbent has, by taking the office, impliedly agreed to abide by its decisions.

[10] With respect to the genuineness of the signatures, the inquiry is limited to the method prescribed in section 3, that is, to call in the voter himself to state the fact, or to admit the genuineness by his absence or failure to deny the same. We do not agree that the registrar is the only person authorized to "call in question" a signature. The charter does not so declare. The officer who is to be subjected to the ordeal is vitally interested, and he, at least, is entitled to have the voter notified. The mode provided, thus liberally construed, is perhaps as just and as efficient to prevent forgery as any that could be devised. We need not here determine whether other registered voters may not also have the right to call signatures in question. The question is not raised. There is, therefore, a tribunal empowered to determine these matters, and, as the language of the charter makes his jurisdiction exclusive, the superior courts have no power to interfere.

[11] The facts that the registrar may have been mistaken as to his duty, and that he has not properly performed it, do not affect the question of his jurisdiction and power, and they are not material to that question.

The decision of the Supreme Court of Oregon, in State v. Olcott, 62 Or. 277, 125 Pac. 303, cited in behalf of the district attorney, has no proper application to this case. The statute of Oregon expressly authorized an action in equity to enjoin the fraudulent referendum proceedings there involved, and it did not empower any other tribunal or person to investigate or determine as to the sufficiency, validity, or authenticity of the petition and signatures, except by the purely mechanical process of counting the names.

Our conclusion is that the writ of prohibition and the restraining order issued by the superior court are invalid and of no force to prevent the registrar from making and exhibiting to the election board his certificate of the result of his examination.

Let a peremptory writ of mandate issue, as prayed for.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; HENSHAW, J.; LAWLOR, J.

(176 Cal. 386)

STEINBERGER v. CALIFORNIA ELECTRIC GARAGE CO. (L. A. 3808.)

(Supreme Court of California. Oct. 25, 1917. Rehearing Denied Nov. 22, 1917.)

1. DAMAGES 🔑171 — PERSONAL INJURIES CASE—POVERTY OF PLAINTIFFS.

In an action by husband and wife against a garage company for personal injuries to the wife, it was error to admit evidence of plaintiffs' poverty.

2. Municipal Corporations 🔑706(6) — Right to Tow Automobile—Question of Fact.

A garage company had a right to tow an automobile on a street by another, provided it exercised due care for the safety of others, what is due care being a question for the jury under the circumstances of the particular case.

3. Municipal Corporations 🔑706(8) — Automobile Accident—Instruction.

In an action against a garage company by husband and wife for injuries to the wife when she tripped over the rope with which the company was towing an automobile by another, it was error to instruct that the extending of the rope between the two cars placed a burden on the company to warn others of the obstruction, since whether or not such warning was necessary depended upon the surrounding conditions.

4. Municipal Corporations 🔑706(8)—Automobile Accident—Instruction.

In such action it was error to instruct that the wife, in the exercise of due care in crossing between the two cars, was not bound by the presence of the rope, unless she observed it, or it was called to her attention, since whether or not she was negligent in not seeing it was an issue raised by defendant, which it had a right to have decided by the jury.

5. Trial 🔑296(4, 5) — Cure of Error — Instructions.

Other instructions declaring that the towing of an automobile by a rope is in itself lawful, if due care is exercised, did not cure the error.

6. Witnesses 🔑383—Impeachment—Testimony as to Collateral Fact.

Where the driver of the rear car denied his imputed declaration to the wife, while taking her home, that four other persons had tried to cross between the two machines the wife's contrary testimony was as to a collateral fact, which could not be used to impeach the driver.

7. Negligence 🔑125—Proof—Similar Instances.

Negligence, or its absence, cannot be proved by similar instances.

8. Damages 🔑216(7) — Instruction — Personal Injuries—Future Suffering.

In an action for personal injuries to a wife, an instruction on the measure of damages that the mental worry, grief, and humiliation, if any, which one suffers, or may suffer, by reason of his physical injuries, are, in contemplation of law, component parts of his mental suffering, for which damages may be awarded, was not erroneous as permitting recovery for future suffering which is not certain to occur, the preceding portion of the instruction having stated that the award must be for mental suffering which the wife was certain to suffer in the future.

9. Municipal Corporations 🔑706(8) — Degrees of Negligence—Instruction.

In an action for personal injuries in tripping over a rope whereby an automobile was towed, an instruction that contributory negligence would not bar recovery, if so slight as not to amount to want of ordinary care, was inaccurate and confusing, since the law of California does not recognize degrees of negligence in such cases.

10. Negligence 🔑82 — Contributory Negligence—Definition—Statute.

"Negligence" is the failure to exercise ordinary care; any want on plaintiff's part of the care which is appropriate to the circumstances is negligence, and, by Civ. Code, § 1714, will prevent recovery, if it be one of the proximate causes of the injury.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Negligence.]

Department 1. Appeal from Superior Court, Los Angeles County; E. P. Unangst, Judge.

Action by Clara B. Steinberger and J. W. Steinberger against the California Electric Garage Company, a corporation. From a judgment for plaintiffs and an order denying new trial, defendant appeals. Judgment and order reversed.

O'Melveny, Stevens & Milliken and Walter K. Tuller, all of Los Angeles, for appellant. G. P. Adams and J. G. Rossiter, both of Los Angeles, for respondents.

LAWLOR, J. The plaintiffs, husband and wife brought suit to recover for personal injuries to the wife, alleged to have been caused by the negligence of defendant. The jury returned a verdict for plaintiffs for $5,400. From the judgment and from an order denying a new trial defendant appeals.

The undisputed facts are that on the evening of September 10, 1910, one of the defendant's employés was driving an electric automobile of defendant through the business district of Pasadena, and towing a gas car guided by another servant of defendant, one Knight. Both cars, displaying the usual lights, stopped at a well-lighted corner, where the plaintiff Clara B. Steinberger was about to cross. The machines started up again, traveling at about three miles an hour, when Mrs. Steinberger attempted to pass in the rear of the electric machine and in front of the gas car. She tripped over the tow rope and fell. It is for the injuries alleged to have been sustained by reason of this fall that the plaintiffs sue. Mrs. Steinberger testified that she did not see the rope between the two machines, and that the distance between them was about 20 feet, giving her ample time to pass between them because of the slow speed at which the cars were traveling. There was evidence on behalf of the defendant that the distance between the two cars was only 12 feet. Knight, the driver of the rear automobile, testified that he saw Mrs. Steinberger about to cross in back of the first car and called to her to look out for the rope. The driver of the first machine and Miss Parmalee, who was riding with Knight, stated that they heard him give the warning, but could not repeat what he had said. Mrs. Steinberger testified that she did not hear any warning. It was not denied that before the accident Mrs. Steinberger was a strong, healthy woman, able to do all her housework and care for her family, and that at the time of the trial she had lost a great deal of weight, was nervous and anemic, and unable to do much of her housework. It was also shown that she had had a miscarriage after the accident, but defendant denied that the miscarriage or weakened condition was due to the fall, and introduced some expert evidence to that effect.

The first point made by appellant is that Mrs. Steinberger was permitted, over objection, to testify that neither she nor her husband had any property except their household goods and $200 in money, and that her husband was a motorman who—

> "drew a salary of between $90 and $95 a month, and our family consisted of ourselves and our three minor children, the eldest of which was nine at the time of the accident, and the youngest under two. I suffered to a great extent in being disabled to do my household duties and looking after the children. I was worried about the fact of them—knowing they had to be brought up and educated in the right way, so that they could go on through life, and I worried a great deal about that, and my husband being employed just by the day, not knowing what day he would lose his job, not knowing how long he would hold it, put me where I worried over that to a great extent, and I had to employ help all along, and my children have been deprived of the pleasures of other children because I have been disabled and could not look after them, and could not show them any attention like a mother ought to show her children, on account of me being sick, and nervous all the time."

[1] Defendant claims it was error to admit evidence of poverty. This contention must be sustained. It seems to be the rule, supported by a long line of decisions in this state and elsewhere, that evidence of the plaintiff's poverty is inadmissible in an action to recover damages for personal injuries. Green v. Southern Pac. Co., 122 Cal. 563, 55 Pac. 577 [citing Mahony v. S. F., etc., Ry. Co., 110 Cal. 471, 476, 42 Pac. 968, 43 Pac. 518; Malone v. Hawley, 46 Cal. 409; Chicago, etc., R. R. Co. v. Johnson, 103 Ill. 512; Pennsylvania Co. v. Roy, 102 U. S. 451, 26 L. Ed. 141; Central R. R. Co. v. Moore, 61 Ga. 151]; see, also, Story v. Green, 164 Cal. 768, 770, 130 Pac. 870, Ann. Cas. 1914B, 961.

Referring to such testimony, the court said in Green v. Southern Pacific Co., supra:

> "Its only effect and inevitable tendency was undoubtedly to excite the sympathies of the jury and improperly influence their finding upon the question of damages. Such evidence is never admissible in a case of this character, for the very simple reason that the extent of a defendant's responsibility for the results of his negligence is not to be measured by the condition as to affluence or poverty of the injured party at the time of suffering the injury, since that is a condition for which the defendant is in no way responsible."

The respondents seek to justify the introduction of the evidence in the case at bar by the claim that it was offered as a part of the showing that plaintiff suffered "mental worry." The case of Merrill v. Los Angeles G. & E. Co., 158 Cal. 499, 111 Pac. 534, 31 L. R. A. (N. S.) 559, 139 Am. St. Rep. 134, is relied on to support the ruling admitting this evidence. In that case the court held that the jury might consider worry as a component part of mental suffering for which damages may be awarded. In the discussion of this question in the opinion, the court, in illustrating varying conditions which may enhance or diminish the extent of such suffering, refers to the "nervous temperament of the individual, his ability to stand shock, his financial condition in life, whether dependent upon his own labor or not, the nature of his injuries, whether permanent or temporary, disfiguring and humiliating, and so through a long category, the enumeration of which it is unnecessary here even to attempt." From this language it is sought to draw the conclusion that every fact which might bear upon these considerations, or upon the innumerable other factors of worry which might be imagined may be given in evidence. We think the decision was not intended to have so far-reaching an effect. The single question under discussion was the correctness of an instruction which told the jury that, in estimating damages, they might consider mental worry caused by the injuries. In holding the instruction to be correct, the learned justice writing the opinion saw fit to explain the meaning of the term "mental worry" by a reference to some of the circumstances which might produce such a state of mind. The language used in this regard, while appropriate in an opinion, was not intended to declare a rule of law suitable for incorporation in an instruction to a jury. Nor yet was it intended to declare that direct evidence of all of the matters thus stated by way of illustration was proper to be presented to a jury. On strictly logical grounds it is, perhaps, difficult to say why a plaintiff should not be allowed to show every fact connected with his situation in life. One can conceive of innumerable factors in the life of every individual, and of his relation to others, which might be thought to have some relevance to the extent of worry which would result in case of an injury to him. But logical relevancy is not the sole test of the admissibility of evidence. Certain kinds of evidence, although material to the issue, are excluded because of their tendency to mislead, confuse or prejudice the jury. We think that proof of the poverty of the plaintiff in personal suits is a fair example of the danger of injustice through the introduction of evidence of this kind, which has always, and we think properly, been regarded as outweighing the advantages to be derived from permitting it to be offered. To allow such evidence to go in under the plea that it forms an element to be considered in weighing the worry or other mental suffering occasioned to the plaintiff would be to open the door to its admission in all cases of this kind. Every person sustaining physical injuries will suffer mentally. If, under the guise of showing the extent of such mental suffering, the plaintiff may show his poverty, and consequent worry, he may on the same ground introduce in evidence a mass of circumstances which in themselves would not be proper elements of damage because too remote or speculative, bringing them in by the claim that he suffered increased worry by brooding over these extraneous factors. To allow such evidence at all is to invite parties to actions of this character to confuse the inquiry with an incalculable medley of collateral issues. We think no injustice will be done, and great injustice may be prevented, by adhering to the rule declared in Green v. Southern Pacific Co., and the other cases cited above.

Defendant complains of the following instruction:

> "When the defendant's employés extended the rope between the two moving automobiles it obstructed a space which ordinarily is clear, and is measured as a passage by pedestrians with an eye only to the extent of the space. The fact that this device was necessary to move the rear automobile would not free the defendant from the imputation of negligence. If, as a consequence of such device, it obstructed the street, it was bound to observe due care to apprise or warn other users of the street of the obstruction. The defendant's employés, as they approached this cross-walk were bound to foresee that pedestrians might be there intending to attempt a passage between these automobiles. And you are instructed that the plaintiff, Mrs. Steinberger, had a right to suppose that there was no obstruction by rope or other like attachment of the clear space between the two automobiles thus equipped, save so far as she observed it or her attention was directed to it, if such was the case."

It is urged that this is an instruction on the facts, and prejudicial error. Considering the state of the evidence, this contention must be sustained.

[2] The defendant clearly had a right to tow its machine on the street, provided it exercised due care for the safety of others. What is due care is a question for the jury, based upon the facts and circumstances of the particular case.

[3] It was therefore error to tell the jury that the extending of the rope between the two automobiles placed a burden on the defendant to warn others of the obstruction. Whether or not such warning was necessary depended upon the surrounding conditions, the presence or absence of sufficient light at the crossing, the size and color of the rope, and other pertinent facts in the possession of the jury.

[4] It was also error to tell the jury that Mrs. Steinberger, in the exercise of due care in crossing between the two vehicles, was not bound by the presence of the rope unless she observed it or it was called to her attention Whether or not Mrs. Steinberger was negligent in not seeing the rope was an issue raised by the defendant, and it had a right to have such matter decided by the jury. On the issue of negligence of the defendant and contributory negligence of Mrs. Steinberger, the evidence as set out above is not so overwhelming in favor of the plaintiffs that we can hold the giving of the instruction not prejudicial.

[5] Other instructions declared that the towing of an automobile by a rope is in itself lawful, if due care is exercised, but did not cure the defect in the charge that due care required a warning to be given, regardless of the contingency that the jury might find such warning unnecessary in this particular case.

[6] Other points are made by appellant which should be noticed. The witness Knight, who had driven defendant's rear car, was asked on cross-examination whether he had not stated to Mrs. Steinberger while taking her home after the accident that four other persons had tried to cross between the two machines before they reached the corner where Mrs. Steinberger was injured. Upon his denying the imputed declaration Mrs. Steinberger was recalled and over objection testified to the alleged conversation. The testimony thus elicited was as to a collateral fact which could not be used to impeach Knight. The plaintiffs could not have brought it out as independent evidence, because its only tendency was to show that others could not see the rope, and that Mrs. Steinberger was therefore not negligent in not seeing it, or that the fact that others did not see it should have indicated to Knight that some warning was necessary.

[7] Negligence, or the absence of it, cannot be proved by similar instances (Martinez v. Planel, 36 Cal. 578, and cases cited), and the necessity of a warning to Mrs. Steinberger could only be determined by the surrounding circumstances in her particular case. The effect of permitting such impeachment might have been to discredit the other testimony of Knight, who stated that he had given proper warning, and must therefore be regarded as prejudicial.

[8] On the measure of damages the jury were instructed:

> "In respect of the amount of damages to be awarded to the plaintiff, in case you find a verdict in her favor, I instruct you that in cases of this sort compensation is the measure of damages, and may be awarded for detriment resulting after as well as before the commencement of this action, or certain to result in the future, and may include * * * Fourth. Such reasonable sum as you may award her for the pain and physical and mental suffering, if any, resulting from her said injuries, and which you may find and believe from the testimony she is certain to suffer in the future."

The court then continued:

> "And I further instruct you that the mental worry and distress and grief and mortification and humiliation, if any, which one suffers, or may suffer, by reason of his physical injuries, are in contemplation of law component parts of his mental sufferings for which damages may be awarded. * * *"

It is of this latter portion of which appellant complains on the theory that it permits recovery for future suffering which is not certain to occur. Melone v. Sierra Ry. Co., 151 Cal. 113, 91 Pac. 522, declares the rule as urged by appellant, but we do not think that the instruction complained of violates this rule. It merely explains to the jury what mental suffering comprehends, and that it is one of the elements to be considered. It cannot be taken as an instruction that plaintiffs can recover for suffering which might occur, the preceding portion having already stated that the award must be for mental suffering which Mrs. Steinberger "is certain to suffer in the future."

[9] The defendant's contention that the court's instruction No. 8 is objectionable must be sustained. The last two paragraphs of that instruction seem to convey the idea that, even though the plaintiff was guilty of contributory negligence, she is not barred from a recovery if her negligence was slight. The law of this state does not recognize degrees of negligence, at least in cases of this character.

[10] Negligence is the failure to exercise ordinary care. Any want on the part of the plaintiff of the care which is appropriate to the circumstances is negligence, and, if it be one of the proximate causes of the injury, will prevent a recovery. Civ. Code, § 1714. The instruction in question tells the jury that contributory negligence will not bar a recovery, "if it be so slight as not to amount to a want of ordinary care." This is inaccurate and confusing. The term "contributory negligence" in itself implies a want of ordinary care. If there was such a want, it matters not how slight might have been the deviation from the required standard. If the conduct of the plaintiff did not amount to a want of ordinary care, it did not constitute negligence at all. To speak, therefore, of negligence which is so slight as not to amount to a want of ordinary care is to use terms which are self-contradictory.

Defendant also complains that the trial court erred in giving other instructions requested by plaintiffs and in refusing to give certain instructions submitted by defendant. We find, however, that, while some of the instructions given were not very lucid, this defect was cured by other instructions which did state the law clearly. The defendant's rejected instructions had either been embodied in those given or were not required. This also applies to the additional instructions proposed by the defendant which the court refused to consider because not submitted within the time fixed by the rules of the superior court. Moreover, we have examined these instructions and cannot say that such refusal was an abuse of discretion.

For the errors above indicated the judgment and order denying a new trial are reversed.

We concur: SHAW, J.; SLOSS, J.

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34 Cal. App. 641

PEOPLE v. MILLER. (Cr. 688.)

(District Court of Appeal, First District, California. Sept. 17, 1917.)

Indictment and Information 🔑161(5) — Amending Complaint—Prejudice.

Where the original information purported to charge a public offense, and the amended information filed did not charge an offense different from that attempted to be stated in the original information, it did not prejudice defendant or violate Pen. Code, § 1008, allowing amendments to an information, unless the amendment charges an offense not shown by the evidence taken at the preliminary examination, or not charged in the original.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

John Miller was convicted of an offense, and from such judgment and an order denying his motion for new trial, he appeals. Affirmed.

Henry Brickley, of Merced, and Frank Curtin, of Fresno, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

PER CURIAM. It is only necessary to say in this case that the original information purported to charge a public offense, and that the amended information as filed, after the request of the district attorney and upon the permission of the court being given, did not charge an offense different from that attempted to be stated in the original information. Consequently the filing of the amended complaint neither prejudiced the defendant nor contravened the provisions of section 1008 of the Penal Code. See People v. Rippe, 32 Cal. App. 514, 163 Pac. 506.

The record does not sustain the contention of counsel for the defendant that the trial court refused to permit him to show upon cross-examination of the complaining witness that the latter was so drunk on the night of the assault with which the defendant is charged as not to be able to identify the defendant as one of the persons who assaulted him. That is all we think need be said as to that assignment of error. No other point in the case requires discussion, and we are satisfied that the evidence sustains the verdict and judgment.

The judgment and order denying defendant's motion for a new trial are affirmed.

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34 Cal. App. 695

SWARTZ v. FILIPELLO et al. (Civ. 2134.)

(District Court of Appeal, First District, California. Sept. 19, 1917. Rehearing Denied by Supreme Court Nov. 15, 1917.)

1. Release 🔑34 — Payment of Attorney's Fees—Inference.

In an action by guardian ad litem for personal injuries, defendants setting up that plaintiff, on order of the probate court, compromised and settled with defendants an action for damages brought by her general guardian two years before, the fact that the release executed by the general guardian to defendants made no mention of the payment of attorney's fees afforded no inference that such fees were not paid.

2. Release 🔑34—Receipt of Payment by Guardian—Inference.

That the terms of the release were broad enough to cover any claim that the guardian might have had individually gave rise to no inference that the payment for which the release was given was for any other purpose than compliance with the terms of the compromise sanctioned by the probate court, or that the guardian received any part of it individually.

3. Release 🔑55—Release as Defense—Invalidation by Fraud — Burden of Proof.

In an action by an infant by guardian ad litem for personal injuries, wherein defendants set up that plaintiff, on order of the probate court, compromised with defendants an action for damages brought by her general guardian two years before, the burden was on plaintiff, claiming that the release was procured by fraud, to show that she was misled to her injury, amounting to a legal fraud.

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Action by Mary Swartz, by Mary Swartz, her guardian ad litem, against E. A. Filipello and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Beggs & McComish, of San Jose, for appellant. B. A. Herrington, Fry & Jenkins, Geo. W. Waldorf, Jas. P. Sex, and C. M. Lorigan, all of San Jose, for respondents.

KERRIGAN, J. This is an appeal from a judgment in favor of the defendants in an action brought by the plaintiff through her guardian ad litem, for personal injuries sustained by her through the alleged negligence of the defendants. The single question involved on this appeal is whether or not the plaintiff, having upon an order of the probate court, after a hearing, compromised and settled with the defendants an action for damages brought by her general guardian some two years prior to the commencement of this action, may maintain this action without restoring, or offering to restore, the money received in such settlement, both actions being for the same injuries. At the trial of the case, after the plaintiff had introduced evidence tending to support the allegations of the complaint, the defendants introduced the petition which had been filed in said probate department for leave to compromise and settle the former action. They also introduced the order of that court, authorizing such settlement upon payment to the guardian of Mary Swartz of the sum of $1,000 and of plaintiff's attorney's fees and costs in that action. Over wholly untenable objections of the plaintiff the defendants also introduced in evidence the contract of settlement entered into pursuant to said order of court, under the terms of which said guardian, in "consideration of the payment to him of $1,000 * * * in his individual capacity and as the guardian of the person and estate of Mary Swartz, a minor, does hereby acknowledge full payment and satisfaction of each and every claim or demand of damages, or otherwise, had or claimed by him, either individually or as guardian of the person and estate of Mary Swartz, a minor, or by the said Mary Swartz, a minor against" the defendants.

Plaintiff claims that under the law in this state neither the return of the consideration, nor offer thereof, received under a settlement or release in an action obtained by the fraud of the other party thereto, is a condition precedent to the maintenance of another action for the same injuries; and she cites Meyer v. Haas, 126 Cal. 560, 58 Pac. 1042, to sustain that position. Assuming the principle to be as broad as asserted by plaintiff, the fact is that she made no claim of any kind in the trial court that any fraud or deceit had been practiced upon her in the settlement of her claim. The objection to the introduction of the agreement of release contained no intimation, as appears to be suggested, that the plaintiff intended to impeach the release because of fraud. Moreover, after the release was admitted in evidence the plaintiff made no offer nor any attempt to explain the circumstances under which the release was obtained. And now, although at the trial she objected to the admission of the contract of settlement, her only claim that fraud was perpetrated upon her is based upon certain language contained in that instrument, to the effect that the $1,000 was received in payment of every demand by the minor and by her guardian as such and individually. Upon that language she argues (the contention apparently being made in this court for the first time) that it must be assumed that she did not get the whole of the $1,000 as directed by the order of court, but that part of it by the connivance of the defendants was paid to the guardian individually. it is also claimed that the receipt and release fails to show that the defendants paid the fees of the plaintiff's attorneys in that action as provided in the order authorizing the compromise and settlement.

[1-3] In our opinion the fact that the release makes no mention of the payment of the attorney's fees affords no inference that they were not paid; and that its terms are broad enough to cover any claim that the guardian might have had individually was doubtless due to that tendency to prolixity that many attorneys indulge in in drafting papers of this character, and certainly gives rise to no inference that the payment for which the release was given was for any other purpose than compliance with the terms of the compromise judicially sanctioned, or that the guardian received any part of it individually. In any event the release is susceptible to a construction showing that it was fair and free from trick or artifice prac-

ticed by any one connected with the transaction. This being so, and the burden being upon the plaintiff, if she made any such claim, to show that she was misled to her injury, amounting to a legal fraud, it follows, in the absence of such showing, that the action of the trial court in instructing the jury to bring in a verdict in favor of the defendants was correct.

The judgment is therefore affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

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34 Cal. App. 681

TORREY v. REFRIGERATION PLANTS MFG. CO. (Civ. 1888.)

(District Court of Appeal, Second District, California. Sept. 18, 1917.)

1. PRINCIPAL AND AGENT ⚷89(8)—ACTIONS FOR COMPENSATION—SUFFICIENCY OF EVIDENCE.

Evidence *held* sufficient to support finding of trial court that at the time of settlement between plaintiff and defendant, his employer, of a dispute as to wages, plaintiff's wages were reduced from $175 to $131.25 per month, and that after settlement plaintiff continued in defendant's employ at the latter salary.

2. APPEAL AND ERROR ⚷1011(1)—FINDINGS OF FACT—CONCLUSIVENESS.

Where there is a conflict in the evidence as to salary at which plaintiff was employed by defendant, findings of trial court will not be disturbed.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by L. L. Torrey against the Refrigeration Plants Manufacturing Company. From judgment for plaintiff, defendant appeals. Affirmed.

E. R. Young, of Los Angeles, for appellant. Shirley E. Meserve and W. A. Sumner, both of Los Angeles, for respondent.

JAMES, J. The appeal in this case was taken from a judgment rendered in favor of the plaintiff. It is claimed that the evidence is insufficient to support certain findings, made by the trial judge. Plaintiff, during the latter part of the year 1913, was employed by the defendant. The general character of his employment was that of salesman of stock of the defendant corporation and salesman of certain machines manufactured by it. It seems to be admitted that, at least for a short period during the early part of his employment, he was to receive the sum of $175 per month. Later, and before January 1, 1914, defendant reduced the compensation of all of its employés. If the reduction affected the compensation of the plaintiff, plaintiff would be entitled to receive, instead of $175 per month, the sum of $131.25 per month. On or about March 16th, settlement not having been made with the plaintiff, the manager of the defendant adjusted the account for compensation of plaintiff by agreeing to pay him $500 in cash and $500 thereafter. In making up this account or settlement of the wages of plaintiff for that period of time subsequent to the date when the general reduction was made in employés' salaries, the sum of $131.25 per month was allowed to the plaintiff. Plaintiff continued to work for the defendant for five months subsequent to March 16, 1914. At the end of that time he brought this suit to recover unpaid balance due on the settlement made March 16th; also to recover wages at the rate of $175 per month for the time subsequent thereto. The trial judge made a finding that plaintiff was entitled to recover for the time subsequent to March 16th at the rate of $131.25. This finding is attacked as being wholly unsupported by the evidence. Plaintiff on his side testified that he never agreed to the reduction being made in the amount of his compensation, to wit, from $175 to $131.25, but that the March settlement was agreed to by him as a compromise and because the defendant at that time claimed, through its manager, that business was poor and it was lacking in funds. On the other hand, the manager of defendant testified that it was his understanding prior to March 16th that for the most part the plaintiff was working on a commission basis which had been agreed to be 20 per cent. of the amount of sales. He testified that after making the settlement of March 16th he informed the plaintiff that, if the plaintiff continued to work for the defendant, he would be paid upon a commission basis only; that no fixed salary would be allowed. Plaintiff denied that any such statement was made, and testified that after the terms of the settlement were agreed upon he was told to go back to work, and nothing was said further as to what his compensation would be. He insisted and repeated in the course of his testimony that he claimed $175 per month for the whole time. Appellant's counsel contends that under this state of the case the court should either have found that the salary agreed to be paid to plaintiff was $175 per month for the five months subsequent to March 16th, or should have found, agreeable to the contention of defendant's manager, that the compensation of plaintiff after March 16th was to be determined wholly upon a commission basis. We think there was evidence to sustain the finding of the court as made. The mere statement of the plaintiff that he claimed $175 per month was a conclusion on his part as to what he was legally entitled to. The trial court had to determine from the facts as to whether there had been a reduction made in the plaintiff's compensation from $175 per month to $131.25, and also as to whether plaintiff was working on a commission or a salary basis after March 16th. There was evidence sufficient upon which the court could find that the reduction was made in the compensation of plaintiff prior to March 16th; and if the statement of the plaintiff was true (as the court evidently concluded) that after the settlement of March 16th was made he was told to go back to work and nothing was said as to what his future compensation should be, the inference would be justified that the plaintiff was then continuing in the employ of defendant at the reduced salary. There was sharp conflict in the evidence introduced on all the material issues involved. The matter of resolving the facts was one exclusively within the province of the trial judge. We think there was evidence to sustain the findings.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

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34 Cal. App. 642

PEOPLE v. MAR FOW. (Cr. 692.)

(District Court of Appeal, First District, California. Sept. 17, 1917.)

HOMICIDE ⚿30(1)—PRINCIPAL—LIABILITY.

Where defendant and three others pursued and killed deceased, defendant firing a shot which inflicted a serious though not necessarily fatal injury, defendant is, under Pen. Code, § 31, declaring that all persons concerned in the commission of a crime are principals, guilty of murder, for he rendered most effective aid to the one who fired the fatal shot, and it is unnecessary to show any connection or conspiracy between deceased's assailants.

Appeal from Superior Court, Alameda County; F. B. Ogden, Judge.

Mar Fow was convicted of murder in the first degree, and, from a judgment and order denying new trial, he appeals. Affirmed.

Snook & Church, of Oakland, for appellant.
U. S. Webb, Atty. Gen., for the People.

PER CURIAM. The defendant was convicted of murder in the first degree and sentenced to imprisonment for life, and appeals from the judgment and from an order denying his motion for a new trial.

The only point seriously urged for a reversal of the case is that the evidence is insufficient to establish, so as to justify the verdict of the jury, either that the defendant killed the deceased or aided and abetted in said killing.

The person killed was of Chinese nationality, as is also the defendant and two other persons who with the defendant pursued the deceased across a public street in the city of Oakland, firing revolvers at him, as the result of which attack he died. Four gunshot wounds were inflicted upon the deceased, of which two with 38-caliber and one with a 32-caliber bullet. One of the 38-caliber bullet wounds was necessarily fatal, and the wound made by the 32-caliber pistol, although serious, was not necessarily a fatal wound. The defendant, pursued and apprehended immediately after the killing, had on his person a 32-caliber pistol, of which at least one of its charges had been fired. The appellant's argument is that, since the fatal wound was caused by a 38-caliber bullet, and it is not shown that the defendant fired any but a bullet of 32-caliber, he cannot lawfully be convicted as a principal in the crime unless there be evidence that the killing was the result of a conspiracy in which he participated, or unless the evidence shows that he aided in the crime of his fellow countrymen.

Section 31 of the Penal Code provides that all persons concerned in the commission of a crime are principals.

In the present case there is much evidence from which the existence of a conspiracy between the defendant and his two companions to kill the deceased might justly be inferred, as, for instance, that the defendant and his companions were acting together in their pursuit of the deceased, and that the murder occurred during the existence of and as part of a tong war between two associations of one of which the deceased was a member, and to the other of which the defendant—and presumably his companions—belonged; and that the defendant immediately after the killing fled to his tong's headquarters. But we think it is not necessary to rely on this principle of law to uphold the verdict and judgment, for we think the facts outlined as to the defendant's participation in the offense clearly amount to an aiding and abetting. The wound inflicted by the 32-caliber bullet was of so serious, although not necessarily fatal, character that the jury were entitled to infer that it had contributed to the death of the deceased. The common pursuit of the deceased by the three persons intent upon his murder was in itself aid of the most effective character one to the other, as much so, in our opinion, as if one of them had seized their fleeing victim and held him down while the other two killed him. The cases cited by the appellant from other jurisdictions which appear to take a different view of the character of the common action of two or more persons in a simultaneous attack upon another do not commend themselves to us as based on sound reasoning. We prefer to follow a case decided in our own courts, People v. Petruzo, 13 Cal. App. 569, 581, 110 Pac. 324, 329, in which it was said:

> "It certainly would be a reproach to the law if it countenanced the doctrine that where A. and B. deliberately and unlawfully fire at C. with intention to kill him, and one shot takes effect causing his death, but it is uncertain whether A. or B. fired it, neither can be convicted of murder unless a conspiracy should be shown between them. In any rational view, each must be considered as aiding and abetting the other, and both responsible for the homicide."

⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

It is evident that the same reasoning applies to a case where both fire at the deceased, and it is apparent whose shot proved fatal.

For the reasons given, the contention of the appellant must be disallowed, and the judgment and order affirmed. It is so ordered.

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34 Cal. App. 675

FIRESTONE TIRE & RUBBER CO.
v. C. E. HERRICK, Inc.
(Civ. 1811.)

(District Court of Appeal, First District, California. Sept. 18, 1917.)

1. Corporations 🔑513(4)—Actions—Pleading—Authority of Agent—Sufficiency.

In an action against a corporation on money orders accepted by it, the allegation that defendant in writing accepted the orders and promised to pay sufficiently alleged that the acceptance was by a duly authorized agent; the fact of the authorized agency being evidence, and not the ultimate fact to be proved.

2. Corporations 🔑521—Actions—Judgments—Sufficiency of Findings.

In an action against a corporation on money orders accepted by it, a finding that defendant in writing accepted the orders and promised to pay them was sufficient, and it was not necessary to find that the orders were properly indorsed and executed by a duly authorized officer or agent of the corporation acting for the corporation.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by the Firestone Tire & Rubber Company against C. E. Herrick, Incorporated. Judgment for plaintiff, and defendant appeals. Affirmed.

Jas. P. Sweeney, of San Francisco, for appellant. Henry A. Jacobs, of San Francisco, for respondent.

PER CURIAM. This is an appeal by defendant from a judgment in favor of plaintiff for the sum of $376.92, the amount of two orders for the payment of money accepted by defendant, together with interest and costs. But two points are urged in support of the appeal, neither of which can be seriously entertained.

[1] The first is the alleged error of the trial court in overruling defendant's demurrer to the complaint. It is claimed that the complaint failed to state a cause of action for the reason that it contained no allegation "that the defendant corporation by its duly authorized officer or agent indorsed the acceptance on the instrument sued upon as agent or officer for the corporation." But it is alleged directly in the complaint as to each of the two orders in question that "defendant in writing accepted said order and promised to pay the same." The ultimate fact to be alleged and proven was the acceptance of the orders by the corporation; and while the proof of such an allegation would consist in showing that the person executing the acceptance was thereunto duly authorized, no averment of such authorization was necessary in the complaint. As was said in the case of Topeka Capital Co. v. Remington Paper Co., 61 Kan. 6, 59 Pac. 1062:

> "The acts of a corporation are necessarily done through its agents. But a cause of action against a corporation, founded on the acts of its agents, should be alleged directly against the corporation itself. The acts constituting the cause of action should be alleged as the acts of the corporation. It is not necessary to aver that they were done by and through the authorized agents of the corporation."

The trial court did not err in overruling the defendant's demurrer.

[2] The second and closely related point urged by the appellant is that the findings do not support the judgment because there is no finding to the effect "that the orders were properly indorsed and executed by a duly authorized officer or agent of the corporation acting for the corporation." The court, however, does find as to each of the orders in question "that said defendant in writing accepted said order and promised to pay the same." This was the ultimate fact to be alleged and found, and it was not necessary for the court to find the probative fact of the due authorization of the person acting for the corporation, since there was no such issue in the case. Moreover, in its cross-complaint the defendant admitted the acceptance of these orders. The second contention of the appellant must therefore be rejected.

Judgment affirmed.

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34 Cal. App. 686

PEOPLE v. DUEBER. (Cr. 394.)

(District Court of Appeal, Third District, California. Sept. 19, 1917.)

1. Criminal Law 🔑1202(5)—Sale of Drugs—Prosecution—Sufficiency of Verdict—Statute.

Under Pen. Code, § 1158, providing that, whenever the fact of a previous conviction of another offense is charged, the jury, if they find a verdict of guilty, must also find whether or not defendant has suffered such previous conviction, in a prosecution for violating St. 1907, p. 124, § 8, as amended, by selling, giving away, or having in possession cocaine or morphine, where the information charged two previous convictions of defendant of violating such section, a verdict of guilty which did not specifically find on the alleged previous convictions of defendant was incomplete and insufficient to authorize judgment thereon; defendant, when arraigned, having made no plea or answer to the previous convictions.

2. Criminal Law 🔑1202(5)—Verdict—Finding on Allegation of Prior Conviction—Statute.

In the cases to which Pen. Code, § 1158, is applicable, where the jury fails to make such specific finding, the omission is fatal to the judgment, unless the subsequent crime charged is itself one for the commission of which it is within the jurisdiction of the superior court to impose punishment.

3. Criminal Law 🔑1202(5)—Verdict—Finding on Allegation of Prior Convictions—Statutes.

Pen. Code, § 1158, providing that whenever the fact of a previous conviction of another offense is charged, the jury, if they find a verdict of guilty, must also find whether or not defendant has suffered such previous conviction, was not intended to apply exclusively to sections 666, 667, prescribing aggravated penalties in cases of prior convictions of certain offenses.

Appeal from Superior Court, San Joaquin County; D. M. Young, Judge.

Byron Dueber was convicted of an offense, and from the judgment and an order denying him new trial, he appeals. Judgment and order reversed.

Walter F. Lynch, of Stockton, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

HART, J. The defendant was, by a jury, in the superior court of San Joaquin county adjudged guilty of violating section 8 of an act of the Legislature prohibiting, under certain specified conditions, the sale of poisons. See Stats. 1907, p. 124, Stats. 1909, p. 422, Stats. 1911, p. 1106, Stats. 1913, p. 692, and Stats. 1915, p. 863. He appeals from the judgment and the order denying him a new trial.

Section 8 of said act, as amended by the Legislature of 1913 (Stats. 1913, pp. 692, 695, supra), provides that it shall be unlawful for any person, etc., to sell, furnish, give away or offer to sell, furnish, or give away, or to have in their or his possession certain specifically named poisons, including cocaine and morphine, or any of the salts, derivatives, or compounds thereof, or any preparation or compound containing any of the "foregoing substances" or their salts, derivatives or compounds, excepting upon the written order or prescription of a physician, dentist, or veterinary surgeon, licensed to practice in this state, etc. "Such order or prescription," proceeds said section, "shall be permanently retained on file by the person, firm or corporation who shall compound or dispense the articles ordered or prescribed and it shall not be again compounded or dispensed if each fluid or avoirdupois ounce contains more than * * * 1 grain of morphine * * * or 1 grain of cocaine, * * * excepting upon the written order of the prescriber for each and every subsequent compounding or dispensing."

It is further provided by said section that the foregoing provisions thereof "shall not apply to sales at wholesale by jobbers, wholesalers, and manufacturers to pharmacies, as defined in section 1 of an act entitled 'An act to regulate the practice of pharmacy in the state of California and to provide a penalty for the violation thereof, and for the appointment of a board to be known as the California State Board of Pharmacy,' approved March 20, 1905, and acts amendatory thereof; or physicians, nor to each other, nor to the sale at retail in pharmacies by pharmacists to physicians, dentists or veterinary surgeons duly licensed to practice in this state." The exceptions thus provided by the section are subject to certain conditions prescribed thereby. Section 7 of said act, as amended by the Legislature of 1915 (Stats. 1915, p. 863, supra), in part provides:

> "Any person violating any of the provisions of section eight * * * of this act shall, upon conviction, be punished as follows, viz.: For the first offense, by a fine of not less than one hundred dollars, and not to exceed four hundred dollars, or by imprisonment for not less than fifty days and not exceeding one hundred and eighty days, or by both such fine and imprisonment; for the second offense, by a fine of not less than two hundred and fifty dollars, and not to exceed five hundred dollars, or by imprisonment for not less than ninety days and not exceeding six months, or by both such fine and imprisonment; and for the third offense, by imprisonment in the state prison for not less than one year and not more than five years."

The information alleges that the defendant, on or about the 28th day of September, 1916, at and in the county of San Joaquin, did "sell, furnish and give away, and have in his possession hydrochloride of cocaine containing more than one-sixth grain of cocaine to the fluid or avoirdupois ounce, and morphine and sulphate of the alkaloid of morphine, containing more than one-quarter grain of morphine to the fluid or avoirdupois ounce, and said sale and possession was not upon the written order or prescription of a physician, dentist, or veterinary surgeon, licensed to practice in the state of California." It is then alleged that the sale and the possession so charged are not within the cases expressly excepted by said section 8 from the provisions thereof interdicting such sale and possession. The information then charges two previous convictions of the defendant of violating the provisions of said section.

The assignments of error upon which the defendant relies for a reversal are: (1) That the information fails to state facts sufficient to confer jurisdiction upon the superior court to try the charge alleged therein; (2) that the trial court prejudiced the rights of the accused by refusing to grant his motion that the people be required to elect and designate the particular offense of the several which it is asserted are charged under the statute and to the establishment of which they intended particularly to address the proofs; (3) that the court misdirected the jury in matters of law; (4) that the verdict as returned by the jury was incomplete and insufficient to authorize the superior court to pronounce judgment thereon, inasmuch as the jury did not specifically find upon the alleged previous convictions of the defendant.

[1] We think the point last stated must be sustained, and consideration of the other points relied upon may therefore be waived. Section 1158 of the Penal Code provides:

> "Whenever the fact of a previous conviction of another offense is charged in an indictment or information, the jury, if they find a verdict of guilty of the offense with which he is charged, must also, unless the answer of the defendant admits the charge, find whether or not he has suffered such previous conviction. The verdict of the jury upon a charge of previous

conviction may be: 'We find the charge of previous conviction true,' or 'We find the charge of previous conviction not true,' as they find that the defendant has or has not suffered such conviction."

The record here discloses that, when arraigned, the defendant made no plea or answer to the previous convictions charged against him in the information, and that the jury made no special finding as to the said prior convictions, the verdict found and returned being general and reading as follows:

"We, the jury in the above-entitled cause, find the defendant, Byron Dueber, guilty as charged."

It is, of course, but the statement of a self-evident proposition to say that the authority of the superior court to impose judgment of sentence in a case arising under the statute upon which this prosecution is founded rests wholly upon the fact of two prior convictions of the accused under the provisions thereof, and that the fact of such prior convictions must be alleged and proved, or admitted by the defendant.

The contention of the Attorney General is that, while it is true that the first and second violations of the statute are each mere simple misdemeanors, yet, when a third offense thereunder is committed by the same party, the three, taken together—that is, the two distinct offenses of which he had previously been convicted and the third offense charged—constitute a specific felony, the same as if the charge involved but one act or transaction, and in support of this view he cites People v. Delany, 49 Cal. 394. It is hence argued that a verdict found, as in this case, of "guilty as charged," necessarily covers and includes every issue made by the information or indictment in a case of this character and every element of which the "specific felony" so charged is constituted. The Attorney General further contends that the requirement of section 1158 that a special finding of the previous convictions alleged must be made applies only to certain sections of the Penal Code prescribing aggravated penalties in cases of prior convictions of certain offenses. See Pen. Code, §§ 666, 667.

[2] We do not conceive it to be important to the decision of the point upon which, as declared above, we find ourselves constrained to reverse this case to consider whether a distinct and independent felony is committed where there exists and is charged against the accused a combination of a previous conviction of a certain public offense with the specific offense subsequently committed and charged. This, though, appears to be the view expressed in People v. Delany, 49 Cal. 394, supra. But whatever may be the correct legislative theory of the Code sections referred to—whether it was to make the prior convictions essential elements of a distinct and specific felony, or merely to make it imperative for the superior court to impose aggravated punishments upon those possessed of a confirmed habitude for the commission of petty and other crimes—the indisputable proposition remains that the Legislature has, without qualification, ordained, by the enactment of section 1158 of the Penal Code, that where a previous conviction of the accused is charged, the jury must, unless the answer of the defendant to the charge of a previous conviction admits it to be true, find whether or not he has suffered such previous conviction; and in those cases to which section 1158 is applicable, under the circumstances pointed out by said section, where the jury fail to make such specific finding, the omission is fatal to the judgment, unless the subsequent crime charged is itself one for the commission of which it is within the jurisdiction of the superior court to impose punishment.

This precise question arose in the case of People v. Eppinger, 109 Cal. 294, 41 Pac. 1037, wherein the court, speaking through Mr. Justice Henshaw, said, inter alia:

"A more serious objection is found in the form of the verdict returned * * * upon the general issue. The defendant, having pleaded not guilty, put the prosecution to proof upon all material averments, of which that of prior conviction was one. The jury did not find specifically upon this issue as they were required to do by section 1158 of the Penal Code, but returned a verdict finding the defendant guilty as charged. * * * The verdict rendered should be treated as a finding against the defendant upon the crime charged, and in favor of the defendant upon the question of prior conviction."

And upon this ground the judgment was reversed.

[3] We are unable to coincide with the contention that section 1158 of the Penal Code was intended to apply exclusively to sections 666 and 667 of said Code. Section 1158 is, as we have in effect said and as is plainly true, in general and unqualified language, and neither from said language nor from any reason rationally arising from the natural theory of such a rule of law are we to conclude or even infer that it was not intended to apply to any case, whether provided for before and at the time of its enactment or that might thereafter be provided for, in which a person charged with a public offense might have pleaded and proved against him the fact of his having suffered a previous conviction of a crime for the purpose of authorizing a more drastic punishment for the crime charged than would be inflicted where such prior conviction had not been brought up against him and proved. The section seems to us to be very plain upon this proposition. It says that "whenever the fact of a previous conviction of another offense is charged in an indictment or information," etc., and thus, as we construe the language, a general rule of procedure as to all of the cases of the class to which the section refers is promulgated and laid down. The words "another offense" cannot reasonably be held to mean some other different kind or character of offense from the one subsequent-

ly committed. If such were the intended signification of those words, then the section would not apply to many cases of previous convictions and certainly not to the case contemplated by subdivision 3 of section 666. But we think that clearly by section 1158 the Legislature has in effect declared: That to avoid any doubt as to the effect of the verdict in any such cases, the jury must, unless the admission of the accused in reference thereto renders it unnecessary for them to pass upon that question, make a specific finding upon an issue involved therein which must of necessity exert an influence upon the question of the extent of the punishment which may be imposed, and, indeed, the decision of which so far as it applies to subdivision 3 of section 666 and even to the present case, is determinative of the question whether the superior court shall be empowered to impose any punishment at all. This, to our minds, is the only reasonable conclusion as to the scope and effect of section 1158. In fact, it seems to us that if the Legislature had intended to limit the application of said section to the provisions of sections 666 and 667 of said Code, it would have so phrased the former section as to read:

> "Whenever the fact of a previous conviction of another offense is charged in an indictment or information, as provided in sections 666 and 667 of this Code," etc.

There is no other legal course open to us but to reverse the judgment and the order, and it is so ordered.

We concur: CHIPMAN, P. J.; BURNETT, J.

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34 Cal. App. 637

PEOPLE v. SMALL. (Cr. 620.)

(District Court of Appeal, First District, California. Sept. 17, 1917. Rehearing Denied by Supreme Court Nov. 15, 1917.)

PROSTITUTION 🔑4—EVIDENCE—SUFFICIENCY.

In prosecution for pandering, evidence, though largely hearsay, *held* sufficient to warrant finding of jury that house in which girl in question was placed as inmate by defendant was at that time house of prostitution.

Appeal from Superior Court, Alameda County; F. B. Ogden, Judge.

Charles Small was convicted of pandering, and appeals. Affirmed.

A. M. Armstrong, of Oakland, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

PER CURIAM. There is but one point made in this case, and that is that the judgment finding the defendant guilty of pandering is not sustained by the evidence because it was not shown that the house in which the girl in question was placed as an inmate was at that time a house of prostitution. While it is true that the evidence as to the nature of the house bears largely upon the reputation of the house, nevertheless we are satisfied that even though it be hearsay it is sufficient to warrant and support the finding of the jury as to the character of the establishment at the time the girl was placed there by the defendant.

That is the only point made worthy of discussion. The judgment and order denying defendant's motion for a new trial are therefore affirmed.

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34 Cal. App. 632

PARKE v. BOARD OF TRUSTEES OF FIREMEN'S RELIEF AND PENSION FUND et al. (Civ. 2005.)

(District Court of Appeal, First District, California. Sept. 15, 1917. Rehearing Denied by Supreme Court Nov. 12, 1917.)

MUNICIPAL CORPORATIONS 🔑200—FIRE DEPARTMENT—BENEFIT FUND—EXTRA MAN—"MEMBER OF FIRE DEPARTMENT."

Minor children of an extra man in employ of fire department of city of Oakland, whose hours, duties, and pay were different from those of regular firemen, but who contributed monthly out of his pay to the firemen's relief and pension fund, are entitled to compensation out of such fund in case of the death of their father from natural causes, since he was a member of the department within meaning of the city charter, and in view of ordinance of July 8, 1911.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Member.]

Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Action by Ireene Parke, as guardian of Stanley Emerson Parke and Lauramae Parke, against the Board of Trustees of the Fireman's Relief and Pension Fund and others. From judgment for plaintiff, defendants appeal. Affirmed.

Paul C. Morf, City Atty., G. E. Jackson, Asst. City Atty., and John J. Earle, Deputy City Atty., all of Oakland, for appellants. George Samuels and Irving Magnes, both of Oakland, for respondent.

KERRIGAN, J. This is an appeal by defendants from a judgment granting to plaintiff a writ of mandate addressed to the defendants, the Board of Trustees of the Firemen's Relief and Pension Fund of the city of Oakland, and its members, directing them to pay to the plaintiff the sum of $1,000.

The question to be decided is whether or not the minor children of James H. Parke, deceased, who was at the time of his death and had been for a period of ten years prior thereto an "extra man" in the employ of the fire department of said city, are entitled to the death benefit of $1,000 provided for in subsection 2 of section 104 of the city charter of 1911. If under his employment as an "extra man" Parke is to be regarded as having been a "member" of the department, then the plaintiff was, as decided by the superior court, entitled to the relief demanded.

The undisputed facts are as follows: On

July 12, 1905, Parke was appointed to the position of extra man in said fire department, at which time what is known as the old city charter of Oakland was in force. Under the provisions of that charter there can be no question but that an extra man was a member of the department. In the year 1911 the present charter became effective, the pertinent portions of which applicable to the fire department read as follows:

"Sec. 97. The fire department shall consist of a chief of the fire department, an assistant chief of the fire department, a second assistant chief of the fire department, as many battalion chiefs as the council may deem necessary, a superintendent of engines and as many captains, lieutenants, engineers, drivers, tillerman, stokers, truckmen and hosemen as the council may deem necessary, and also such other employés as the council may provide for by ordinance. The officers and members of the fire department shall receive annual compensations, comprising their salaries and an allowance of two dollars per month for the firemen's relief and pension fund herein provided for, as follows: * * * All members of the fire department, appointed prior to September 1, 1910, and in good standing at the time this charter goes into effect, shall be retained in their respective positions except as otherwise in this charter provided. * * *

"Sec. 98. No person shall become a member of the fire department unless he shall be a citizen of the United States, of good character for honesty and sobriety, able to read and write the English language, and a resident of the city of Oakland for at least five years next preceding his appointment. * * * Every appointee of the department shall be not less than 21 nor more than 35 years of age, and before his appointment must pass a satisfactory examination under such rules and regulations as may be prescribed by the Civil Service Board."

Section 99 provides that the officers enumerated in section 97 "and all other officers and members shall be appointed by the commissioner of public health and safety, subject to the civil service provisions of this charter. * * *"

"Sec. 100. Each member of the fire department shall be entitled to fifteen days vacation annually with full pay; such vacations shall be had at such times as the chief of the fire department shall direct. Each member of the fire department shall be allowed a leave of absence of not less than 24 hours duration not less than once each week, with full pay. A member becoming incapacitated for duty by reason of sickness shall be entitled to thirty days sick leave without loss of pay. If such sickness continue he shall be entitled to half-pay for a period of thirty days, and if such sickness shall further continue he shall receive such pay, if any, as the council shall direct. A member on sick leave shall present such certificate of a reputable physician as the chief of the fire department may direct."

The provisions of the charter relating to the pension fund having a bearing on this case provide as follows:

Section 102 provides that a "member" of the department who has been such actively for twenty years, and who has arrived at the age of 55 years, and by reason of disability is unfit for the performance of his duty, may be retired, and shall receive a monthly pension equal to one-half the salary attached to the rank held by him one year prior to the date of retirement.

Section 103 provides that "any member of the department who shall become physically disabled by reason of any bodily injury received in the performance of his duty * * * may be retired from the department upon an annual pension equal to one-half the amount of salary attached to the rank he held one year prior to the date of such retirement * * * to cease on his death."

Section 104, subd. 1, provides a pension for the family of an officer, member or employé of the department who may be killed while in the performance of his duty.

Subdivision 2 of said last-mentioned section reads: "When a member of the department shall die from causes other than those specified in subdivision 1 of this section after ten years of service, then his widow, and if there be no widow, then his children, and if there be no widow or children, then his mother, if dependent upon him for support, shall be entitled to the sum of one thousand dollars."

Subd. 3. "Any member of the fire department receiving a pension from the firemen's relief and pension fund who shall be convicted of a felony, shall become dissipated (or) an habitual drunkard * * * shall forfeit all right to said pension."

Subdivision 4 of the same section provides that any "member of the fire department may be rewarded for conduct which is heroic and meritorious."

And subdivision 9 reads: "The treasurer shall retain from the compensation of each member of the fire department two dollars per month, which shall forthwith be paid into the firemen's relief and pension fund. * * *"

On July 8, 1911, the city council passed an ordinance which, pursuant to section 97 quoted above, enumerated the officers and persons to be employed in the fire department of the city, and fixed the compensation of such officers and employés in cases in which the charter had not done so. Section 2 of that ordinance provides:

"Extra men at $32 per month each, which sum includes an allowance of $2.00 per month each for the firemen's relief and pension fund."

From and after the passage of said ordinance, Parke, under his original appointment of July 12, 1905, continued in service as an extra man in the fire department until the 9th day of September, 1915. During all of such time the city paid to him the sum of $30 per month, and also paid into the fireman's relief and pension fund the sum of $2 per month as the allowance established by said ordinance. On said last-mentioned day he died, death being due to natural causes. He left surviving him two minor children, of whom plaintiff is the general guardian and for whose benefit this proceeding is prosecuted. The features distinguishing the duties, responsibilities, and privileges of extra men from those of regular firemen may be said to be that regular firemen are on duty at the engine houses 24 hours a day for six days a week, and receive a higher rate of pay than extra men; while the latter are not compelled to live at the engine houses (but may do so if they choose), and are free to engage in any other employment. They are, however, at all times bound to respond to fire alarms in their respective districts. In the compensation of the extra men, as in that of their fellow employés of the fire department, there is included the monthly sum of $2, which is paid over to the relief and pension fund. Extra men assist in keeping the fire houses and apparatus in order, and while on active duty the services of both classes of employés are substantially the same; in other words, while on duty fighting fires the duties of extra men are just as exacting and no less onerous than those of the regular firemen.

It is the contention of the defendants in urging their appeal that the present charter of the city of Oakland makes a clear distinction between "members" and "employés" of the fire department; that "extra men" are not recognized as members, and are to be classed as "employés"; and that under the provisions of section 104, subds. 1 and 2, above set out, while death benefits are granted to the family of either a "member" or an "employé" who may be killed while in the performance of his duty, the allowance to the family in the event of death otherwise occasioned is limited to the case of "members" only.

We think this position cannot be successfully maintained. Under the terms of the old charter, Parke was admittedly a "member" of the department, and with his family was entitled to the relief provided therein by the pension fund. We are of the opinion that the provision of the new charter (section 97) that all "members" of the fire department in good standing at the time it went into effect should be retained in their respective positions plainly implies that all persons occupying the grades enumerated in said section, "and * * * such other employés as the council may provide for by ordinance," come within the designation "member" of the fire department. The charter sections hereinabove referred to prescribe the age, residence, and qualifications of employés of the department (section 98); when and to what extent they shall be entitled to a vacation or leave of absence on account of sickness (section 100); under what circumstances such persons shall be entitled to a pension for physical disability (section 103) or forfeit the right to a pension or be entitled to a reward for heroic and meritorious conduct—and in all of these and other instances in the charter the employés of the department are referred to as members; and we have no doubt that in these instances extra men are included in such designation. We certainly do not think that when the charter framers drafted the provisions of the charter here under consideration they had in mind and intended to declare that extra men should not be regarded as "members" of the department and not entitled to pensions. Moreover, from an examination of the whole charter it is apparent to us that the words "officers," "employés," and "members" are used synonymously and interchangeably. They were so used in the provisions here relating to the fire department.

Counsel for the defendants enters into an elaborate argument to demonstrate that the charter recognizes the distinction insisted upon by him; but his reasoning, while plausible, is not convincing. We think his construction of the provision under consideration is technical and narrow, and that it, being beneficent in character, should be liberally construed. So construed we think the trial court correctly apprehended its meaning and effect.

The judgment is affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

34 Cal. App. 683

STARBUCK v. CITY OF FULLERTON et al.

(Civ. 2293.)

(District Court of Appeal, Second District, California. Sept. 18, 1917.)

MUNICIPAL CORPORATIONS 🔑279—INITIATIVE AND REFERENDUM.

The right of initiative and referendum reserved to electors of municipalities by Const. art. 4, § 1, and the machinery for the execution of which is provided by St. 1915, p. 319, was not designed to furnish a means by which local improvements might be either commenced or prevented, and an ordinance for a local improvement cannot be referred to the electorate.

Appeal from Superior Court, Orange County; W. H. Thomas, Judge.

Petition by Flora J. Starbuck for a writ of mandate against the City of Fullerton and others. From a judgment denying the petition, petitioner appeals. Affirmed.

C. R. Allen and Chas. Cassat Davis, both of Los Angeles, for appellant. E. J. Marks and Homer C. Ames, both of Fullerton, for respondents.

JAMES, J. Plaintiff's petition for a writ of mandate was denied in the superior court, and she appeals from the judgment. The question presented is as to whether a resolution adopted by the board of trustees of the city of Fullerton, wherein such trustees declared it to be their intention to open a public street over certain property and within the boundaries of a certain district which was described as embracing property to be benefited by the improvement, and which it was the intention to assess to pay the costs and expenses thereof, was subject to the referendum provisions of the Constitution of the state and the acts of the Legislature.

From the stipulation of facts it appeared that there were 19 several owners of land within the district described in the resolution, 15 of whom were consenting owners, the plaintiff being one of those not consenting; that there were 1,200 qualified electors residing within the city of Fullerton and 20 qualified electors residing within the assessment district; that there were 10,755 acres of land within the corporate limits of the city of Fullerton, and about 264 acres of land within the assessment district. It was further stipulated that on the 26th day of January, 1916, a petition duly signed by a sufficient number of qualified electors of the city of Fullerton was filed with the city clerk and presented to the board of trustees, which petition requested that the resolution be either repealed or submitted to a vote of the electors of the city; that the city clerk refused to certify to the sufficiency of the petition, and the board of trustees refused to either reconsider or repeal the resolution, or submit it to a vote. The Constitution of the state reserves to the electors of cities the right to initiate legislation and to have proposed legislation referred to a vote. This right is, as is stated in the Constitution, "to be exercised under such procedure as may be provided by law." Cal. Const. art. 4, § 1. The Legislature in 1912 (St. [Ex. Sess.] 1911, p. 131) adopted an act to provide the necessary procedure to enable electors of cities to enjoy the right secured to them under the provision of the Constitution. This act was amended in its general substance by the Legislature in 1915 (Stats. 1915, p. 319), and provides that proposed ordinances are subject to the initiative and referendum. For the purposes of this case we may assume, although that matter is made the subject of discussion in the briefs, that a resolution of intention such as that adopted by the board of trustees of the city of Fullerton was in effect an ordinance. The question, then, is squarely presented as to whether an ordinance adopted by the legislative body of a municipality and which, while legislative in character, is one designed to provide for improvements local to a part of the city only, is one against which the right of referendum can be invoked. If the right of referendum can be invoked in such a case, then the corollary right to initiate legislation of the same kind must be conceded to exist. If the latter right does exist, it then follows that a proceeding may be initiated by electors of a distant part of a city to compel the opening of a street in another part of the same city and to have the costs thereof assessed upon property owners other than the electors who both initiate and decide upon the advisability of having the improvement made. We think that the initiative and referendum were not intended, nor are they designed, to apply to such a case. Our Supreme Court has, in the case of Hopping v. Council of the City of Richmond, 170 Cal. 605, 150 Pac. 977, considered the general subject involved as applied to an ordinance or resolution affecting electors or property owners of an entire city, and the court there, as we understand that decision, holds that whether the legislation be by resolution or ordinance is immaterial; that referendum proceeding may be made to affect it so long as it answers to the character of "legislation" and is of general effect. That court had suggested that there may be grounds for excluding from the operation of the initiative and referendum powers legislative acts special and local in their nature. No opinion is expressed as to how the minds of the court might settle on that proposition, and we are expressly told in the decision that what is therein said must not be understood as expressing any intimation of the views of the court on that particular matter. It was not necessarily involved in the decision. In our opinion, the constitutional provision giving and guaranteeing to electors the right to the initiative and referendum was not designed to furnish a means by which street improvements local in character can be either commenced or prevented by the use of the initiative or referendum. We, therefore, agree with the conclusion arrived at by the trial judge.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

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34 Cal. App. 676

DE VALL v. PERRIN. (Civ. 2152.)

(District Court of Appeal, First District, California. Sept. 18, 1917. Rehearing Denied by Supreme Court Nov. 15, 1917.)

1. APPEAL AND ERROR ⚷979(2)—GRANT OF NEW TRIAL—REVIEW.

Discretion of court under Code Civ. Proc. § 657, in setting aside a verdict and granting a new trial in whole or in part, where, in its judgment, the evidence is insufficient, will not be reviewed, save in cases showing a clear abuse of such discretion.

2. APPEAL AND ERROR ⚷867(2)—REVIEW—OPINION OF TRIAL COURT.

The opinion of the trial court granting defendant's motion for a new trial, unless plaintiff consent to a remittitur, does not restrict the appellate court to determining solely whether specified defects in the evidence existed where the entire opinion showed that the judge deemed the evidence insufficient to support the amount of the verdict.

3. APPEAL AND ERROR ⚷979(5)—REVIEW—ABUSE OF DISCRETION.

The granting of a motion for new trial, unless the clerk enter a remittitur for part of the recovery, cannot be disturbed on appeal as an abuse of discretion, where the evidence as to the amount to which plaintiff was entitled was sharply conflicting.

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by A. M. De Vall against E. B. Perrin. From a judgment for plaintiff, defendant appeals, and from an order granting defendant's motion for a new trial, unless plaintiff consent to a remittitur, plaintiff appeals. Judgment reversed, and order granting motion for new trial affirmed.

Jacob M. Blake, John R. Tyrrell, and Crittenden Thornton, all of San Francisco, for plaintiff. Randolph V. Whiting, of San Francisco, for defendant.

RICHARDS, J. These are two appeals—one from a judgment for the plaintiff entered upon a verdict of a jury in his favor for the sum of $20,000; the other an appeal by said plaintiff from an order granting the defendant's motion for a new trial.

The action was instituted by the plaintiff as the assignee of two claims for legal services alleged to have been rendered to the defendant by his assignors, the first being a claim for such services by Barclay Henley, alleged to have been reasonably worth the sum of $50,000, upon which payments aggregating $7,000 were alleged to have been made; the second consisting of a claim for like services on the part of J. E. Harper for $50,000, upon which no payments were alleged to have been made.

Upon the trial the undisputed evidence showed that upon the first of these claims payments aggregating the sum of $3,270, and upon the second the sum of $3,690, had been made. The jury returned a general verdict upon the first of these claims for the sum of $15,000, and upon the second for the sum of $5,000. A motion for a new trial was made upon all statutory grounds, upon the submission of which the court rendered a written opinion reviewing the evidence in the case, and thereupon made an order "that unless the plaintiff within 20 days from the date of the entry of this order consents to deduct from the amount of the verdict and judgment herein in favor of plaintiff's assignor Henley for $15,000, the sum of $8,270, and from the amount of $5,000, the verdict awarded the plaintiff's assignor Harper, the sum of $3,690, making a total deduction of $11,960, the defendant's motion for a new trial will be granted; if such stipulation is entered within the time prescribed an order will be entered denying the defendant's motion for a new trial." The consent and stipulation required by this order not having been given or entered within said time, it was ordered "that the defendant's motion be and the same is hereby granted." The appeal from the order granting the defendant's motion for a new trial will be first reviewed.

[1] On the part of the appellant from that order it is first contended that under the terms of the orders made by the trial court in disposing of the motion for a new trial the only ground of said motion which can be considered or reviewed by this court is that the verdict was excessive because of the insufficiency of the evidence to support it; and that as to all other grounds of said motion it must be deemed to have been denied. We do not deem it essential, however, to pursue this contention through the argument or authorities urged in its support for the reason that the chief reliance of the respondent upon this appeal is that there was a substantial conflict in the evidence as to the value of the services rendered by each of the assignors of the plaintiff, and that in view of such conflict the trial court had a right to exercise its discretion in granting or refusing a new trial; and that this court will not interfere with the exercise of such discretion in the absence of any sufficient showing that it has been abused.

The appellant, however, insists that the trial court has no such discretion in dealing with the verdict of a jury in cases of this character; and that in attempting to exercise it the trial court has arbitrarily usurped the function of the jury in this case, and has thereby nullified the plaintiff's right to a trial by jury. The only authority cited in support of such a doctrine is the case of Head v. Hargrave, 105 U. S. 45, 26 L. Ed. 1028, which far from supporting does not even hint at such a rule of law. On the other hand, the language of the Code is explicit and the authorities are abundant to the effect that the trial court has the power to set aside a verdict and grant a new trial, in whole or in part, in every case where, in its judgment, the evidence is insufficient, and that its action in so doing will not be reviewed upon appeal save in cases showing a clear abuse of such discretion. Code Civ. Proc. § 657; Domico v. Casassa, 101 Cal. 412, 35 Pac. 1024; Gordon v. Roberts, 162 Cal. 508, 123 Pac. 288; Estate of Everts, 163 Cal. 452, 125 Pac. 1058; Meinberg v. Jordan, 29 Cal. App. 761, 157 Pac. 1005, 1007. The appellant in this connection, however, presents the further contention that the trial court, as the predicate for its first order, filed a written opinion, reviewing elaborately the evidence in the case, and specifying certain deductions which in its judgment should be made from the gross amount of the verdict in the case of the Henley claim; and counsel for the appellant insists that this court is confined to a consideration of the merits of the reasoning and conclusions of the trial court in respect of these specific matters.

[2, 3] Ordinarily the opinion of the trial court rendered upon ordering judgment or upon granting or refusing a motion for a new trial is no proper part of the record on appeal, and thus when made so is not to be regarded as in any respect limiting the consideration by this court of any matter which would be the proper subject of review under the terms of the judgment and order itself; nevertheless, since counsel for both parties have seen fit to certify to this court a record which embraces the full text of such opinion, and since both have referred to it as having some bearing on the scope and effect of the orders under review on this appeal, we have examined the court's opinion only to find that while it is true that the trial court did advert to certain specific matters as not with-

in the proper purview of the jury in arriving at their general verdict, the court also generally reviewed the evidence offered in support of the Henley claim, and commented upon the same as "extravagant" and as "varying and irreconcilable" to an extent which would justify his conclusion that the verdict of the jury based thereon was excessive. It is clear that in the light of those animadversions and conclusions of the trial judge as to the insufficiency of the evidence in general to support the verdict, the views expressed in its opinion as to whether other specified defects in the evidence, whether right or wrong, cannot be considered as a limitation upon the powers of this court in its review of the orders granting the new trial. It may, therefore, be disregarded in determining the only question practically which is before us on this appeal, namely, whether from a reading of the entire evidence in the case it can be said that the trial court abused its discretion in granting the defendant's motion for a new trial. Upon such review we find that the evidence educed upon either phase of the case, involving both the amount and the value of the services rendered by the assignors of the plaintiff to the defendant, is in sharp and substantial conflict. This being so, neither of the two orders of the trial court relating to the granting of the motion for a new trial will be disturbed upon appeal.

This conclusion obviates the necessity of a consideration of the questions discussed on the appeal from the judgment, which has already been set aside as the result of the orders upheld upon the appeal from the order granting a new trial.

Judgment reversed. Order granting the motion for a new trial affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

(34 Cal. App. 629)

JONES v. SOUTHERN PAC. CO. et al.*

(Civ. 2149.)

(District Court of Appeal, First District, California. Sept. 14, 1917.)

1. Evidence ⚷588 — Crossing Accidents —Contributory Negligence.

Where from the physical facts established, plaintiff, had he looked and listened, must have observed the approach of a train, the fact that he testified that he looked for the train, but did not see it until he was on the track, does not absolve him of contributory negligence.

2. Railroads ⚷350(22) — Crossing Accidents—Contributory Negligence.

In action for injuries by a train at a crossing, the mere fact that telegraph poles obscured the vision at one point did not absolve plaintiff of contributory negligence in driving upon the track when for 30 feet immediately before he went on the track his vision was unobscured, since a traveler must look for a train at a point where such looking would be effective.

3. Railroads ⚷350(16) — Crossing Accidents—Contributory Negligence.

Where under the evidence, plaintiff must have seen the train had he looked where he said he looked and nevertheless went on the track and was injured, he could not recover, since if he did see the train and attempted to cross he was contributorily negligent, and if he did not see it, it must have been because he failed to look, in which case he was also guilty of contributory negligence.

Appeal from Superior Court, Alameda County; Stanley A. Smith, Judge.

Action by David L. Jones against the Southern Pacific Company, a corporation, and W. J. Edwards. Judgment for plaintiff, and defendants appeal. Reversed.

A. A. Moore and Stanley Moore, both of San Francisco, for appellants. J. Leonard Rose, of Oakland, for respondent.

LENNON, P. J. That the evidence shows, as a matter of law, that the plaintiff was guilty of contributory negligence is the only point raised upon this appeal from a judgment, entered in favor of the plaintiff upon the verdict of a jury in the sum of $1,000, as damages for personal injuries resulting to the plaintiff from a collision, occurring in the city of Oakland, between a taxicab, which the plaintiff was driving, and an electric train operated by the defendants.

Appellants concede, for the purposes of this appeal, that defendants were guilty of negligence, in that, on the night of, and at the time and place of, the collision the defendants were operating an electric train at a high rate of speed; that plaintiff had no warning of the approach of the train in question by bell, whistle, or otherwise, and that the defendant usually maintained a flagman at the street crossing where the collision occurred, but that no flagman was on duty at the time of the collision, or if he was, he failed to signal the approach of the train.

The record discloses evidence tending to show that the accident happened at the intersection of Eleventh and Webster streets, Oakland; that both of these streets are 80 feet in width and have 12-foot sidewalks; that from the west property line of Webster street to the first rail of the track, which runs north and south on Webster street, is a distance of 30 feet, and that the taxicab was running east on Eleventh street.

When the taxicab reached the property line of Webster street there was a space of 30 feet in which the plaintiff had opportunity to look for an approaching train. He testified that he looked for a train at this point, also when he passed the curb line, at which point he would have been 18 feet from the nearest rail of the track, with an unobstructed view for many blocks of the approaching train. The headlight of the train was burning, and was plainly seen by a police officer, standing at a point beyond the accident, from the time the train left Second and Webster, a distance of nine city blocks.

[1] Since, from the physical facts estab-

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied by Supreme Court November 12, 1917.

lished, it is plain that by looking and listening plaintiff must have observed the approach of the train, the fact that he testified that he looked for the approaching train, but did not see it until he was on the track will not suffice to absolve him of contributory negligence. Chrissinger v. S. P. Co., 169 Cal. 619, 624, 149 Pac. 175.

[2] The evidence to the effect that there were telegraph poles along the west side of Webster street between Tenth and Eleventh streets, which tended to obstruct the view of one approaching defendant's tracks is immaterial because of the admitted fact that for 30 feet from the nearest rail of the track there was a clear, unobstructed view. Plaintiff must look at a point where such looking would be effective. Griffin v. S. P., L. A. & S. L. Co., 170 Cal. 772, 151 Pac. 282, L. R. A. 1916A, 842. According to plaintiff's testimony, he did look after he got past the telegraph poles, also when he passed the curb line, which is 18 feet from the nearest rail of the track. He said he glanced almost down to Tenth street and did not see any train. He also admitted that he could have seen the train as far as Tenth street if he "looked straight at it."

[3] If plaintiff had looked for a train where he said he looked, he must have seen it, for the uncontradicted testimony is that he had a clear view, and that the train was in sight with headlight burning. If he did see it he was guilty of contributory negligence as a matter of law in attempting to cross. If he did not see it, it was because he did not look, and in that case he likewise was guilty of contributory negligence.

The Supreme Court, by its recent decisions, has fixed a standard of conduct at railroad crossings, a violation of which is contributory negligence as a matter of law. Under the rule as expounded in the Chrissinger Case, supra, to the effect that:

> "Where * * * the standard of conduct is so obvious as to be applicable to all persons, and the plaintiff has failed to measure up to that standard, under the circumstances shown, he is not entitled to have his case go to the jury"

—we are constrained to reverse the judgment, and it is so ordered.

We concur: RICHARDS, J.; KERRIGAN, J.

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34 Cal. App. 693

MERCHANTS' NAT. BANK OF SAN FRANCISCO v. WESTON. (Civ. 2098.)

(District Court of Appeal, First District, California. Sept. 19, 1917.)

1. Banks and Banking 🔑261(2)—National Banks—Ultra Vires Acts—Right to Question Power of Bank.

Assuming that a national bank was not authorized to make a lease of an apartment house, the lessee could not raise the point when sued in unlawful detainer, as the United States alone could be heard to raise this question.

2. Landlord and Tenant 🔑24(3)—Lease—Sufficiency of Description of Property.

A lease of an apartment house, describing the property generally as being located on a certain street, followed by a specific description by metes and bounds, sufficiently described the property.

3. Landlord and Tenant 🔑35—Right to Contest Validity of Lease—Sufficiency of Description.

Where a lessee went into actual possession of leased premises and continued in such possession until an action of unlawful detainer was commenced, she was estopped from repudiating the lease for any uncertainty in the description of the premises.

4. Banks and Banking 🔑262—Action of Unlawful Detainer—Sufficiency of Notice to Quit.

A notice to quit, signed by the duly authorized agent of a national bank, the lessor, after consulting with the president and the attorney for the bank, and being instructed by the attorney to sign it, was sufficient to support an action of unlawful detainer, though signed without written authority.

5. Banks and Banking 🔑236—National Banks — Evidence of Corporate Existence.

A certificate of the controller of currency, authorizing a bank to do business as a national bank and a certificate authorizing it to change its name to the M. National Bank, was sufficient proof of the corporate existence of the M. National Bank in an action by it.

Appeal from Superior Court, City and County of San Francisco; B. J. Flood, Judge.

Action by the Merchants' National Bank of San Francisco against Mrs. M. L. Weston. From a judgment for plaintiff, defendant appeals. Affirmed.

Wm. Hoff Cook, of San Francisco, for appellant. W. F. Williamson, of San Francisco, and A. D. Donovan for respondent.

PER CURIAM. This is an appeal by defendant in an action of unlawful detainer wherein judgment was rendered in favor of plaintiff for the restitution of the possession of a certain apartment house, and the cancellation of the lease thereof, and for the sum of $2,400 as rent.

Several grounds are relied upon for a reversal of the judgment.

[1] It is first argued that the act of plaintiff in executing the lease under which defendant went into possession of the premises was ultra vires; that, plaintiff being a national bank, it had no authority to execute the character of lease in question. We see no force in this argument. Assuming that the bank was not authorized to make the lease, it does not lie with the plaintiff to raise the point, as the United States alone can be heard on this question. Camp v. Land, 122 Cal. 167, 54 Pac. 839.

[2, 3] The second objection, that the lease failed to definitely locate the premises, finds no support in the record. The lease generally described the property as being located on a certain street, and then followed with a specific description of the premises by metes

and bounds. Aside from the fact that this description was ample and sufficient in every particular, defendant went into actual possession of the premises under the lease and continued in such possession until this action was commenced. She is therefore estopped from repudiating the lease for any uncertainty in the description of the premises so occupied by her. Pierce v. Minturn, 1 Cal. 470.

[4] Equally untenable is the claim that the notice to quit was not signed by a duly authorized agent of plaintiff. It appears in evidence that the party signing the notice was the duly authorized agent of the bank, and that, before signing the notice, he consulted with its president and also its attorney, who gave him a form of notice to quit and instructed him to sign it. In actions of this character a notice to a tenant to quit which purports to come from the landlord and is signed by authority of the latter's attorney, is valid though signed without written authority. Felton v. Millard, 81 Cal. 540, 21 Pac. 533, 22 Pac. 750.

[5] And finally it is claimed that proper and sufficient proof was not made that the plaintiff was a corporation. In proof of its corporate existence plaintiff introduced in evidence the certificate of the controller of the currency authorizing the Western Metropolis Bank to do business as a national bank, together with the certificate authorizing its change of name to "Merchants' National Bank." This was sufficient proof of its corporate capacity.

For the reasons given the judgment is affirmed.

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34 Cal. App. 658

DEE v. DEE. (Civ. 2230.)

(District Court of Appeal, First District, California. Sept. 17, 1917.)

1. Divorce ⟹147—Weight of Evidence—Credibility of Witnesses.

Although evidence of defendant in a divorce action is evasive, but conflicts with that of plaintiff, its weight and credibility is for the trial court.

2. Appeal and Error ⟹931(3)—Waiver of Findings—Presumptions.

Where findings are waived, it must be assumed, where there is supporting evidence, that the court found all the facts necessary to sustain its judgment.

3. Divorce ⟹235—Discretion of Court—Separate Maintenance.

In denying a divorce for cruelty, the allowance of separate maintenance and support is a matter for the sound discretion of the court.

Appeal from Superior Court, Alameda County; J. J. Trabucco, Judge.

Action by Rose Dee against Manuel E. Dee for divorce, and a cross-complaint by the defendant. Divorce denied both parties. From the judgment and an order denying a new trial, plaintiff appeals. Affirmed.

B. C. Mickle, Gus L. Baraty, of San Francisco, and John L. Mickle, for appellant. St. Sure, Callaghan & Rose, of Oakland, for respondent.

PER CURIAM. This is an appeal from a judgment denying plaintiff a divorce, and from the order denying a new trial.

Plaintiff charged extreme cruelty, and defendant by a cross-complaint set up a like charge against the plaintiff. After a trial of the action, findings were waived and judgment was rendered denying both parties a divorce and requiring defendant to pay a certain sum to plaintiff for the support of two minor children.

Plaintiff seeks a reversal of the judgment and order on two grounds: First, that under the evidence she was entitled to a divorce; second, that although a divorce was denied, she was entitled, pursuant to the provisions of section 136 of the Civil Code, to separate maintenance and permanent support.

[1, 2] Plaintiff's complaint alleged ten acts of cruelty, and while it is true that the denial by defendant while on the stand of some of these alleged acts was somewhat evasive in character, nevertheless there is a conflict in the evidence, and inasmuch as the trial court is the judge of the weight of the evidence and the credibility of the witnesses, its findings on these questions are conclusive. Since the findings were waived, it must be assumed that the court found against the plaintiff all of the facts necessary to sustain the judgment. Bruce v. Bruce, 16 Cal. App. 357, 116 Pac. 994.

[3] The allowance of separate maintenance and support was a matter for the sound discretion of the trial court (Hagle v. Hagle, 68 Cal. 588, 9 Pac. 842), and we are not prepared to say that that discretion was abused in the present case.

The judgment and the order denying a new trial are affirmed.

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34 Cal. App. 625

CLINTON CONST. CO. OF CALIFORNIA v. CLAY, City Auditor. (Civ. 2163.)

(District Court of Appeal, First District, California. Sept. 13, 1917. Rehearing Denied by Supreme Court Nov. 12, 1917.)

1. Municipal Corporations ⟹236—School Building—Letting Contracts—Necessity for Competitive Bids.

Oakland City Charter, § 189, authorizing change in plans and specifications according to which contract for school building was let, does not authorize board of education to enter into contract for work entirely distinct from any work provided for under original contract, exceeding $500, without complying with section 130, requiring letting of contracts to lowest bidder after public notice.

2. Municipal Corporations ⟹248(1) — School Building—Letting Contracts — Necessity for Competitive Bids.

Where board of education lets contract without complying with Oakland City Charter, §

130, requiring competitive bidding, contractor's claim is not validated by its approval, as provided in section 122, by four-fifths vote of board of education, after rejection by auditor, as that section relates only to claims arising out of contracts board had authority to make.

Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Action by the Clinton Construction Company of California against I. H. Clay, as auditor of the City of Oakland. From judgment in favor of petitioner, defendant appeals. Judgment modified and affirmed.

Paul C. Morf, City Attorney, of Oakland, for appellant. Ernest K. Little, of San Francisco, for respondent.

KERRIGAN, J. Petitioner herein sought and obtained a writ of mandamus against the auditor of the city of Oakland, commanding him to draw his warrant in favor of petitioner for the sum of $3,763.96, payable out of a certain fund raised by a bond issue and known as the "Clawson School Construction Fund." This appeal is from such judgment.

Appellant justifies his refusal to issue such warrant upon the ground that the amount for which it is sought to have the warrant drawn represents expenditures by the board of education of the city of Oakland in excess of the sum of $500, and which therefore were in violation of the charter provisions of said city requiring advertising and competitive bidding, and upon the further ground that the amount represents expenditures for matters and things other than those for which the bonds creating said fund were issued.

From the petition the following facts appear: The council of the city of Oakland provided by ordinance for a special election to vote upon two propositions to issue bonds for certain purposes. One of these—and the only one involved in this case which it is necessary to consider—was whether the city should incur an indebtedness in the sum of $210,000 for the construction and completion of a new building to be known as the "Clawson School" in said city, together with the furnishings and equipment thereof, and the acquisition of certain lands which were necessary for the purpose of the schoolhouse site and additions. Pursuant to said ordinance a special election was held, and the proposition to bond the city for the purposes and in the amount mentioned was carried. Thereafter bonds were issued and sold, and the proceeds were deposited in a separate fund designated as the "Clawson School Construction Fund." Subsequently the board of education entered into a written contract with petitioner to construct the Clawson school building according to plans and specifications prepared therefor. Such plans and specifications, however, did not make provision for the work for which recovery is here sought. The omitted improvements consisted in the building of a fence around the premises, the planting of a lawn on a large portion of the yard, and the paving of another portion thereof. About the time of the completion of the original contract for the construction of the Clawson school the board of education agreed with the respondent to do this extra work for the sum of $3,461.16. Two other pieces of work were also authorized in a similar manner—one for the erection of a flagpole costing $244, the other for shellacking certain linoleum for the sum of $58.80.

The validity of respondent's claim for these two latter items, amounting to the sum of $302.80, is not disputed, it being conceded that the board had power to order this work, the cost being less than $500.

Upon completion of all of the extra work respondent presented its demands for payment. The demands were passed by the board of education, but were rejected by appellant as auditor. Subsequently they were again passed by the board by a four-fifths vote of its members, again presented to appellant and again refused audit unless respondent would accept in full satisfaction therefor the sum of $302.80, the amount of the demands for erecting the flagpole and shellacking linoleum. This the respondent refused to do, and brought this proceeding which, as we have said, resulted in the judgment in its favor from which the present appeal is prosecuted.

We are of the opinion that the contract made by the board of education with respondent for that portion of the work exceeding $500 was one not authorized by the charter provisions, and that the judgment must be modified by striking the amount claimed thereon from such judgment. The charter of the city of Oakland by section 130 thereof provides for the letting of all contracts to the lowest bidder after public notice where the expenditure exceeds $500. No attempt was made in the letting of these contracts to comply with the provisions of this section, but counsel for the respondent seeks to justify the validity of the claim based thereon by a clause in his original contract which provides for changes during the progress of the work, whereby the increased or decreased cost thereof by reason of such changes shall be determined by the architect and fixed by agreement. In this behalf he argues that as such changes were warranted by his contract, and were made strictly in accordance with section 189 of the charter, which authorizes a change in the plans and specifications to be made with the consent of the board of education and commissioner of public works, no competitive bidding was necessary, and the work could be done without complying with section 130 of the charter, and, having been so ordered and completed, all that remained to be done was for the architect to certify in writing the fair and reasonable amount to be paid therefor in accordance with the provision of said section.

[1] But section 189 of the charter is limited in its terms to changes in work provided

for in original contracts, and it makes no provision for new or supplemental contracts. The question as to the character and extent of improvements that might be made under a change in the plans and specifications is not here involved. The work here performed and for which compensation is sought was entirely distinct, independent, and apart from any and all work contemplated and provided for under the original contract. To hold that section 189 of the charter, providing for changes in the work, was designed to dispense with competitive bidding provided for under section 130 of that same act would be to render nugatory the safeguard which the provision surrounds the municipality in its dealings with the public, and would subject it to all the well-recognized evils the provision was designed to prevent.

It is only just to state that no fraud is here charged. The result is the same, however. Here no provision was made in the plans and specifications for the work done, and, as before stated, whatever character of changes might be warranted in the work contracted for, such changes could not warrant and include, as here, distinct work not even mentioned in the plans and specifications and not contracted for. Ely v. Grand Rapids, 84 Mich. 336, 47 N. W. 447; Auditor General v. Stoddard, 147 Mich. 329, 110 N. W. 944.

[2] Upon this question the respondent advances the further argument that failure to comply with the provisions of section 130 of the charter was remedied by the approval of the claims by a four-fifths vote of the board of education after their first rejection by appellant, and cites us to section 122 of the charter in support thereof. That provision, however, in express terms limits the approval of rejected claims to those which the body had authority to make and out of which the claim arose, and was never intended to remove the restrictions upon the mode of entering into a contract prescribed by section 130. Here the contract was wholly void. It was one which the board of education had no authority to make, and the subsequent approval of it gave it no force or validity. Reams v. Cooley, 171 Cal. 150, 152 Pac. 293, Ann. Cas. 1917A, 1260; Zottman v. San Francisco, 20 Cal. 96, 81 Am. Dec. 96.

From what has been said it follows that the private contract for the work here performed, having been made without complying with the charter provisions, was void and was incapable of ratification by the board of education, and no recovery can be had therefor.

In view of the conclusion just announced the further contention that the expenditures could not be made a charge on the fund in question becomes unimportant.

For the reasons given the judgment is modified by striking therefrom the sum of $3,461.16, and, as so modified, the judgment will stand affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

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34 Cal. App. 644

PEOPLE v. DUFUR. (Cr. 407.)

(District Court of Appeal, Third District, California. Sept. 17, 1917.)

1. Jury 🔑80—Challenges—Criminal Case.

It is not error to refuse to fill up the panel after a juror has been excused before requiring defendant to exercise right of peremptory challenge.

2. Criminal Law 🔑1171(1)—Harmless Error—Questioning Defendant.

Violation of defendant's constitutional right not to be called on to testify against himself, by the district attorney, on prosecution for making false affidavit and proof of loss, for fraudulent claim on insurance contract, preliminarily to introducing copies of policies retained by insurer, to ask defendant to produce the policies, was harmless.

3. Insurance 🔑31 — Fraudulent Claim — Evidence of Loss.

Civ. Code, § 2756, fixing the measure of indemnity between insured and insurer in case of burning of insured property, not valued in policy, at the expense to insured to replace the articles, has no application to a prosecution under Pen. Code, § 549, for making false affidavit and proof of loss for fraudulent claim on insurance contract, so that the proofs need not be addressed to such measure of indemnity.

4. Criminal Law 🔑460—Evidence—Opinion as to Value.

Witnesses accustomed to life in the hills on stock ranches remote from markets and in cabins scantily furnished, on a prosecution for fraudulent claim on fire policy on furnishings of such a place, old and secondhand, or homemade, may, in connection with description thereof, state their value as not exceeding a certain amount; this being the best evidence available.

5. Insurance 🔑31 — Fraudulent Claim — Evidence.

Evidence on a prosecution under Pen. Code, § 549, *held* to raise more than a presumption, and to be sufficient to go to the jury on the question of the sending of the proof of loss, and claim having been by defendant.

6. Insurance 🔑31 — Fraudulent Claim — Evidence.

While on prosecution for the second crime denounced by Pen. Code, § 549, the preparing, making, or subscribing of an affidavit or proof of loss with intent to present it in support of a fraudulent claim on an insurance contract for payment of a loss, evidence of the presentation of the claim is admissible, such crime may be established without proof of actual presentation of the claim.

7. Criminal Law 🔑763(3) — Trial—Instructing on Facts.

Under Const. art. 6, § 19, inhibiting charges with respect to matter of fact, charging that as to certain facts, of which there was evidence, there was no contention, and the jury should find accordingly, was error, defendant having by his plea of "not guilty" put in issue every material fact, and being entitled to have the jury pass thereon, though not having put in countervailing evidence.

Appeal from Superior Court, Humboldt County; Denver Sevier, Judge.

John F. Dufur was convicted, and denied a new trial, and appeals. Reversed.

L. M. Burnell and J. L. Kennedy, both of Eureka, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

CHIPMAN, P. J. Defendant was tried upon an information brought under section 549 of the Penal Code charging that he made and subscribed an affidavit and proof of loss with intent to present and use the same, and to allow and cause the same to be presented in support of a false and fraudulent claim for loss by fire. The claim is alleged to have been false and fraudulent by reason of the fact that, whereas the claim was alleged to have been made for $250 on a policy of insurance upon household furniture and personal effects, such personal property was charged to be of the value of not to exceed $25. There was a second count based upon a claim arising out of another policy, but as the jury found the defendant not guilty as to this count, it needs no further mention.

The jury found defendant guilty as charged in the first count. He appeals from the judgment of conviction and from the order denying his motion for a new trial. As the judgment and order must be reversed, we will notice some alleged errors as to matters likely to arise again should there be a new trial.

[1] 1. It is contended that the court erred to defendant's prejudice in refusing to fill the panel after a juror was excused and requiring defendant to exercise a peremptory challenge when the panel was not full, and also in refusing to fill the panel after a physically disqualified person had been excused. This question was raised in People v. Scoggins, 37 Cal. 676, and decided adversely to defendant's contention. The method of impaneling a jury in a criminal case was established in that case, and was approved subsequently in People v. Russell, 46 Cal. 121; People v. Iams, 57 Cal. 115; People v. Riley, 65 Cal. 107, 3 Pac. 413; People v. Hickman, 113 Cal. 81, 45 Pac. 175; People v. Harrison, 18 Cal. App. 288, 123 Pac. 200. We see no reason for reopening the question, but must regard it as settled.

[2] 2. Witness Ridling, an adjuster of fire losses for the company issuing the insurance policy in question, was called as a witness for the prosecution. He testified that:

> He met the defendant in Eureka and talked with him about the loss, at which time the defendant told witness that the premises had been burned. "Q. Did Mr. Dufur have the policies of insurance there at that time? A. Yes, sir. Q. Did you examine them? A. Yes, sir. Q. Did he surrender them to you, or did he retain them? A. He retained them, but let me look them over. Q. You looked them over? A. Yes, sir.
>
> "Mr. Nelson: Now I will ask the defendant to produce the policies.
>
> "Mr. Burnell: To that we object and assign it as error upon the part of the district attorney. He has no right to make any demand of that kind in any way, shape, or form. He cannot call upon the defendant in any way, shape, or form to produce anything. I assign that as error, and ask that the jury be instructed to disregard it.
>
> "Mr. Nelson: If you refuse to do that, we will offer in evidence these copies.
>
> "Mr. Burnell: We also object to that remark of counsel, and ask that counsel be instructed not to make any more such remarks.
>
> "Mr. Nelson: I ask for the original documents. We are not asking Mr. Dufur to testify. I know he does not have to testify, but we want to identify these documents.
>
> "Mr. Burnell: My objection runs to all the remarks of the district attorney.
>
> "Court: Proceed, Mr. Nelson.
>
> "Mr. Nelson: Q. I will ask you, Mr. Ridling, to examine that copy of a policy. A. This is a copy of the policy.
>
> "Mr. Burnell: To that we object, unless he shows he knows this to be a copy of his own knowledge, that he knows this is a copy; unless he swear of his own knowledge, this is a copy.
>
> "Mr. Nelson: Q. Is this a copy of one of the policies shown you by Mr. Dufur on October 2, 1916, in this city? A. Yes, sir."

The copy produced by the witness was then introduced in evidence.

It is urged with much earnestness that this was a violation of defendant's constitutional right forbidding his being called upon to be a witness against himself. 14 Ency. of Evidence, §§ 646, 647, is cited to the effect that it is error "even to call upon a defendant in a criminal case in the presence of a jury to testify or produce documents against his will, even though he makes no objection thereto." The following cases are cited in support of this view of the law: State v. Merkley, 74 Iowa, 695, 39 N. W. 111; McKnight v. United States, 115 Fed. 972, 54 C. C. A. 358; Gillespie v. State, 5 Okl. Cr. 546, 115 Pac. 620, 35 L. R. A. (N. S.) 1173, Ann. Cas. 1912D, 259. In the Oklahoma case it was said:

> "When such a demand is made, a defendant must accept the alternative of either producing the letters, and thereby incriminating himself, or of having the jury place the strongest possible construction against him upon his failure to do so. If this can be done, the very life, body, and soul of the Constitution would be violated and trampled upon."

In the Iowa case "the defendants answered that they did not have the papers, and did not know where they were," and the court, while holding that the lower court erred in making the inquiry, stated that:

> "Whether in view of the answer to the inquiry and the whole record, the defendants were in any respect prejudiced by what the court did, we have no occasion to determine."

In view of our constitutional provision found in section 4½, article 6, we must determine this very question whether the error was prejudicial. The policy of insurance was an essential link in the chain of evidence necessary to be proven, although the charge was based upon a false affidavit as to the value of the goods covered by the policy and lost by fire. But the existence of the policy was shown. Defendant had it and showed it to the agent, the witness, to examine, and the agent had at the time in his possession the copy of the policy retained by the company, which was introduced.

In the cases cited the documents demanded were the original and only ones in existence. The courts held that secondary evidence of their contents could have been shown, and hence there was no necessity for making the demand in the presence of the jury, thus giving rise to inferences prejudicial to the defendant. We cannot see how, in the present case, any inference unfavorable or prejudicial to defendant could have arisen in the minds of the jury in view of the fact that the policy in his possession and the one introduced were identically the same, and that the offense charged was based upon an entirely different document.

[3, 4] 3. Error is assigned in connection with evidence admitted over objection in making proof of value of the property destroyed. Witnesses Jones and his wife testified to the purchase price of certain of the destroyed articles. Certain other witnesses testified to the value of the articles destroyed and, it is contended, that they did not qualify as expert witnesses; that they did not know the market value in the vicinity where the property was situated when destroyed or that there was any market value at that place, and did not know what it would cost to replace the property at the point where destroyed. The contention seems to be that section 2756 of the Civil Code applies, and that the proof should have been addressed to the measure of indemnity to the insurance company which the Code says "is the expense it would be to the insured at the time of the commencement of the fire to replace the thing lost or injured in the condition in which it was at the time of the injury." We do not think this section has any application in this case. As between the company and the insured, the section fixes the "measure of idemnity," and that is its sole purpose. The issue here is whether defendant violated section 549 of the Penal Code, which provides that:

> "Every person who presents or causes to be presented any false or fraudulent claim, or any proof in support of any such claim, upon any contract of insurance for the payment of any loss, or who prepares, makes, or subscribes any account, certificate of survey, affidavit, or proof of loss, or other book, paper, or writing, with intent to present or use the same, or to allow it to be presented or used in support of any such claim, is punishable," etc.

Rightly to test the correctness of the court's rulings and whether or not prejudicial, the situation and character of the property destroyed should be understood. In 1906 Isham R. Jones acquired the land. It is situated east of Eureka about 45 miles in what is spoken of as "the mountains" or "in the hills." Jones erected a dwelling house and barn on the premises, and moved his family there in 1907. The dwelling consisted of a small sitting or family room and a kitchen; over these was an attic. He took with him for the kitchen a small four-hole cooking stove, and for the family room a small sheet-iron heater, "a pair of bed springs," which he utilized by nailing them to uprights for legs, "a kind of a camp chair that had a cloth back and seat, and some other chairs." These articles were "secondhand" and were purchased in Eureka at a cost, as Jones testified, of $15. He took some bedding, dishes, knives and forks, and other kitchen utensils. A center table for the family room was roughly constructed after the family arrived. A rough cupboard and table were made for use in the kitchen. In 1914 Jones sold the premises to Ed Baxter and A. D. Dufur, defendant's brother, for whom defendant was attorney in fact and made the affidavit charged in the information. Baxter had a third interest in the premises, and sold this interest to Dufur in 1915. He "lived there until the summer or fall of 1915," and had charge of the property. He testified that when he left the place the articles turned over with it by Jones were in the house, and that these constituted substantially all of its furnishings. He described the household effects. The heating stove in the family room "was a little, round sheet-iron heating stove, with a kind of fancy top to it, but it had been broken, and we had to put the wood in from the top. It was secondhanded." He describes the bed thus:

> "It was made out of poles, and I believe a pine board was split out for the front part of it and shaved a little bit in the center, and if I remember right, the back was the same kind of a board, and underneath were legs. All of the bed except the wire springs was a homemade affair. It had been there a long time."

Of the bedding he testified:

> "Well, there was a tick made out of calico. I believe that was spliced together in two or three pieces, and I believe it was filled with straw or hay, * * * a half a white blanket that had been a good blanket, and a double gray blanket and a quilt stuffed with some kind of feathers, quite a heavy quilt, but it had been used a great deal, * * * that Mrs. Jones made herself; a pillow or two, but no sheets."

He mentions a center table and a small table made out of a dry goods box "with four small legs attached to it," also a small diamond-shaped hat rack with "four pegs in it," a set of deer horns, a canvas bottomed "tipping chair" and five or six common wooden bottom chairs in the whole building. In addition to the bed described, there was a bunk, homemade. "Mr. Wells was sleeping in that, and he fixed it up himself." There was no bedding for this bunk. Wells was a hired man. Baxter described the kitchen equipment as consisting of some plates, knives and forks, and spoons, and some pots and kettles and other small articles, enough to serve a half a dozen people, all old and formerly in use by the Joneses. There was a cupboard built against the wall with three or four shelves "and a cloth nailed up for a cover" and another similarly constructed cupboard with no cover; a homemade sink of wood; the cooking stove he describes as "a small stove, a four-hole cooking stove," old when he went there; "the fire box was burned out and Mr.

Wells had patched it up"; the chairs were old, as were all the cooking utensils; there were two galvanized washtubs, one in fairly good condition, the "other leaked and would not hold water." The foregoing covers substantially the furnishings of the dwelling. This and other witnesses mentioned some other things of small value. The witness was asked to state "the value of the household contents" when he was last there, and replied: "About $25 or $30. Q. You would consider that a liberal valuation? A. Yes, sir." Several witnesses were called to testify to the contents of the house—persons who lived in the vicinity and had frequently been at the Dufur house, some of them working there, eating and sleeping at the place. They described the furnishings and the condition they were in as to use. None of them fixed a greater value than did Baxter, and some placed it as low as $20 "for the entire outfit."

The schedule of articles to which defendant made affidavit embraces many articles, of no great value each, which seem not to have been in the house. The list foots up $336.45. Among the items are the following:

> "1 bed and mattress and springs, all complete, $25; blankets on said bed, $5; sheets on said bed, $2; pillows on said bed, $1.50; 1 bed, mattress, bedding and pillows, $25; cooking utensils (not otherwise herein enumerated), $25; kitchen cooking stove, $30; 1 large parlor stove, $25; 1 kitchen cupboard, $15."

Other articles are set down at values much in excess of the value placed upon them by witnesses. Defendant submitted no evidence of values, nor did he controvert the testimony of witnesses as to the contents of the house which covered the time shortly before the fire occurred. These witnesses were accustomed to life in the hills on stock ranches such as the Dufur place, remote from markets and in cabins scantily furnished as this one was, and they testified to a general knowledge of the cost or value of such articles as entered into the outfitting of the Dufur house. Concededly there was no open market or established market value of these articles at the place where destroyed, and especially was this true of old furnishings. The principal articles had been in use since 1906, and were then "secondhand," and practically all of them had been in use from that date forward. We might almost safely say that with the description given by the witnesses, the jury would be authorized to pass upon values without the aid of expert testimony. Certain it is that the testimony given was the best available, and in the absence of any evidence to the contrary, the jury were justified in accepting the values testified to.

[5] 4. Error is assigned in admitting the claim and the proof of loss, which were one and the same instrument, on the ground that "it was incompetent and not identified as coming from the defendant." At the time Mr. Ridling met defendant, referred to in paragraph marked 2 above, defendant furnished Ridling an itemized statement of the contents of the house. This was on October 2, 1916. On the next day defendant presented the statement, and witness told him to have it sworn to before a notary. Defendant took the statement, and on October 4th defendant returned it to witness duly sworn to as of that date.

> "Q. What did he say to you in reference to the document that he handed to you, and the values therein set forth? A. He said that is the value, what he claimed was his loss. Q. What further conversation did you have with Mr. Dufur at that time? A. Mr. Dufur and I could not agree as to the amount of his loss, and he requested proof of loss, blank proof of loss for him to make out, which I gave to him. Q. I will ask you to examine these two documents, in reference to the form first, Mr. Ridling. Did you hand Mr. Dufur two proofs of loss similar to those? A. Those are the identical proofs that I handed to him; yes, sir. Q. And where did you give them to Mr. Dufur? A. In his office. Q. In this city? A. Yes, sir. Q. Now, Mr. Ridling, after you gave these two blank forms of proof of loss to Mr. Dufur, when did you next see them? A. He mailed them to the company's office, and they returned them to me."

Witness testified that:

> He "received the first proof upon the 7th of October, and after examining them, returned them to defendant for amendment by registered mail. Q. Did you get a return card from Mr. Dufur that he had received them? A. Yes, sir" (exhibiting the card which was introduced in evidence signed John F. Dufur). "Q. Now, Mr. Ridling, when did you next see the original proofs of loss? A. Upon the 16th day of October I received the amended proofs of loss. Q. And they were certain proofs of loss with certain additions and slips attached thereto. A. Yes, sir. Q. Who handed them to you the second time? A. Mr. Stealey. Q. Did you see the envelope in which they came the second time? A. This is it, the second time (showing envelope). * * *
>
> "Mr. Nelson: Q. This exhibit marked 6 is the one you received on October 5, 1916, and again on October 16, 1916? A. Yes, sir. * * * Q. Do you identify these exhibits, People's Exhibits Nos. 6 and 7, as having been handed to you in this envelope (showing envelope)? A. Yes, sir. Q. Both of them in the one envelope? A. Yes, sir. Q. You received them on October 7, 1916? A. Yes, sir. Q. And then again on October 16, 1916? A. Yes, sir; they came back in that envelope. Q. They both came back in that envelope? A. Yes, sir."

The envelope was then introduced and was indorsed:

> "John F. Dufur, Eureka, Cal. [Four 2-cent stamps.] Registered No. 1420. [Ten cent registry stamp.] Return Card Required. (143) Newark Fire Insurance Co. San Francisco 76695 California. 332 Pine Street. Old office 304 and 310 Kohl Bldg."

Post-marked on back:

> "Eureka Cal Oct 14 1916, Registered. San Francisco Cal Oct 15 1916."

Notary Dickson identified his signature to the first proof made October 4th.

> "Q. Can you identify John H. Dufur's signature there? A. No, I am not familiar enough with his signature to do that. Q. Well, did he subscribe the paper in your presence? A. Well, I presume he must have done so, although my recollection does not serve me on that point."

The witness stated he had "no recollection about it"; that he had seen Mr. Dufur write, and had seen his signatures, and was of the opinion that this was his signature, but would not say so positively.

Notary Frost, before whom the proofs of October 14th were sworn to, was called as a witness, and defendant's counsel admitted the signature of defendant to be attached to the proofs. Witness was then shown defendant's signature on the envelopes above referred to, and after having qualified himself to testify as to defendant's signature, he testified: "Well, in my judgment I would say that I am convinced that the name of John F. Dufur in the upper left hand corner of each one of those envelopes is the signature of John F. Dufur, the gentleman sitting there." All this evidence was admitted under objection, and after it was all in, defendant moved to strike it from the record, which motion was denied, and the contention now is that:

> "At the best such evidence merely raised a presumption that the proof of loss was presented to the insurance company."

Counsel cited many cases to the effect that:

> "Every fact necessary to a conviction must be proven beyond a reasonable doubt, and no presumptions are to be made against the defendant."

The argument is thus stated:

> "At the most the evidence only shows the claim and proof of loss to have been in the possession of the insurance company, after having been in the possession of the defendant. But it does not show such paper was delivered or presented to the company by the defendant, or that it and the envelope in which it was contained were sent by him or even with his knowledge, much less with his consent. The presumption of delivery which follows from the possession of an instrument cannot be indulged in opposition to the presumption of innocence, where a material element of a criminal charge is involved."

We think the jury had something stronger than a presumption to justify their implied finding that defendant not only executed these proofs, but did so with intent to present them, and did cause them to be presented by transmission through the mail. It is inconceivable that after defendant had executed the documents and had sworn to them before notaries and had inclosed them in envelopes indorsed and registered by him and directed to the insurance company, that some other person got possession of them and dropped them into the post office at Eureka without defendant's knowledge or consent. At no time after investigation began of his good faith in making claim of loss did he disavow executing and sending these documents, but, on the contrary, sought to show by witness Ford, who had acted as his attorney at one time, that he consulted Mr. Ford as to the values he had placed to the various articles claimed to have been destroyed by the fire. It would tax human credulity to the breaking point to attribute the sending of these proofs to the insurance company by any person other than defendant.

[6] Furthermore, section 549 of the Penal Code embodies two crimes: First, the presenting or causing to be presented any false or fraudulent claim, etc.; and, second, the preparing, making, or subscribing any affidavit or proof of loss with intent to present the same, or to allow it to be presented, etc. Evidence of the presentation of the claim is admissible in support of the second crime mentioned in the section, but the crime as charged in the information might be established without proof that the claim was actually presented.

5. Error is urged in giving the following instruction:

> "Certain facts are admitted in this cause, and hence it is proper that the court refer to them. There is no contention but that there was a building and barn at the place designated in the information, and that in this building there was certain personal property, and in the barn there was hay which belonged to A. D. Dufur; that this property was insured by the Newark Fire Insurance Company of Newark, N. J., and that if any loss by fire occurred to said property, such loss, if any, was payable to A. D. Dufur; that the defendant was the attorney in fact for said A. D. Dufur at the times mentioned in said information; that there was a fire, and the dwelling house and contents therein and the barn and the hay therein were destroyed by said fire. As to those facts there is no contention, and you must find accordingly."

[7] There was sufficient evidence to have justified the jury in finding the facts stated in the instruction. The record, however, does not show that they were admitted by the defendant. On the contrary, the plea of "not guilty" put in issue every material fact, and though not controverted by countervailing evidence, it was the right of the defendant to have the jury pass upon every material fact. Section 19, article 6, of the Constitution, declares that:

> "Judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law."

The court took from the jury or, what is the equivalent, directed them to find the enumerated facts leaving substantially only the alleged making of the affidavit with the intent alleged and the value of the property destroyed, to be found by the jury. The Attorney General cites People v. Perry, 65 Cal. 568, 4 Pac. 572, and People v. Christensen, 85 Cal. 568, 24 Pac. 888, where it was held that a mere statement of the evidence is not a violation of the Constitution. But the instruction is not a "mere statement of the evidence"; it is a statement that certain material facts were admitted; that there was no contention as to them, and that the "jury must find accordingly." It was said in People v. Gordon, 88 Cal. 422, 426, 26 Pac. 502, 504:

> "While section 19, article 6, of the Constitution allows judges to state the testimony to the jury, yet this principle has always been strictly enforced, and necessarily so, for that judges must not charge juries with respect to matters of fact is a constitutional prohibition which has been jealously guarded and rigidly upheld from the earliest judicial history of the state," citing People v. Williams, 17 Cal. 147.

See remarks of Mr. Justice Sloss in People v. MacDonald, 167 Cal. 545, 550, 140 Pac. 256; People v. Carder, 31 Cal. App. 355, 357, 160 Pac. 686. See, also, note in Treadwell's Constitution, p. 344, where the cases are collected.

There are some other assignments of error which we do not deem it necessary to consider. A number of collateral matters were gone into by the district attorney which had little, if any, bearing upon the issues. The statement made by the witness Baxter respecting an insurance policy distinct from the one in question we think was irrelevant. Some matters introduced as tending to show intent might well have been omitted as too remote to have such tendency. We think there was evidence upon all issues sufficient to support the verdict if the jury had been permitted to exercise their own judgment upon all the evidence. Inasmuch, however, as the court took from the jury certain material facts and directed a verdict as to them, it becomes imperative upon the reviewing court to hold this to have been prejudicial error.

The judgment and order are reversed.

We concur: BURNETT, J.; HART, J.

(34 Cal. App. 660)

STEPHENS, Governor, v. CHAMBERS, State Controller. (Civ. 1757.)

(District Court of Appeal, Third District, California. Sept. 17, 1917.)

1. STATES 🔑119 — APPROPRIATIONS — AUTHORITY OF LEGISLATURE.

In view of unquestioned appropriations by the federal Congress, which has only delegated powers for the purpose of paying pensions and for defraying expenses for the national memorial celebration at Vicksburg, Act July 31, 1917 (St. 1917, p. 1608), appropriation by Legislature of $15,000, to be used in the discretion of the Governor for the purpose of defraying expenses of a public nature, incident to such memorial reunion, is valid, despite Const. art. 4, § 31, prohibiting the gift of public money to any individual or corporation, or for the purpose or benefit of any corporation, or other institution not under the exclusive management of the state, for the purpose of the appropriation, was a public one to strengthen fraternal and patriotic ties in the United States, and was not an appropriation for the benefit of any particular individuals.

2. STATUTES 🔑119(3) — APPROPRIATIONS—SUBJECTS OF ACT—VALIDITY.

Act July 31, 1917 (St. 1917, p. 1608), appropriating $15,000 to be expended by the Governor for the purpose of assisting to defray the expenses of a public nature incident to the national memorial and peace jubilee at Vicksburg, in October, 1917, is not subject to attack under Const. art. 4, § 34, declaring that no bill making an appropriation of money except the general appropriation bill shall contain more than one item of appropriation, and that for a single and certain purpose to be expressed therein, on the ground that the language of the act is so indefinite and uncertain that it could not be determined whether the appropriation provided for is or is not for a public purpose.

3. STATUTES 🔑119(3) — APPROPRIATIONS—SUBJECTS OF ACT—VALIDITY.

Such act is not subject to attack on the ground that the appropriation is not for a single purpose.

4. CONSTITUTIONAL LAW 🔑62—APPROPRIATION—VALIDITY.

Act July 31, 1917 (St. 1917, p. 1608), making an appropriation of $15,000 to be expended by the Governor in his discretion in defraying the expenses of a public nature incident to the Vicksburg National Memorial Reunion of October, 1917, is not invalid because vesting the Governor with discretion as to the expenditure of the appropriation.

Original application by William D. Stephens, Governor of the State of California, for a writ of mandate against John S. Chambers, State Controller of the State of California. Writ granted.

L. T. Hatfield, of Sacramento, for petitioner. U. S. Webb, Atty. Gen., and Robert W. Harrison, Deputy Atty. Gen., for respondent.

HART, J. This is an application for a writ of mandate requiring respondent, as state controller, to draw his warrant in favor of petitioner "for such portion of the sum of $15,000 as petitioner may require."

At the recent session of the Legislature there was regularly passed an act entitled "An act to provide for the celebration of the national memorial reunion and peace jubilee at Vicksburg, Mississippi, and making an appropriation therefor," which act was by the Governor approved and took effect July 31, 1917. Stats. 1917, p. 1608. Section 1 thereof reads, in part, as follows:

> "There is hereby appropriated * * * the sum of fifteen thousand dollars, to be expended by the Governor, in his discretion, for the purpose of assisting to defray the expenses of a public nature incident to the holding of the national memorial reunion and peace jubilee to commemorate the victories and virtues leading to the half century of peace and prosperity to the American nation, and further to strengthen the fraternal ties of amity in the United States," said reunion to be held at Vicksburg in October, 1917, on certain named days.

Section 2 provides that the Governor shall—

> "demand from the * * * controller, and the state controller is hereby authorized and instructed upon such demand, to draw his warrant in favor of the Governor for the sum of fifteen thousand dollars to be expended by him as above provided, and the treasurer is hereby authorized and directed to pay the same."

By way of answer and return to the petition for a writ of mandate, respondent alleges that said petition "does not state facts sufficient to entitle the petitioner to the relief prayed for," and it is contended that the attempted appropriation of money is contrary to the provisions of section 34, article 4, of the Constitution, which reads:

> "No bill making an appropriation of money, except the general appropriation bill, shall con-

tain more than one item of appropriation, and that for one single and certain purpose, to be therein expressed."

Thus it will be observed that, so far as the pleadings in this proceeding are concerned, the legality of the statute or appropriation in question is attacked upon one ground only. Indeed, in his brief, the Attorney General appears to concede that it is within the constitutional competence of the Legislature of this state to appropriate money from the funds of the state for the purpose and object for which the appropriation is made by the act under attack here, for he says:

> "In the determination of the validity of this appropriation, it is not necessary to question the objects and purposes of the reunion to be held at Vicksburg. It may well be admitted that such reunion tends to do all of the things expressed in the act as the reasons for holding such reunion. Nor do we here contend that the holding of such reunion is not a matter of state and national importance and one which it might well be to the state's advantage to encourage, even to the extent of appropriations of money to defray the expenses incident thereto."

In thus expressing himself, the Attorney General doubtless took into consideration, as properly he should, the act of the Sixty-Fourth Congress of the United States (session of 1915–16)—Act Cong. Sept. 8, 1916, c. 464, 39 Stat. 812—whereby money was appropriated for defraying the expenses of the "National Memorial Celebration and Peace Jubilee, * * * at Vicksburg, * * * in the year 1917, by the survivors of the Armies of the Tennessee and of the Mississippi," who participated in the memorable battle of Vicksburg in the month of July, 1863, for the reason that the appropriation involved in the act whose validity is here challenged is in aid of the purposes and objects of said act of the national Congress. With this concession of the Attorney General that there legally reside in the state the power and the right to appropriate a reasonable amount of the public moneys to aid in the achievement of the purposes of the act of Congress referred to, further consideration herein thereof might well be waived or dismissed, but, in view of the strictness with which the Constitution, by certain provisions therein contained, guards the disposal of the public revenues, and of certain cases expounding those provisions, some observations with respect to that proposition need not be deemed out of place herein.

[1] From what has already been said, it is doubtless plain enough that we are in full accord with the concession of the Attorney General that the Legislature may, without offending any of the inhibitory mandates of the Constitution with regard to the appropriations of the public moneys, make such an appropriation as the one whose legality is challenged in this proceeding; and so we express ourselves because of the conviction that, while the Legislature will not be permitted to go beyond the bounds expressly established by the people through their Constitution in the matter of the disposal of the revenues raised for the support of the state government, it would be opposed to and, indeed, conceivably in many instances, subversive of the highest ends and the best interests of, a government whose sovereignty and general policies are outlined and controlled by a written Constitution, framed in language necessarily general, if it were found requisite, in constitutional construction, to hold that the terms of the organic law should on all occasions be accepted and applied in their literal sense, or that there are not certain matters incidental and necessary to every well-governed state and its subjects as to which the Constitution is silent, in so far as express language is concerned, and as to which legislation looking to the highest welfare of the governed is absolutely necessary. A written Constitution, like a statute, cannot so deal with particulars as to meet or provide for every case or contingency which may arise and of which legislative cognizance is allowable if necessary to the complete enjoyment of those privileges, immunities, and rights which are of the essence, and, indeed, the primary and foremost objects of a government in which, like ours, ultimate sovereignty is in the people themselves. By this we do not mean to say that the limitations or barriers contained in the Constitution against the exercise of legislative power may be set aside or disregarded, or that the intent of the organic law, as it is to be gathered from the instrument itself, shall not in all cases prevail. Nor do we intend thus to imply that the courts, in the construction of a written Constitution, may be governed by a change in public sentiment as to any subject to which express attention is given and as to which limitations are fixed by the Constitution. But what we do maintain is that, since a written Constitution is intended as and is the mere framework according to whose general outlines specific legislation must be framed and modeled, and is, therefore, as stated and as is essentially true, necessarily couched in general terms or language, it is not to be interpreted according to narrow or supertechnical principles, but liberally and on broad general lines, so that it may accomplish in full measure the objects of its establishment and so carry out the great principles of government.

The Constitution of the United States involves a grant and limitation of powers. The federal government, through its Congress, can exercise or exert no power which is not clearly within the grant of the federal Constitution; and this means that Congress may exercise only the powers expressly conferred upon the federal government and such incidental or auxiliary powers as may be essential to the exercise and execution of the powers expressly granted. There is no provision in the national Constitution expressly authorizing the expenditure of public moneys for the purposes and objects stated in the act of Congress above referred to. Nor is there any single provision of that Constitution within the spirit or reason of which does authority for such an appropriation of the public moneys fall. The same is true as to the several acts of Congress pensioning soldiers who fought to uphold the Union in our domestic Civil War. But the latter acts, as well as the one giving rise to the appropriation herein attacked, have never been challenged upon the ground that they were ultra vires, or beyond the authority of Congress to enact. Perhaps, by applying to them the touchstone of strict technical principles of construction, their force as legal enactments might be destroyed. But no such view or method of construction as applied to those acts would by any court be accepted or resorted to. To the contrary, in comparing them with the Constitution, if, indeed, the solution of the question whether they are or are not valid involves a matter of constitutional construction, the courts, if discovering even no indirect or inferential authority for their enactment in the language of that instrument, would nevertheless find ample sanction for them in the general spirit of our national government and in the genius of our political institutions, as outlined and promulgated by the Constitution itself and so sustain them as treating with subjects which clearly fall, not within the letter of the organic law, but within the spirit and reason of those general policies which inhere, and of necessity must inhere, in every government framed and formed upon the lines of enlightened general principles—policies consistent and in harmony with the nature and form of the government as outlined by the primary law of the land and the absence of which would greatly and seriously curtail or restrict that full enjoyment of the rights of persons and of property which can only come from a government deriving its force from the consent of the governed. It would, indeed, come as a shock if the courts felt compelled to declare and so hold that laws pensioning those who fought to preserve the integrity of the American Union and who, from their accumulated years or disease, are unable to care for themselves, were beyond the power of Congress to enact. Such a judicial fiat would be universally denounced as repugnant to every consideration of governmental duty, obligation, and gratitude. But the motive underlying such legislation is much broader and more far reaching in its effect upon the government of society than the mere consideration of gratitude. Undeniably, the stability of every civilized government and its political institutions wholly depends upon the patriotism and loyalty thereto of its subjects; hence it is the first duty of every government so to administer its affairs as to inspire in its citizens patriotism and loyalty to the fundamental political principles upon which it is founded, and, to that end, through appropriate policies, teach and exemplify the duty which every citizen owes to his country and its government. Therefore, as stated, legislation which provides for the pensioning of those who have fought the battles of their country for the preservation of its governments and who are in need of assistance involves not only the quality of gratitude, but a just and substantial recognition of services inspired by patriotism, without which battles cannot, as a rule, successfully be fought. If it may be said as to the present crisis with which our country is confronted that patriotism in our citizens has not been aroused, how infinitely worse would the conditions in that regard now be if, in the past, our government had wholly failed in a proper way to recognize and reward, in proper cases, those who had gone to the front and fought our battles in the past?

As we understand the congressional act in aid of the purposes and objects of which the appropriation challenged here was made by our own Legislature, the great object and desideratum thereof is to bring about a sentiment of amity between those sections of our country who opposed each other in one of the most bitterly fought domestic wars of which history gives any record; for it is a matter of common historical knowledge that the bitterness of sentiment brought about between the northern and southern sections by that war existed in full vigor down to the opening of hostilities between this country and Spain which ended with the late Spanish-American War. And there can hardly be any doubt that that same old feeling in some degree still lingers or exists. The governments of the Union and of the states could adopt no more effective policy for reuniting the two sections in one common political sentiment than that which is involved in and represented by the legislation in question. That the inevitable effect of such a gathering, annually held, as seems to be the policy of Congress, so long as there is a considerable number of the survivors of both sides of that war, will be ultimately to destroy every vestige of that old feeling of antagonism in political sentiment (we here use the word "political" in its more comprehensive sense), there cannot be the shadow of a doubt; and that the inevitable consequence of a condition so brought about will be to establish throughout the whole country a deeper, more abiding and a universal love for our common country and its government, is equally plain. Congress could have exercised no power or established no other policy more conducive to the general welfare of our government and the people, for no government can long exist with its people radically divided in sentiment upon the fundamental political doctrines upon which it is founded.

If, then, Congress, circumscribed as it is within the narrow bounds of granted and limited powers, may rightfully, in the absence of express authority therefor, but solely by the exertion of that power which must inhere in every government if the general welfare is on all occasions and in every emergency to be subserved as intended by the very nature and spirit of our form of government, appropriate moneys from the public revenues for the purpose of accomplishing the great ultimate object of the act in question, why may not a state, essentially a constituent part of the Union—which, indeed, goes to the making of the Union—make a like appropriation as in aid of the object thus to be achieved?

While the governments of the Union and the states are independent of each other, operate within distinctly different spheres and are designed for the accomplishment of different specific objects, yet, upon general political or governmental policies their interests are common, and what in a political sense stands for the general welfare of the Union necessarily stands for the general welfare of the states. Unquestionably, the states, as separate entities and as component parts of the Union, are each equally with the Union interested in the crystallization and execution of any policy of the federal Union that will tend to perpetuate the permanency of the latter, for largely if not wholly upon the perpetuity of the Union depends the permanency of the states as governmental organizations. It follows, therefore, that the policy of the general government with respect to the subject-matter of the act of Congress above mentioned is necessarily the policy of each of the states, and that within the latter, no less than within the federal government, resides the power of effectuating and applying that policy. In other words, the duty, if it be a duty, of contributing to the carrying out or execution of that policy rests no less upon the states than upon the federal government. And the right of the states to do so does not depend upon any authority vested in them by express language in their Constitutions, nor is it to be controlled by the restrictions or limitations upon the legislative power contained in those instruments, but, as in the case of the federal government, arises from that inherent, dormant power which may legally be aroused to action, exerted and applied by all democratic governments, controlled by written Constitutions, whenever the exigencies of government imperatively require its exertion and exercise—that power which, in a general sense, is analogous to the general war powers of the federal government, under which, as war measures, the latter may, as it is now doing, properly control trade principles and execute an infinite variety of other acts which, under normal conditions, approach if not in truth involve paternalism in government or unwarranted abridgments of individual rights as assured and guaranteed by the Constitution.

Thus, it is clear, the inhibitions of our state Constitution against any gift of public money to any individual, municipal or other corporation (article 4, § 31), and interdicting the appropriation of public money "for the purpose or benefit of any corporation, association, * * * or any other institution not under the exclusive management and control of the state as a state institution" (Const. art. 4, § 22), have no application to this case. Indeed, it has been so held in a decision treating a proposition quite analogous in principle to that submitted for solution here. Daggett v. Colgan, 92 Cal. 53, 28 Pac. 51, 14 L. R. A. 474, 27 Am. St. Rep. 95. That case involves an interesting and instructive discussion of the propositions to which we have hereinabove given considerable attention, and we may, therefore, pardonably and with advantage, reproduce herein an extended excerpt from the learned opinion therein. It should first be explained that the Legislature of 1891 (St. 1891, p. 24) passed an act appropriating a large sum of money to be paid to the California Commission of the World's Fair Columbian Exposition, held in the city of Chicago, and to be used by said commission in the construction of buildings at said fair in which to maintain an exhibit of the industrial products of this state and to defray the expenses arising in connection with such exhibit. The state controller, claiming that the appropriation made by the act was in direct contravention of that part of section 22, article 4, of the Constitution above quoted herein, declined to draw his warrant in favor of said commissioners on the fund so appropriated. After discussing that proposition adversely to the position of the controller, the court, in its opinion, made these significant observations:

> "The defendant further contends that the statute is unconstitutional for the reason that the appropriation thereby made is not for a public use, such as the state is authorized to make; that the maintenance of an exhibition of the products of the state in the manner contemplated does not fall within the legitimate authority of the state government. In passing upon this proposition, it is necessary to bear in mind that what is for the public good, and what are public purposes, 'are questions which the Legislature must decide upon its own judgment, in respect to which it is vested with a large discretion which cannot be controlled by the courts, except, perhaps, where its action is clearly evasive. * * * Where the power which is exercised is legislative in its character, the courts can enforce only those limitations which the Constitution imposes; not those implied restrictions which, resting in theory only, the people have been satisfied to leave to

the judgment, patriotism, and sense of justice of their representatives.' Cooley's Constitutional Limitations, 154. It is undoubtedly true that public money can be rightfully expended only for public purposes, but as well said by that eminent jurist, Judge Cooley, in delivering the opinion of the court in People v. Salem, 20 Mich. 452, 4 Am. Rep. 400: 'Necessity alone is not the test by which the limits of state authority in this direction are to be defined, but a wise statesmanship must look beyond the expenditures which are absolutely needful to the continued existence of organized government, and embrace others which may tend to make that government subserve the general well-being of society, and advance the present and prospective happiness and prosperity of the people.'

"In view of these principles of constitutional law, which are so well settled as to be placed beyond discussion or dispute, it is manifest, we think, that the court is not authorized to declare the act under consideration void, upon the theory that the expenditure thereby authorized can in no manner be considered as tending to promote the public welfare, which it is one great object of government to secure. The question whether the public interests of the state would be at all advanced by an exhibition of its products such as is contemplated by the act was an appropriate one for discussion in the halls of the Legislature before its enactment, and for the consideration of the Governor before approving it, but it is not one for this court to decide, upon the individual views of its members concerning the wisdom or expediency of such legislation.

"There is no difference, except in degree, between the appropriation contained in this act and those which for years have been made without any question as to their validity, for the support of the state agricultural fair, and the various district agricultural societies throughout the state. The fact that this exhibit of the products of the state is to be made without the limits of the state does not change its essential character, or make it any less an occasion or purpose in which, in an enlarged sense, it may be said that the people of the state have an interest. So, also, it would be hard to distinguish this appropriation in principle from those appropriations which have been made from time to time for the maintenance of horticultural, viticultural, and other similar commissions. None of these, strictly speaking, are required for the proper administration of the government of the state, and possibly, in the opinion of many, call for an unjustifiable and useless expenditure of money. But the power of the Legislature to create such commissions has never been doubted.

"We know from the express declaration of the act of Congress authorizing the Columbian Exposition that the purpose of the exposition is to commemorate the four hundredth anniversary of the discovery of America, 'by an exhibition of the resources of the United States of America, their development, and of the progress of civilization in the New World'; and that such exhibition is to be of a 'national and international character, so that not only the people of the Union and of this continent, but those of all nations, as well, can participate.' We have no doubt that it was fairly a matter within the power of the Legislature to determine whether, as a matter of public policy and as tending to advance the best interests of its citizens, this state should join with its sister states, and with the government of the United States, in celebrating in the way suggested the historical event referred to.

"It has been held in many cases that a municipal corporation has no authority, under the general powers usually given such corporations, to appropriate money for the celebration of the anniversary of important events in the history of our country, such as the Fourth of July (Hodges v. Buffalo, 2 Denio [N. Y.] 110; Hood v. Lynn, 1 Allen [Mass.] 103) and the surrender of Cornwallis (Tash v. Adams, 10 Cush. [Mass.] 252). See, also, The Liberty Bell [C. C.] 23 Fed. 844. These decisions, however, all rest upon the principle that municipal corporations have no powers except such as are specifically granted by the act of incorporation, or are necessary for the purpose of carrying into effect the powers expressly granted. But it has never been doubted that the state could confer upon a city or town the authority to celebrate such important events in the history of the country as appeal to the patriotism or higher sentiments of the people, and to tax their citizens to pay the expense thereof. Thus it was held that the city of Philadelphia had the power under its charter to provide for the entertainment of distinguished visitors upon the occasion of the celebration of the Centennial Anniversary of American Independence. Tatham v. Philadelphia, 11 Phila. [Pa.] 276. So, also, in Massachusetts, by general statutes, the power has been conferred upon towns to celebrate the centennial anniversary of their incorporation (Hill v. Easthampton, 140 Mass. 381 [4 N. E. 811]), and also to appropriate money for the celebration of holidays, and for other public purposes (Hubbard v. Taunton, 140 Mass. 467 [5 N. E. 157]). These cases are authority for the proposition that the state itself, unless restrained by its Constitution, has the power to make appropriations for such purposes, because unless it possesses the power, it could not confer it upon its municipal corporations. Such expenditures are justified under the general power which the state has to provide for the public welfare, the limits of which are perhaps not capable of exact definition, and are the same in principle as appropriations made for the building of monuments to commemorate great historical events, or for the erection in public places of the statues of those who by common consent are classed among the patriots or benefactors of the nation. Undoubtedly this power may be the subject of great abuse, but this is no argument against its existence. The only protection against reckless and improvident appropriations for public purposes must be found in the character of those intrusted with the power of legislation, and in the integrity and firmness of the chief executive of the state."

Obviously, there is a distinction between the act questioned in the Daggett Case and the act involved in this proceeding with respect to the specific objects of the respective appropriations of the public money. Both, however, aim at the accomplishment of the same general object, viz. the promotion of the general public welfare. For, so far as the promotion of the public welfare is concerned, no distinction in importance or effect between the two acts can logically be pointed out. The exploitation of the industrial resources of a state is surely a matter which directly affects and, where such resources are in magnitude such as to demonstrate the natural material wealth and prosperity of the state, promotes the public welfare. No less may be said of public acts looking to the promotion and fostering in the citizens of a state or nation sentiments of patriotism, which, as we have shown, and as is most obviously true, constitutes the essential mainspring of every stable government. What, indeed, would industrial prosperity count for in a country whose government was without the support of the patriotism and loyalty of its subjects? The past political history of Russia, at this writing in the throes of bitter political disturbances and turbulences, may well stand as an answer to the question.

As stated in the opinion in the Daggett Case, supra, the question whether the public interests of the state as well as of the nation of which the former is an essential part will be advanced by the meeting in reunion at Vicksburg of the survivors of both sides of the Civil War that fought at the battle known in history by the name of that city was an appropriate one for discussion in the halls of the Legislature before the appropriation was made by a legislative act, and for the consideration of the executive before approving it. We must assume that the Legislature and the Governor had before them facts and data upon which they were enabled to predicate their judgment that the state and the Union would be materially benefited by the reunion, and thus the public welfare and general well-being of society subserved. Their conclusion regarding the act cannot, therefore, be impeached by the courts.

There is no language or provision in the statute appropriating the money indicating that any individual will or can, if the appropriation be properly expended, or dispensed according to the face of the act, receive a single cent as a gratuity or by way of assistance, but that the money appropriated shall be expended in such manner as the executive shall determine will the better and the more effectively effectuate the specific objects of the appropriation and the ultimate purpose to be thereby subserved. And herein lies the distinction between the appropriation in question and that considered and properly held invalid by this court in the case of McClure v. Nye, 22 Cal. App. 248, 133 Pac. 1145. The act in that case attempted to appropriate the sum of $15,000 out of the state treasury "for the purpose of paying the transportation of certain veterans of the Civil War to Gettysburg, Pennsylvania, on the occasion of the fiftieth anniversary of the battle fought on that battlefield. Obviously, upon the very face of that provision the appropriation amounted to nothing less than a gift of public moneys, and hence flew squarely in the face of the provision of our Constitution against thus disposing of our public revenues. In the present case, as seen, the appropriation is to be used on the occasion of the reunion at Vicksburg for the purpose of effectuating the great, central object of the gathering, as pointed out by the act of Congress and the act here in question, viz. to strengthen the fraternal ties of amity in the United States. As shown, no express provision is made by the act for the payment of the transportation of veterans or other persons to Vicksburg, though we doubt not that if, in furtherance of the paramount and ultimate object of the reunion, it be necessary to apply some of the money in sending representatives from California to the reunion or convention, such expenditure would come within the legitimate purposes of the appropriation and the right of the state to bear.

[2] We are now brought to the consideration of the principal point upon which the Attorney General relies to impeach the constitutional validity of the appropriation, viz. that the act making the appropriation is inconsistent with the provisions of section 34 of article 4 of the Constitution, which is above reproduced in full herein. The gravamen of the Attorney General's argument in support of this position is that the language of the act is so uncertain and indefinite that it cannot be determined therefrom whether the appropriation thereby provided for is or is not for a public purpose. This argument, no doubt, comes from the language of the act, "for the purpose of assisting to defray the expenses of a public nature," etc. It may be conceded that this language is so general as to be ambiguous as to the specific purpose of the appropriation, and if the act contained no further amplification of the purpose for which the appropriation is designed than may be implied from those words—that is, that the appropriation was for some unexpressed or undiscovered purpose—it might be necessary to hold that the position of the Attorney General is well taken. But the language referred to is immediately followed by other language which clearly and with certainty expresses the specific purpose of the appropriation—a purpose which the Legislature has found refers to the general welfare of the state and, therefore, the expenses necessary for its execution a burden which may properly be borne by the state.

[3] There is no ground to support the argument that the appropriation is not for a "single" purpose within the meaning of that word as it is employed in the section of the Constitution mentioned. The sole and only purpose of the appropriation, as is clearly deducible from the language of the act, is to assist in defraying the expenses of a convention of persons who are so to meet in reunion to effectuate a purpose by the execution of which, according to the tenor of the act here in question and the act of Congress above referred to, the public welfare of the state will be subserved.

[4] Nor is there any legal reason which will uphold the objection that the act is invalid because it vests in the Governor discretion as to the expenditure of the money appropriated. This provision was doubtless inserted in the act for the purpose of committing to the judgment of the executive the determination of the manner in which the appropriation may be expended to the best and highest interests of the state. If, for illustration, it becomes necessary to send representatives from the state to the reunion, it is only proper that the Governor, upon whom

the act fixes the responsibility for the expenditure of the money, should be clothed with some discretionary power as to the number of persons so to be sent, and as to the amount of money that should reasonably be expended for defraying the expenses of such representatives to Vicksburg and back and while there during the progress of the convention. This should be true, since the act itself does not undertake to point out specifically how the money shall be used. Of course, the presumption is that the executive will perform his duty under the act faithfully and in furtherance of the objects and purposes intended to be subserved thereby.

Our conclusion is that the appropriation is perfectly valid, and, accordingly, a writ of mandate will issue out of this court commanding and requiring the respondent, state controller, to draw his warrant or warrants on the fund appropriated by the act in favor of the Governor of the state of California, as provided by said act, and, in accordance with the stipulation heretofore filed herein by the attorneys of the respective parties, said writ is ordered to issue forthwith.

We concur: CHIPMAN, P. J.; BURNETT, J.

176 Cal. 402

In re WALKER'S ESTATE. (L. A. 4968.)

(Supreme Court of California. Oct. 26, 1917. Rehearing Denied Nov. 22, 1917.)

1. Executors and Administrators 🔑314(6)—Distribution of Estate—Parties.

An administrator has no interest in a controversy to determine rights of inheritance, he being a mere officer of the court holding the estate as a stakeholder, to be delivered in accordance with the order of the court.

2. Executors and Administrators 🔑314(6)—Distribution of Estate—Administrator as Party—Waiver of Objection.

Where an administratrix claiming to be sole heir petitioned that the estate be distributed to her and others claiming to be heirs proceeded to try the case and made only vague objections, that the latter were the "only persons interested," to the administratrix being a party, there was a waiver of the objection.

3. Appeal and Error 🔑1036(2)—Harmless Error—Parties.

Where an administratrix petitioned in her representative and individual capacities alleging that she was sole heir, and cross-petitioners joined issue, and petitioner paid all the expenses of the controversy out of her personal estate, there was no prejudicial error in her appearance in her representative capacity.

4. Bastards 🔑3—Presumptions as to Legitimacy—Rebuttal.

Where an interlocutory decree of divorce is granted, and children are begotten thereafter and are born within 10 months of the death of the husband, the children, as provided under Civ. Code, § 194, are presumed to be his, but such presumption may be rebutted by sufficient evidence that he was incompetent, entirely absent, absent during the period when the child must have been begotten, or only present under such circumstances as afford clear proof that there was no sexual intercourse.

5. Bastards 🔑3—Marriage—Presumptions as to Legitimacy of Issue.

Where communication between husband and wife was such as to have afforded opportunity for sexual intercourse, whatever probabilities exist, no evidence can be admitted to show that any man other than the husband may have been, or probably was, the father of the wife's child.

6. Bastards 🔑5—Legitimacy — Evidence of Prior Act of Infidelity.

That a wife had an illegitimate child was not competent to show that a later child was illegitimate, under Civ. Code, § 194, providing that children born within 10 months after dissolution of marriage are presumed to be legitimate.

7. Bastards 🔑1—Legitimacy — Effect of Interlocutory Decree of Divorce.

An interlocutory decree of divorce does not affect the status of children begotten after its rendition, as they were not parties to such action.

8. Divorce 🔑169 — Interlocutory Decree of Divorce—Effect.

While an interlocutory decree of divorce does not affect the relations of husband and wife, it is a judicial determination that the wife is not thereafter dwelling with him as his wife.

9. Bastards 🔑3—Presumptions of Legitimacy—Interlocutory Decree of Divorce—Evidence.

An interlocutory decree of divorce is admissible to negative Code Civ. Proc. § 1962, subd. 5, providing that issue of a wife cohabiting with her husband is indisputably presumed legitimate, and also to show the improbability of an immoral sexual intercourse.

10. Bastards 🔑8—Presumption of Legitimacy—Instructions.

An instruction that an interlocutory decree of divorce on the ground of desertion decreases somewhat the weight of the presumption of legitimacy, in Civ. Code, §§ 193, 194, presuming issue legitimate born within 10 months of dissolution of marriage relation, was erroneous and prejudicial, misleading the jury to believe less evidence was required to overcome the presumption, and that very little weight should be given it.

11. Bastards 🔑5—Interlocutory Decree of Divorce — Conduct of Husband and Wife—Declarations—Evidence.

In an action concerning legitimacy of a child begotten during an interlocutory decree of divorce, evidence of conduct, and declarations concerning such conduct, was admissible to show illegitimacy, although of little weight where access of the husband to the wife was shown.

Department 1. Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

In the matter of the estate of Cornelius Walker, deceased. Petition by Mabel A. Nason, administratrix and heir of the estate, for distribution of the estate, and cross-petition by Earl Walker and Edwin Walker, by guardian, Mabel E. Walker. From an order distributing the estate, and an order denying their motion for a new trial, cross-petitioners appeal. Reversed.

See, also, 169 Cal. 400, 146 Pac. 868.

Schmidt & Riggins, of Los Angeles, for appellants. Geo. M. Harker, of Los Angeles, for respondent.

VICTOR E. SHAW, Judge pro tem. This proceeding grows out of the following facts: On July 3, 1913, upon the ground of desertion, Cornelius Walker obtained an interlocutory decree of divorce from his wife, Mabel E. Walker. He died on November 20, 1913, leaving an estate of which Mabel A. Nason, a daughter by a former wife, was appointed administratrix. On April 11, 1914, Mabel E. Walker gave birth to twin sons, Earl and Edwin, whose legitimacy as lawful heirs of deceased constitutes the subject of this controversy. On March 29, 1915, Mabel A. Nason, as "petitioner and administratrix," filed her first and final account, accompanied by a petition wherein she alleged that she was the sole heir of deceased, to whom she asked that the estate be distributed. In due time Mabel E. Walker, as guardian of her said minor sons, filed a counter petition alleging that they were children of deceased, and who, with Mabel A. Nason, constituted the only heirs to whom the estate should be distributed. Mabel A. Nason, as administratrix, answered this counter petition, denying all the material allegations thereof other than that she was an heir of deceased. Thereafter, on May 27, 1915, Mabel A. Nason, as administratrix, served notice that she would demand a jury to try the issues, as provided by section 1717, Code of Civil Procedure, and that on June 1, 1915, the administratrix would move the court to settle the issues to be tried. When the case was called for trial on December 9, 1915, Mabel E. Walker waived a jury trial and for the first time made an objection to the participation of any one in the proceeding other than herself, "on the ground that said minors by their guardian are the only persons interested in this proceeding," which objection was overruled and a trial was had before a jury, which rendered a verdict finding that said minors were not the children of deceased. Thereupon the court made its order settling the account and distributing the entire estate to Mabel A. Nason, from which, and an order denying her motion for a new trial, and other orders incident to the settlement of said estate in accordance therewith, Mabel E. Walker, as guardian of said minors, prosecutes this appeal.

[1] The first contention made by appellant is that Mabel A. Nason in her capacity as administratrix had no interest in the proceedings, and therefore no authority to participate in the trial or demand the impaneling of a jury to try the issues. In support thereof several authorities are cited, to the effect that an administrator of an estate has no interest in a controversy to determine rights of inheritance, he being a mere officer of the court holding the estate as a stakeholder, to be delivered in accordance with the order of distribution made by the court. Undoubtedly this is true. Roach v. Coffey, 73 Cal. 281, 14 Pac. 840; Estate of Healy, 137 Cal. 474, 70 Pac. 455; Estate of Murphy, 145 Cal. 464, 78 Pac. 960.

[2, 3] Nevertheless the rule is not applicable to the facts disclosed by the record in this case. It clearly appears therefrom that Mabel A. Nason, in filing her petition, appeared before the court not only as administratrix, but in her individual capacity, alleging that she was the sole heir of deceased. Her petition as an individual for distribution of the estate to her as the sole and only heir of deceased was filed prior to the appearance in the proceedings of Mabel E. Walker as guardian of the minors. Her position as an heir was clearly set forth therein, which fact as pleaded was by counter petition recognized and admitted by the guardian of the minors, and reiterated in the answer filed by the administratrix. It further appears that Mabel A. Nason personally paid the costs of the proceedings charged to her in defense against the claims of the said minors, and bore the expense of hiring counsel therein. Up to the time of calling the case for trial, her right as an heir to wage the contest was recognized not only by the guardian, but as well by the court. Appellant made no objection whatsoever to the fact that she appeared as administratrix or in a dual capacity, until after issue of heirship was joined, and the impaneling of a jury called to try the same on December 9, 1915, at which time her counsel, in language, if not misleading, at least not calculated to acquaint the court or opposing counsel with the grounds thereof, made the objection, as shown by a colloquy between the court and counsel for appellant, as follows:

> "Counsel: At this time we wish to interpose another objection and an objection is made to any one participating in this proceeding other than Mabel E. Walker, on the ground that said minors by their guardian are the only persons interested in this proceeding.
>
> "The Court: Overruled. * * * I cannot understand counsel's position. The petition here is by Mabel A. Nason and she alleges that she is the sole heir. You allege that the two children mentioned in your petition are the children of the deceased and admit that the administratrix is a child of the deceased and entitled to inherit. How can there be any question about her interest?"

To which counsel for appellant replied:

> "We do not believe there is any one interested in this case excepting the minors.
>
> "The Court: How could that possibly be?"

To which inquiry counsel for appellant made no response, but stipulated that the objection might be considered throughout the whole case. The case was tried upon the theory that Mabel A. Nason had appeared in her personal capacity as an heir of said deceased, contesting the right of the minors to inherit. Not only should appellant, under these circumstances, be deemed to have waived the objection now urged, but, since throughout the proceedings the case was tried as a contest waged by Mabel A. Nason as a conceded heir of deceased contesting the rights of the minors to inherit, the latter could not possibly be prejudiced by reason of such irregularity, which, in case of a new trial and upon the court being made acquainted with the condition of the record, it will no doubt order corrected.

A number of errors are predicated upon rulings of the court in admitting evidence the prejudicial effect of which, it is claimed, was greatly accentuated by instructions given to the jury. At the time of the death of deceased, Mabel E. Walker, mother of the minors, was, and for a number of years prior thereto had been, his wife, though they had not lived together as man and wife for a period of some four years. Excepting for a short time when the husband lived at Santa Monica, they, having separate abodes, resided in the city of Los Angeles, where during all the time the husband was engaged in business. On November 8, 1911, a property settlement was had between them, and on January 10, 1912, the wife brought suit for divorce on the ground of the husband's desertion. This action, however, was dismissed, and thereafter, on April 8, 1913, the husband instituted suit for divorce, alleging that his wife had deserted him since December, 1911. In this action the wife made default and an interlocutory decree was granted July 3, 1913, and thereafter, on April 11th, the twin sons were born.

[4] Section 194, Civil Code, provides that:

> "All children of a woman who has been married, born within 10 months after the dissolution of the marriage, are presumed to be legitimate children of that marriage."

The marriage relation existing between the husband and wife was not dissolved by the interlocutory decree of divorce, but by the death of the husband on November 20, 1913. Estate of Dargie, 162 Cal. 51, 121 Pac. 320; Brown v. Brown, 170 Cal. 1, 147 Pac. 1168; Olson v. Superior Court, 165 Pac. 706. Hence the children, having been born within 10 months succeeding his death, are, under the provisions of said section 194, presumed to be his sons. This presumption, however, as stated in Hargrave v. Hargrave, 9 Beav. 552, may be rebutted and overcome—

> "by proper and sufficient evidence showing that the husband was (1) incompetent; (2) entirely absent, so as to have no intercourse or communication of any kind with the mother; (3) entirely absent at the period during which the child must, in the course of nature, have been begotten; or (4) only present under such circumstances as afford clear and satisfactory proof that there was no sexual intercourse." Estate of Mills, 137 Cal. 304, 70 Pac. 91, 92 Am. St. Rep. 175.

[5] The court instructed the jury that the evidence adduced was insufficient to justify a finding that Cornelius Walker was impotent, or that he was entirely absent so as to have no intercourse or communication with the mother, or that he was entirely absent at the period during which the children must, in the course of nature, have been begotten; and told the jury that the sole question for it to pass upon in determining the issue was whether the presence of Cornelius Walker upon the occasion of conceded visits made upon and meetings with his wife were under circumstances which clearly established the fact that no sexual intercourse was had between them. Hence the jury must be deemed to have considered the evidence adduced only in so far as it bore upon the question thus submitted for its determination. Therefore, in reviewing the alleged errors, we are not concerned with evidence, even though incompetent, which tended to prove the incompetency of the husband, or his absence from the wife to an extent that he could have no intercourse or communication of any kind with her, or absent at the period during which the child must, in the course of nature, have been begotten, unless it also bears upon the question submitted to the jury, namely, that he was only present under such circumstances as afford proof that there was no sexual intercourse. In the consideration of such question, Lord Langsdale, in Hargrave v. Hargrave, supra, said:

> "It is, however, very difficult to conclude against the legitimacy in cases where there is no disability and where some society or communication is continued between husband and wife during the time in question, so as to have afforded opportunities for sexual intercourse; and in cases where such opportunities have occurred and in which any one of two or more men may have been the father, whatever probabilities may exist, no evidence can be admitted to show that any man other than the husband may have been or probably was the father of the wife's child."

See Phillips v. Allen, 2 Allen (Mass.) 453; Cross v. Cross, 3 Paige (N. Y.) 139, 23 Am. Dec. 778.

Not only is the record barren of any evidence tending to show that Cornelius Walker did not, during the period while living separate and apart from his wife, have physical access in the sense of opportunity for intercourse with her; but it, without contradiction, shows that he did at numerous times call upon her at her residence (ostensibly on business), on which occasions (and particularly at about the time when these children were begotten), the wife, without objection, testified they indulged in the procreative act. That he was not impotent, and during the period covering the time when the children were begotten he had access to his wife, by which is meant opportunity for intercourse (Cope v. Cope, 1 M. & Rob. 275; Bury v. Philpot, 2 Myl. & K. 349), cannot upon this record be questioned.

In the Banbury Peerage Case, 1 Sim. & Stu. 159, it was said "that after proof given of access (opportunity) of the husband and wife, by which, according to the laws of nature, he might be the father of a child, no evidence can be received except to deny that such intercourse had taken place."

In Van Aernam v. Van Aernam, 1 Barb. Ch. (N. Y.) 375, it is said that the mere fact that the wife is living as the mistress of another, the husband not making any effort to break up such relation, is not sufficient evidence from which nonaccess of the husband can be presumed, thus bastardizing the issue.

To the same effect is Phillips v. Allen, 2 Allen (Mass.) 453. In other words, the party insisting upon the illegitimacy of one born in wedlock must prove nonaccess of the husband by evidence other than the fact that he and his wife did not live together, or even that she was living with another, since, having access and being competent, even though another had like opportunity and might be the father, the law, in determining the question, will not permit the indulgence in probabilities, but presumes "that he is the father whom the nuptials show to be so." This "is the foundation of every man's birth and status, * * * the corner stone and very foundation on which rests the whole fabric of human society; and if you allow it once to be shaken, there is no saying what consequences may follow." Routledge v. Carruthers, Nicol. Adult. Bast. 161.

In Powell v. State, 84 Ohio St. 165, 95 N. E. 660, 6 L. R. A. (N. S.) 255, it is said:

> "Public policy requires that the status of a child born or begotten in lawful wedlock should be fixed and certain, and the immediate exigencies, or even the apparent justice of any particular case, will not justify a departure from the rule so necessary and salutary to the best interests of society. The law is not willing that a child shall be declared a bastard to suit the whim or purpose of either parent, nor upon evidence merely that no actual act of intercourse occurred between husband and wife at or about the time the wife became pregnant. The proof must be such as to show the impossibility of access, and this evidence not only fails to prove that, but on the contrary does show that access was a physical possibility at all of the time from the date that she claims there was a final separation up until the time the divorce was granted. * * * Before such a child can be adjudged a bastard, the proof must be clear, certain, and conclusive, either that the husband had no powers of procreation, or the circumstances were such as to render it impossible that he could be the father of the child."

To the same effect are Dennison v. Page, 29 Pa. 420, 72 Am. Dec. 644; Kraus v. Kraus, 98 Mo. App. 427, 72 S. W. 130; Orthwein v. Thomas, 127 Ill. 554, 21 N. E. 430, 4 L. R. A. 434, 11 Am. St. Rep. 159; Egbert v. Greenwalt, 44 Mich. 245, 6 N. W. 654, 38 Am. Rep. 260; Ewell v. Ewell, 163 N. C. 236, 79 S. E. 509, Ann. Cas. 1915B, 373.

As said in Hargrave v. Hargrave, supra, where the communication between husband and wife was such as to have afforded opportunity for sexual intercourse, whatever probabilities exist, no evidence can be admitted to show that any man other than the husband may have been or probably was the father of the wife's child.

Now, bearing in mind the existence of the marriage, the fact that the husband was competent and that he concededly had access in the sense of opportunity for sexual intercourse with the wife, we come to a consideration of the evidence received and which the jury concluded sufficient to overcome the presumption declared in section 194, Civil Code, to the effect that such children are presumed to be legitimate children of the marriage.

[6] Over appellant's strenuous objection, much evidence was introduced with reference to the birth, paternity, and death of a child born to Mabel E. Walker in February, 1913, the illegitimacy of which and Walker's knowledge thereof the evidence tended to prove, and concerning which the court, among other things contained in a lengthy oral charge covering some 21 pages of printed matter, instructed the jury that the legitimacy or illegitimacy of such child was not involved in the controversy, except as such fact might incidentally throw light upon the relations of the husband and wife, the probability of love and affection between them, and the probability of acts of sexual intercourse occurring between them subsequent to that time; that such evidence bore upon the question of the innocence of the mother of the minors which, since it was a civil case, might be overcome by a preponderance of the evidence; and that such "evidence with regard to the legitimacy of the child born February 1, 1913, * * * was admitted for the purpose of overcoming, so far as it might justly have that weight in your mind, the presumption of the innocence of the mother." It thus appears that this line of testimony was received upon two theories:

First. That if the illegitimacy of the child born February 1st was established, it was a circumstance tending to controvert the presumption arising from conceded access and prove there was no act of sexual intercourse had between husband and wife, as testified to by her, on occasions when he subsequently met and visited her, and particularly at about the time when claimants were conceived. In other words, such fact was calculated to destroy his love and affection for her, in the absence of which no intercourse was had. It cannot be said that an act of intercourse between husband and wife (opportunity therefor being shown) depends upon the existence of conventional love and affection, although it does depend upon opportunity and inclination of the parties at the time to join in the procreative act. Access of the husband to the wife at about the time when the minors were begotten, thus affording opportunity, is conclusively shown; and assuming that the wife gave birth to an illegitimate child on February 1, 1913, such fact was not admissible as a circumstance tending to prove that the husband did not thereafter, at the time when these minors were begotten, he having access to his wife, have sexual intercourse with her. In Estate of Gird, 157 Cal. 534, 108 Pac. 499, 137 Am. St. Rep. 131, it is said:

> "The authorities are practically in accord to the effect that evidence tending to show unchaste conduct of the alleged mother with other men is allowable only in so far as it has a bearing upon the question of the paternity of the child—in so far as it tends to show that another is or may be the father of the child, and hence that it must be directed to a time at or about the time the child was begotten."

See, also, Sabins v. Jones, 119 Mass. 167, where it is held that "evidence of acts of intercourse with other men 12 months before the birth is inadmissible." Hence it follows that if such evidence was sufficient to overcome the presumption of the mother's innocence on the earlier occasion, and did convince the jury that she was guilty of an adulterous act, the fruit of which was the child born in February, 1913, such fact was not a circumstance tending to show there was no act of intercourse between the husband and wife at the time these minors were begotten, and their status, under the presumption declared in section 194, Civil Code, is unaffected thereby. In our opinion, all evidence with reference to the paternity and death of the child born February 1, 1913, and that tending to prove that A. B. was the father thereof, was inadmissible and the prejudicial effect of such error accentuated by the instruction of the court thereon.

[7-9] Although the status of the children, since not parties to the action for divorce, was unaffected by the interlocutory decree (Kleinert v. Ehlers, 38 Pa. 439; Shuman v. Shuman, 83 Wis. 250, 53 N. W. 455), such decree was admissible in evidence: First. For the purpose of negativing the provisions of subdivision 5 of section 1962, Code of Civil Procedure, that "the issue of a wife cohabiting with her husband, who is not impotent, is indisputably presumed to be legitimate." While the interlocutory decree did not affect the relations of husband and wife (Estate of Dargie, 162 Cal. 51, 121 Pac. 320), it was a judicial determination that the wife was not at the time the children were begotten cohabiting with her husband; that is, dwelling with him as his wife. Taylor v. Taylor, 10 Colo. App. 303, 50 Pac. 1049; Robinson v. Robinson, 188 Ill. 371, 58 N. E. 906.

Second. It was likewise admissible as tending to establish a relationship from which, depending upon other circumstances established, and evidence of the disposition and character of the parties, the jury might fairly draw the inference that, notwithstanding opportunity therefor, intercourse was not had on the occasions when the husband visited the wife. Standing alone it might have little weight, while considered with other facts it might be of probative value as tending at least to show the improbability of parties occupying such relation indulging in an act which, though not affecting the legitimacy of the children, must, in the absence of a reconciliation of the parties which the law contemplates may take place (Olson v. Superior Court, supra), be deemed essentially immoral.

[10] While in our opinion the interlocutory decree was admissible in evidence, the court erred in its instruction to the jury that "the law, then, is that the presumption of intercourse between husband and wife after the date of a divorce by an interlocutory decree, is not nearly so strong as the presumption that such intercourse occurred before the entry of such decree." The jury were further told, with reference to the effect, as evidence, of the decree and judgment roll in the divorce action, that while such decree does not destroy the presumption declared in sections 193 and 194, Civil Code, "You are entitled, however, in weighing the evidence in this case, to consider the fact that where a divorce is obtained on the ground of desertion that that fact decreases somewhat, and you are to judge to what extent, the weight of the presumption of legitimacy." The effect of thus instructing the jury was to tell them that after the granting of such decree the presumption declared by sections 193 and 194, Civil Code, should not have full force and effect, but must be deemed of less weight and effect than in cases where no interlocutory decree had been granted. In other words, that where such decree was granted, less evidence was required to overcome the presumption than would be required in the absence of such decree, notwithstanding proof of facts upon which the decree might have been granted. We do not so understand the law. The effect of an interlocutory decree of divorce upon the ground of desertion is but a judicial declaration of such desertion, which fact in a case of this nature might be otherwise established; and since the marriage relation, notwithstanding such decree, continues, how can it be said, as a matter of law, that the presumption is of less weight—requiring less evidence to overcome it—in the one case than in the other? In such cases the law declares the presumption and it is the province of the jury alone to determine under all the circumstances what weight in overcoming the same should be accorded the fact that at the time the children were begotten an interlocutory decree of divorce had been granted. Under the instructions the jury might well have concluded that, instead of the deduction which the law directs to be made from existing wedlock (section 193, Civ. Code, and section 1959, Code Civ. Proc.), very little weight should be attached to such fact. In our opinion, it was prejudicial error to give these instructions.

[11] The objection that the court erred in permitting evidence of the conduct of Walker and his wife towards each other, and of declarations connected with such conduct, goes more to the weight thereof than to its competency. While it might, where access of the husband and wife is shown, be entitled to very little weight in determining the question, nevertheless, under the authority of Baker v. Baker, 13 Cal. 87, and Wright v. Hicks, 12 Ga. 155, 56 Am. Dec. 451, we cannot say that such evidence was erroneously admitted.

Aside from the erroneous instructions referred to, the lengthy oral charge contains much matter that could serve no purpose other than to confuse in the minds of the jurors the real issue submitted to them, which, as stated, was whether the husband on conceded visits to and meetings with his wife was "only present under such circumstances as afford clear and satisfactory proof that there was no sexual intercourse."

The judgment and orders appealed from are reversed.

We concur: SLOSS, J.; SHAW, J.

(34 Cal. App. 702)

PEOPLE v. LEE. (Cr. 379.)

(District Court of Appeal, Third District, California. Sept. 20, 1917. Rehearing Denied by Supreme Court Nov. 19, 1917.)

1. Homicide 🔑232, 244(1)—Prosecution—Evidence—Sufficiency.

In prosecution for murder, evidence *held* sufficient to negative the contention of self-defense and show the killing to have been deliberate, premeditated, and malicious, so that a reversal of the conviction would work a miscarriage of justice.

2. Criminal Law 🔑720(1)—Trial—Argument of Counsel.

Where the district attorney stated that the law was for the court, his further argument as to what constituted a reasonable doubt intended to illustrate the instructions was harmless, if erroneous, in view of the fact that the attorney, when his attention was called to the matter, stated that the jury should follow the instructions of the court.

3. Criminal Law 🔑730(1)—Trial—Argument.

Where the court directed the jury to disregard argument of the prosecutor which was possibly within the range of legitimate argument, it must be assumed that the jury did so and that defendant was in no way harmed.

4. Criminal Law 🔑1171(1)—Harmless Error—Argument of Prosecutor.

In a prosecution for murder committed by a member of a Chinese tong or secret society, argument by the prosecutor that the people of the state might as well bow down to the influence of the Suey Sings if defendant was allowed to escape punishment, being trivial, does not warrant reversal, even if the inference that the persons mentioned had interested themselves in accused's defense was not warranted.

5. Criminal Law 🔑1171(3)—Harmless Error—Argument.

In a prosecution for murder, argument by the district attorney that a witness had assisted in manufacturing testimony for the defense, though not warranted, does not necessitate a reversal, where the court interposed the remark that there was no showing that such witness had ever manufactured any evidence whatsoever, for it cannot be deemed that the jury were misled by the prosecutor's erroneous logic.

6. Criminal Law 🔑419, 420(10)—Evidence—Admissibility—Conversation with Third Person.

A witness testifying as to deceased's threats and demonstration against defendant, made in a club, cannot testify as to his advice to defendant to leave the place and avoid trouble; such statements by the witness being hearsay.

7. Criminal Law 🔑1169(3)—Review—Harmless Error—Admission of Evidence.

In a prosecution for murder, where accused admitted his own attempt at flight, testimony as to the flight of his codefendant, though erroneously received, was harmless.

8. Criminal Law 🔑438—Evidence—Photographs.

In a prosecution for murder, the admission of photographs of the place of the killing was not improper, though the photographs which were taken after the killing showed sticks of wood laid in the street to indicate a witness' idea of the positions of deceased and defendant; the photographs being used as illustrations only.

9. Criminal Law 🔑1144(12)—Appeal—Presumption—Admission of Evidence.

Where accused's testimony indicated that he shot deceased from behind, the admission of photographs of the wounds intending to illustrate the place of entry of the bullets cannot, in the absence of the exhibits, be deemed prejudicial, though probes may have been inserted in the wounds before the photographs were taken.

10. Criminal Law 🔑865(1)—Coercion of Jury.

In a prosecution for murder, where accused's guilt was plain, the court's action in holding the jury in custody during the night after the foreman had stated that the jurors had come to the conclusion that it was impossible to reach an agreement, and in returning them to the jury room after they reported in the morning that it was impossible to reach an agreement, was not, where the court had not indicated what verdict should be rendered but merely offered assistance as to instructions and urged the jury to reach an agreement if possible, erroneous as coercing the jury in rendering a verdict against accused, for the case was an important one, had consumed much time, and the jury should, if possible, have been induced to render a verdict.

11. Criminal Law 🔑765—Instructions Invading Province of Jury.

In prosecution for murder, an instruction that, in determining whether accused acted as a reasonable person upon the appearances as they were presented to him, the test should be what accused had reasonable cause to believe and did believe as a reasonable person at the time of the killing, and that the jury should judge accused's actions in the light of the circumstances surrounding him at the time of the killing, did not withdraw from the jury the consideration of threats made by deceased against him.

Appeal from Superior Court, San Joaquin County; John Hancock, Judge.

Henry Lee was convicted of murder, and, from the judgment and order denying new trial, defendant appeals. Affirmed.

A. H. Ashley, Hugh J. Tye, and Gordon A. Stewart, all of Stockton, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

BURNETT, J. Defendant was informed against jointly with one Ah Wing for the murder of one Lee Yow Juck. The parties were all Chinamen, and the homicide occurred on February 11, 1916, on Washington street in Stockton in Chinatown of that city. There is ample evidence found in the testimony of white witnesses to show that deceased was crossing Washington street from one side to the other, when defendant and the codefendant came out, observed him, and each fired several shots into the body of the deceased. The deceased was attempting, during this time, to escape, and when on the south side of the street he dropped to the ground, and defendant, being near him, reached over and fired two shots into his temple. Ah Wing also shot the deceased while he was lying on the ground. The two defendants then dropped their pistols and began running to get away. They attempted to escape but were pursued by officers, and, after running a short distance, each of them was apprehended. Eleven shots took effect in the body of the deceased, and caused his immediate death. The evidence of the prosecution shows a clear case of murder, deliberately executed, meriting, it might well be said, the extreme penalty of the law. Indeed, the case is so clear and convincing and satisfactory that the recent amendment to the Constitution (section 4½ of article 6) might well be invoked in the consideration of all of the points made by appellant upon which he bases his contention for a reversal of the judgment. Indeed, it is quite likely that, if the cause for any reason should be reversed, its history might furnish a duplicate of the case of People v. Grill, 3 Cal. App. 514, 86 Pac. 613, wherein the verdict rendered by the jury found the defendant guilty of murder in the first degree and fixed the penalty at imprisonment for life. The cause was reversed on account of an erroneous instruction, and upon a retrial the defendant was convicted of murder in the first degree carrying with it the penalty of death. This judgment was affirmed by the Supreme Court (151 Cal. 592, 91 Pac. 515), and the defendant thereafter executed.

[1] Even the testimony of defendant in the case at bar negatives the contention of self-defense and shows the killing to have been deliberate, premeditated, and malicious. We may give a portion of his testimony, giving it in the narrative form. After stating that he saw deceased put his hand in his pocket and that Ah Wing was standing alongside of defendant, he proceeded:

> "I didn't see him take his hand out of his pocket, and I fired and shot at him. He was facing me then a little to one side, and as soon as I fired the first shot he turned around. Then he started to run across the street. I went after him shooting. I was shooting at his person. After he turned around I was shooting at his back. I don't know how many times. I don't know whether he had his hand in or out of his pocket; I didn't see that. He had his hand in his pocket; I couldn't tell what he had. When he was running across the street and I was running after him, I was about three or four feet from him. Juck didn't turn around any more at all. He fell down after he got across the street. When I was running across to Juck, Ah Wing was on one side of me, and he was shooting into Juck's back, too. After we got across the street, Juck fell on the sidewalk. I shot him after he was down. I don't know how many shots I fired then. I was bending over a little when I shot him in the head."

He further testified that, after emptying his pistol, he threw the weapon away and tried to escape. It is true that in his testimony he claimed he believed that his life was in danger, but his recital of the facts must have convinced the jury, as it would any fair-minded man, that he had no reason to believe, and did not believe, that his life was in danger, and that his plea of self-defense was a mere subterfuge without any real foundation for its support. In fact, in view of the record it must have taxed the ingenuity of the able counsel of appellant to present to the jury a plausible argument that there was any excuse or justification for the homicide. So we repeat that, if there ever was a case where a reversal for errors committed during the trial would work a miscarriage of justice, such is the case before us.

We have, however, examined with some care the various assignments of error made by appellant, and, while we are inclined to the view that some of the rulings of the court were erroneous, yet none of them is of sufficient importance to demand more than passing notice, and certainly there is nothing of error sufficiently grave, as shown by the record, to warrant a reversal of the conviction, based, as it is, upon indisputable proof of the defendant's guilt.

[2] The point upon which appellant seems to dwell most earnestly relates to the conduct of the district attorney. It is claimed that he overstepped the bounds of legitimate argument in his address to the jury, and that he sought to introduce improper evidence to the prejudice of the defendant. We deem it unnecessary to notice all the specifications in that particular. One objection to the district attorney's argument to the jury was directed to his statements as to the doctrine of reasonable doubt, as follows:

> "The law is for the court. But sometimes jurymen may think that there is some artificial rule that they must follow, something more than is reasonable, to believe it beyond a reasonable doubt. I think just the common sense rule that you believe it now, and are satisfied, and fully conscientious, and not wishing to do any harm, and not wishing to find him guilty unless he is guilty, and you know the consequences of a thing like that, then it is for you, gentlemen of the jury, to find out if you believe beyond a reasonable doubt, and without any artificial rules or any confusion in your understanding of what the definition of reasonable doubt means."

Upon his attention being called to this statement, the district attorney added:

> "As I stated before beginning, what I have said here is for the purpose of illustration only. You listen to the instructions of the court and determine from them and not what I say."

We can see no merit in the criticism of these statements made by the district attorney. It may be that his effort did not result in making any clearer in the minds of the jury the generally accepted definition of "reasonable doubt," but it certainly did no harm, and any possible prejudicial impression was removed by the direction of the district attorney to follow the instructions of the court.

[3] In commenting upon the incidents connected with the homicide, the district attorney said:

> "You may imagine why the testimony is all one way. Thirty or forty Chinamen along there saw the shooting. I do not see any of them in court telling about it, either for the defense or the prosecution. Do you suppose, gentlemen of the jury, that the prosecution could get any

Chinaman in Stockton to come up here and testify that they saw Wing and Lee shoot Juck?"

Upon objection being made to this statement, the court directed the jury to disregard the remark of the district attorney and to strike it from their minds. Said statement of the prosecuting officer was probably within the range of legitimate argument, but at any rate we must assume that the jury followed the admonition of the court to disregard the statement.

[4, 5] Again the district attorney said:

> "If a murder like this was committed on the streets of Stockton, in the presence of five white men—I believe four officers—and the man caught red-handed in the act, and then a proposition of his defense like this is staged, and if they can get away with it, if they can save the man on a thing of that kind, gentlemen of the jury, hadn't the people of the state of California just as well bow down to the power and influence of the Suey Sings?"

This was assigned as error, and the court was asked to instruct the jury to disregard it. The court: "Let the exception be noted. Proceed, Mr. Foltz." We do not think that the court was required to direct the jury to disregard it. We think it was a rational inference that the "Suey Sings" had interested themselves in the defense of appellant, but at any rate it was a matter of such trivial importance as not to justify a reversal of the case even if such remarks of the district attorney were to be deemed improper. The appellant also complains bitterly of the statement of the district attorney that one Ahtye had manufactured the defense in the case. The language of the district attorney was:

> "Say, gentlemen of the jury, to Mr. Ahtye, although you are educated, a graduate of a college, and speak fine English, that you cannot put up a defense like has been shown in this case, and deceive an American jury."

The opinion of the court as to the impropriety of this remark coincided with that of appellant, and the judge said:

> "There is no evidence whatsoever that Mr. Ahtye ever manufactured any evidence in any manner whatsoever in this case. Therefore, disregard the remarks of the district attorney, so far as Mr. Ahtye manufacturing or made any defense in this case whatsoever. There is no evidence in this case to that effect at all."

As to this, we must also assume that the jury followed the admonition of the court. Moreover, there was evidence of interest and activity on the part of Ahtye, and the district attorney, believing, as he undoubtedly did, that the defendant was guilty of deliberate murder, and that his so-called self-defense was simulated, was probably justified in drawing the inference that Ahtye was responsible for the fraudulent claim that was made. But even if he were mistaken as to the proper inference to be drawn from the evidence, we must assume that the jurors were men of intelligence and probity, and not to be misled by the district attorney's erroneous impressions or faulty logic. It is probable that in the heat of argument some statements were made by the district attorney that might very properly have been left unsaid; but we are satisfied from the examination of the record that this officer had no desire to prejudice the rights of defendant or take an unfair advantage of him, and that, while zealous in the discharge of his duty as public prosecutor, he did not violate any of the constitutional rights of appellant. See People v. Yee Foo, 4 Cal. App. 730, 89 Pac. 450. Indeed, we are satisfied that appellant was accorded a fair and impartial trial, and was justly convicted of the offense charged against him.

[6] We may refer to two or three rulings as to evidence made by the court, of which complaint is made by appellant. One Mah Guey was called as a witness for defendant and testified to a singular occurrence at the How Yuen Tong Club between 8 and 9 o'clock that evening immediately preceding the homicide. After testifying that the deceased came in and pointed his finger at Henry Lee and Ah Wing, while at the same time he was pulling a revolver from his pocket and was trying to shoot them, he further testified that he, through the assistance of other Chinamen present there, disarmed the deceased, that the latter demanded the gun back, that he would not give it to him, and that deceased used a vile epithet, said he would go and get another one and come back and kill "you buggers." "After that he left, and when he left I told Ah Lee and Ah Wing to leave the place and avoid trouble." This latter statement as to what he told Ah Lee and Ah Wing was stricken out on motion, and we think correctly so, as it was clearly hearsay, and was no part of any threats or demonstrations made by deceased against said defendant. We may state in this connection that defendant, when on the stand, testified to this same declaration on the part of Mah Guey. There was no objection to it, and it was probably offered as affording some explanation of his reason for leaving the place. At any rate, the jury got the full benefit of it for what it was worth.

[7] Complaint is also made that the court permitted evidence of the flight of the codefendant Ah Wing. This was probably technically erroneous under the ruling of People v. Stanley, 47 Cal. 113, 17 Am. Rep. 401, and other cases following it. It appears that in the Stanley Case the defendant and three persons jointly indicted with him were discovered by a policeman in the act of attempting to perpetrate a robbery, and immediately after the attempt they proceeded to a saloon, where they were all soon after arrested by the same and another policeman. After leaving the saloon and while being conducted to the jail, one of them (other than the defendant) broke away from the officers having him in charge, and attempted to escape by fleeing, but after considerable chase he was recaptured. The evidence of the attempt to escape was admitted against the objection of

the defendant, and the Supreme Court, referring to the "flight," said:

> "At most, it is but a circumstance tending to establish a consciousness of guilt in the person fleeing; and it would be extending the principle to a great length to hold that the flight of one person tends to establish the guilt of another person."

In that case it is to be observed that there was no evidence of the flight of the defendant, but in the case at bar it is beyond question that the defendant himself as well as Ah Wing attempted to escape; the evidence all shows that appellant himself attempted it, he admitting it on the witness stand; hence it is perfectly apparent that the evidence as to Ah Wing's flight could not possibly have prejudiced the defendant.

[8, 9] Appellant also claims that photographs of the locality of the shooting were improperly admitted in evidence. The objection is based largely upon the fact that one of these contained sticks of wood laid in the street on the next day after the shooting to indicate where the witness C. J. Bartholdt had seen the two defendants and the deceased when he turned after the first shot, the wood not having been there at the time of the shooting. It seems that Bartholdt, before the trial, had pointed out this location, and the sticks of wood were placed there to aid his memory. We think there was no error in the ruling. It comes within the spirit of People v. Clapp, 26 Cal. App. 523, 147 Pac. 469, and cases therein cited. Of course, the photograph was admitted for the purpose of illustration only, and not as evidence of what in fact occurred. As to the photograph of the wounds, it may be that it should not have been admitted, since it appears that probes were inserted therein subsequent to the shooting; but, in the absence of the exhibits, it is apparent that we cannot determine that thereby any prejudicial error was committed. The purpose of the offer was to illustrate the place of entry of the bullets, in support of the contention of the people that deceased was shot from behind. We cannot presume that any such effect was produced. Besides from the testimony of appellant himself, as well as that of other witnesses, there could hardly be any question upon that subject.

[10] It is claimed that the court coerced the jury into rendering a verdict against the appellant. It seems that, after the jury retired, they were brought back into the courtroom two or three times. The first time was to obtain the exhibits that had been offered in evidence; the second time for additional instructions, and again they returned, and the foreman said:

> "We have come to the conclusion it is impossible to come to an agreement after a deliberation for quite a while." Thereupon the court said: "Do you want any of the instructions read?" Thereupon the foreman said: "They have already been instructed. It is perfectly clear to me; it seems to be to the others. The instructions are perfectly plain to me. If any of the other jurors would like an instruction—" The court thereupon asked how the jury stood, and the foreman said: "The last ballot stood eight to four, in—" Whereupon the court questioned each of the jurors as to his belief as to probability of an agreement on a verdict, and each declared that it was impossible to agree. Thereupon the following took place: "Gentlemen, the court is going lock you up for the night, until 9:30 to-morrow. The court will keep you here until 9:30 to-morrow morning. At that time you will be returned into court. A Juror: Return at 9:30 o'clock? The Court: No, return to the jury room. At 9:30 to-morrow morning the court will ask you to come in. By that time you will see whether you have reached a verdict or not." At 9:30 the next morning the jury were called, and the foreman stated that they still disagreed, and the court said: "The court is not satisfied, gentlemen, that you cannot agree on a verdict in this case. It realizes, gentlemen, it is your bounden duty to agree on a verdict, if you can conscientiously do so within the law and the evidence. The court is not satisfied that you cannot agree. It is the instructions of the court that you be returned to the jury room for further deliberation and discussion of the case."

One hour and a half thereafter, the jury returned with the verdict. We cannot say that the court abused its discretion in refusing to discharge the jury, or that it did more than insist that they have ample time for consideration and reflection. The case was an important one; it had consumed many days in its trial, and the court was naturally and properly anxious to have it determined, if it could be done without any infraction of the rights of the defendant. We cannot see that any improper influence was exerted by the court, nor does it appear that the verdict was anything but the deliberate and voluntary act of all the jurors. This circumstance affords, we think, no just ground for criticism, much less a reason for reversing the judgment.

[11] In reference to the instructions we think the jury were correctly and sufficiently informed as to the law of the case. All those necesssary, fundamental, and essential legal concepts relating to the situation were clearly presented, including the nature of the charge, the definition of the various offenses contained therein, the necessity of the prosecution proving beyond all reasonable doubt every material element of any crime contained within said information before the jury would be warranted in finding a verdict of guilty, the presumption of innocence attending the defendant at all stages of the case, the function of the jury to determine the credibility of the witnesses and the weight of the evidence, the definition of "reasonable doubt" and "the burden of proof," the right of self-defense, including the doctrine of appearances, and the necessity for the exercise of great care on the part of the jury in reaching a verdict of guilty, and in fact everything which the situation seemed to demand. It is true that certain terms of caution and remonstrance, sometimes given by trial courts to juries, were omitted; but as far as they had any important bearing upon the case

they were, no doubt, supplied by arguments of counsel and the common sense of the jury. We deem it unnecessary to notice the specific criticisms of appellant further than to say that we do not regard the following instruction erroneous as claimed by appellant:

> "The question of the sufficiency of the appearances upon which the defendant may act under the plea of self-defense is one of fact for the jury to determine from all the evidence in the case. The acts which a defendant may do and justify under a plea of self-defense depend primarily upon his own conduct, and secondly upon the conduct of the deceased; but there is no fixed rule applicable to every case. In determining whether defendant acted as a reasonable person upon the appearances as they were presented to him, the test is what such defendant had reasonable cause to believe, and did believe, as a reasonable person at the time of the killing, and not what subsequent events may have proved the actual situation to have been. The jury should judge the actions of the defendant in the light of all the circumstances surrounding him at the time of the killing. In other words, as far as possible, the jury should put themselves in the place of such defendant, and then judge him by the standard of what an ordinarily reasonable person acting in good faith would have done if placed in such a situation. In determining the sufficiency of the appearances presented to a defendant at the time of the killing, the jury is not limited to such defendant's estimate of those appearances, unless his estimate of the situation, viewed in the light of all the circumstances surrounding him at the time, was that of a reasonable person."

We are satisfied that said instruction did not withdraw or attempt to withdraw from the consideration of the jury the circumstance of any threat that may have been made by deceased against appellant, as claimed by the latter. The gist of the instruction was that the jury should consider the situation as a reasonable person, and place themselves, if possible, in the position of the appellant, in order to determine whether he was justified in killing deceased. In order to place themselves in the position of appellant, they must, of course, have viewed the conduct of deceased in the light of any threat he may have made against said appellant. In fact, the instruction directs the jury virtually to acquit the defendant if he had reasonable cause to believe, and did believe, that the killing was necessary. This would necessarily include the consideration of any previous hostile demonstration on the part of the deceased. Manifestly the fact that such a threat may have been made would not justify the defendant in killing the deceased, but would be only a circumstance to be considered in connection with the conduct of deceased at the time of the homicide, as showing the probability that defendant was at the time in danger of being killed or receiving great bodily injury, and therefore justified in what he did.

We deem it inadvisable to notice further and more specifically the able argument of counsel for appellant. They certainly have made a strong presentation of a weak case, and to their persuasive skill exercised during the trial, no doubt, their client is indebted for his life.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

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34 Cal. App. 698

LOMBARDI v. KALLOCH et al. (Civ. 2209.)

(District Court of Appeal, First District, California. Sept. 20, 1917. Rehearing Denied by Supreme Court Nov. 19, 1917.)

APPEAL AND ERROR ⚷1011(1)—SCOPE OF REVIEW—CONFLICTING EVIDENCE.

Where the evidence directly conflicts as to the understanding the parties had of a settlement agreement, the court on appeal will not interfere with the finding of the lower court construing it.

Appeal from Superior Court, Alameda County; J. J. Trabucco, Judge.

Action by Lottie R. Lombardi against I. M. Kalloch and another as copartners. Judgment for defendants, and plaintiff appeals. Affirmed.

R. B. Tappan, of Oakland, for appellant. Street & Street, of Oakland, for respondents.

PER CURIAM. The plaintiff, Lottie R. Lombardi, brought suit against the defendants, I. M. Kalloch and Francis Fox, copartners and attorneys at law, to recover the sum of $1,000, which it was contended they had retained from her in making a settlement of a suit for divorce between herself and her husband; said attorneys at that time being her counsel in the conduct of that suit. The defense presented by the defendants was that the settlement had been made with her full knowledge and concurrence, and that she was fully informed at the time the settlement was made that one of the conditions of the settlement of the property rights of the contending parties was that $1,000 of the money which she was to receive as a part of that settlement was to be paid to her attorneys as their counsel fee for representing her in the entire matter, and that she had at the time of that settlement and with full knowledge as to what its terms were and as to what her counsel were to receive out of the settlement signed an agreement in which it had been expressly stated that their fees, to be retained by them out of the money she was to receive, were to be the sum of $1,000.

The only point presented in the case is the conflict in the evidence as to her understanding of the matter at the time the settlement was made. There is a sharp conflict in the evidence upon that point, plaintiff testifying that she did not fully understand that her counsel were retaining this amount out of the money which she was then about to receive; and, on the other hand, the defendants both testifying, and being supported by other witnesses, that she did so fully understand the transaction, and that there was no misrepresentation or concealment or fraud or abuse in any way of the confidential relation existing between her and them in the making of that settlement and in the receipt by them of the amount of money for which she now sues. The lower court resolved that conflict in favor of the defendants, and under the well-settled rule we will not interfere with the finding of the lower court upon such a state of the evidence.

It follows that the judgment will be affirmed, and it is so ordered.

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34 Cal. App. 716

PEOPLE v. DE ANGELLI. (Cr. 680.)

(District Court of Appeal, First District, California. Sept. 26, 1917.)

1. Criminal Law 🔑1171(1)—Harmless Error—Misconduct of Prosecutor.

In a trial for murder, the prosecutor's repeated statements that defendant was able to testify without an interpreter, made to induce the court to change its ruling that his testimony should be given through an interpreter, were not prejudicial, especially in view of the fact that if such statements were made without sufficient cause, and with an improper motive, it would operate more to defendant's benefit than to his prejudice.

2. Criminal Law 🔑1037(1)—Appeal—Preservation of Statements—Objections of Counsel.

Statements by the prosecutor alleged to be prejudicial to defendant will not be reviewed on objection, made for the first time on appeal.

3. Witnesses 🔑277(4)—Cross-Examination—Scope.

In a trial for murder, where the court on defendant's direct examination asked several questions relating to his early history, cross-examination by the district attorney to clear up matters referred to in the court's questions, was not beyond the scope of the direct examination.

4. Criminal Law 🔑706—Cross-Examination of Defendant—Use of Memorandum.

Permission to prosecuting officer to consult memorandum of a conversation between himself and the defendant during the defendant's cross-examination, consisting merely of notes made by such officer of a prior conversation with defendant relating to minor details of case, not being either a deposition or a confession, was not error.

5. Criminal Law 🔑406(1)—Evidence—"Confession."

The word "confession" is not a mere equivalent of the word "statement" or "declaration," and does not include statements not amounting to a confession of guilt, or an admission of a fact that may tend to show guilt as in a confession.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Confession.]

6. Criminal Law 🔑406(3)—Evidence—Confessions—Voluntary Character.

The rule that confessions must be voluntary is limited to confessions of guilt, and has no application to admissions of fact which merely tend to show guilt.

Appeal from Superior Court, Alameda County; F. B. Ogden, Judge.

Charles De Angelli was convicted of murder in the second degree, and from the judgment and from an order denying his motion for a new trial, he appeals. Judgment and order affirmed.

Albert C. Agnew, John H. Tolan, of Alameda, and Henry C. Reynolds, of Oakland, for appellant. U. S. Webb, Atty. Gen., for the People.

KERRIGAN, J. The defendant was charged by information with the crime of murder, it being alleged that on August 20, 1916, in the county of Alameda, he willfully and with malice aforethought killed Stefano Coppi. He was convicted of murder in the second degree, and sentenced to life imprisonment. He appeals from said judgment, and from an order denying his motion for a new trial. The evidence is amply sufficient to support the verdict of the jury.

[1, 2] As to certain acts on the part of the prosecuting officer, claimed by appellant to constitute misconduct, it is true that the former repeatedly during the examination of the defendant stated that the latter was able to testify without the aid of an interpreter, but we are unable to understand how the defendant was prejudiced thereby. From the record it appears that such assertions were not without cause, and they were made with a view to inducing the court to change its ruling that the testimony of the defendant should be given through an interpreter. It may also be said in this connection that if these repeated statements of the representative of the people were made without sufficient cause and with an improper motive, this was doubtless apparent to the jury, and would operate rather to the benefit of the defendant than to his prejudice. Moreover, with reference to the several instances now claimed to constitute misconduct on the part of the prosecuting officer, even if they could be regarded as such, no assignment thereof was made during the trial nor any request made for an admonition to the jury with relation thereto; consequently the objection here made for the first time cannot be considered. People v. Metzler, 21 Cal. App. 80, 130 Pac. 1192.

[3] During the direct examination of the defendant, and in order to clear up some doubts concerning certain circumstances of his early history, the court asked him several questions. Thereafter the district attorney was permitted over objection to cross-examine the defendant concerning the matters therein referred to. It is now claimed that this cross-examination trespassed beyond the scope of the direct examination. We find nothing to criticize in the questions asked by the court. As before stated, they were asked in order to make clear matters elicited by the defendant's counsel; and in any event the state would have a right to cross-examine the defendant on all matters brought out by the court through questions to which no ob-

jection was made, and which may be regarded as having been tacitly consented to by the defendant.

[4-6] It is also claimed that the court erred in permitting the prosecuting officer to consult a memorandum of a conversation between himself and the defendant while cross-examining the latter. The objection and argument here seem to be based upon the assumption that the memorandum constituted a deposition or confession; and the contention is that if it was the former the defendant was entitled to an inspection thereof before he could be examined concerning it; or if the latter, that there should have been a showing made that it was given freely and voluntarily and not under the incitement of fear or hope of reward. But the memorandum was neither a deposition nor confession. It consisted merely of notes made by such officer of a prior conversation had with the defendant in relation to minor details of the case. In no sense did it purport to be an acknowledgment of guilt; in fact the statements therein recorded barely came within the category of admissions. The word "confession" is not the mere equivalent of the word "statement" or "declaration." People v. Strong, 30 Cal. 158. The term is restricted to acknowledgments of guilt. People v. Parton, 49 Cal. 637; People v. Velarde, 59 Cal. 461. It does not include statements not amounting to a confession of guilt, or admissions of fact that may tend to show guilt as in a confession. People v. Hickman, 113 Cal. 86, 45 Pac. 175. The rule that confessions must be voluntary is limited to confessions of guilt, and has no application to admissions of fact which merely tend to show guilt. People v. Parton, supra; People v. Velarde, supra.

The judgment and order are affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

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34 Cal. App. 715

COLUMBIA COFFEE & SPICE CO. v. LE BARON BROS. & NELSON. (Civ. 2184.)

(District Court of Appeal, First District, California. Sept. 25, 1917.)

Appeal and Error 🔑1011(1)—Findings—Conflicting Evidence.

The appellate district court will not disturb a finding of the trial court on conflicting evidence.

Appeal from Superior Court, City and County of San Francisco; Edgar T. Zook, Judge.

Action by the Columbia Coffee & Spice Company against Le Baron Bros. & Nelson. Judgment for defendant, and plaintiff appeals. Affirmed.

Henry G. W. Dinkelspiel, of San Francisco, for appellant. Edward J. Linforth, of San Francisco, for respondent.

PER CURIAM. The only question to be determined on this appeal is as to whether there is evidence in the record to sustain the trial court's finding as to where certain merchandise, consisting of a quantity of onions and potatoes, was to be delivered in good, merchantable condition. It is claimed by the plaintiff that the defendant agreed that said produce should arrive in a marketable condition at a distant foreign port; while the defendant, on the other hand, contends that San Francisco was the point of delivery to which the guarantee as to the condition of the produce had reference. The evidence shows that part of the goods on their arrival at the foreign port was decayed and unmerchantable, but there is evidence to sustain the finding of the court that the extent of defendant's warranty was that the potatoes and onions should be in good, marketable condition at San Francisco. This court therefore, under the familiar rule relating to the presence of a conflict in the evidence, will not disturb the finding of the trial court.

Judgment affirmed.

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34 Cal. App. 720

OLIPHANT v. HOME BUILDERS. (Civ. 1909.)

(District Court of Appeal, Second District, California. Sept. 26, 1917.)

1. Corporations 🔑304—Officers—Contracts—Construction.

A contract whereby defendant was employed as managing agent of the plaintiff corporation did not divest the board of directors of its authority to manage and control the affairs of the corporation, but gave plaintiff power to enter into contracts without the authorization of the directorate.

2. Corporations 🔑307—Officers—Duties.

It is the duty of a corporate agent acting in a fiduciary capacity to make full and complete disclosure to his superior officers and directors as to all business transacted by him on behalf of the corporation.

3. Corporations 🔑294—Manager—Employment—Contract—Discharge.

Where plaintiff, engaged as manager of the defendant corporation, with knowledge of a resolution of the directors requiring all contracts to be executed by the president and manager, entered into a contract with a third person for the avowed purpose of protecting such third person, and when questioned by the directors and his superior officers denied the existence of the contract, such conduct warranted the corporation in terminating plaintiff's contract of employment.

4. Master and Servant 🔑74—Contracts—Compensation.

A contract providing for plaintiff's employment at an annual salary of $6,000, payable at the rate of $500 per month, does not entitle employé to payment in advance; the ordinary rule being that services are paid for after they have been performed, unless there is a contract to the contrary.

Appeal from Superior Court, Los Angeles County; C. A. Raker, Judge.

Action by F. H. Oliphant against the Home Builders, a corporation. From a judgment for plaintiff, defendant appeals. Reversed.

Hickcox & Crenshaw, of Los Angeles, for appellant. Garrett & Bush, of Los Angeles, for respondent.

JAMES, J. Plaintiff brought this action to recover from the defendant certain money alleged to be due to the plaintiff on account of services rendered. Defendant appeals from the judgment entered against it.

[1] In June, 1914, a written contract was made between plaintiff and defendant whereby plaintiff was employed for a period of one year as a managing business agent at an annual salary of $6,000, payable at the rate of $500 per month. By the writing which expressed the contract, it was agreed that the employment should relate back and commence on the 31st day of May, 1914. Plaintiff entered upon the employment and continued therein until the 10th day of February, 1915, when the board of directors of defendant by resolution proposed to discharge him and terminate the contract. The sole question here presented is as to whether defendant corporation had sufficient cause to dispense with the services of plaintiff and end the contractual relations prior to the expiration of the year mentioned in the contract. In its answer the defendant set up that the plaintiff was discharged from its employ—

"for cause, and for the reason that he was insubordinate, did not obey the instructions of the proper officials of said corporation or the instructions given him by the board of directors, and because he was using the moneys of the defendant corporation for improper purposes, and not for the best interests of said defendant corporation."

That portion of the written contract determining the character of the employment is as follows:

"That the party of the first part (the corporation) does by these presents employ the party of the second part for a period of one year from date to manage, take charge of and conduct the business of the party of the first part along such lines as the said party of the second part may deem expedient and best at a yearly salary of $6,000, payable at the rate of $500 per month."

The trial judge by his findings negatived the allegation of defendant's answer that the discharge of plaintiff was for sufficient cause. It appears from the evidence given that, after entering upon his office as managing agent, the plaintiff initiated an extensive business policy, especially in connection with the exploitation of certain lands in the San Fernando Valley in Los Angeles county. As the defendant had no title to these lands, the advisability of expending large sums of money, as appears was done, with a view of acquiring title and marketing that property, was the subject of considerable discussion and resulted in opposition on the part of certain of the directors of defendant corporation. When plaintiff first took hold of the matter of the San Fernando lands he did not consult with the directors, but proceeded on his own responsibility, and the first notice that the directors had of his action was furnished them by an advertisement in a newspaper. It was later determined by both the directors and stockholders that the expenditures in that matter should be continued, this policy being apparently dictated by the consideration that, as a large amount of money had theretofore been expended, the protection of the investment required that additional money be used in the same project. There were other matters in which the policy of the manager was opposed to that of some of the directors. We make this statement preliminarily as showing that the plaintiff assumed to act under his contract of employment as the directing head of the corporation, and that he assumed to act in the making of contracts without first obtaining the sanction of the directors. However broad the terms of the contract of employment, we do not believe that it may be said that they were broad enough to divest the board of directors of the authority imposed upon that board by law to manage and control the affairs of the corporation; nor do we think there was any intent on the part of the board to so delegate its power. It may be said perhaps that as to the San Fernando land project, as the acts of plaintiff in that matter were finally ratified, sufficient cause was not shown upon which to base a rescission or termination of the contract under which plaintiff was employed.

[2, 3] There was, however, as is shown in the transcript of the evidence, the case of the making of a supplemental contract with one Stoltz. The by-laws of the corporation were not introduced in evidence, but the president testified that, shortly after plaintiff was appointed as manager, a resolution was adopted requiring that all contracts be executed by the president and manager. A contract was in existence between the corporation and Stoltz which had for its object the securing, through the services of Stoltz, funds with which to construct a business building on certain property. Upon certain conditions, Stoltz was to receive a payment of $15,000. On October 2, 1914, the plaintiff wrote to Stoltz a letter in the form of an offer to contract, which supplemented the original contract made and obligated the corporation to pay to Stoltz for six months the sum of $375 per month, with the condition that that amount would be reduced to $125 per month if Stoltz was successful in doing what the original contract provided he was to do. By written acceptance, Stoltz agreed to the terms of this contract. The matter of the making of this supplemental contract was not divulged by the plaintiff, and inquiries of the plaintiff, both by the president of the corporation

and a director during a directors' meeting, as to whether there was any other contract in existence of which notice had not been given, received a negative response from the plaintiff. In explanation of this matter the plaintiff stated that he made the supplemental agreement with Stoltz for the purpose of protecting the latter in the event that the directors "or some of them" might want to "side step" the paying of the compensation to Stoltz under the original contract. As an agent of the corporation acting in a fiduciary capacity, it rested upon plaintiff to make full and complete disclosures to his superior officer and the directors as to all business transacted by him in the corporation's behalf. That a breach of this obligation gave to the corporation the legal right to rescind the contract of employment and discharge the plaintiff, we have no doubt at all. It seems quite evident that the plaintiff assumed that he possessed the largest authority to bind the corporation by his acts as manager, and assumed that the policy adopted by him was not subject to direction or supervision. As to the matters to which we have referred, the testimony was uncontradicted. Plaintiff made no denial of the assertions of the president and director who stated that plaintiff had denied that any other contract was outstanding of which the officers had no knowledge, and there was no dispute at all but that the Stoltz contract had theretofore been made. Plaintiff did not deny knowledge of the resolution of the board of directors which required that contracts be executed by the president and manager. In view of this state of the record, we think that the contention of appellant that the evidence was not sufficient to sustain the finding made by the trial judge, wherein it was determined that no cause existed for the discharge of the plaintiff, should be sustained. While that matter is not made the subject of discussion on this appeal, it may be suggested that there is a strong reason also for holding that plaintiff acquiesced in the rescission of his contract. After receiving notice of the action of the board of directors discharging him, he took his effects away from the office and did not thereafter offer to perform any services in the capacity of manager prior to the commencement of this action.

[4] Neither do we think that the written contract of employment authorized the plaintiff to collect his compensation in advance as in this action he sought to do as to the February, 1915, salary. The ordinary rule is that services are paid for after they have been performed, unless there is a special contract to the contrary. The contract here exhibited contains no terms to that effect.

The judgment is reversed.

We concur: CONREY, P. J.; SHAW, J.

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34 Cal. App. 713

GRAY et al. v. INDUSTRIAL ACC. COMMISSION et al. (Civ. 2275.)

(District Court of Appeal, First District, California. Sept. 24, 1917.)

1. Master and Servant ⟹417(7)—Injuries to Servant — Workmen's Compensation Act—Review—Conflicting Evidence.

On petition to review an award of the Industrial Accident Commission, a finding of fact by the commission on conflicting evidence cannot be set aside.

2. Master and Servant ⟹405(2)—Injuries to Servant—Evidence—Joint Employers.

In a proceeding under the Workmen's Compensation Act (St. 1913, p. 279) for compensation for the death of a servant, evidence *held* to warrant a finding that the employers were jointly engaged in business of rock crushing, in which the fatality occurred.

Petition by H. N. Gray and another for writ of review to Industrial Accident Commission and others to review an award under the Workmen's Compensation Act for the death of a servant. Writ dismissed, and award affirmed.

J. E. Manning, for petitioners. Warren H. Pillsbury, of Oakland, for respondents.

PER CURIAM. [1] In support of the application for the writ it is urged first that the decedent, to whose dependents an award was made by the respondent Industrial Accident Commission was guilty of willful misconduct in returning to the place from which he had been taken earlier in the day and where he ultimately met with the accident which caused his death. Now the evidence shows that he was ordered to go from that place, where he was engaged in loading dirt on cars, to another place some little distance away. The evidence does not show that he was warned not to return to the place where he was originally working, nor does it show that it was explained to him what the dangers of the place were from which he was taken. He was simply told to go and work somewhere else. He went and worked for a while at the place indicated on the same character of work which he had been doing; and later on, the work at that place becoming slack, or there not being any dirt to load, or some such reason, he went back to the place where he had been working earlier in the morning, apparently with the intention of keeping employed where there was work to do. Now there is no direct evidence—there was none before the commission that we can see—that at the time that he returned to this place he actually knew of the dangers that were incident to his being there; and, that being so, the question whether his act in returning was willful misconduct is one which is only inferable from the argument now made that he must have seen the dangers of the place, and that he willfully returned to a place that was dangerous knowing the dangers of it and knowing that he was taken away from it because of the dangers existing there. Now that is only an inference to be drawn from his action; but the commission did not draw it, nor upon this application can we.

[2] The only remaining point is as to whether or not H. N. Gray and P. B. Gray were jointly interested in the business of rock crushing; and upon that point we think that the record shows sufficient evidence to warrant the finding that they were, although H. N. Gray did testify that the rock-crushing business was separate and apart from the selling of the rock when crushed, which was conducted by P. B. Gray. Nevertheless the commission did not apparently see fit to believe him in that statement in view of all the other circumstances in the case, which, among other things, showed that the rock was taken at the quarry by (Mrs.) P. B. Gray, there delivered to her, that she sold it, and if there was a balance due she paid it to Mr. H. N. Gray. She kept all the books of the entire concern, of both departments of the rock-crushing plant and of the sales made, and Mr. H. N. Gray kept no books at all; all of his accounts were kept by her, and if he wanted any money he got it from her. We think the evidence upon the whole supports the implied finding of the commission that Mr. H. N. Gray and Mrs. P. B. Gray were jointly interested and had jointly employed the deceased to work for them.

The award is affirmed, and the writ dismissed.

(34 Cal. App. 724)

DICK v. CITY OF LOS ANGELES et al.

(Civ. 1886.)

(District Court of Appeal, Second District, California. Sept. 27, 1917.)

1. MUNICIPAL CORPORATIONS 🔑835—STREET GRADING—DAMAGE FROM SURFACE WATER—EVIDENCE—FINDINGS.

In an action for the alleged destruction of crops owned by plaintiff on leased land, by surface water which by a system of street grading was collected at one place and overflowed upon the land, evidence *held* to sustain findings following the allegations of the complaint.

2. MUNICIPAL CORPORATIONS 🔑835—STREET GRADING—SURFACE WATERS—DAMAGES.

A city by virtue of its power to create and improve streets has no absolute and unconditional right to intentionally divert water therefrom to protect the streets, and to discharge it by artificial means in increased quantities upon the property of an adjoining owner.

3. MUNICIPAL CORPORATIONS 🔑845(4) — STREET GRADING—SURFACE WATERS—DAMAGE.

In an action for the destruction of crops owned by plaintiff on leased land from surface waters collected by a system of street grading and overflowing upon the land, evidence *held* not to require finding that rains of certain years were so unprecedented that city need not have calculated on their probability.

4. RELEASE 🔑35—INJURY TO LEASED PREMISES—LANDLORD'S WAIVER OF DAMAGES—EFFECT.

In such action, the fact that plaintiff's landlord had waived all damages resulting from the improvement of the streets in consideration of the granting of the petition for the improvement, where it appeared that the city had constructed the work differently from the work sought by the petition of the landlord and other property owners, could not be set up as a waiver as against the tenant.

5. APPEAL AND ERROR 🔑232(1½)—OBJECTION TO EVIDENCE—SUFFICIENCY.

In such case, where defendants in their answer did not set up the waiver, an objection to waiver on the ground that it was incompetent, irrelevant, and immaterial, and that no foundation had been laid therefor, and that it was not a waiver of the condition shown to exist in the case, was sufficient to raise the point that the defense of waiver based on landlord's petition containing a waiver was not within the issues presented by the pleadings.

Appeal from Superior Court, Los Angeles County; Eugene P. McDaniel, Judge.

Action by Louie Dick against the City of Los Angeles and P. P. O'Brien and others, constituting the Board of Public Works of the City. Judgment for plaintiff, and, from the judgment and from an order denying their motion for a new trial, defendants appeal. Judgment against the City of Los Angeles, and order denying its motion for a new trial affirmed, and judgment against defendants O'Brien and others, and order denying their motion for new trial reversed.

Albert Lee Stephens, City Atty., and Charles S. Burnell, Asst. City Atty., both of Los Angeles, for appellants. Lloyd, Cheney & Geibel and Ovila N. Normandin, all of Los Angeles, for respondent.

CONREY, P. J. Action to recover damages for the unlawful destruction of crops owned by the plaintiff on leased land. The defendants are the city of Los Angeles and three persons who constituted the board of public works of that city. The defendants appeal from the judgment and from an order denying their motion for a new trial.

Vermont avenue in the city of Los Angeles runs in a northerly and southerly direction. It is crossed by Slauson avenue running in an easterly and westerly direction. The right of way of the Atchison, Topeka & Santa Fé Railway Company adjoins and parallels Slauson avenue on the north side at and in the vicinity of the crossing of Vermont avenue. The land on which the crops were grown consists of about 13 acres adjoining the north side of the railroad right of way and fronting along the westerly line of Vermont avenue a distance of 590.25 feet. At all times mentioned in the complaint the land was owned by F. P. Dalton and two other persons, and was occupied by the plaintiff as tenant of the owners; the tenancy being from month to month. The damage to plaintiff's crops of vegetables was caused by the overflow of water from Vermont avenue, resulting from two certain rainstorms which occurred in January or February, 1913, and at about the same period of the year 1914. During the latter part of the year 1911 and the early part of the year 1912, the city of Los Angeles caused certain work to be done, consisting of the grading, paving, guttering, and curbing of Vermont avenue from Santa Barbara street to the south line of Fifty-Eighth street (the next street north of Slauson avenue), and the grading and curbing of Vermont avenue to the Santa Fé right of way, and the grading, macadamizing, guttering, and curbing of Slauson avenue at and adjoining its intersection with Vermont avenue. The plaintiff bases his cause of action upon certain alleged facts concerning the plan and construction of said improvements, and alleges that the flooding of his land was caused by those improvements as constructed.

[1] The principal facts in issue at the trial are shown by certain findings of the court which follow and affirm the allegations of the complaint, as follows: In finding 4 it is stated:

> "That the specifications and construction of said work were and are such that at the said intersection of Slauson avenue and Vermont avenue, the grade of Slauson avenue was not made and is not the same grade as Vermont avenue, and the drainage of Vermont avenue ended there in a cul-de-sac, except as to a small culvert box and a small amount of drainage down the right of way of the Atchison, Topeka & Santa Fé Railway Company when the water backs up to a sufficient height. That as a part of said work and as a manifest fault in the construction and plans, defendants filled up a ditch or waterway on the westerly side of Vermont avenue and made no provision for carrying off the water theretofore carried therein, but on the contrary made said street carry the water theretofore carried by said ditch up to said Slauson avenue and there deposit same without any drainage except the small culvert box aforesaid. That as constructed said culvert box drains away only a small portion of the water carried to and deposited at said place by ordinary rains and said water thereupon backs up and floods plaintiff's land and adjacent lands. That defendants had constructed a culvert box on the easterly side of Vermont avenue under said Santa Fé railway right of way into Slauson avenue, but said box caused water to run from Slauson avenue back into Vermont avenue and was nailed up."

In finding 5 it is said:

> "* * * That said work upon and paving of Vermont avenue conducted a greatly increased flow of water southerly along said Vermont avenue, being water that had not theretofore flowed there; that defendants had a pipe or drain under Vermont avenue from the east to the west side thereof immediately north of the Santa Fé right of way, by which drain the waters which had formerly flowed in a southerly direction on Vermont avenue were diverted from the easterly side of Vermont avenue to the westerly side of Vermont avenue and deposited upon plaintiff's said leased land; that the said defendants failed to provide for the drainage or escape of such increased flow of waters or the adequate escape of any waters flowing south on Vermont avenue at this locality, but on the contrary banked up and stopped the same."

The court found and the evidence shows that prior to the paving of Vermont avenue no storm, drainage, or other waters ran upon or through plaintiff's said leased lands so as to injure the same.

Appellants claim that the findings are not sustained by the evidence. Prior to the street work, Slauson avenue had been higher than Vermont at the intersection of the streets. The land in the vicinity had not been included, at that time, within the city limits. The country's road workers had filled that part of Vermont avenue for some distance north of the railroad right of way in order to raise the road to a convenient level for driving across the right of way. Prior to the street work there were culvert boxes, one on the east side of Vermont avenue and one on the west side of Vermont avenue, to carry water under the right of way and under Slauson avenue. When the street work was done, these culvert boxes were retained and an additional box for the passage of water was placed alongside the old one on the west side of Vermont avenue, and thereby the drainage facilities were increased; although, as we shall see, the increase was not enough to carry all the water that might come to that point during heavy rainstorms. Respondent claims that Slauson avenue was higher after it was paved than before. We do not so understand the testimony. Apparently the fact was, as stated by the witness Matteson (of the city engineer's office), that Slauson avenue at that crossing was not at a greater level after the paving work was done than it was previous thereto, relative to Vermont avenue. Fifty-Eighth street extends easterly from Vermont avenue, and if extended westerly would pass through the plaintiff's land. Matteson's uncontradicted testimony is that the elevation of the curb on the west side at Fifty-Eighth street was changed by decreasing it two-hundredths of a foot, and that "the curb at Slauson was 1 foot 7 inches lower than the track before the paving, it is the same now." We understand that the track referred to is the Santa Fé railroad track at its Vermont avenue crossing. The essential fact is that after the street work was done, as also before the work was done, there would always be some accumulation of water on Vermont avenue immediately north of the railroad, whenever the water came down that avenue faster than it could escape through the culverts or through a ditch next to the railroad right of way. And since the general grade of the country fell away toward the west, any large accumulation of water at that place on Vermont avenue would naturally find its way across the plaintiff's land. This tendency was probably increased by the fact found by the court that the defendants filled up a ditch or waterway on the westerly side of Vermont avenue and made no provision for carrying off the water theretofore carried therein. Appellants attack this finding, but we think not successfully. The witness Dalton said that the gutters on both sides were narrowed by the filling in of earth "to make the approach to the railroad," and we have not observed that there was any other evidence on that point.

The court found also:

> "That said work upon and paving of Vermont avenue conducted a greatly increased flow of water southerly along said Vermont avenue, being water that did not theretofore flow there."

Counsel for appellants claim that there is no testimony in the record which supports this finding. In response, our attention is directed to the testimony of the witness Hufford, which is to the effect that, prior to the paving of Vermont avenue, water would run down Vernon avenue (a street parallel to Slauson avenue and about a mile north thereof); "there was a little high sand ridge, and the water would come down there practically on Santa Monica avenue to Vernon avenue, and take down Vernon avenue to the west, and, after they put in the street paving through there, they naturally put it down to the grade, which lowered it lower than either side, the water would naturally run from the west back to the east, and from the east back to the west to Vermont avenue." Thus it was shown, and not contradicted, that there was a sand ridge running across Vermont avenue which kept water from running down Vermont avenue from points at or north of Vernon avenue, and that this ridge was removed when the city in doing the street work on Vermont avenue paved the street at the level of the established grade. Counsel for respondent only offer, in addition to the foregoing facts, their own suggestion that the natural result of the paving itself added to the flow of the water by substituting a paved surface for the dirt surface theretofore existing.

It is not necessary to discuss the other specifications of the particulars in which it is claimed that the evidence is insufficient to justify the findings. There is no evidence that the city diverted to Vermont avenue, and to the land occupied by the plaintiff, any natural stream of water. Nor was there any stream whatever other than the ditches which carried surface water when it reached the streets. The natural drainage of surface waters in that part of the city is toward the west. Whenever rainstorms caused surface waters to drain from the east of Vermont avenue so as to reach that thoroughfare, they ran down Vermont avenue, except as above stated.

Los Angeles Cemetery Ass'n v. City of Los Angeles, 103 Cal. 461, 37 Pac. 375, is a case relied upon by both sides in this action. In that decision the court, following Palmer v. Waddell, 22 Kan. 352, said that:

> "The rule that the owner of a tract of land may obstruct the flow of surface water across his land appears to and does have an exception, which is where surface water, having no definite source, is supplied by the falling rains and melting snows from a hilly region or high bluffs, and, owing to the natural formation of the surface of the ground, is forced to seek an outlet through a gorge or ravine, and by its flow assumes a definite or natural channel, and escapes through such channel regularly during the spring months of every year, and in seasons of heavy rains."

It was held in Los Angeles Cemetery Ass'n v. City of Los Angeles, supra, that, since the embankment placed by the city across First street did obstruct the flow of a natural water course of the kind above described, the case came within the exception stated, and the city could not lawfully turn the flow upon adjacent lands to their injury. But the city was protected from liability in that action, because the overflow which caused plaintiff's damage was occasioned by an extraordinary flood, which could not have been reasonably foreseen. In the same case the court affirmed the general rule and stated the exception, by saying that as to ordinary surface water, if the injury to plaintiff was caused by grading a public street to its established grade, and plaintiff could grade its property so as to conform to the established grade, whereby the surface water would flow off, and not stand upon its property, the plaintiff could not recover. But the court held that the rule has no application to a case where surface water assumes the form of a regular stream or water course and the case comes within the exception before stated. In Conniff v. San Francisco, 67 Cal. 45, 7 Pac. 41, the court said:

> "It is well settled that a municipal corporation has no right * * * to stop up a natural channel through which waters run by an embankment made in grading a street, under its general power to grade and improve streets."

In Lampe v. San Francisco, 124 Cal. 546, 57 Pac. 461, 1001, the court said:

> "As we understand it, damages are claimed because the grading of the street, which is the property of defendant, prevents the surface water from flowing off the lands of the plaintiff and onto the lands of defendant as it had been wont to flow. The question is as to whether or not defendant is liable for damages caused by the obstruction of the flow of surface waters from the lands of plaintiff, occasioned by the necessary and lawful grading of defendant's street in front of plaintiff's said lands. Upon the solution of this question depends the result as to whether or not this judgment shall be affirmed."

The court then quotes with approval from Dillon on Municipal Corporations, to the effect that, where the work of grading or improving streets has caused damage by surface water to private property and the damage has resulted solely as a consequence of the proper execution of a legal power by the corporation, there is no implied liability therefor. The court further said:

> "There is in some of the books an apparent exception to the general rule in that class of cases where the surface water, owing to the conformation of the country, has found for itself a definite channel in which it is accustomed to

flow, in which class of cases it is said that the municipal corporation, in making an embankment while grading its streets, should erect a culvert or waterway so as not to obstruct the flow of the surface waters in their well-defined channel."

The ditch on the west side of Vermont avenue which it is specially complained was made narrower by the street work here in question was not a channel which the water had found for itself and had none of the characteristics of a natural channel. It had been formed on one side by the plaintiff or his predecessors who threw up the earth at the end of the rows in plowing. On the other side of the ditch a wall had been formed by reason of the work done by the county, as we have heretofore stated, before this land became a part of the city of Los Angeles. Moreover, it does not appear that the water which came into Vermont avenue from Vernon avenue was derived from any water course, or had any characteristics other than that of surface water which comes to a street and runs along its gutters.

[2] From the decisions thus far mentioned it might seem to follow that the plaintiff in this case has not established a cause of action. But notwithstanding these decisions, we are unable to say that the nonliability of cities, for damages caused under circumstances like those shown in this case, is clearly and finally established. In none of those cases did the city, by its street grading work, cast upon private property water which by a system of streets was collected in large quantities at one place, with consequent overflow and damage to adjacent land. In Lampe v. San Francisco, supra, the court refers to Stanford v. San Francisco, 111 Cal. 198, 43 Pac. 605, and summarizes that case in these words:

> "The question in that case was as to whether or not the city was liable for damage caused by the accumulation of surface water which was the necessary consequence of paving the streets. It appears that by reason of the grading of the street large quantities of surface water accumulated and broke over the curbing and ran into the basement occupied by the plaintiff. In the opinion, after discussing the principle upon which the city was held liable, it is said: 'Nor is this case within that numerous class of cases where it is held with almost entire unanimity that a municipality is not bound to protect from surface water those who may be so unfortunate as to own property below the level of the street.' In this case there is no allegation that the grading of the street caused surface waters to accumulate in unusual quantities, and that such surface waters were turned upon the lands of the plaintiff."

The plain inference is that, if such allegation had been made, the complaint would have stated a cause of action. The two decisions last above mentioned are in harmony with the conclusion reached by Mr. Dillon. In section 1736 of his work on Municipal Corporations (5th Ed.), he says:

> "We agree to the doctrine that the municipality is not bound to protect from surface water those who may be so unfortunate as to own property below the level of the street; nor is the duty a perfect one, to adopt a system or mode of drainage which will have this effect; and, if one be adopted, there is in general, as hereafter shown, no liability except as to ministerial duties in connection therewith. It is possible there may be no middle ground; but we are unable to assent to the doctrine that by reason of their control over streets, and the power to grade and improve them, the corporate authorities have the absolute and unconditional legal right intentionally to divert the water therefrom, as a mode of protecting the streets, and to discharge it, by artificial means, in increased quantities and with collected force and destructiveness, upon the property, perhaps improved and occupied, of the adjoining owner."

[3] Appellants contend that the flooding of plaintiff's crops occurred only during extraordinary and unprecedented rainfall, and that for this reason he is not entitled to recover. The court's finding against this contention is not entirely without support in the evidence. The plaintiff's witness Wildasin, on cross-examination, said:

> "I don't know that I could of my own knowledge state whether or not the rain this last winter, 1913, was a heavier rain than is usual in Los Angeles in that part of the city. I know we had a lot of wet years and we have had some very dry years, and I remember 1884 being a very wet year, and somewhere along in the '90's. I don't think it is a question of big rains. I have lived 30 years in that neighborhood, and in that time I don't know of many rains as heavy as those in January and February of this year, with the possible exception of 1884 and 1889. It is among the heaviest at least."

This testimony comes short of being such evidence as would compel the trial court to decide that the rains of 1913 and 1914 were so excessively unusual and so unprecedented that the city in making its plans need not have calculated upon the possibility or probability of such rains.

The fact is, and it was admitted by Mr. Matteson and found by the court, that it was contemplated (but no official action was taken to that end) that the city would obtain a right of way or open a street to flow water from Vermont avenue westerly across and at about the center of plaintiff's leased land; and that the city proceeded to complete its Vermont avenue work without waiting to obtain said right of way or to open said street.

[4, 5] Further, it is contended that the plaintiff is not entitled to recover because his landlords had waived all damages which might result from the improvement of the streets. It was shown in evidence that on June 17, 1909, said property owners, together with other owners of property fronting on Vermont avenue between Santa Barbara avenue and Slauson avenue, petitioned the city council to improve Vermont avenue, between those limits by doing certain work, which included asphalt paving of the street together with other work specified, and requested that such improvements be made according to the official grade of the street. In that petition they said:

"In consideration of the granting of said petition and of doing the work therein mentioned, we (each for himself) do hereby waive any right which we may now have or may hereafter have, to make or prosecute any claim or demand against the city of Los Angeles, or the contractors for said improvement, for damages caused by said improvement or arising from the nature thereof, and particularly by any damages to our property occasioned by any cuts, excavations, retaining walls, fills, culverts, storm drains or sewers in, along or across the street in which said work is to be done."

Let it be assumed, although the proposition is disputed, that the plaintiff's claims herein are subject to that stipulation, and that it limits his right of recovery herein to the same extent that the rights of his landlords would be limited if they were making this claim for damages caused to crops of their own on said land. The contention may be answered in two ways. The appellants did not allege in their answer anything whatever in regard to said petition, and claimed neither waiver nor estoppel. Appellants respond to this that no objection was made when the waiver was offered in evidence. On inspection of the record we find that objection was made that the evidence was incompetent, irrevelant, and immaterial, that no foundation had been laid therefor, that it was not a waiver of the conditions shown to exist in this case, and that it would in no event be binding upon the plaintiff. We think that this was sufficient to cover the point that the defense which the document was offered to sustain was not included within the issues presented by the pleadings. And it was true, as stated in the objection, that the document did not contain a waiver under the conditions shown to exist. The petition called for asphalt paving to be done throughout the entire distance down to Slauson avenue, whereas in fact the paving as completed did not include Vermont avenue, between Slauson avenue and Fifty-Eighth street. It was admitted that that last section of the paving was omitted or postponed for the reason above noted, that the city authorities were expecting to extend Fifty-Eighth street westerly across the land occupied by the plaintiff and that drainage facilities would be obtained along that new street. The city, having elected to make these differences between the work as constructed and the work as asked for by the petition of the property owners, should not be permitted to take advantage of a waiver which was only made upon conditions with which the city did not comply.

We agree with appellants that no cause of action was stated or proved as against the defendants O'Brien, Handley, and Johnson. As to those defendants, the judgment and order are reversed. The judgment against the city of Los Angeles is affirmed, and the order denying the motion of the city of Los Angeles for a new trial is affirmed.

We concur: JAMES, J.; SHAW, J.

(34 Cal. App. 719)

LILLARD v. ABBOTT HARDWARE CO.

(Civ. 1877.)

(District Court of Appeal, Second District, California. Sept. 26, 1917.)

Appeal and Error ⚷757(1) — Briefs — Incorporating Record.

Where appeal is under alternative method, appellant must, under Code Civ. Proc. § 953c, print in his brief such portions of the record as he desires to call to the attention of the court in support of his argument, and, not incorporating enough to illustrate his points or show error, there must be affirmance.

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by Frank Z. Lillard against the Abbott Hardware Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Jones & Weller, of Los Angeles, for appellant. Leo V. Youngworth, of Los Angeles, for respondent.

JAMES, J. In this case the appeal is taken by the defendant from an adverse judgment. It was taken under the procedure known as the alternative method by which typewritten transcripts of the clerk's and reporter's records are provided to be filed in the appellate court. In such cases it is the duty of the appellant to print in his brief such portions of the record as he desires to call to the attention of the court in support of his argument. See section 953c, Code Civ. Proc.; also Cunnison v. Miller et al., 167 Pac. 890, and collection of cases cited therein. In this case no part of the judgment-roll is printed in or with the brief of appellant, and none of the testimony given at the trial is therein printed, except very brief and fragmentary extracts which are wholly insufficient to illustrate the points made or show error. For that reason, following the uniform holding of the Supreme Court and of this court, the judgment must be affirmed.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

176 Cal. 430

In re BAKER'S ESTATE.

GOULD v. PATROSSO.

(L. A. 4833.)

(Supreme Court of California. Nov. 5, 1917. Rehearing Denied Dec. 3, 1917.)

1. COSTS 🔑135—SECURITY FOR PAYMENT—NONRESIDENTS.

Code Civ. Proc. § 1036, allowing the court to require additional security from nonresidents, does not authorize the sufficiency of the sureties to be questioned by exception and justification.

2. WILLS 🔑161—NONCONTESTING CLAUSE.

Where a will is void because of undue influence and mental incapacity, a provision therein, prohibiting heirs from contesting it, is also invalid, and, when alleged, requires no answer from contesting heirs.

3. WILLS 🔑230—CONTEST—ESTOPPEL.

An heir is not estopped from contesting a will on the ground of undue influence and mental incapacity by a provision that legatees, etc., contesting the will, should receive no part of the estate.

4. INSANE PERSONS 🔑26 — MENTAL INCAPACITY—PRESUMPTIONS.

Successive adjudications by a foreign state that testator was insane and later became sane created rebuttable presumptions of insanity between the two adjudications and of sanity after the second adjudication.

5. WILLS 🔑55(1) — MENTAL INCAPACITY — SUFFICIENCY OF EVIDENCE.

Evidence that testator had been several times declared insane, together with his deposition when later declared sane, *held* to sustain a verdict of mental incapacity.

6. WILLS 🔑400—REVIEW—NECESSITY OF DECISION.

Where a verdict of testator's mental incapacity was sustained by the evidence, it is unnecessary to decide whether the evidence also sustains a finding of undue influence.

7. EVIDENCE 🔑341—DOCUMENTS—ADMISSIBILITY.

Under Code Civ. Proc. § 1918, subd. 6, authorizing documents to be certified by the legal keeper thereof, a copy of testator's commitment to an insane asylum, certified by its superintendent, was admissible.

8. EVIDENCE 🔑349—DOCUMENTS — ADMISSIBILITY.

Under the direct provisions of Code Civ. Proc. § 1905, testator's being declared insane in a foreign state may be proved by a copy of the proceedings certified by the clerk with the court's seal annexed and the presiding magistrate's certificate that the attestation was in due form and by the proper officer.

9. WILLS 🔑53(2)—MENTAL INCAPACITY——ADMISSIBILITY OF EVIDENCE.

Whether evidence regarding testator's insanity for some 50 years prior to his death is too remote rests largely in the trial court's discretion.

10. WILLS 🔑53(2) — MENTAL INCAPACITY — ADMISSIBILITY OF EVIDENCE.

Evidence regarding testator's insanity for some 50 years prior to his death *held* admissible, where contestants claimed the insanity was permanent and of long standing.

11. EVIDENCE 🔑349—DOCUMENTS—ADMISSIBILITY IN EVIDENCE.

Documents on file in a foreign court may be proved by oral evidence or by copies testified to be correct, since they stand upon the same ground as lost documents, which Code Civ. Proc. § 1855, expressly authorizes to be proved by copy or oral evidence.

12. WILLS 🔑53(1) — MENTAL INCAPACITY — ADMISSIBILITY OF EVIDENCE.

In a will contest, witnesses may testify whether testator's appearance and manner was rational or irrational as regards both his actions and sayings.

Department 1. Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Petition by Julius V. Patrosso to revoke the probate of the will of Samuel F. Baker. From a judgment setting aside the probate of the will, Will D. Gould, as executor, appeals. Affirmed.

James H. Blanchard, Wm. T. Kendrick, and Will D. Gould, all of Los Angeles, for appellant. Wm. M. Abbott and Wm. M. Cannon, both of San Francisco, and Thos. C. Ridgway, of Los Angeles (Kingsley Cannon, of San Francisco, of counsel), for respondent.

SHAW, J. This is an appeal by Will D. Gould, as executor of the last will of Samuel F. Baker, deceased, and also as residuary legatee, under said will, from a judgment of the lower court revoking a previous order of that court admitting said will to probate.

Samuel F. Baker died on May 8, 1912. His will was admitted to probate by an order of the superior court made on May 24, 1912. The decedent left as his surviving heirs at law his brother Horace Baker, his sister Julia F. Baker, and his sister Mary J. Farrand. On May 23, 1913, said Mary J. Farrand filed her petition to revoke the probate of said will, alleging as grounds of contest that the testator at the time of making the same was of unsound mind, and that he was acting under the undue influence of the said W. D. Gould. After filing the said petition, and while it was pending, in February, 1914, Mary J. Farrand died. Thereupon Gould, as executor of the will, moved to dismiss the proceeding on the ground that the right to contest the will did not survive the death of the heir. The motion was granted, and judgment of dismissal given accordingly. From this judgment an appeal was taken to this court, in which the court determined that the proceeding to contest the will did not abate by the death of the contestant, but that the right to contest survived, and that the prosecution thereof could be continued by the personal representative of the contestant, and the judgment dismissing the cause was reversed. Estate of Baker, 170 Cal. 578, 150 Pac. 989. Thereafter, in the court below, Julius V. Patrosso, as administrator with the will annexed of the estate of Mary J. Farrand, was substituted as contestant, and the cause proceeded to trial, resulting in the judgment setting aside the probate of the will, from which the present appeal is taken.

I. Mary J. Farrand was not a resident of the state. Upon the filing of her petition for revocation Gould, as executor, demanded that she file the undertaking for costs required of nonresident plaintiffs by section 1036 of the Code of Civil Procedure. Thereupon the undertaking required by that section was given, it being signed by two persons as sureties, each of whom made the affidavit required by section 1057 of the Code of Civil Procedure, respecting his property. Gould thereupon filed a paper, stating that he excepted to the sufficiency of the sureties upon said undertaking, and that he required that said sureties justify as sureties in the manner provided by law. The sureties did not justify, except by the affidavit aforesaid, attached to the undertaking. Within ten days thereafter Gould moved the court to dismiss the proceeding on the ground that the contestant had not caused the sureties on said undertaking for costs to justify as such sureties. The court denied the motion. On the trial the appellant renewed the objection and moved to arrest the proceedings on the ground that there had been no justification of the sureties upon the undertaking for costs. The objection was overruled, and the court proceeded with the trial. The appellant assigns these rulings as error. They are without merit.

[1] Section 1036 does not authorize a proceeding against the sureties on an undertaking for costs, filed by a nonresident plaintiff, of the character here attempted. It provides that if the security provided by the undertaking is insufficient, the court may order a new or additional undertaking. It does not authorize the sufficiency of the sureties to be questioned by way of exception and justification. That method is provided with respect to some classes of undertakings, such as appeal bonds, injunction bonds, undertakings upon which a corporation is the sole surety (Code Civ. Proc. §§ 529, 948, 1057a), and some other classes of undertakings. But with respect to an undertaking for costs given by a nonresident plaintiff, no such method of procedure is provided, and the only remedy, if the security is insufficient, is that provided by section 1036. The appellant did not resort to that method. Consequently his motion was properly denied and his objection was properly overruled. We are not to be understood as intimating that in any event the failure to give additional security when properly ordered by the court below would operate to deprive that court of jurisdiction of the cause. Section 1037 provides that when an order is made for additional security, as provided in section 1036, and none has been given, the court, after 30 days, may dismiss the action or proceeding. It does not follow that the court is bound to dismiss it, or that if it refuses to do so its further proceedings therein are without jurisdiction and void.

[2, 3] II. The appellant filed a so-called cross-complaint in the court below, alleging therein that the contestant was estopped from maintaining this contest by reason of a clause in the will declaring that, if any legatee or devisee contest the will, such legatee or devisee should receive no part of the estate. This cross-complaint was duly served upon the contestant, and she did not answer the same within the 10 days allowed by law therefor. Thereupon her default for not answering was entered by the clerk at the request of Gould. He now contends that by reason of this default the contestant has forfeited her right to proceed with the application to revoke the will. One ground of contest is that the testator was of unsound mind at the time of the execution of the will. It would be a strange doctrine which held that one who was of unsound mind could not execute a will, and that at the same time he could by a clause in a will otherwise invalid, prevent any persons interested in the estate from maintaining a contest thereof. The invalidity which attaches to a will on the ground of insanity in the testator at the time of its execution attaches to all of its provisions, and is as effective upon a declaration therein forbidding a contest as upon any other part of it. It would be equally strange if a will procured by undue influence of another could be safeguarded by a provision inserted therein that any person who sought to set it aside on the ground of such undue influence should receive no part of the estate, and should therefore be disqualified from maintaining a contest upon that ground. It follows that the so-called cross-complaint, assuming for the present that a cross-complaint in any event is a proper pleading in a case for the revocation of the probate of a will, did not state any facts which the contestant was called upon to answer, and it is immaterial whether she did formally answer or not. Her failure to do so did not estop her from proceeding with the cause.

[4-6] III. The appellant claims that the evidence does not sustain the verdict with respect to insanity and undue influence. At the time of his death the testator was 87 years of age. He left an estate of the value of more than $25,000. The theory of the contestant was that he became insane early in life; that his insanity was of a fixed and permanent character, continuing throughout his life, that he had an insane delusion that his brother and sisters were endeavoring to obtain his property, and that this delusion led to and controlled the making of the will. In support of this theory evidence was introduced showing that he was adjudged insane in 1858 in San Francisco, Cal., and was thereupon committed to the hospital for the insane at Stockton, where he remained for something less than a year, and was discharged; that he was again adjudged insane in the state of Massachusetts in 1876, and a guardian of his person and estate was appointed; that thereupon he was committed to an asylum for the insane in that state, where he remained for a period of about 13 years, and was then transferred to the state

farm, from which place he escaped in the year 1892; that in 1877 he was adjudged insane by the Supreme Court of the state of New York, where some of his property was situated, and a guardian was appointed for his estate; that this guardianship continued until the year 1902, at which time, in a proceeding for that purpose in the Supreme Court of New York in Westchester county, it was adjudged that he had become competent to manage himself and his affairs, and that the guardian theretofore appointed for his person and estate be discharged. Other evidence was given tending to show that his insanity was of long standing and was of a fixed and permanent character, and that his delusion concerning the purpose of his brother and sisters to obtain his property and their attempts in that behalf, continued until the time of his death.

The adjudication in 1902 by the Supreme Court of New York, declaring that he was competent to manage himself and his affairs was not a conclusive adjudication that he was then sane. Prior to that judgment the legal presumption would be that the insanity previously adjudged to exist would continue. Thereafter the legal presumption would be that he was sane. Each of these presumptions was disputable. After the adjudication in 1902, that he was competent, the disputable presumption that he was sane, arising therefrom, was subject to contradiction by competent evidence. The appellant contends that there was no sufficient evidence to rebut this presumption of his subsequent sanity. While the evidence that he was insane from that time until his death is not as strong as that showing his previous insanity, we think there was sufficient to sustain the verdict. The history of the case prior to that time, as disclosed by the evidence, strongly indicated that his insanity was likely to continue during his life, and that while it might become less acute as he grew older, he would never entirely recover. In the proceeding to have him restored to sanity in New York, his deposition was taken at great length. His testimony on that occasion is sufficient of itself to support the conclusion that he was then of unsound mind. Other circumstances appearing in the evidence and occurring at intervals from that time until his death tended to show that this condition continued thereafter, and that he still retained an insane delusion that his relatives had attempted to take from him his property and had had him imprisoned for that purpose. Without further discussion it is sufficient to say that the evidence on this subject supports the verdict of the jury.

Inasmuch as the verdict declaring him to be of unsound mind at the time the will was executed is sufficient to sustain the judgment, it is unnecessary to enter into any discussion of the sufficiency of the evidence to sustain the finding of the jury that the will was procured by undue influence, or of the alleged errors of law relating to that subject.

IV. A large number of alleged errors in rulings made during the trial are presented in the brief of the appellant. It will be necessary to notice only a few of them.

[7] A copy of the commitment under which the testator was confined in the insane asylum at Stockton in 1858, certified by the superintendent of the asylum, was admitted in evidence. Subdivision 6, § 1918, of the Code of Civil Procedure, provides that an official document of this character may be proven by a copy certified by the legal keeper thereof. The superintendent of the insane asylum is the legal keeper of the commitments under which persons are confined in such asylum. The authentication was therefore legal, and the copy was properly allowed in evidence.

[8] The record of the proceedings in Massachusetts, whereby the testator was adjudged insane and a guardian appointed for him, was proven by a copy certified by the clerk having the legal custody thereof, with the seal of the court annexed, and by a certificate of the presiding magistrate that the attestation was by the proper officer and in due form. This was in exact accordance with section 1905 of the Code of Civil Procedure. The admission of the copy in evidence was not error.

[9, 10] Objections were made to these documents and other evidence tending to show his insanity at a period beginning more than 50 years before his death and continuing until the year 1901, on the ground that it was too remote. The question whether evidence of this character is too remote from the time of the execution of the will is a matter resting very largely in the discretion of the trial court. No general rule can be given on the subject. Each case must depend upon its particular circumstances. Where the evidence tends to show that the insanity developed early in life, and was of a fixed and permanent character, the period during which the insanity may be shown is, of necessity, greatly extended. Its persistent character can best be shown by proof of its existence during a long period of time, and evidence thereof is properly admissible in such cases. "There seems to be no agreed definition of the limit of time within which such prior or subsequent condition is to be considered; and in the nature of things no definition is possible." 1 Wigmore on Evidence, § 233, p. 292. The following decisions support the rulings of the court below as to this evidence under the conditions of this case; State v. Jones, 50 N. H. 382, 9 Am. Rep. 242; United States v. Holmes, 1 Cliff. 108, Fed. Cas. No. 15,382; Herster v. Herster, 122 Pa. 239, 16 Atl. 342, 9 Am. St. Rep. 95; People v. Griffin, 117 Cal. 583, 587, 49 Pac. 711, 59 Am. St. Rep. 216. Of course, all the evidence on the subject was material only because of its bearing on the

question of the sanity of the testator at the time of the execution of the will. Its weight was for the jury to determine. The jury was correctly instructed by the trial court as to its duty in considering and applying this evidence.

[11] The testator, shortly after he was charged with insanity in Massachusetts, wrote two statements of the occurrences which led to the adjudication. These documents were on file in the Supreme Court of New York as a part of the papers in the proceeding in which he was there adjudged insane. The deposition of Horace Baker was given, to the effect that the witness had examined the papers on file in New York, that the same were in the testator's handwriting, and that he had made a correct copy thereof, which he produced, and the same was admitted in evidence in the court below over the objection of the appellant. The statements made in the writings tended strongly to show the insanity of the testator at that time. The documents consisted of declarations of the testator himself. While they might have been proven by copies of the documents certified by the keeper of the records in New York, this method of proof does not exclude all other methods. The papers, being out of the jurisdiction, could not be produced at the trial by means of the ordinary processes of the court. They stand upon the same footing as lost documents, and therefore their contents may be proven by oral evidence, or by copies shown by the testimony of witnesses to be true copies. Code Civ. Proc. § 1855; Zellerbach v. Allenberg, 99 Cal. 73, 33 Pac. 786.

[12] The witness Horace Baker, brother of the testator, was allowed to testify to conversations had with the testator in his lifetime, and in relation thereto to state whether or not the manner and conversation of the testator impressed him as rational or irrational. Objections were made to these questions, and others of like character, and much of the brief is taken up with the presentation of the alleged errors in ruling upon them. It is well settled that it is competent to ask a witness who describes the conduct of another whose sanity is in question, whether or not the appearance and manner of the person at the time was rational or irrational, not only with respect to his actions, but also with respect to his sayings. People v. Manoogian, 141 Cal. 595, 75 Pac. 177; People v. Lavelle, 71 Cal. 352, 12 Pac. 226; Holland v. Zollner, 102 Cal. 636, 36 Pac. 930, 37 Pac. 231; People v. McCarthy, 115 Cal. 260, 46 Pac. 1073.

V. A great number of rulings made in the course of the trial are mentioned in the briefs, and are claimed to have been erroneous. Many of them are not even argued. All of them which we have not already discussed are trivial in character, and we will not extend this opinion by further discussion of them. If any of them are erroneous, which we do not admit, the error was not of sufficient importance to have affected the result of the trial. This applies also to the giving and refusal of instructions.

The judgment is affirmed.

We concur: SLOSS, J.; LAWLOR, J.

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176 Cal. 421

ALLAN v. GUARANTY OIL CO.

(L. A. 3877.)

(Supreme Court of California. Nov. 1, 1917. Rehearing Denied Nov. 28, 1917.)

1. PLEADING 🔑34(3)—CONSTRUCTION—PERFORMANCE OF CONTRACT—INFERENCE OF PREVENTION BY ADVERSE PARTY.

In suit to recover money paid to defendant for the execution of a lease of oil land on the ground that defendant was neither the owner nor entitled to possession, and had not delivered possession to plaintiff, general objection to the sufficiency of the complaint to state a cause of action could not be urged against its defective allegation that plaintiff had performed his part of the contract, where the ultimate fact that defendant had prevented plaintiff from performing could be inferred.

2. MINES AND MINERALS 🔑76—OIL LEASE—COVENANT FOR QUIET ENJOYMENT—DEMAND FOR POSSESSION.

Where the lessor of oil lands was neither the owner nor entitled to possession, demand upon the lessor for possession by the lessee was unnecessary to give the latter a cause of action for breach of an implied covenant for quiet enjoyment, since demand upon the lessor would have been futile, especially after assertion of a paramount title by the real owner.

3. MINES AND MINERALS 🔑76—OIL LEASE—COVENANT FOR QUIET ENJOYMENT—YIELDING TO PARAMOUNT TITLE — BURDEN OF PROOF.

Plaintiff, lessee of oil lands, by yielding to the paramount title without a prior demand for possession on the lessor, undertook the burden to prove the validity of such paramount title in his suit against the lessor for breach of covenant for quiet enjoyment.

4. MINES AND MINERALS 🔑76—OIL LEASE—COVENANT FOR QUIET ENJOYMENT—BREACH —PLEADING DEMAND.

In suit for breach of covenant for quiet enjoyment by the lessee of oil lands against the lessor, where the complaint set up the paramount title, and lack of title or right of possession on the lessor's part, an allegation of demand on the lessor for possession was unnecessary.

5. MINES AND MINERALS 🔑76—OIL LEASE—EVICTION.

Where there could have been no actual eviction of plaintiff lessee, who had never been in possession, an allegation of eviction was unnecessary.

6. MINES AND MINERALS 🔑76—OIL LEASE—COVENANT FOR QUIET ENJOYMENT—EVICTION—SUFFICIENCY OF EVIDENCE.

In suit by the lessee of oil lands for the lessor's breach of its covenant for quiet enjoyment, evidence *held* to support finding that plaintiff lessee, in a former suit wherein the holder of paramount title to the land asserted it, was one of the defendants designated under a fictitious name.

7. Mines and Minerals 🔑76—Oil Lease—Covenant for Quiet Enjoyment — Eviction—Notice of Suit—Judgment.

To constitute a suit by the true owner of the paramount title the equivalent of an eviction, no notice thereof by the lessee to the lessor is necessary, nor need the paramount title have been established by judgment.

8. Mines and Minerals 🔑76—Oil Lease—Covenant for Quiet Enjoyment—Breach—Paramount Title—Burden of Proof.

The burden is on the lessee, suing for the lessor's breach of covenant for quiet enjoyment, to prove that the paramount title is in the one who brought a former suit to quiet title, of which the lessor was not notified by the lessee, and that the paramount title, not having been established by judgment, was not in the lessor.

9. Mines and Minerals 🔑58 — Signing Lease—Necessity.

Where the signing of lease by the lessee was not contemplated by the parties to render it complete, signing was not otherwise necessary.

10. Mines and Minerals 🔑76—Breach of Covenants by Landlord—Recovery by Tenant.

Where the lessor of oil lands broke both its express covenant to give possession and its implied covenant of title, the lessee was entitled to recover.

11. Mines and Minerals 🔑76 — Lease — Covenant for Quiet Enjoyment—Pleading.

Under a lease of oil lands requiring the lessee to begin work immediately, he could not state a cause of action for the lessor's breach of covenant for quiet enjoyment without setting forth a compliance or an attempted compliance with the requirement.

12. Mines and Minerals 🔑76 — Lease — Covenant for Quiet Enjoyment—Pleading.

Where the lessee of oil lands by his lease had three months in which to commence work, by alleging that suit to quiet title by the owner of paramount title was begun within seven days after the execution of the lease, the lessee was able to state a cause of action against its lessor for breach of its covenant for quiet enjoyment without averring his own performance.

13. Mines and Minerals 🔑76—Oil Lease—Lessee's Action for Breach of Covenant—Complaint.

In a lessee's suit against his lessor for breach of covenant for quiet enjoyment, the complaint, not setting out the particular covenants, but incorporating the whole lease, including the pertinent provisions, was sufficient against general demurrer, though the lessor might have demurred specially for uncertainty.

14. Mines and Minerals 🔑73—Oil Lease — Covenant for Quiet Enjoyment — Intent of Parties.

No particular words in lease need be used to effectuate a covenant for quiet enjoyment; the intent of the parties controlling.

15. Mines and Minerals 🔑76—Oil Lease—Covenant for Quiet Enjoyment—Breach—Pleading.

In a lessee's action against his lessor for breach of covenant for quiet enjoyment, it was not necessary for the lessee to allege that the lessor had failed to protect him according to the covenant so long as he took upon himself the burden of proving that the lessor had no rights in the property.

16. Limitation of Actions 🔑24(1)—Statute of Limitations—Express Contract in Writing.

Action on an express contract in writing must be brought within four years.

17. Trusts 🔑257 — Action by Trustee — Party in Interest.

A trustee, with whom a lease was made, with whom all negotiations were had by the lessor, and to whom assignments of the rights of the beneficiaries were made, was the real party in interest, authorized to sue, for the purposes of his action for the lessor's breach of its covenant for quiet enjoyment, under Code Civ. Proc. § 369, providing that trustee may sue without joining beneficiaries, and that person with whom a contract is made for another's benefit is a trustee within the section.

18. Appeal and Error 🔑1071(6) — Harmless Error—Failure to Find.

Where plaintiff was clearly the real party in interest for the purposes of the action within Code Civ. Proc. § 369, failure to find on the issue raised by the answer that plaintiff was not the real party in interest, and therefore not entitled to sue, was not prejudicial to defendant.

19. Stipulation 🔑14(7)—Evidence—Depositions.

Where, by stipulation, defendant's failure to be represented at the taking of depositions merely permitted it to object to the form of the questions, and not to the validity of the deposition as a whole, depositions taken in the absence of defendant were admissible.

20. Appeal and Error 🔑1051(1)—Harmless Error—Evidence.

The admission of evidence by plaintiff's witnesses that a third person was defendant's agent in the negotiations with plaintiff was harmless to defendant, where such an agency between the person and defendant was sufficiently established by other evidence.

Department 1. Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Suit by Thomas Allan, trustee, against the Guaranty Oil Company, a corporation. From a judgment for plaintiff, and an order denying its motion for a new trial, defendant appeals. Judgment and order affirmed.

Weaver, McCracken & McKee, of Los Angeles, for appellant. Collier & Clark and Arthur J. Abbott, all of Los Angeles, for respondent.

LAWLOR, J. Plaintiff sued to recover certain sums of money alleged to have been paid by him to defendant for the execution of a lease of oil land, on the grounds that the defendant was neither the owner nor entitled to the possession of the land in question, and that it had not delivered possession thereof to plaintiff. The lower court rendered judgment for the plaintiff for $12,086.50, being $10,000 principal and $2,086.50 interest. From the judgment and from an order denying defendant's motion for a new trial, defendant appeals.

It appears that one McAllister and one Herolz had been in negotiations with the defendant for the right to go upon certain land, which defendant claimed to have at its disposal, in order to search for oil. Separate contracts were made with each of them, and $2,500 paid by each to the defendant as a bonus for the execution of the contract. The one with McAllister was formally executed, but Herolz's contract was not so executed for the reason that it was intended to consolidate it with a contract between the plaintiff and the defendant. Each of these contracts gave the exclusive right for 20 years to drill for oil on 20 acres of land, upon a royalty basis, with an option of purchase. The contracts reserved certain easements in favor of the defendant. Thereafter a similar contract was made with the plaintiff, representing a syndicate of several persons, including McAllister, Herolz, and one Sunley. This contract consolidated and superseded the two former ones already mentioned, covering the 40 acres which made up the two former holdings. It declared that the lessor, Guaranty Oil Company, party of the first part, "agrees to immediately place at the disposal of" Thomas Allan, trustee, the 40-acre tract of land thereby leased to Allan, the party of the second part. It also contained a reservation of easements to defendant, and the following clause:

> "First party agrees to protect second party against the claims of any party or parties, should any contests ever arise as to the ownership of same."

One of the provisions required the plaintiff to begin immediately upon the erection of a derrick upon the premises. This contract was drawn May 29, 1911, by plaintiff's Vancouver solicitors and forwarded to defendant. On May 31, 1911, defendant by telegram accepted all the conditions, but did not formally execute the instrument. On June 2, 1911, another instrument covering the same property and for the same purposes was executed by the defendant and sent to plaintiff's solicitors. The provisions of the second contract are practically like those of the first, except that the plaintiff was given three months within which to begin work on the first derrick. The consideration for this consolidated contract was the payment to defendant by plaintiff of $5,000 in addition to the $5,000 theretofore paid by McAllister and Herolz. This consolidation was had with the knowledge and consent of the latter persons, who had on May 29, 1911, assigned to plaintiff as trustee all their rights to their contracts, for the purpose of syndicating their interests with the plaintiff and others. On June 9, 1911, the Lucky Boy Oil Company filed in the superior court of Kern county an action to quiet title to the land in question against the defendant herein, joining other persons under fictitious names, among whom plaintiff claims to be included. On March 2, 1912, the plaintiff filed suit against the defendant for a return of the money paid, attaching as an exhibit the contract drawn May 29, 1911. The complaint was amended December 31, 1912, and an answer filed. On August 6, 1913, by stipulation of counsel, the contract executed June 2, 1911, was substituted for the earlier one, the former having been mislaid by the Vancouver solicitors and not discovered until August 4, 1913.

The court found the making of the McAllister and Herolz contracts and their consolidation with the Allan contract of May 29, 1911, which in turn was superseded by the contract of June 2, 1911. Further it found that defendant had received $10,000 for the making of the contract; that plaintiff had been and was at all times ready, able, and willing to perform the terms of the contract, but that the defendant was not at the time of the execution thereof, and never had been the owner of the premises described in the contract, and had not and could not deliver possession thereof or any part thereof to the plaintiff; that defendant's only interest in the premises had been under an agreement of purchase with the Lucky Boy Oil Company, but that all rights thereunder had been forfeited by it prior to the making of the contract with the plaintiff; and that the Lucky Boy Oil Company was during all the times mentioned herein the true owner of the premises and entitled to the possession thereof. The court also found:

> "That said defendant at all times mentioned herein knew that it was not the owner of said premises or any part thereof, and was not entitled to the possession of said premises or any part thereof, and that it was unable and would be unable to perform said contract on its part to be performed, according to the terms thereof, or at all."

[1] The first assignment of error is that the complaint does not state facts sufficient to constitute a cause of action against the defendant, because it does not allege that the plaintiff had performed his part of the contract. The contract attached to the complaint shows that plaintiff had three months from June 2, 1911, within which to begin work on the first derrick, and that suit was filed by the Lucky Boy Oil Company on June 9, 1911, seven days after the execution of the contract. The complaint avers that the defendant never delivered, and never was able to deliver, possession of the land to plaintiff, and that plaintiff has never had possession of said land, or any part thereof, and thus shows that plaintiff was prevented, and therefore excused from performing his part of the contract. A general objection to the sufficiency of the complaint cannot be urged against a defective allegation where the ultimate fact of prevention can be inferred.

[2-4] Before considering the other questions as to the sufficiency of the complaint it is proper to state that the contracts in suit are leases of the land described therein. This is not seriously disputed by the defendant, and was settled as to similar contracts with this defendant in Kline v. Guaranty Oil Co., 167 Cal. 476, 140 Pac. 1, and Commins v. Guaranty Oil Co., 29 Cal. App. 139, 154 Pac. 882. See, also, Graciosa Oil Co. v. Santa Barbara, 155 Cal. 144, 99 Pac. 483, 20 L. R. A. (N. S.) 211. Defendant claims

that the complaint is framed upon the theory of a breach of the implied covenant of quiet enjoyment, and as such is defective in not showing a demand upon defendant for possession, and an eviction. Granting, for the moment, that defendant's theory of the nature of the action is correct, it cannot be held that under the circumstances of this case a demand upon defendant for possession was necessary, since if the findings are true that defendant was neither the owner nor entitled to possession, demand upon it would have been futile, especially after the assertion of a paramount title by the real owner. Plaintiff by yielding to the paramount title without a prior demand undertook the burden of proving the validity of such title. Having done so, all occasion for a demand was obviated, and since the complaint set up the title of the Lucky Boy Oil Company and lack of title or right of possession on the part of the defendant, an allegation of demand was unnecessary. Rawle on Covenants for Title, §§ 138, 139; 24 Cyc. 1051.

[5-7] Defendant's further contention is that the complaint should have alleged an eviction. It did not set forth an actual eviction, which would have been impossible, since plaintiff had never been in possession. Kline v. Guaranty Oil Co., supra. But it did allege facts showing the equivalent of an eviction by reason of the assertion of a paramount title and right to possession by the Lucky Boy Oil Company in its suit to quiet title against the defendant and the plaintiff. The court found that the plaintiff was a party defendant, sued under a fictitious name. Defendant claims there is no evidence to support the finding that plaintiff was sued in that action. It did appear, however, that there were several defendants joined in the suit to quiet title whose names were not known to the Lucky Boy Oil Company, and who claimed to have some interest in the property. In view of the fact that the plaintiff's lease gave him some color of interest in the property, and that he would have been a proper party defendant, the finding that the plaintiff was one of the defendants designated under a fictitious name must be accepted. In order to constitute such suit by the true owner the equivalent of an eviction, no notice by the lessee to the lessor is necessary, nor need the paramount title have been established by judgment.

[8-10] But in such case the burden is on the lessee to prove that the paramount title is in the one who brought the suit to quiet title and not in the lessor. Rawle, Covenants for Title, § 124; McGary v. Hastings, 39 Cal. 360, 2 Am. Rep. 456; Tiffany on Landlord and Tenant, p. 535. It follows that the amended complaint did state a cause of action for breach of covenant of quiet enjoyment, and that the court properly denied defendant's motion to exclude all evidence that might be offered in support of the complaint. There is nothing in defendant's contention that the lease itself is incomplete because not signed by the plaintiff as evidence of his assent to the terms imposed upon him. There is nothing in the record to show that such signing was contemplated by the parties, and it is not otherwise necessary. In Spinney v. Downing, 108 Cal. 666, 41 Pac. 797, cited by defendant, such an intent did appear. Whether the case be regarded as an action on the implied covenant of title or on the express covenant to give possession is not very important, except, possibly, on the question of the statute of limitations, concerning which we need express no opinion. Both covenants were broken, and that fact entitled plaintiff to recover. 1 Tiffany on Landlord and Tenant, §§ 81, 82.

[11, 12] Defendant's principal contention is that the court erred in failing to find upon the issue of the statute of limitations raised by the defendant in its answer to the amendment of August 6, 1913. This error is claimed to be prejudicial on the ground, as alleged, that the lease of June 2, 1911, constituted a new cause of action, and that the suit on the covenant implied therefrom was barred within two years and could not therefore be relied upon on August 6, 1913. We agree with defendant that the lease of June 2, 1911, did give rise to a different cause of action than the one set up under the lease of May 29, 1911. Under the earlier lease which required that plaintiff begin work immediately, he could not state a cause of action, without setting forth a compliance or attempted compliance with such requirement. But under the later lease plaintiff had three months within which to commence work, and by alleging that the suit to quiet title was started within seven days after the execution of the lease, the plaintiff was able to state a cause of action without averring performance. The two leases are two distinct transactions; in fact, we do not see why the later one did not entirely supersede the earlier one and render it of no effect whatever. It may be conceded for the sake of argument, therefore, that the filing of the original complaint on March 2, 1911, did not stop the running of the statute on the second lease.

[13, 14] However, we are of the opinion that the complaint of August 6, 1913, states a good cause of action for breach of the express covenant in the lease that the defendant will protect the plaintiff against any party or parties on any contest ever arising as to the ownership of the land in question, and the agreement to place the land "at the disposal" of plaintiff, upon which the statute of limitations did not run until four years after June 2, 1911. The complaint does not set out these particular covenants, but it does incorporate the whole lease, including these provisions. This is

sufficient against general demurrer, even though defendant might have demurred specially for uncertainty. The phraseology may not be such as is usual in a covenant for quiet enjoyment. But no particular words need be used. The intent of the parties controls. In this case, considering the nature of the instrument and the activities to be engaged in thereunder, it is clear that what was intended was that the plaintiff should not be disturbed in his possession and use of the land in question. The complaint sufficiently alleges a breach of the covenant in setting out that the title and right to possession are not in the defendant, but in a third party, and that such third party had brought suit against the lessor and the lessee to quiet title to the premises.

[15, 16] It was not necessary for plaintiff to allege that defendant had failed to protect him according to the covenant, so long as he took upon himself the burden of proving that the defendant had no rights in the property. In such case, any call upon the defendant for protection must have been futile. The findings, too, support the action as one on the express covenant, for they show the making of the lease and its breach by reason of the assertion of the ownership and right to possession by the Lucky Boy Oil Company. Whether or not the defendant was aware of this theory of the action, it could not have been misled because, under the facts as found, it was not in a position to interpose a defense to the action. As a result, the institution of the new cause of action on August 6, 1913, was within the four years allowed on an express contract in writing.

[17, 18] The lower court also failed to find upon the issue raised by the answer that the plaintiff is not the real party in interest, and therefore not entitled to bring the action. It appears, however, that the lease was made with Thomas Allan, trustee; that all negotiations were had by defendant with reference to Thomas Allan, trustee; and that the assignments of the rights of McAllister and Herolz were made to Thomas Allan, trustee. Since the plaintiff was clearly the real party in interest for the purposes of this action (Code Civ. Proc. § 369), failure to find on this issue was not prejudicial.

[19, 20] Defendant alleges a number of errors committed during the course of the trial. The first was in the introduction of certain depositions taken in Vancouver on the stipulation of counsel. It is urged that the stipulation required that the defendant be represented at the examination. A reading of the stipulation shows, however, that failure of defendant to be represented merely permitted it to object to the form of the questions and not to the validity of the deposition as a whole. For the same reason it was not error for the court to refuse to strike out the statement of plaintiff's counsel that he had an understanding with counsel for defendant that the latter might not be represented at the examination. The second error pointed out by defendant is in the admission of certain evidence by witnesses for the plaintiff to the effect that Sunley was the agent of the defendant in the negotiations with the plaintiff. Whether or not this was error, it could not have been prejudicial because such an agency between Sunley and the defendant was sufficiently established by other evidence.

Other points are made by the defendant, including the sufficiency of the evidence to support the findings, and of the findings to support the judgment. None of these points is well taken.

Judgment and order affirmed.

I concur: SLOSS, J.

SHAW, J. I concur. I think it necessary to add, however, that nothing said in the opinion is to be understood as an intimation that, where a lease is in writing. the obligation of the lessor, under section 1927 of the Civil Code, to secure to the lessee the quiet possession of the property leased, during the term, although not expressed in terms in the lease, is not a contract in writing, within the meaning of section 337 of the Code of Civil Procedure, fixing four years as the limitation for actions upon a liability "founded upon an instrument in writing."

176 Cal. 440

DUPES v. SUPERIOR COURT OF KERN COUNTY et al. (L. A. 5204.)

(Supreme Court of California. Nov. 6, 1917.)

DIVORCE ⟹312—APPEAL—JUVENILE COURT—JURISDICTION.

Where a divorce decree awarding custody of the litigants' children was pending upon appeal, a juvenile court had jurisdiction over the custody of such children, at least pending the divorce action's final determination.

In Bank. Eugenia N. Dupes obtained an alternative writ of prohibition from the District Court of Appeal against the superior court of the county of Kern and Howard A. Peairs, Judge thereof, and upon petition the proceedings were transferred to the Supreme Court. Alternative writ dismissed.

George W. Macknight, Ray H. Fitzgerrell, and P. N. Meyers, all of Los Angeles, for petitioner. Emmons & Johnstone and Chas. N. Sears, all of Bakersfield, for respondents.

MELVIN, J. Eugenia N. Dupes sought and obtained from the District Court of Appeal an alternative writ of prohibition directed to the superior court of Kern county, sitting as a "juvenile court." By it that tribunal was prohibited from interfering with the petitioner's custody of her two minor children. Upon petition the matter was transferred to this court.

An action for divorce between T. W. Dupes and Eugenia N. Dupes was tried in the superior court. T. W. Dupes was the plaintiff, and his wife by answer and cross-complaint demanded custody of their two minor children, as he had done in his pleading. Pending the trial and pursuant to stipulation the court made an order awarding the custody of the children to the mother. Judgment went in favor of the father, and the court made an order that he should have custody and control of the children, but this order was held by the District Court of Appeal to be of no force pending the appeal of the mother from the judgment against her. In re Dupes, 31 Cal. App. 698, 161 Pac. 276. After the mother had resumed possession of the children following the decision in the proceeding on habeas corpus, a warrant for their arrest and detention was issued by a judge of the superior court of Kern county other than the one who had presided at the trial of the action for divorce. The petition upon which this warrant was based was filed by one J. H. Dupes, an uncle of the minors, and it contained numerous allegations of the misconduct of Eugenia N. Dupes, some of which, if true, tended to establish immorality and depravity on her part. The judge of the "juvenile court" after overruling the demurrer of Mrs. Dupes to the petition, fixed a day for a hearing thereon, but was restrained by the alternative writ of prohibition.

The question presented, therefore, and the only one, is whether or not the fact that the superior court, in the action for divorce, had made an order providing for the custody of the minor children of the litigants deprives the "juvenile court" of jurisdiction to dispose of them in any manner. In answering this question we must first consider the difference between an action for divorce and a proceeding under the juvenile court law. In an action for divorce the purpose is to determine whether or not the court should dissolve the ties of marriage, and in such an action it sometimes becomes necessary to provide for the custody of minor children. It is true that the court has very extensive powers touching the children of those who are engaged in such a suit. The court may bestow them upon one or the other of the parents or may provide for placing them with a third person. Does it follow that, having made an order in such a case, the court is impotent to make any disposition of the children through any of its departments or under any of its functions or powers? We must answer this question in the negative. The "Juvenile Court Act" is intended to provide for the protection of children who have become, or from their surroundings may become, depraved and to punish those responsible for or contributing to the dependency or delinquency of such children. Matter of Maginnis, 162 Cal. 200, 121 Pac. 723; Nicholl v. Koster, 157 Cal. 416, 108 Pac. 302. By that law the state as parens patriæ has provided proper machinery for rescuing children from influences likely to debauch them and to make them, in the future, charges upon the public either as criminals to be restrained or paupers or incompetents to be maintained. The mere fact that a litigation is pending between the parents, and that an order regarding the custody of the children has been made therein, does not take away the power of the state nor prevent the exercise of that power under the juvenile court law.

It is suggested that if a general and unqualified order should be made by the "juvenile court" awarding the custody of these children, it might be in conflict with the judgment in the action for divorce if that judgment should be affirmed on appeal, and that we would then be confronted with the problem of determining the relative value of two adjudications of the same court, each being of the same formal dignity and apparent force. But it is not necessary, in this case, for us to contemplate such a contingency. On the contrary, we must assume that, whatever eventually may be the order of the "juvenile court," it will be so drawn that it will not conflict with the judgment in the action between the parents.

It is argued, also, that, inasmuch as all of the essential allegations of the unfitness of Mrs. Dupes contained in the petition of her brother-in-law correspond with those made in her husband's complaint, therefore that part of the superior court acting as a "juvenile court" in the hearing of the petition and the decision thereon will really be passing upon exactly the same question as the one decided by the division exercising the functions of a divorce court. We do not see that this circumstance makes the slightest difference in the power and jurisdiction of the "juvenile court." That court has the authority to decide what is best for the present welfare of the children, and if it appears that the mother is an unfit person, in contemplation of law, to have them in her charge and under her influence, the "juvenile court" may place them in a suitable environment and under proper influences during the months which, in the usual course, must elapse before the appeal in the action for divorce can be decided. In passing upon the question regarding the fitness or unfitness of the mother, the court will be aided by evidence of her conduct in the past, and it will make no difference if exactly such evidence may have been adduced in some other action in which the parties and the issues were not the same as in the proceeding inaugurated by the uncle of the minors.

Let the alternative writ be dismissed.

We concur: ANGELLOTTI, C. J.; HENSHAW, J.; SLOSS, J.; SHAW, J.

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176 Cal. 448

FIDELITY & DEPOSIT CO. OF MARYLAND et al. v. BRUSH et al.

(S. F. 8127.)

(Supreme Court of California. Nov. 10, 1917.)

1. Master and Servant 🔑405(2)—Workmen's Compensation Act—Relation—Evidence.

In a proceeding under the Workmen's Compensation Act (St. 1913, p. 279), evidence *held* not to warrant a finding that a son of a man employed to cut wood by the cord, and who was helping his father, was an employé.

2. Master and Servant 🔑367—Workmen's Compensation Act—Who are "Employés."

One employed to cut wood by the cord and posts at a fixed sum, where there was no agreement as to hours or method of work, was an independent contractor, and a son helping him for half that his father received for the work was not an employé, within the Workmen's Compensation Act, and was not entitled to compensation for injury.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Employé.]

In Bank. Proceedings under the Workmen's Compensation Act by Martin A. Brush to obtain compensation for personal injuries, opposed by the Round Valley Land Company, a corporation, the employer, and the Fidelity & Deposit Company of Maryland, a corporation. Compensation was awarded, and employer and insurance company applied for a writ of review, and certiorari was issued. Award annulled.

Alfred C. Skaife and Guy Le Roy Stevick, both of San Francisco, for petitioners. Christopher M. Bradley, of San Francisco, and Warren H. Pillsbury, of Oakland, for respondents.

MELVIN, J. A writ of certiorari was issued, directed to the Industrial Accident Commission, for the purpose of reviewing an award of compensation to Martin A. Brush, a laborer, injured while cutting wood on the premises of the Round Valley Land Company.

The father of the applicant, one Seymour Brush, had made an agreement with the superintendent of the Land Company's property to cut 60 to 80 cords of wood, or as much as would be required for the use of the company in its kilns for the ensuing year. By the terms of this arrangement Seymour Brush was to be paid $1.75 a cord for firewood and six cents for each post cut by him. He was not required to cut any fixed amount of wood, but there was an understanding that he was to keep at work until told by Harrington, the superintendent, that a sufficient quantity of cut wood had been produced. There was no agreement regarding the hours of work nor the methods to be pursued. Brush entered into an arrangement with his son, Martin A. Brush (the man who was injured subsequently), whereby they agreed that they should work together, pile their wood together, and have it measured, and that the amount received for the work should be equally divided between them. The applicant testified that Mr. Harrington told him at times to assist his father with the work.

[1] This was denied by the superintendent, but giving to the testimony of Martin Brush all possible force it would not justify a finding that he was hired by the representative of the Round Valley Land Company to do the chopping. The father received payment whenever he asked the land company for an advance, and the final settlement was made with him. The company was not a party to the agreement whereby the proceeds of the work were to be equally divided. The most that may be said of the company's participation in causing Martin to be engaged in the work is that its representative knew he was so employed and approved of his activity.

[2] In holding that the father and the son were both employés of the land company, the Industrial Accident Commission sought to differentiate this case from Donlon Bros. v. Industrial Accident Commission, 173 Cal. 250, 159 Pac. 715, on the grounds that the man injured was not a remote contractor but the son of the man who directly negotiated with the superintendent of the land company, and that "there was in this arrangement no element of profit or loss usually attendant upon independent contracts or commercial transactions." Neither supposed ground of distinction is good. The fact that in the Donlon Case the man injured was the subcontractor twice removed from the owner of the trees, does not change the principles regarding employment of independent assistance by one who engages to do certain work. Nor does the agreement considered in the Donlon Case differ in essence from the one made with the elder Brush. We fail to see what "the element of profit and loss usually attendant upon independent contracts or commercial transactions" has to do with the case. That element is entirely a false quantity in this discussion. It is conceded by learned counsel for the Industrial Accident Commission that if Seymour Brush was not an employé but an independent contractor the award of the Industrial Accident Commission must be annulled, whether the son, Martin A. Brush, was a partner or an employé of his parent, and this must be true under the authority of Donlon v. Industrial Accident Commission, supra, and Western Indemnity Company v. Pillsbury, 172 Cal. 807, 159 Pac. 721. In the former case, which was very similar to this one, Mr. Justice Henshaw, who delivered the opinion of the court,

commenting on the finding of a majority of the commissioners that the injured woodchopper was an employé of the Donlon Bros., said:

> "Commissioner Weinstock filed his dissent, holding that the relation of employer and employé necessarily involves the element of personal service, which is not delegable, and that the facts clearly established that such relationship did not exist; that Kataoka, the only one with whom petitioner had dealings, was an independent contractor, and that this relationship extended to the subcontractor. In this we think the dissenting commissioner was clearly right."

In the other case cited above, the following language was used:

> "It has been said that the true test of a contractor is that he renders service in the course of an independent occupation, following his employer's desires in the results but not in the means used (1 Shearman & Redfield on Negligence [6th Ed.] 396), but in weighing the control exercised we must carefully distinguish between authoritative control and mere suggestion as to detail or the necessary co-operation where the work furnished is part of a larger undertaking. Standard Oil Co. v. Anderson, 212 U. S. 221, 222 (53 L. Ed. 480, 29 Sup. Ct. Rep. 252). The same principles are announced in Fink v. Missouri Furnace Co., 82 Mo. 276 (52 Am. Rep. 376)."

Measured by this definition, it is clear from the undisputed facts presented by the record that Seymour Brush was not an "employé" or a "servant," in contemplation of the Industrial Compensation Act, but an independent contractor.

It follows that the award must be annulled, and it is so ordered.

We concur: ANGELLOTTI, C. J.; HENSHAW, J.; SHAW, J.; SLOSS, J.; LAWLOR, J.; LORIGAN, J.

176 Cal. 443

FICKERT v. ZEMANSKY, Registrar of Voters, et al. (S. F. 8544.)

(Supreme Court of California. Nov. 8, 1917.)

CERTIORARI ⇐25—MATTERS REVIEWABLE.

A petition, alleging that the registrar of voters under San Francisco Charter, cc. 3, 5, relating to recall of officers, fraudulently refused to fix a time and place for a hearing or to investigate claims that names on the recall petition were forged and not signed in the presence of the solicitor, but which did not set forth any specific facts nor any particular persons whose signatures were falsely procured, did not state such an abuse of his power as to constitute an excess of his jurisdiction, but stated nothing more than an error of law, not reviewable by certiorari.

In Bank. Certiorari by Charles M. Fickert against J. H. Zemansky, Registrar of Voters of the City and County of San Francisco, and others, to annul a certificate of the sufficiency of a petition for the recall of the former as district attorney. Proceeding dismissed.

Harry I. Stafford, Aylett R. Cotton, Grover O'Connor, and U'Ren & Beard, all of San Francisco, amici curiæ, for petitioner. Thomas V. Cator, of San Francisco, for respondents.

SHAW, J. The plaintiff filed in this court an application for a writ of review to annul a certificate of the sufficiency of a petition for his recall as district attorney, issued by the defendant Zemansky, as registrar of voters of the city and county of San Francisco, and asking that in the meantime, and until the hearing of his application, the board of election commissioners of said city and county be restrained from calling such election. An order upon the defendants to show cause why an alternative writ of review should not issue was thereupon made. The matter has been presented and submitted to the court upon said order to show cause. The question for determination is whether or not the allegations of the petition are sufficient to authorize the issuance of such writ of review.

The matter in controversy was considered at some length in the case of Baines v. Zemansky (S. F. No. 8505) 168 Pac. 565, decided by this court on October 20, 1917, that case being an application by the plaintiff therein for a writ of mandate to compel the registrar of voters to proceed with his investigation as to the sufficiency of said petition, and thereupon to certify the result of such examination. The registrar in that case, by way of answer, stated that he had failed to make said certificate because he was restrained from so doing by a writ of prohibition and by a restraining order, each issued out of the superior court of said city and county, in two certain actions pending therein. The allegations of the present petition for a writ of review are, in substance, a repetition of the allegations of the respective complaints in the two actions in the superior court mentioned in the former proceeding and set up in the answer of the registrar.

On July 21, 1917, James A. Young, Nellie Harpold, and A. P. Carroll filed with the board of election commissioners a petition for the recall of said Fickert as district attorney, signed by 15,214 persons. Thereupon the registrar, upon investigation, found that the same contained only 10,219 legal signatures, and refused to certify the same as sufficient. Within 20 days thereafter the said filers of said recall filed a supplemental or amended petition signed by 5,104 persons. The registrar ascertained that said supplemental petition contained 3,050 legal signatures, and determined that the original and amended or supplemental petition together were lawfully signed by 13,269 qualified persons. 11,837 signatures are necessary to authorize a recall election. The registrar held the said petition, as so amended, to be sufficient, and executed his certificate of the sufficiency thereof, as provided in section 3 of article 11, chapter 3, of the San Francisco charter. It is this certificate which the plaintiff herein seeks to annul by his proceeding in certiorari.

The powers of the court in a proceeding in certiorari, and the office of the writ of review, have been thoroughly settled by our decisions. In Whitney v. Board, 14 Cal. 499, the court said:

> "We have already seen that the writ can be granted only where the jurisdiction of the inferior tribunal has been exceeded, and * * * it is clear that the courts are confined to the determination of the question of jurisdiction. Beyond this, they have no right or authority to go; and they have nothing whatever to do with the proceedings before the inferior tribunal, except so far as an examination of such proceedings is necessary for the determination of this question. * * * It brings up no issue of law or fact not involved in the question of jurisdiction. Under no circumstances can the review be extended to the merits. Upon every question, except the mere question of power, the action of the inferior tribunal is final and conclusive. * * *"

This rule is now the settled law of the state.

Under the provisions of the San Francisco charter, the filing of a petition for the recall of an officer, purporting to be signed by 10 per cent. of the total vote cast for mayor at the last preceding election, gives the registrar of voters jurisdiction, and makes it his duty to investigate and determine whether or not such petition conforms to all legal requirements of the charter relating thereto, and whether or not it contains signatures of registered voters to the number necessary to authorize a recall election. Article 11, c. 5, § 1; chapter 3, § 2; Baines v. Zemansky, supra. If a signature to the petition is called in question, the charter requires him to mail a notice to the purported signer, stating the fact that his name is attached to the petition, and citing him to appear at a time and place stated, to affirm or deny the genuineness of his signature, and provides that if he does not appear and deny the same, or does not return a verified affidavit denying the same within the 15 days allowed to the registrar for such investigation, his signature must be counted as genuine. The methods of procedure and the kind of evidence to be taken or considered by the registrar in ascertaining whether or not the petition conforms to the other legal requirements of the charter are not prescribed, except by a provision to the effect that to ascertain whether or not the signers are qualified voters he must compare their signatures with the registration affidavits.

Section 2 of chapter 3, further requires that each section of such petition shall be verified by the person soliciting signatures thereto, by his affidavit stating that he is the person who solicited the signatures; that he has numbered each signature seriatim; that no person signed it except in his presence; that said section has not been left at any time where any person could sign it except in his presence; that each signature was made in his personal presence, and is to his best knowledge and belief the genuine signature of the person whose name it appears to be; and that such solicitor was and is a duly qualified voter of the said city and county. These affidavits are required as safeguards against fraud and perjury by the persons getting up said petition. Unquestionably the registrar is required to examine these affidavits as well as the several sections of the petition, to ascertain whether or not they conform to the legal requirements of the charter. The time allowed is very short, and his inquiry must necessarily be of a summary character. The extent of the inquiry and the nature of the other evidence he may take in respect to these matters are not specified. The subject is left to his discretion. In determining what evidence he will take and what he will reject he acts in the exercise of the jurisdiction and discretion confided to him by the charter. If he mistakenly refuses to receive proof that he should accept and consider, it cannot be deemed to be other than an error of law committed in the exercise of his jurisdiction. Perhaps a clear abuse of discretion could be reached by a proceeding in mandamus. That question is not before us. But errors of this character cannot be considered or determined in certiorari. Central P. R. Co. v. Board, 43 Cal. 365; People v. Burney, 29 Cal. 459; Morley v. Elkins, 37 Cal. 457; C. P. R. R. Co. v. Board, 46 Cal. 670.

The petition herein alleges that 174 sections of the said original and supplemental petition, containing 6,125 signatures, all of which were counted by the said Zemansky as genuine, and without which the said petition would be insufficient, were fraudulent, in that many of the signatures thereto are forged, in that many of said sections were left out of the presence of the solicitor where any one could sign without his knowledge, and in that many of said signatures had been made out of his presence. It is not alleged that all of the signatures are forged, nor how many were forged, nor that all of the signatures were made out of the presence of the solicitor, nor that any specific number of them were so made. It is alleged that immediately upon the filing of the supplemental petition above mentioned, and within the 15 days allowed by the charter for examining the same, the plaintiff demanded of the registrar that he fix a time and place for a hearing and allow the plaintiff to offer proof of the said allegations, and that the registrar refused to receive or consider such evidence, or allow an opportunity for the same to be presented, but that, although he knew that the said allegations of fraud were true, he nevertheless disregarded them, refused to investigate concerning the same, and that, having ascertained from the records of registration that the petition contained the required number of signatures of persons registered thereon as voters, he made his certificate that it was sufficient.

The evidence offered by the plaintiff would be merely contradictory of that contained in the affidavits attached to the several sections. No specific facts were set forth, nor any particular persons named as those whose signatures were falsely procured. Assuming that the registrar might conceive it to be his duty to receive evidence upon such vague charges as these, we are satisfied that his discretionary powers relating to such investigation must authorize him to determine, within reasonable limits, at least, how far his investigation shall go. His determination not to enter upon the inquiry demanded of him was not such an abuse of his power as to constitute an excess of his jurisdiction. At most it was in the nature of an error of law committed by him in the exercise of that power and, under the authorities above cited, his action in that respect cannot be corrected in certiorari. We are therefore of the opinion that no writ should issue in the case.

It is ordered that the proceeding be dismissed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; HENSHAW, J.; LAWLOR, J.; MELVIN, J.; V. SHAW, Judge pro tem.

176 Cal. 451

MERCANTILE TRUST CO. OF SAN FRANCISCO v. SUNSET ROAD OIL CO. et al.
(L. A. 3996.)

(Supreme Court of California. Nov. 13, 1917.)

1. APPEAL AND ERROR 🔑996 — INFERENCES FROM FACTS PROVED.

The Supreme Court on appeal cannot say which of two opposing inferences, both within the bounds of reason, should have been drawn by the trial court.

2. NEW TRIAL 🔑6—DISCRETION OF COURT.

In deciding a motion for new trial, a trial court has large discretionary power.

3. APPEAL AND ERROR 🔑977(1) — REVIEW — ORDER ON MOTION FOR NEW TRIAL.

An order denying or granting a motion for new trial will not be reversed on appeal unless an abuse of discretion appears.

4. APPEAL AND ERROR 🔑854(6) — REVIEW — MOTION FOR NEW TRIAL—GROUNDS.

An order granting motion for new trial in general terms must be sustained on appeal if there is any ground upon which it could properly have been made.

5. MORTGAGES 🔑183—CORPORATION BONDS—PRIORITY.

Where a bank held the personal debt of corporation officers, but was induced to release them in consideration of bonds of the corporation in the sum of $240,000, the corporation property being worth $500,000, and the person inducing such transactions thereafter caused bonds greatly in excess of the value of the corporate property to be issued to him without consideration on parity with those issued to the bank, he was estopped from participating in the proceeds from the security until the bonds of the bank were satisfied.

6. ESTOPPEL 🔑52—MORTGAGE LIENS.

Where holder of corporation bonds secured by mortgage sued to foreclose, and another holder who obtained his bonds without consideration to the prejudice of plaintiff's rights sought to enforce an equal lien, the estoppel asserted by plaintiff against him was a defense not lost by lapse of time nor subject to statute of limitations.

In Bank. Appeal from Superior Court, Kern County; H. A. Peairs, Judge.

Suit by the Mercantile Trust Company of San Francisco against the Sunset Road Oil Company and others, wherein the Kern Valley Bank and W. R. Williams, as Superintendent of Banks, filed cross-complaints. From an order granting a new trial on the motion of the cross-complainants, certain defendants appeal. Affirmed.

Gavin McNab and R. P. Henshall, both of San Francisco, for appellants. A. A. De Ligne, of Sacramento, and Denman & Arnold and Donzel Stoney, all of San Francisco, for nonappealing defendants. Morrison &

Brobeck and A. E. Shaw, all of San Francisco, for respondents.

SHAW, J. This is an appeal by the defendants above named from an order granting a motion of the Kern Valley Bank and W. R. Williams, superintendent of banks, for a new trial of the action.

The complaint states a cause of action for the foreclosure of a mortgage executed to secure bonds issued by the Sunset Road Oil Company. The Sunset Road Oil Company was organized in June, 1905. In the early part of July, 1905, it authorized the creation of a bonded debt of $2,000,000, to be evidenced by 1,990 bonds for $1,000 each, and 100 bonds for $100 each, running 20 years, at 5 per cent. annual interest. On July 15, 1905, it duly executed to the plaintiff, Mercantile Trust Company of San Francisco, a deed of trust or mortgage to secure the payment of the proposed bonds, transferring and conveying to the trust company for that purpose certain parcels of property in Kern county, and also all other property, real and personal, which said oil company then owned or might thereafter acquire. In pursuance of this mortgage or trust deed, bonds were prepared for issuance, and a large number of them amounting to $1,495,000, were sold by the company to divers persons. The oil company failed to pay interest on the bonds. The principal was thereupon declared due and payable, and on March 4, 1911, the plaintiff began this action to foreclose said deed of trust as a mortgage.

Thereafter the Kern Valley Bank, and Williams, as superintendent of banks, on its behalf, appeared in the action and filed a cross-complaint, making the appellants herein parties thereto, alleging that the said appellants each claimed to hold certain of the bonds of said oil company; that said bank was the owner of 459 of said bonds of the par value of $1,000 each, and 4 bonds of the par value of $100 each, amounting to $459,400; that the bonds held by the appellants were by said appellants fraudulently procured to be issued, that they were issued without any consideration, and that in consequence thereof they are invalid, and that the holders are not entitled to participate in the proceeds of any sale of the property upon the foreclosure, and asking that the bonds held by the bank be declared to be a prior lien upon the said properties, paramount to the liens of the bonds held by the appellants respectively, and that the said bank's bonds be first paid out of the proceeds. The court below upon the trial made findings declaring that the bonds issued to the appellants respectively were not fraudulently issued, that they were issued for a valuable consideration, and that the cause of action stated in the cross-complaint was barred by the statute of limitations, and, concluding therefrom that the Kern Valley Bank was entitled to no relief upon its cross-complaint, gave judgment for the foreclosure of the trust deed and sale of the properties covered thereby, and directing the payment of the bonds of all the parties pro rata out of the proceeds. Thereupon the Kern Valley Bank moved for a new trial. This motion was granted, and an order was made directing a new trial, from which this appeal is taken.

Of these outstanding bonds the Kern Valley Bank holds $459,400, the Metropolis Trust and Savings Bank, as pledgee in trust for sundry persons, $173,200, and the Canadian Bank of Commerce, as pledgee to secure the debt of Tevis, $365,000. The ownership of the remaining $497,400 is not stated in the findings.

The Kern Valley Bank acquired bonds to the amount of $244,200 in December, 1905, in satisfaction of a debt of $244,200 theretofore due to the bank from Jewett & Blodget, a firm composed of Solomon Jewett and H. A. Blodget, both of whom were, during all this period, directors of the bank, and bonds to the amount of $190,000 were acquired by the bank in December, 1907, in exchange for an individual debt of said Blodget to the bank, amounting to over $223,000. It is not shown how the bank acquired the remaining $25,200 of its bonds.

The principal controversy upon the cross-complaint of the Kern Valley Bank arises from the claim that the two blocks of bonds taken for the Jewett and Blodget debt, and the H. A. Blodget debt, respectively, should be preferred in payment from the proceeds of the property over all other bonds issued by the Sunset Road Oil Company.

The cross-complaint of the Kern Valley Bank, among other things, alleged the following facts: In May, 1905, the firm of Jewett & Blodget owed the Kern Valley Bank $244,200 upon certain promissory notes, which were secured to be paid to the bank by first mortgage liens upon the same property that is described in the trust deed herein sought to be foreclosed. The board of state bank commissioners then had legal supervision and control of the affairs of said bank, and objected to said debt of Jewett & Blodget on the ground that the bank's loan to them was made while they were officers of the bank, and that the securities held by the bank therefor could not be readily converted into cash, and notified the bank that, unless said indebtedness was liquidated forthwith, the bank would be closed by said board. To avoid this disaster the appellant W. S. Tevis, at the instance of Blodget, undertook to assist in extricating said bank from its difficulties, and in that behalf he represented to said board that the Sunset Road Oil Company was organized for the purpose of taking over all of the said properties which said bank, as aforesaid, held as security for the payment of said Jewett & Blodget debt, and that it had authorized the issuance of bonds thereon, to be secured by first mortgage on the said real estate, that he could procure for the bank such first mortgage bonds of said oil company to the amount of $244,200, face value, in exchange for the Jewett & Blodget debt, and he agreed that said bonds so exchanged should be a first and prior lien to any other indebtedness which might then exist or thereafter be incurred by said oil company. The said board, being in control of the affairs of said bank, on its behalf accepted the said proposition, and thereupon caused the said bank to receive said bonds in satisfaction of the Jewett & Blodget debt, and delivered over to Jewett & Blodget the notes theretofore held by the bank as evidence of said debt. The real estate so held by the bank as security for said Jewett & Blodget debt was transferred to said oil company, and was by it conveyed to the plaintiff herein, as security for the bond issue theretofore authorized by said oil company. Before said exchange of bonds for the Jewett & Blodget debt was effected, Tevis, in conjunction with the appellants Beal & Blodget for the purpose of defrauding the said bank and decreasing the amount of its security for said bonds, and for their own advantage, caused the said oil company, of which they had control, to issue to Tevis $400,000 of said bonds, ostensibly in consideration of the aforesaid conveyance of said properties by him to the oil company. The $244,200 of bonds afterwards given to said bank in exchange for the Jewett & Blodget debt were a part of the $400,000 so issued to Tevis. Thereafter the said appellants Tevis, Blodget, and Beal, without the consent of said bank or said commissioners, procured other bonds of said issue to be issued without adequate consideration, and delivered to themselves and others, amounting to $790,300, of which Tevis received and still holds and controls nearly $400,000, which, upon the face of said trust deed, would have equal right to payment with the bonds so exchanged to said bank. The bank commissioners relied on said representations and promises, and did not know of any issue of bonds in excess of the $244,200 to be exchanged for the Jewett & Blodget debt, and would not have consented to such exchange if they had known that other bonds were to be or would be issued upon an equal footing therewith. The value of the properties covered by the trust deed does not exceed $500,000.

The court below found that the bank did not have any liens whatever upon the property afterwards mortgaged as security for the said Sunset Road Oil Company's bonds, and that there were no representations made by Tevis to the effect that the bonds taken for the Jewett & Blodget debt should be a first lien, or paramount to the other bonds of the authorized issue.

[1-4] There is evidence in the record sufficient to support a finding of the truth of the aforesaid facts alleged in the cross-complaint. The evidence as to some of them is inferential. It is not within the province of this court on appeal to say which of two opposing inferences, both within the bounds of reason, should have been taken by the trial court. Conflicting inferences, if reasonable, stand upon the same plane as conflicting evidence. In deciding a motion for a new trial the court below has large discretionary power. Its order either denying or granting such motion will not be reversed on appeal unless an abuse of discretion appears. In considering the evidence upon such motion that court has power to draw inferences from the evidence opposed to those which were drawn by it upon the trial, provided they are not unreasonable. The order granting the motion for a new trial was general in its terms. It did not specify the reasons upon which the motion was granted. This court must uphold the order if any ground upon which it might have been granted is supported by the record. We are therefore bound to assume that the court, upon its last consideration of the evidence, believed that the inferences in favor of the Kern Valley Bank should prevail, rather than those against it, and we cannot say that this was an abuse of discretion.

[5] The question therefore arises whether upon these facts the bank was entitled to any relief. Of this we have no doubt. The bank was induced to give up its first lien on the property for the debt of $244,200 owing to it from Jewett & Blodget, and accept in exchange a like amount of bonds of the oil company secured by the same property, upon the promise that these bonds should be a first lien thereon, and thereupon it released Jewett & Blodget from the debt. The person who made the promise, according to the facts assumed, thereupon caused the issue to himself of additional bonds upon the same property in parity with those of the bank, and for no consideration except the property upon which the bank formerly held a prior lien. The same person afterwards caused additional issues of bonds to himself which also have an equality in law with those of the bank. All this was done without the consent of the bank. The amount of all these bonds exceeds the value of the property hypothecated as security. The effect of allowing such person to claim a part of the proceeds of the property would be to reduce the value of the bank's security below the amount of its debt. Under these circumstances the person who thus obtained and holds the additional bonds will be estopped from participating in the proceeds from the security until the bonds of the bank are satisfied. The circumstances indicate that these additional bonds were caused to be issued by Tevis and his associates with no bad intent, but in the belief that the property hypothecated as security was of sufficient value to satisfy them all. This,

however, would not affect the result. Tevis had agreed that the bonds issued to the bank should have priority, and as the bank acted on that agreement, he, at least, is bound by it, regardless of his intent in issuing the subsequent bonds.

[6] This estoppel is in the nature of a defense to the claim of Tevis, made through the medium of plaintiff's foreclosure, to enforce his right to an equal lien on the property. Such defense is not lost by lapse of time, and the statute of limitations has no application thereto.

There are many other questions arising in the case and presented in the briefs which it is unnecessary to consider. Our conclusion upon the question we have discussed is sufficient to support the order granting the new trial. We express no opinion concerning the merits of the other questions.

The order is affirmed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; MELVIN, J.; HENSHAW, J.; VICTOR E. SHAW, Judge pro tem.

(176 Cal. 458)

MERCANTILE TRUST CO. OF SAN FRANCISCO v. SUNSET ROAD OIL CO. et al.

(L. A. 4027.)

(Supreme Court of California. Nov. 13, 1917. Rehearing Denied Dec. 13, 1917.)

1. NEW TRIAL 🔑159—PARTICULAR ISSUES.
Where the mortgagee suing for foreclosure established its right to foreclose without dispute, and a controversy arose over the rights of a holder of bonds secured by the mortgage as against other parties than the plaintiff, a new trial should have been limited to issues other than the rights of plaintiff, in order to avoid the necessity of plaintiff producing evidence at the new trial.

2. CORPORATIONS 🔑479 — MORTGAGES — RIGHTS OF BONDHOLDERS—FORECLOSURE.
Where a corporation gave a trust deed securing its bonds providing that in case of sale under foreclosure any bondholder could bid in the property and could use toward payment of his bid the bonds and coupons held by him at the time, each bondholder had a direct interest in the validity of the bonds held by the other bondholders, so that, where one sought foreclosure, and it was so decreed, and a new trial was granted in favor of another, judgment of foreclosure was properly vacated, since each bondholder had the right to know just what he would be required to pay if he bought the property, and such amount could not be determined until the rights of all the bondholders were finally adjudicated.

In Bank. Appeal from Superior Court, Kern County; H. A. Peairs, Judge.

Suit by the Mercantile Trust Company of San Francisco against the Sunset Road Oil Company and others, wherein the Kern Valley Bank and W. R. Williams, Superintendent of Banks, filed a cross-complaint. From an order granting a new trial on motion of the cross-complainants, plaintiff appeals. Affirmed.

Morrison, Dunne & Brobeck and A. E. Shaw, all of San Francisco, for appellant. Gavin McNab, R. P. Henshall, and Jno. E. Bennett, all of San Francisco, for nonappealing defendants. A. A. De Ligne, of Sacramento, and Donzel Stoney and Denman & Arnold, all of San Francisco, for respondents.

SHAW, J. This is an appeal by the plaintiff from an order granting the motion of the Kern Valley Bank and W. R. Williams, superintendent of banks, for a new trial of the action, being the same order that was under consideration in the appeal of other persons from said order, numbered on our register of actions L. A. No. 3996. 168 Pac. 1033. We refer to the decision in that case for a more complete statement of the nature of the action.

[1] The issues tendered by the Kern Valley Bank and Williams, in the cross-complaint, do not affect the right of the plaintiff to foreclose the trust deed, set forth in its complaint. The questions raised related solely to the rights of different holders of bonds purporting to be secured by the trust deed to participate in the proceeds of the foreclosure sale. The plaintiff contends that the order granting a new trial should not extend to the entire case so as to require it again to prove such allegations of its complaint as may be controverted by the answers of the various parties. This point is well taken. There was no dispute at the trial concerning the validity of the trust deed or the right of the plaintiff to a foreclosure thereof. The order granting a new trial might well have excluded from its operation all issues arising upon the complaint itself and limited the new trial to the issues arising upon the said cross-complaint. The matter, however, is practically of no importance; for we do not understand that there are any issues taken upon the allegations of the complaint, except mere formal denials which were not insisted upon at the trial, and which cannot be successfully supported upon a new trial. If they are insisted upon, no appreciable time will be required to dispose of them upon such new trial. For these reasons we do not deem it necessary to modify the general order granting the new trial.

[2] The plaintiff further insists that, since its right to foreclose the trust deed is not in fact disputed by cross-complainants, the court below should not have vacated the judgment of foreclosure, but should have ordered a new trial only of the issues made upon the cross-complaint, leaving the judgment of foreclosure to stand, to the end that the plaintiff may proceed to sell the property covered by the trust deed without delay, and that the controversy over the right of the respective bondholders to priority should be postponed until after such sale, and reduced to a controversy over the application of

the proceeds. The provisions of the trust deed dispose of this contention adversely to the plaintiff. It provides that in case of a sale under foreclosure thereof any holder of bonds may bid for the property at such sale, and that, if his bid is accepted, he may, in settling the same, use toward its payment the bonds and coupons thereon held by him at the time, if the sale produces enough to pay the entire debt, interest, and costs, or his just share of such proceeds, if there is a deficiency. This right being secured to each bondholder by the deed of trust itself, it follows that each has a direct interest in the validity of the bonds held by the other bondholders, and that, if there are any circumstances which estop one of such bondholders from asserting an equality of his bonds with the others, or with any one of them, the person so entitled to such estoppel has the right to have such dispute determined prior to the sale, in order that he may know the amount of money he must produce in case he should bid at such sale. While this would not prevent a foreclosure of the trust deed, it does make it necessary to postpone the sale until the matter can be determined. The question was before the court with respect to this deed of trust and this foreclosure thereof, in Mercantile Trust Co. v. Miller, 166 Cal. 568, 137 Pac. 913. It was there determined that the Kern Valley Bank, and the superintendent of banks in its behalf, had an interest in the determination of this question, before the judgment and sale, and therefore that they had a sufficient interest to authorize them to appeal from the judgment. It is not true, as contended by the plaintiff, that all of the justices concurring in that judgment did not agree to this proposition. The concurrence in the judgment was of necessity a concurrence in the proposition stated. As we have held in case No. 3996, 168 Pac. 1033, aforesaid that the order granting a new trial upon the cross-complaint should be affirmed, and have so ordered, it follows from what is said above that the order granting a new trial of the entire case is not prejudicially erroneous with respect to plaintiff.

The order is affirmed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; MELVIN, J.; HENSHAW, J.; VICTOR E. SHAW, Judge pro tem.

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MERCANTILE TRUST CO. OF SAN FRANCISCO v. SUNSET ROAD OIL CO.

UNION OIL CO. OF CALIFORNIA v. MERCANTILE TRUST CO. OF SAN FRANCISCO.

(L. A. 4128, 4152.)

(Supreme Court of California. Nov. 14, 1917.)

1. Mortgages 🔑590—Foreclosure—Effect—Leases.

Foreclosure of a mortgage made prior to a lease ends the leasehold in the absence of equitable grounds in favor of the lease.

2. Appeal and Error 🔑854(6)—Review—Motion for New Trial—Grounds.

An order granting a motion for new trial in general terms must be sustained on appeal if there is any ground upon which it could properly have been made.

3. Mortgages 🔑448—Foreclosure—Default—Pleading—Sufficiency.

Where corporation bonds bore interest payable semiannually in January and July, with coupons calling for the payment of such installments of interest, a complaint in May, 1911, alleging a default in payment of all coupons on the 15th day of January, 1908, or thereafter, and that demands were made more than one year prior to the suit, and that the entire debt had been declared due three months prior to the suit, sufficiently showed default.

4. Trial 🔑105(1)—Incompetent Evidence—Failure to Object—Effect.

Incompetent evidence admitted without objection is to be regarded as sufficient to establish the fact involved.

5. New Trial 🔑81—Grounds—Insufficient Evidence—Raising Objection.

In suit to foreclose mortgage, where absence of direct testimony of presentation of coupons to the trustee for payment was not suggested except by motion for nonsuit, the grounds of which were not sufficiently specific to direct the attention of the court to the precise point made, the failure to produce the best kind of evidence does not justify the granting of a new trial where there is no evidence to the contrary.

6. Corporations 🔑478—Mortgages—Foreclosure—Construction.

Where a deed of trust provided that, if default is made in payment of principal or interest and continues for six months after presentment for payment, the trustee may take possession of the premises and declare all sums due and payable, and that, if the principal is due, and default is made and continued for six months, the trustee may take possession and foreclose the mortgage, and that such rights shall be in addition to the ordinary right of foreclosure, there was no intention to limit the right of the mortgagee to resort to the courts for relief whenever the principal sum was due and unpaid, though six months had not elapsed.

7. Contracts 🔑32—Execution—Requisites—Agreement to be Reduced to Writing.

Where the parties understand that the terms of the compact are to be reduced to writing and signed by them, the assent to its terms must be evidenced in the manner agreed upon or it does not become a binding or completed contract.

8. Landlord and Tenant 🔑22(3)—Leases—Execution.

Where the proposed lessee, learning of an outstanding deed of trust, required as condition of signing lease that all bondholders subordinate their liens to the lease, whereupon lengthy correspondence and negotiations between the parties were had, but the lessee went into possession before all the bondholders had acquiesced, there was no valid subsisting lease upon the terms agreed upon, so that the lessee, though it went into possession, could not assert priority of its lease over the bonds and mortgage securing them.

9. Estoppel 🔑54—Reliance on Conduct of Other Party—Knowledge.

It being of the essence of an estoppel in pais that the party asserting it should not only have been ignorant of the true state of facts, but should have relied on the representation of the adverse party, such proposed lessee, knowing all the facts, and by its letters having recognized that the negotiations were not concluded, could not set up an estoppel in pais against the bondholders.

10. Corporations 🔑479 — Mortgages — Rights of Parties—Special Agreements.

Where a corporation's property mortgaged to secure bonds was leased to another corporation under agreement that royalties should be paid to the trustee to care for the interest payments on the bonds, the lessor corporation and one of its officers could not bind the bondholders without their consent by a second agreement by which the royalties should be paid to the officer on his agreement to care for interest payments on certain bonds to the exclusion of others.

11. Appeal and Error 🔑958—Review—Discretionary Orders—Amending Pleadings.

The granting or withholding of permission to file amended pleadings rests largely in the discretion of the trial court, and its action will not be reviewed on appeal unless an abuse of discretion appears.

12. Pleading 🔑238(4)—Amendment During Trial—Motion for New Trial.

Though the court denied leave to amend pleadings at the conclusion of the trial it could reconsider the rulings, on motion for new trial.

13. Appeal and Error 🔑933(4) — Review —Presumptions.

Where at close of trial a party was denied leave to file amended answer and cross-complaint which might properly have been granted, if the refusal could have been prejudicial the court on appeal from the order granting the new trial must assume that the new trial was granted for that reason and affirm the order.

14. Mortgages 🔑455—Foreclosure—Cross-Complaint—Adverse Title—Claim by Lessee.

In suit to foreclose mortgage on leased property of the mortgagor, the lessee could not on its cross-complaint tender the issue of its claim of adverse title.

15. Corporations 🔑482(1) — Mortgages — Foreclosure—Rights of Lessee.

Where a corporation gave a mortgage to a trustee as single security in favor of all bondholders, and defaulted and leased the premises, whereupon some bondholders agreed to subordinate their lien to the rights of the lessee, and others did not so agree, the nonassenting bondholders being entitled to foreclosure and priority, and having no rights superior to the assenting bondholders, the foreclosure was required to be in favor of all the bondholders, and the rights of the lessee terminated in the absence of the lessee's allegation that it was ready and willing to pay off the bonds held by nonassenting owners.

16. New Trial 🔑6—Discretion of Court.

The wide discretion allowed to the superior court on motions for new trial will not justify the granting of such motion where, in its findings and judgment, the court reached the only conclusion which it could properly have reached on the record.

In Bank. Appeal from Superior Court, Kern County; Howard A. Peairs, Judge.

Suit by the Mercantile Trust Company of San Francisco against the Sunset Road Oil Company and others, wherein the Union Oil Company of California filed a cross-complaint. From an order granting a new trial on the motion of the cross-complainant, the plaintiff and the defendant Oil Company and others appeal. Reversed.

Morrison, Dunne & Brobeck, A. E. Shaw, Gavin McNab, and R. P. Henshall, all of San Francisco, for appellants. Lewis W. Andrews, Thomas O. Toland, and Andrews, Toland & Andrews, all of Los Angeles, for respondent.

SLOSS, J. The action was brought to foreclose a mortgage or trust deed made by Sunset Road Oil Company to the plaintiff to secure an issue of bonds. Its general features are set forth in our opinion in Mercantile Trust Co. of San Francisco v. Sunset Road Oil Co. (L. A. No. 3996) 168 Pac. 1033, where the appeal was from an order, made in the same case, granting the motion of the Kern Valley Bank and the superintendent of banks for a new trial.

One of the defendants named in the complaint was Union Oil Company of California. It filed its answer and a cross-complaint.

[1] The interest asserted by the Union Oil Company is based on a lease from Sunset Road Oil Company to it of the major part, if not all, of the property covered by the trust deed. This lease bore date December 10, 1908, and was recorded December 31, 1908, long after the execution and recording of the trust deed. Under this lease, which was for a term beginning with its date, and ending with the close of the year 1928, Union Oil Company went into possession of the demised premises, and expended large sums of money in their development and operation as oil-producing lands. Its sole concern in the litigation is the protection of its possession as lessee. The mortgage was prior to the lease. and, in the absence of equitable grounds sufficient to overcome this legal status, a foreclosure sale would, of course, end the leasehold interest. McDermott v. Burke, 16 Cal. 580. The effort of the Union Oil Company was to prevent such foreclosure, or to secure, in some form, an adjudication that, by reason of certain transactions which we shall outline, its rights under the lease were entitled to protection even if a foreclosure should be had. With respect to the right to foreclose at all, the Union Oil Company, by denials in its answer, made the claim that there had not been, at the time of the institution of the action, such a default as would authorize foreclosure proceedings. Its contention that its rights as lessee should be recognized and protected, notwithstanding a foreclosure, were based upon the claim that the plaintiff, Mercantile Trust Company, and all of the bondholders, had agreed, prior to the execution of the lease of December, 1908, and the taking of possession thereunder, that all of such bonds should be subordinated to the rights of the Union Oil Company as lessee. It asserted that it had gone into possession and made large expenditures on the faith of this understanding, and claimed, by virtue of the alleged contract, and by way of estoppel, the right to have any sale on foreclosure made subject to its lease.

The findings of the court were against the claims of the Union Oil Company, and the judgment provided for a foreclosure and the distribution of the proceeds of the sale among the holders of all bonds, without in any way recognizing the alleged rights of the lessee.

Subsequently the Union Oil Company made its motion for a new trial which was granted, and from the order so made an appeal (No. 4128) is taken by the plaintiff, and another (No. 4152) by the Sunset Road Oil Company, W. S. Tevis, and others. Both appeals will be discussed in this opinion.

[2] The order granting the motion is in general terms. It must therefore be sustained here if there be any ground upon which it could properly have been made. Although the voluminous record shows a great number of assignments of error, the substantial matters in controversy narrow themselves down to the two of which we have spoken; i. e., whether the right to a foreclosure had ripened at the time the complaint was filed, and whether the Union Oil Company had shown any ground upon which its right of possession as lessee might be held to have priority over the right of the plaintiff, or of the bondholders, to foreclose in such manner as to cut under the lease.

[3] On the first of these questions it may be remarked incidentally that no appeal was taken from the decree of foreclosure by the Sunset Road Oil Company, the mortgagor and owner of the property, and that the judgment has become final as to it. Assuming that the lessee of the mortgagor is in a position to make the point under discussion, it is quite clear, on the record, that there is no merit in the contention that there had not been such a default as to justify the institution of the action. The bonds of the Sunset Road Oil Company bore interest payable semiannually, on the 15th days of January and July of each year, and bore coupons calling for the payment of such installments of interest. The amended complaint, which was filed in May, 1911, alleged a default in the payment of all interest coupons maturing on the 15th day of January, 1908, or thereafter. It further alleges that demands were made upon the plaintiff by holders of coupons for the payment of the same more than one year prior to the commencement of the action, but that the Sunset Road Oil Company has ever since failed and refused to furnish the plaintiff with funds for the payment of any interest or coupons. It is further alleged that on February 27, 1911, prior to the commencement of the action, the plaintiff declared the principal sum of the bonds immediately due and payable, and demanded payment thereof of the Sunset Road Oil Company, but said Sunset Road Oil Company neglected to pay the same or any part thereof.

[4, 5] These allegations are denied by the Union Oil Company. The findings in support of them are, however, fully sustained by uncontradicted evidence. The evidence tending to show presentation of coupons to the trustee for payment might, perhaps, if objected to, have been excluded as hearsay. Such objection was not, however, made, and it is well settled that incompetent evidence admitted without objection is to be regarded as sufficient to establish the fact. McCloud v. O'Neall, 16 Cal. 392; Curiac v. Packard, 29 Cal. 194, 197; Janson v. Brooks, 29 Cal. 214, 223; Williams v. Hawley, 144 Cal. 97, 102, 77 Pac. 762. The want of direct testimony of such presentation was not suggested at the trial except by motion for nonsuit, and the grounds of motion were not sufficiently specific to direct the attention of the court or of opposing counsel to the precise point now made. If they had been, the necessary proof would, in all probability, have been supplied. Under these circumstances the failure to produce the best kind of evidence will not justify the granting of a new trial, where there is no evidence to the contrary.

[6] The deed of trust provided that:

> "If default shall be made in the payment of the principal or interest moneys mentioned in said bonds, * * * and if such default shall continue for the period of six months after the same, or any of them, shall have been properly presented for payment at the place provided therefor, * * * the trustee may * * * enter into * * * and take possession of all and singular the premises, * * * and may or shall declare all sums secured hereby to be immediately due and payable."

There is a further provision that in case the principal moneys shall have become or been declared to be due, and default made in the payment thereof, and such default shall have continued for a period of six months, then the trustee may take possession, and may foreclose the mortgage or deed of trust, and sell and dispose of all the rights, property, etc. It is argued that, under these clauses, the option to declare the principal due does not arise until there has been a six months' default in the payment of interest, and that then a further period of six months must elapse before a right of foreclosure arises. But the remedy contemplated by the later provision is a right of entry and sale by the trustee without judicial proceedings. The instrument goes on to declare that "the foregoing provisions" for foreclosure and sale "shall be in addition to the ordinary right of foreclosure by entry, by suit, or by action." It is plain, therefore, that there was no intention to limit the ordinary right of the mortgagee to resort to the courts for relief whenever the principal sum was overdue and unpaid. Toler v. East Tenn. Ry. Co. (C. C.) 67 Fed. 168, 179; Farmers' L. & T. Co. v. Chicago & N. P. R. Co. (C. C.) 61 Fed. 543, 546; Morgan's L. & T., etc., Co. v. Texas Centr. Ry., 137 U. S. 171, 11 Sup. Ct. 61, 34 L. Ed. 625; Guaranty Trust Co. v. Green Cove R. Co., 139 U. S. 137, 142, 11 Sup. Ct. 512, 35 L. Ed. 116.

We pass to the consideration of the second and more important question, i. e., whether the Union Oil Company made out a case which, under any rational view of the evidence, would have justified the court in holding that its rights were superior to those of the plaintiff, as trustee, or of any of the holders of bonds. While a great mass of testimony and documentary evidence was introduced, there is no substantial conflict upon the points which are material in this regard. The following state of facts appears to have been established beyond question: Toward the end of 1908 the Sunset Road Oil Company was in serious financial difficulties. Its properties were subject to this large bond issue, aggregating almost $1,500,000, it was in default in payment of interest on the bonds, it was in arrears on account of royalties on a portion of its lands held under lease, it had a large floating indebtedness, and its returns from the operation of its oil wells were not sufficient to enable it to meet any substantial part of these demands, if, indeed, they equaled the actual cost of operation. At this juncture H. A. Blodget, who was largely interested in the Sunset Road Oil Company, and was one of its officers, opened negotiations with the Union Oil Company, with a view to having the latter corporation take a lease of the property and prosecute its active development. The managing officers of the Union Oil Company expressed their willingness to take such a lease, but, being or becoming aware that there was an outstanding bond issue, stated that the Union Oil Company would not go on with the proposed transaction unless its possession as lessee were protected as against the mortgage and the bonds secured by it. This condition was acceptable to Blodget and his associates, and steps were taken to procure the assent of the various bondholders to an agreement making the bonds and mortgage subject or subordinate to the lease. At the outset it seems to have been contemplated that the plaintiff, as trustee, should execute some writing subordinating said mortgage to the rights of the Union Oil Company as lessee. The trustee was approached, but did not state whether it would, in any event, make such an arrangement. It did, however, declare that an indispensable condition to its joining in the plan, if it should join, would be the assent of the holders of all bonds outstanding. While Blodget and his associates, among whom was C. N. Beal, were endeavoring to get the various holders of bonds to agree to the proposed arrangement, papers were drawn for carrying the plan into effect. These included: First, a form of indorsement to be made upon the bonds; second, an instrument to be signed by the holders of the bonds, for delivery to the trustee; and, third, a notice to be given by the trustee to the Union Oil Company when said trustee should have received for indorsement all of the bonds, together with the instructions of the bondholders for their indorsement. It may be remarked that these papers plainly indicated that all of the outstanding bonds were to be delivered to the trustee and indorsed as provided, and that the royalties accruing under the lease were to be paid to the trustee. The papers were all sent to the Union Oil Company for its approval. They were held by that company for several weeks, and then returned, with a letter, under date of January 20, 1909, stating that the attorney for the Union Oil Company "reports that they are in satisfactory shape." The same letter states that the papers will be returned "in order that you may complete the work necessary to be done for the accomplishment of the Sunset Road Oil Company's lease to the Union Oil Company." The lease itself had been executed some time in December, and recorded on December 31, 1908. There is some evidence from which the court might have inferred that the execution and recording had taken place, in advance of the completion of the negotiations for subordination, at the suggestion of persons connected with the Sunset Road Oil Company. Be that as it may, it is entirely clear from the evidence that all parties contemplated that any arrangement finally made was to be evidenced in writing, and that the drafts submitted to, and subsequently approved by, the Union Oil Company constituted the form of writings by which this end was to be accomplished.

[7] It is elementary that, where "it is a part of the understanding between the parties that the terms of their compact are to be reduced to writing and signed by the parties, the assent to its terms must be evidenced in the manner agreed upon, or it does not become a binding or completed contract." Spinney v. Downing, 108 Cal. 666, 41 Pac. 797; Las Palmas, etc., Distillery v. Garrett, 167 Cal. 397, 139 Pac. 1077.

[8] Until the return of the papers by the Union Oil Company the parties were still negotiating regarding the terms of the writings which were intended to ultimately embody the proposed agreement respecting the subordination of the bonds to the lease. These papers were never, in fact, executed, and it follows that no binding agreement was ever reached. The Union Oil Company did not, however, await either the execution of the writings or the ascertainment of the fact that they would not be executed. It went into possession on or about January 1, 1909, and immediately began the active prosecution of work under its lease. In the meantime many bondholders had been approached by Blodget and Beal, and most of them had expressed their willingness to join in the proposed arrangement. Unquestionably, however, all of them contemplated, as did the Sunset Road Oil Company and the Union Oil Company, that any arrangement ultimately made should be embodied in writing, and their verbal assent neither bound them, nor

did it afford to the Union Oil Company any justification for proceeding on the faith of a proposed or contemplated agreement which, as it knew, had not actually been made. It is true that in various letters to the Union Oil Company Blodget or Beal expressed the confident hope that the assent of all bondholders would be obtained. There seems to be little reason to doubt their good faith in these expressions. But, as a matter of fact, they never did succeed in getting the unanimous action contemplated. The Kern Valley Bank was the holder of $190,000 of bonds. While the evidence is not clear on the subject, there was some testimony to the effect that its managing officers had at one time expressed their willingness to join in the proposed agreement of subordination. But when it came to taking final action, which, as we have said, was to be in writing, they declined to go forward. The National Tube Company, holding $14,500 of bonds, after hesitating for a considerable time, expressed its willingness to participate, but by this time the Kern Valley Bank had finally announced its refusal. There were other bondholders who, so far as the evidence shows, had never assented, and some of them had not even been approached. One of the holders, who had signed the proposed agreement, to be delivered to the trustee, had done so on the express condition that all royalties arising from the lease were to be paid to the trustee for the benefit of the bondholders, and this, as above stated, appears to have been a part of the general plan in contemplation. At any rate, the evidence leaves no room for doubt that the Union Oil Company, instead of awaiting the consummation of the proposed agreement, took the chance of going into possession and making large expenditures under its lease. Under these circumstances the court could not have found that it accepted the lease, and went into possession under it, pursuant to an agreement on the part of the trustee and the holders of the bonds that such bonds should be subordinate to the lease. There is no evidence whatever that the trustee, plaintiff in the action and appellant here, ever assumed to make such an agreement, and, so far as the bondholders are concerned, the only agreement which any of them contemplated making was the written agreement which, as we have seen, was never consummated.

[9] What we have said disposes, in effect, of the claim that these transactions afford a foundation for a claim of estoppel. It was, no doubt, the desire and expectation of the Union Oil Company that the proposed lease should be given a status superior to that of the trust deed and the bonds secured thereby. But the Union Oil Company knew, as well as did the persons with whom it was negotiating, that the consent of the bondholders was necessary to the consummation of such an arrangement. It was also known to all concerned that the plan in view was to be made effective by means of the execution of written documents. The Union Oil Company executed the lease, took possession, and began active operations with full information, not only that the writings intended to be signed by the bondholders and the trustee had not been signed, but that a number of bondholders had not even given an informal assent to the scheme of subordination. On December 2, 1908, Mr. Stewart, an officer of the Union Oil Company, writing to Mr. Blodget, said:

> "We are assuming that everything is going to be arranged satisfactorily between us, and are therefore getting ready our force and equipment for the work in Sunset, but will spend no money until everything is buttoned up."

On December 10, 1908, the lease was executed, and on the 17th of the same month it was ratified by the board of directors of the Union Oil Company. On the 18th day of December, Mr. Blodget wrote to Mr. Stewart outlining the proposed plan, viz. to have all of the bonds, issued and to be issued, stamped with notice that they were subject to the lease, and "when done" to have the trustee advise the Union Oil Company. The letter further stated that forms of agreement would be sent to the Union Oil Company as soon as settled, and that the trustee would instruct said Oil Company to pay all royalties to it. On December 24, 1908, Mr. Orcutt, of the Union Oil Company, wrote to Mr. Blodget, stating his understanding that it would be necessary to have the bondholders or the trustee consent to the lease, and requesting that this work be hastened "as fast as possible, as we are anxious to enter into possession of the property." On December 26th Mr. Beal, an officer of the Sunset Road Oil Company, wrote a letter to the Union Oil Company, saying, among other things:

> "The matter of securing the consent of the Sunset Road Oil Company bondholders to the lease is well under way, papers to carry the purpose into effect having been prepared by our attorneys and submitted to the trustee."

On December 31, 1908, Mr. Beal again wrote to the Union Oil Company, inclosing the drafts of the three documents which were to be signed for the purpose of accomplishing the subordination of the bonds. It is perfectly evident that at this stage the Union Oil Company was fully informed that the negotiations had not reached the stage of a binding or effective agreement. The letters to it conveyed direct information of this fact, and its own letters disclosed in plain terms its understanding that the steps required to protect it in its lease were being prepared, but that, in Mr. Stewart's phrase, everything had not been "buttoned up." Having full and accurate knowledge of the real situation, the Union Oil Company cannot claim to have been misled. It is of the essence of an estoppel in pais that the party asserting such estoppel should not only have been ignorant of the true state of facts, but that he should have relied upon the representation or admission of the adverse party. Biddle Boggs v. Merced M. Co., 14 Cal. 279, 367; Raynor v. Drew, 72 Cal. 307, 13 Pac. 866; Montgomery v. Keppel, 75 Cal. 128, 133, 19 Pac. 178, 7 Am. St. Rep. 125.

[10] The evidence supplies a further answer, and a conclusive one, to the claims of contract and estoppel set up by the Union Oil Company in the pleadings upon which it went to trial. Those pleadings made no reference to any agreement subsequent to the Union Oil Company's taking of possession. Some of the cross-defendants set up in their answers a written agreement dated March 24, 1909, between W. S. Tevis, Union Oil Company, and Sunset Road Oil Company. This agreement recited the existence of the lease; that royalties would become payable from the lessee to the lessor thereunder; that the Sunset Road Oil Company's properties were subject to the mortgage here sued upon, under which $1,362,000 of bonds were outstanding, all of which "are now in default in interest payments"; and that under the mortgage the bondholders might cause to be made a foreclosure, which, if made without the bonds being rendered subject to the lease, might cause the property to be sold free and clear of such lease. It further recited that Tevis owns or controls all of the bonds except $210,000 thereof; that the Sunset Road Oil Company has issued to the Union Oil Company, and the latter has accepted, an order directing the payment of all royalties under the lease, not theretofore disposed of, to Tevis. Following these recitals, Tevis agrees that he will cause all of the outstanding bonds, except the $210,000, to be made subject to the lease, and to cause to be made upon each of them an indorsement in a prescribed form. He further agrees, as to the $210,000, that as long as he receives all royalties under the order accepted by the Union Oil Company, he will keep the interest paid on said $210,000 of bonds, so as to leave the holders thereof without grounds for foreclosure of the mortgage. The Union Oil Company accepts the order to pay all royalties to Tevis, and covenants and agrees to all the terms of the contract. This agreement affords convincing proof that the alleged agreement, subordinating the bonds to the lease, had not been made at the time of the execution of the lease, or the taking of possession thereunder. The recitals of the agreement of March 24th, which are binding between the parties thereto, show clearly the understanding of all of them that the bonds had not been made subject to the lease, and that it was desired to provide for their being so made. It cannot be justly claimed that the agreement of March, 1909, was a mere amplification or continuance of the alleged earlier agreement. The original negotiations contemplated the payment of royalties to the trustee, for the benefit of the bondholders, while under the later contract all royalties were to go to Tevis. Certainly the bondholders could not, without their consent, be bound by an agreement making so important a change in their rights, and it is not to be supposed that the parties to the contract of March 24th attempted to so bind them. The later writing must be regarded as a new agreement, binding only on the parties to it, and independent of all prior transactions or negotiations on the part of others.

So, too, the written contract of March 24th furnishes an additional argument against the claim of estoppel. When it was made and signed, the Union Oil Company had already expended $75,000 upon the property. Obviously the said company was not then relying upon any belief or understanding that the bondholders had theretofore bound themselves to subordinate their bonds, but was, on the contrary, bargaining for the covenant of Tevis that he would cause some of the bonds to be subordinated, and would, on certain conditions, pay interest on the rest. It is impossible to see, therefore, how the court could have made any findings in support of the positions asserted by the Union Oil Company in the pleadings upon which it went to trial. Those pleadings set up an alleged agreement by the trustee and all the bondholders, made at or prior to the execution of the lease, that, in consideration of such execution, the bonds should be, and were, made subordinate to the rights of the lessee. They further sought to set up an estoppel, based upon the execution of the lease and the taking of possession thereunder by the Union Oil Company, and the expenditure of large sums of money upon the faith and in the belief, induced by the acts and representations of the bondholders and the trustee, that the right of foreclosure would not be exercised to the detriment of the lessee's right of possession.

[11-13] At the conclusion of the trial the Union Oil Company asked leave to file an amended answer and cross-complaint. The court denied the request, and this is one of the rulings assigned as error. The granting or withholding of permission to file amended pleadings rests largely in the discretion of the trial court, and its action will not be reviewed on appeal unless an abuse of discretion appears. But, we take it, the court has not exhausted its power to determine whether the interests of justice demand a granting of such leave by passing on the application in the first instance. It may, upon motion for new trial, reconsider its ruling, and conclude that a contrary ruling would have been proper. If the trial court might properly have granted leave to file the amended pleadings, and its refusal so to do could have been in any way prejudicial to the respondent, we must, on this appeal, assume that the new trial was granted for this reason, and affirm the order.

[14] We think, however, that the proposed amendments, if allowed to be filed, could not have availed the respondent. In so far as they sought to set up a claim of title adverse to that of the mortgagor, the issue tendered was not one which could be adjudicated in the foreclosure suit. Croghan v. Minor, 53 Cal. 15; Ord v. Bartlett, 83 Cal. 428, 23 Pac. 705; Murray v. Etchepare, 129 Cal. 319, 321, 61 Pac. 930. What we have said in our discussion of the questions of estoppel and agreement to subordinate furnishes a sufficient answer to the claim, asserted in the proposed amendments, that the respondent is entitled to a lien equal in rank to that of the mortgage for its expenditures under the lease.

It was also sought by the proposed amendments to set up rights under the contract of March 24, 1909. The amended cross-complaint, which the Union Oil Company asked leave to file, alleged that by virtue of this contract the bonds owned or controlled by Tevis "are and should be held by the court to be subject to the rights of this cross-complainant under said lease." It further alleged that Tevis had failed to perform his agreement to keep the interest paid on the $210,000 of bonds not owned or controlled by him. The making of this contract had already been set up in the pleadings of some of the cross-defendants, who had alleged that the Union Oil Company had failed to perform the obligations imposed upon it under the agreement. The court found that the contract had been made, but declined to find on the issues relative to the performance of the obligations arising under it, deeming this controversy to be one not properly arising in the foreclosure suit, but to be determined in a separate action between Tevis and the Union Oil Company.

While the amended pleading offered for filing alleges that Tevis had not paid interest on the $210,000 of bonds, it fails to allege that the respondent had paid the accruing royalties to Tevis. His agreement bound him to keep the interest paid only so long as the royalties were paid to him. But, apart from this, it goes without saying that, if in fact there was a default on the coupons, there was no power in Tevis to waive or impair the rights which such default conferred upon the holders of bonds not owned or controlled by him. And his agreement did not assume so to do. We shall not stop to consider whether, by this contract, he undertook to accomplish a present subordination of the bonds which he did control, or merely promised to bring about that condition at some later time. It appears in the record that some of the bonds owned by Tevis did, in fact, bear an indorsement of subordination in the form prescribed in the agreement of March, 1909. We may therefore, going beyond various objections of a more or less technical character which are urged against the proposed amended cross-complaint, proceed to a consideration of what is really the fundamental question on the merits of this litigation, i. e., whether the agreement on the part of the holders of some, but not all, of the bonds to subordinate their bonds to the rights of the Union Oil Company under its lease, could give to such lessee a right to resist foreclosure, or to obtain any of the relief sought by it in its pleadings.

[15] The mortgage to the trustee was a single security in favor of all the bondholders. Dickerman v. Northern Trust Co., 176 U. S. 181, 206, 20 Sup. Ct. 311, 44 L. Ed. 423. The mortgagor having defaulted, the nonassenting bondholders were clearly entitled to foreclose, and to have the proceeds of sale applied to the payment of their bonds. But the assenting bondholders were also entitled to subject the security to the payment of their bonds. As between the different bondholders, there were no priorities or preferences. Those who agreed to subordinate their bonds did not agree to surrender their lien upon the property mortgaged, or to make their bonds and lien subordinate to that of the nonassenting holders. As was said in a case presenting a similar situation:

> "The bonds are as valid now as before the execution of the agreement. * * * The security of the first mortgage is still pledged for their payment, as before." Poland v. Lamoille V. R. Co., 52 Vt. 144.

Accordingly, if there be any foreclosure, it must be a foreclosure for the benefit of all outstanding bonds entitled to share in the security. The court could not order the property sold in parcels until the nonassenting bondholders were paid, and then allow the rest to be sold subject to the lease. Such a sale would be in violation of the right of all bonds to share equally in the security, and would give to a part of them a prior lien upon some or all of the property. Furthermore, as we have already pointed out, if there were any sale of the property on foreclosure, such sale would necessarily terminate, as against the purchaser, the lease of the Union Oil Company. We see no possible way in which a court of equity could protect the rights of the lessee as against the holders of subordinated bonds, except, perhaps, by permitting the lessee to pay off the principal and interest due on all bonds not subordinated, and then directing a foreclosure, subject to the lease, for the benefit of the others. But if the Union Oil Company desired relief of this nature, it should have offered to make such payment. Its request for leave to file amended pleadings was made after the trial, when it conclusively appeared that a large amount of the bonds had not been subordinated to this lease. If it desired to obtain the opportunity of paying off the holders of bonds who were entitled to foreclose the mortgage without regard to its lease, it should have made an allegation of its willingness and ability to make such payment. Those who seek equity should offer to do equity. Bell v. Walsh, 7

Cal. 84; Buena Vista F. & V. Co. v. Tuohy, 107 Cal. 243, 40 Pac. 386; Peshine v. Ord, 119 Cal. 311, 314, 51 Pac. 536, 63 Am. St. Rep. 131.

In Poland v. Lamoille Valley R. Co., supra, a railroad company had made a mortgage to secure an issue of $2,300,000 in bonds. It had also made a second and a third mortgage to secure other bonds. Thereafter, in order to obtain money necessary to complete its road, it had made a fourth mortgage of $500,000 of "preference bonds." Under the last mortgage the preference bonds were not to be issued until the holders of $1,800,000 of the first mortgage bonds had agreed to make their bonds subject to the preference bonds. The requisite number did so agree; the holders of the remaining $500,000 did not. In an action for the foreclosure of the various mortgages it was held that the first mortgage should be foreclosed, but that the $1,800,000 of bonds held by the assenting bondholders should be treated as a security in favor of the holders of the preference bonds. This case is cited by the respondent in support of its contention that it is entitled to some relief as against the holders of subordinated bonds. The decision does not, however, meet the requirements of the present case. In the Vermont case it was distinctly held that the nonassenting bondholders were not entitled to any priority in the foreclosure of the security as against the assenting bondholders. The first mortgage had to be foreclosed for the benefit of all of the first mortgage bonds alike. But the preference bondholders held a subordinate lien on the same property, and in the enforcement of this lien, which was a proper subject for adjudication in the action, they were entitled to be subrogated to the position of the $1,800,000 of first mortgage bonds which had agreed that the preference bonds should have priority. All of the parties were creditors having claims secured by mortgage of the same property, and the question was merely as to the application of the proceeds of the security among the different creditors. Here we have an entirely different situation. Union Oil Company is not a creditor of the mortgagor, and has no lien upon the mortgaged property. It has a right, as against certain bondholders, that they shall not foreclose their security in such manner as to terminate its lease. But the security must be foreclosed in the interest of other bondholders, and such foreclosure terminates the lease. The result is that, in the absence of a subordination by all bondholders, the Union Oil Company must seek its remedy by personal action for damages against those bondholders who have broken their agreement to protect the lease as against foreclosure; it having failed, as above suggested, to offer to pay off all bonds not subordinated.

[16] If these views be correct, the other assignments of error specified by the Union Oil Company do not require detailed notice. Further findings, or different rulings on the admission or rejection of evidence, could not have affected the findings made on uncontradicted evidence, or the legal conclusions which followed. A new trial could not benefit the Union Oil Company. Upon any further hearing the result must be the same as that already reached.

The wide discretion allowed to the superior court on motions for new trial will not justify the granting of such motion where, in its findings and judgment, the court reached the only conclusion which it could properly have reached on the record. Flood v. Petry, 165 Cal. 309, 318, 132 Pac. 256, 46 L. R. A. (N. S.) 861.

On each of the appeals the order is reversed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; MELVIN, J.; HENSHAW, J.; VICTOR E. SHAW, Judge pro tem.

176 Cal. 493

HENDERSON v. NORTHAM et al.
(L. A. 4267.)

(Supreme Court of California. Nov. 16, 1917.)

1. Pleading 🔑409(3)—Waiver of Defects—Sufficiency of Denial.

Where plaintiff treated the answer as sufficient to require proof of the allegations of the complaint, he must be deemed to have waived all objections to sufficiency of the denial.

2. Negligence 🔑6 — Cause of Injury — Failure in Statutory Duty.

While failure to perform a duty imposed by statute is evidence of negligence, the act or omission in order to warrant its consideration by the jury must contribute directly to the injury.

3. Highways 🔑184(2)—Negligent Driving—Failure in Statutory Duty—Evidence.

In action for injury when struck by automobile, the omission of the operators of the car to stop and give their names and owner's name and address could not be considered by the jury, since it in no way contributed to the injuries.

4. Evidence 🔑220(3)—Admissions—Acquiescence in Statements by Others.

To render statements made in the presence of a party, and uncontradicted by him, binding as his admissions, it must clearly appear that he heard and understood them, and that the circumstances were such that his acquiescence therein may be fairly inferred from his silence.

5. Evidence 🔑220(3)—Admissions—Acquiescence.

In action for damage when struck by automobile, it being in issue whether defendant owned the car involved, evidence that several days before at a racing meet it was announced that defendant would race such a car, and that defendant was present 15 minutes before and 15 minutes after the announcement, is not admissible as an admission of ownership.

6. Evidence 🔑472(2) — Admissibility — Opinion—Damages.

In action for damages in automobile collision, plaintiff could not state what, in his opinion, his damages were.

7. Highways 🔑184(3)—Negligent Driving of Automobile—Question for Jury.

It cannot be said as a matter of law that the operation of an automobile in a manner to make a loud noise, creating dust and smoke, constitutes negligence.

8. Negligence 🔑136(9)—Question for Jury—Facts.

Negligence is a question of fact for the jury even when there is no conflict in the evidence if different conclusions upon the subject can be rationally drawn from the evidence.

9. Highways 🔑184(4)—Automobile Accident—Negligence—Instructions.

In action for damages in automobile collision where some evidence indicated speed of 40 to 50 miles per hour, and other evidence indicated a speed of not to exceed the statutory limit of 20 miles per hour, an instruction that it was negligence to drive at a high rate of speed was erroneous.

In Bank. Appeal from Superior Court, Kern County; Howard A. Peairs, Judge.

Action by John M. Henderson against Leotia Northam and others. From judgment for plaintiff and order denying motion for new trial, defendants appeal. Reversed.

Gurney E. Newlin and Roy V. Reppy, both of Los Angeles, and F. E. Borton, of Bakersfield, for appellants. R. H. Wilson, for respondent.

VICTOR E. SHAW, Judge pro tem. Action to recover damages for personal injuries alleged to have been sustained by plaintiff as the result of defendants' negligent operation of an automobile.

The jury returned a verdict in favor of plaintiff in the sum of $2,500, for which judgment was entered. The appeal is from an order denying defendants' motion for a new trial.

It appears that on Sunday afternoon, April 27, 1913, plaintiff and his wife, by means of a buggy drawn by a horse, were traveling near Bakersfield in a southerly direction on a highway known as Union avenue when an automobile going in the same direction, occupied by two men alleged to be defendants Toft and Nelson, passed in a manner that frightened his horse, causing it to leave the road and precipitate the buggy against an electric light pole, in colliding with which plaintiff was thrown to the ground, receiving the injuries which, with some slight property damage, forms the basis of the action. The theory of the complainant, and that upon which the trial was had, is that, while defendant Northam was not present at the time of the accident, she was the owner of the car described as a large, powerful, blue racing machine of Simplex make, which, at the time and place, her codefendants, as her agents and employés and within the scope of their authority, were engaged in operating, or that all of defendants were copartners engaged in the joint enterprise of racing said car for their mutual profit.

[1] Mrs. Northam filed a separate answer wherein she denied that on the day in question Toft and Nelson, or either of them, were operating her car, or any car, on Union avenue, or in the vicinity of the place where the accident occurred, and Toft and Nelson joined in an answer containing like denial, from which, if true, it followed that plaintiff's injury was caused by a car other than that of Mrs. Northam and by an automobile driven by others than Toft and Nelson. Notwithstanding such denials the court instructed the jury that the pleadings in the case admitted that the car which was being operated by Toft and Nelson was the Simplex car belonging to the defendant Mrs. Northam. We must assume the instruction had reference to the car, the operation of which at the time caused plaintiff's injury. Respondent justifies the giving of the same upon the ground of the alleged insufficiency of the denial to raise an issue. Under section 452 of the Code of Civil Procedure, which provides that pleadings "must be liberally construed, with a view to substantial justice between the parties," we are constrained to hold that, conceding the denial to be somewhat complex and artificially drawn, it was a sufficient negative to present an issue, the determination of which question was for the jury. Moreover, this was the view of the answer taken by the plaintiff, who introduced much evidence, the sole purpose of which was not only to identify the car causing the accident as that owned by Mrs. Northam, but to identify Toft and Nelson as the men operating it as alleged in the complaint. Having treated the answer as sufficient to require proof of the allegation of the complaint, plaintiff must be deemed to have waived all objections as to the sufficiency of the denial. Reclamation Dist. v. Hershey, 160 Cal. 694, 117 Pac. 904.

[2, 3] Evidence was offered which without contradiction tended to prove that the men in the automobile witnessed the accident occasioned by their operation of the car, but did not stop and give their names and addresses, as to which the court instructed the jury in effect that the neglect and failure of the operators of the car to stop and give his or their names and the name of the owner of said car and their addresses was a fact to be considered by it in arriving at a verdict. While failure to perform a duty imposed by statute is evidence of negligence (Driscoll v. Market St. Ry. Co., 97 Cal. 553, 32 Pac. 591, 33 Am. St. Rep. 203), the act or omission in order to warrant its consideration by a jury in actions of this character must contribute directly to the injury. "However, improper or illegal it may have been in the abstract, an action for damages cannot be founded upon it." McKune v. Santa Clara, etc., Co., 110 Cal. 480, 42 Pac. 980. The omission of the parties operating the car to stop after the accident occurred, since it in no way contributed to plaintiff's injury, was not a

subject for the consideration of the jury; hence the giving of the instruction was prejudicial error. As well might a blind man base an action for injury upon the failure of one to comply with an ordinance requiring the placing of a light to warn travelers of an obstruction in the street.

[4, 5] As stated, one theory which plaintiff sought to develop at the trial was that Mrs. Northam, the owner of the car, and Toft and Nelson were copartners engaged with her in the joint enterprise of racing the car for money. It appears that on April 26 and 27, 1913, there was an automobile race meet at Bakersfield, and that all of defendants attended the same, Toft and Nelson in charge of the car arriving there in the evening of April 25th, and defendant Northam going by train. As showing the existence of such copartnership and that Mrs. Northam as the owner of the car had it taken to Bakersfield for the purpose of entering it in the races as a partnership venture, the court, over defendants' objection, received evidence to the effect that on the afternoon of April 26th some one paraded the track in front of the grand stand, and by means of a megaphone announced to the large crowd assembled upon the grounds that Mrs. Northam had entered her car with Toft as driver in a 50-mile race to be run the next day for a wager of $2,500; the announcer introducing some one unknown to the witness as Toft. While the witness could not say that Mrs. Northam was present and heard the announcement, he did see her in her car at one end of the grand stand about 15 minutes before the making of the announcement, and later about 15 minutes after the announcement was made saw her drive away.

We know of no principle of law under which this evidence was admissible. To render statements made by another in the presence of a party, and because uncontradicted by him, binding as his admissions, it must clearly appear that he heard and understood them, and that the circumstances were such that his acquiescence therein may be fairly inferred from his silence. Where Mrs. Northam was when this announcement was made is not made to appear. True, she was in an automobile at one end of the grand stand some 15 minutes before, and was seen driving away some 15 minutes thereafter, but it cannot be said from this fact that she heard the megaphone announcement. Leach v. Dickerson, 14 Ind. App. 375, 42 N. E. 1031; Schilling v. Union R. Co., 77 App. Div. 74, 78 N. Y. Supp. 1015. Conceding, however, that she did hear the statement made and that it was her duty to contradict the same, there is not a scintilla of evidence disclosed by the record which tends to prove that she remained silent. Indeed, for aught that appears to the contrary, she may by like use of a megaphone have repudiated the declaration as being false and untrue. In itself and standing alone the declaration did not constitute evidence affecting defendants. In a proper case evidence of statements made in the presence of a party may be admissible primarily for the purpose of showing acquiescence therein by conduct which implies assent. If, however, it is not followed by some proof of conduct on the part of the one sought to be bound thereby, it is clearly inadmissible. People v. Mallon, 103 Cal. 514, 37 Pac. 512. To have warranted the admission of such evidence it devolved upon plaintiff to show conduct on the part of Mrs. Northam from which her assent could fairly be implied.

[6] To the question put to plaintiff, "What do you consider as being the amount of the damages that you have suffered by reason of the injury to your person?" he, over defendants' objection, was permitted to answer, "It is about $15,000." The question as to damages resulting from plaintiff's personal injuries was for the jury to determine upon testimony as to the extent of such injuries. Our attention is directed to no case constituting authority for the admission of such opinion testimony by one who is injured. The rule is that the witness may state the facts showing the extent of the injuries, the measure of which is the ultimate fact to be found by the jury. De Wald v. Ingle, 31 Wash. 616, 72 Pac. 471, 96 Am. St. Rep. 927; Ohio, etc., Ry. Co. v. Nickless, 71 Ind. 271; Andreson v. Ogden Union Depot, etc., Co., 8 Utah, 128, 30 Pac. 305. The testimony was stamped with the approval of the court as to its competency as proof of the amount of damage sustained by plaintiff, and hence it cannot be said that it did not in some degree influence the jury in estimating the amount of damage claimed.

[7-9] Among other instructions the court gave one to the effect that the driving of Mrs. Northam's car by Toft and Nelson in a manner which made a loud noise, created dust and smoke, and traveling at a high rate of speed which frightened plaintiff's horse constituted negligence. It cannot as a matter of law be said that the operation of an automobile in a manner to make a loud noise, creating dust and smoke, constitutes negligence. The instruction is likewise objectionable because of the use of the indefinite term "high rate of speed," which the jury might understand to be the statutory limit of speed not in excess of 20 miles an hour, as was the provision of the law at the time of the alleged accident. There was evidence to the effect that the automobile was being operated at a speed of 40 to 50 miles an hour, and other evidence which, if believed by the jury, would have justified a conclusion that the car at the time was not being driven in excess of 20 miles an hour, which rate of travel, accompanied by noise, smoke, and dust caused by the operation of the car, might or might not in the

minds of the jurors, depending upon all the circumstances, constitute negligence. The rule is that negligence is a question of fact for the jury even when there is no conflict in the evidence if different conclusions upon the subject can be rationally drawn from the evidence. Wahlgren v. Market St. Ry. Co., 132 Cal. 656, 62 Pac. 308, 64 Pac. 993; Hampton v. Occidental Steamship Co., 139 Cal. 706, 73 Pac. 579. Other instructions given are subject to like objections.

The order denying defendants' motion for a new trial is reversed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; MELVIN, J.; HENSHAW, J.; SHAW, J.; LAWLOR, J.

(176 Cal. 479)

JOHNSTON v. CITY OF LOS ANGELES.

(L. A. 3997.)

(Supreme Court of California. Nov. 14, 1917.)

1. DEEDS 🔑156—CONDITIONS SUBSEQUENT.
At common law the benefit of a condition subsequent in a grant of real estate could be reserved only to the grantor and his heirs.

2. DEEDS 🔑156—CONDITIONS SUBSEQUENT—WHO MAY RECEIVE ON BREACH OF CONDITIONS—RESIDUARY DEVISEES.
Under Civ. Code, § 1046, providing that a right of re-entry or repossession for breach of condition subsequent can be transferred, a residuary devisee of the grantor is entitled to real estate for breach of condition, although such breach was subsequent to death of grantor.

3. DEEDS 🔑93—CONSTRUCTION.
Although a deed employs words usual in conveying complete title in fee, it must be read like other contracts, with the purpose of carrying out the intention of the parties.

4. DEEDS 🔑155 — CONSTRUCTION — CONDITIONS SUBSEQUENT.
A deed employing the usual words in conveying land in fee, but which refers to the purpose of the conveyance as delineated on a map entitled "Map * * * on the Subject of Water Supply for Irrigation," and provides that when the lands ceased to be used for said purposes of the "erection and maintaining of said dam, reservoir, and ditch, they should revert to the grantor," etc., created a condition subsequent that such dam should be used for no other purpose whatever than irrigation, and such reservation was a contingent estate capable of passing by will or transfer.

5. INJUNCTION 🔑62(1)—CONDITIONS SUBSEQUENT—DEED—ASSIGNMENTS.
If the grantee used such property for a fairground, a park, or a place for storing municipal property, or a site for a public building, an assignee of the grantor could have invoked the power of equity to prevent such a consummation.

6. DEEDS 🔑156—CONDITIONS SUBSEQUENT—RIGHT TO SUE FOR BREACH.
An estate which would be sufficient to support an assignment, whereby the assignee has the power to prevent use of real estate by a grantee of his assignor for other than a certain purpose, is sufficient foundation for a right by a residuary devisee of the grantor to sue for breach of a condition subsequent.

7. DEEDS 🔑212—CONDITIONS SUBSEQUENT—BREACH—SUFFICIENCY OF EVIDENCE.
In an action to recover real estate for breach of a condition subsequent that the land was to be used only for irrigation purpose, evidence *held* not to support a finding that defendants have not ceased to use the land for that purpose, although the grantee, a city, did use some of the water to fill a lake in its park.

Department 2. Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action to quiet title by John Griffin Johnston against the City of Los Angeles. From a judgment allowing partial recovery, both appeal. Affirmed as to appeal of the City, and reversed as to plaintiff's appeal.

Charles Lantz and Gibson, Dunn & Crutcher, all of Los Angeles, for appellant. Albert Lee Stephens, City Atty., and Myron Westover, both of Los Angeles, for respondent.

MELVIN, J. On December 13, 1877, Dr. John S. Griffin, plaintiff's predecessor, executed a deed reciting the nominal consideration of $1 whereby he granted to the city of Los Angeles the land which is the subject of this suit. The deed contained a provision (which we shall presently quote) to the effect that, if the city should cease to use the premises for the purposes outlined in the grant, the property should revert to the grantor, his heirs, executors, administrators, or assigns. In November, 1910, this action to quiet title, based upon the theory of the city's abandonment of the premises for the purposes contemplated by the grantor, was commenced. The city of Los Angeles denied that it had ceased to use the land for the maintenance of a dam, reservoir, etc., and after trial of the issues joined the court rendered judgment granting plaintiff's prayer as to a part of the property and denying it as to the remaining portion. Each party to the action appeals from that portion of the judgment which is adverse, and the plaintiff also appeals from the order denying his motion for a new trial.

For a better understanding of the issues it will be necessary to quote from Dr. Griffin's deed to the city. It contains the following description of the land and the purposes of the grant as well as the conditions which would work a reversion:

"Beginning at a point in the prolongation of the southerly line of Downey avenue in the city of Los Angeles, from which beginning point the southwest corner of said Downey avenue and Thomas street bears south 89 degrees west 2,490 feet; thence in a northerly direction about 2,600 feet following the contour of the ground by horizontal curves to a point near the east line of the city; thence in a southerly direction about 3,000 feet, still following the contours of the ground by horizontal curves to a point near the easterly end of the proposed dam or reservoir No. five (5); thence westerly 850 feet across the valley to a point which would be on the same elevation as the end of the last-mentioned course, or five (5) feet higher than the bottom of the new ditch which is to supply water to said proposed reservoir No. 5, the end of the last-mentioned course being the westerly end of said proposed dam; thence northerly 800 feet following the contour of the ground by horizontal curves to the point of beginning.

"The above-described parcel of land includes all of the land lying within or below a horizontal plane extending northerly from the top of the dam as proposed, the top of said dam to be five (5) feet higher than the bottom of the ditch as now constructed, and containing twenty-four (24) acres of land, more or less.

"And the said party of the first part also grants, as aforesaid, to the party of the second part, so much of his land situated below and to the south of said dam as is now necessary or may hereafter become necessary to be used for the proper erection, protection and maintenance of said dam and reservoir, including the land on which the present or future slope of the embankment of said dam may necessarily rest, and also the right of way over and upon the lands of the party of the first part for the purposes of constructing and maintaining and repairing said ditch and dam, and also the right to excavate, transport, and use all earth, stone, rock, and gravel from, over, and upon all lands belonging to the party of the first part, which are now or may hereafter become necessary for the purposes of constructing, or maintaining, or repairing the said ditch, dam, or reservoir. It is hereby understood by and between the parties to these presents that the reservoir, dam, and ditch herein referred to are the reservoir, dam, and ditch delineated on a map entitled 'Map of the City of Los Angeles and Vicinity Accompanying the Report of Consulting Engineers on the Subject of Water Supply for Irrigation, Dated July 27, 1877,' and more fully described and located by the field notes and report accompanying said map, now in possession of M. Kelleher, city surveyor, said reservoir being designated on said map as reservoir No. five (5), and being also shown on the annexed plat herewith recorded, to which reference is hereby made. * * *

"It being also expressly understood and agreed by and between the parties hereto that in case the party of the second part shall cease to use the said premises for the said purposes of the erection and maintaining of said dam, reservoir, and ditch, that then and in that case the said premises hereinbefore conveyed shall revert to and become the property of the said party of the first part, his heirs, executors, administrators, or assigns."

It seems very clear, from the terms of the deed and particularly the words of the paragraph last quoted, that Dr. Griffin's gift to the city was made in contemplation of the continued maintenance of a reservoir and ditch as parts of a system of irrigation, and that it was his intention, clearly expressed in the deed accepted by his grantee, that failure on its part to maintain such instrumentalities and for the very purposes designated in the indenture would work a forfeiture. For example, any one reading the deed would be forced to the conclusion that after the reservoir had been established and the ditch constructed and used the disuse of the ditch and the dedication of the reservoir solely to the purposes of a public swimming pool would amount to a perversion of the grant and give to the grantor the right to recall his gift; or if the city should continue to use the reservoir, but should devote the water, not to irrigation, but to the creation of electric power, a similar result would follow. The court, however, put a different construction upon the deed, as will readily appear from a consideration of the findings.

The court found, among other things, that the city accepted the deed; that it constructed the dam and ditch referred to in said instrument and in the report there specified of the board of engineers on the subject of water supply for irrigation dated July 27, 1877; that thereafter the ditch and dam were used continuously for general irrigation purposes by the city until the year 1904, at which time its use for said purposes was discontinued; that since that time the city has several times each year used the water from said reservoir for the purpose of replenishing a lake in one of the public parks owned by the said city—a park which was not in existence until ten years after the execution of Dr. Griffin's deed; that for a portion of the time between 1904 and 1909 the water from the reservoir was used without permission from or compensation to the city upon privately owned land near the dam; that the original irrigation ditch which was constructed to take water from the reservoir has not been maintained, but since 1904 the city has kept up a ditch leading from the reservoir to its park, using as a part of it that portion of the original ditch being about 150 feet thereof which was conveyed by the deed from Griffin; and that "all the water used in replenishing said lake has been taken from said reservoir, except on occasions when the reservoir was dry or the water was too low therein, on which occasions water was supplied for said lake from the city water system."

There were further findings by which the good condition of the dam since 1904 was declared and certain repairs to the water gate and the valve to the service pipe were described. The court also found as follows:

"Since the year 1904 water has not been conveyed into or from said reservoir through pipes or ditches constituting part of said general irrigation system as had been done prior thereto, and the ditches leading into and out of said reservoir have been destroyed, at and near the points where they formerly entered and left said reservoir, * * * and the rights of way upon which said ditches were constructed beyond said land conveyed by said Griffin deed have been released by said city, and quitclaim deeds therefor executed and delivered to the owners of the lands over which they passed, and the spillway originally constructed to prevent overflow of said dam has been filled up by the construction of an electric railway; but the rainwater and storm water from a large area has ever since said year 1904 drained into said reservoir, and said reservoir has since that time held such water, when not dry, and such water has been used in the manner herein specified."

According to the findings, the reservoir was entirely dry during the latter half of the year 1910, and in August of that year plaintiff caused a part of the bed of said reservoir to be plowed. At times people living near the reservoir complained of its unsanitary condition when the water was low and foul, and at other times when copious rains had filled it the city's employés or others caused it to be partially drained to prevent injury to the adjoining lands from overflow. Since 1904 the amount of water obtained for the park and taken from the reservoir has required the use of "ten acres of the land conveyed by said Griffin deed lying within contour lines above said dam and easterly of Mission road."

In 1903, as the court also found, the land described in the deed from Dr. Griffin was conveyed by the city to its board of water commissioners. Thereafter, in 1905, after condemnation proceedings duly taken, Mission road was opened across the property in such manner as to separate about one acre of the westerly portion of the land from the rest of the tract. Within the lines of the roadway were included 1½ acres of the land. The board of water commissioners paid an assessment of $4,383.15 upon the property east of the new road, but no award was made for the land taken and no payment was made of a purported assessment on the acre to the west of Mission road, but "said land on said westerly side was permitted to be sold by said city to a private party." Plaintiff's counsel stipulated that title to all streets included in the property was in the city. There were further findings that in 1910 the board of water commissioners adopted a resolution declaring this westerly portion of the property no longer useful as part of the site for a reservoir and advising its abandonment and sale for a price not less than $500. On August 15, 1911, this resolution was rescinded. It was found that the plaintiff is the residuary devisee under the will of John S. Griffin, who died in August, 1898, distribution having been made to him by decree made and entered August 2, 1909, and containing the following language:

> "And that all the residue of said estate, whether described herein or not, be distributed to said John Griffin Johnston."

While the decree described certain property specifically, the land here in controversy was not included in the description.

The conclusions of law were that as to the land east of Mission road and north of the dam embracing ten acres, as to the dam itself, and as to that ground south of the dam on which the present slope of the embankment rests, the city and its agencies have not at any time ceased to use said portion of the premises in the manner specified in the Griffin deed; that said portion is owned by the board of public service commissioners of the city of Los Angeles; that title to all roads not within said ten acres is vested in the city; that all of the remaining land, by reason of the cessation of public use, has reverted to and vested in plaintiff in fee simple; and that neither party should recover costs. Judgment was entered accordingly.

It will be noted that Dr. Griffin died years before the city ceased to use the entire tract as a part of its irrigating system, and the first point made by the city is that plaintiff. as residuary devisee, took no estate in the premises by devise, because the right of reentry, if any, arose after the death of the grantor, and could not therefore be the subject of testamentary devise. It is argued that Dr. Griffin parted with every vestige of interest or estate in the land, retaining nothing which he could convey or transmit by descent; that any future relation between him and the property would be created by breach of the condition on the part of the grantee or its successors or assigns; and that such mere possibility of reverter was not a right to re-enter which could be assigned or devised. Counsel for the city of Los Angeles take the position also that the right to re-entry existed only in the grantor or his heirs.

[1] It is quite true that at common law the benefit of a condition subsequent in a grant of real estate could be reserved only to the grantor and his heirs, and this rule still prevails in states in which the common law has not been swept aside by statute. Such cases as Upington v. Corringan, 151 N. Y. 143, 45 N. E. 359, 37 L. R. A. 794, and others cited by counsel for the city, discuss this rule and trace its origin to a wish to discourage maintenance.

[2] But in California, by Code provision "a right of re-entry, or of repossession for breach of condition subsequent, can be transferred." Section 1046, Civ. Code. This, as the Code commissioners said of it at the time of its adoption, reverses the rule in force in New York. But, say counsel for the city, there is no right, no estate—nothing upon which an assignment may operate until after breach of condition. With this view we cannot agree.

[3] The deed of Dr. Griffin does, it is true, employ the words of conveyance usual in the transmitting of complete title in fee, but instruments of this kind are to be read, like other contracts, with the purpose of carrying out the intention of the parties.

> "It is impossible to lay down an invariable and universal rule of construction. The tendency of modern decisions is to uphold conveyances, and give effect to the intention of the parties, regardless of technical rules of construction." Faivre v. Daley, 93 Cal. 664–671, 29 Pac. 256.

[4] Applying this rule to the deed before us, we are forced to the conclusion that it was the intention of the parties to that instrument that the city should enjoy the use of the property for its reservoir and ditches so long as it maintained them as a part of its irrigation system as then contemplated; that its right to hold the land should be forfeited upon its abandonment of the property for the designated use; and that the reservation in favor of the grantor was one which should pass to heirs or assigns of the grantor. It was a contingent estate, not a mere naked possibility of a future right, and therefore it was a species of property capable of passing by will or transfer. Section 699, Civ. Code.

[5] If the city, ignoring the limiting words of the grant, had prepared to use the land for a fairground, a park, or a place for storing municipal property, or as a site for a public building, there can be no doubt that the grantor's assignee could have invoked the power of equity to prevent such a con-

summation. Pavkovich v. Southern Pacific Railroad Co., 150 Cal. 39, 87 Pac. 1097; Newlove v. Mercantile Trust Co. of San Francisco, 156 Cal. 657, 105 Pac. 971.

[6] And it is equally certain that the estate necessary to support the assignment in such a case is sufficient foundation for the right asserted by the plaintiff in this action. Taylor v. McCowen, 154 Cal. 798–805, 99 Pac. 351. We conclude, therefore, that the plaintiff has succeeded to the right of the grantor.

There is no force in the contention that under the terms of the deed the city was bound merely to erect and maintain the dam, ditch, and reservoir, but that the contemplated use of the water was not required; and Reclamation District No. 551 v. Van Loben Sels, 145 Cal. 181, 78 Pac. 638, cited to support this contention, does not do so. In that case the grant provided that the property should be used for reclamation purposes reverting to the grantor when abandoned and used no more for such purposes. The court found that the land was used and had been continuously used for such purposes and this court sustained the finding as supported by the evidence. In the case at bar the evidence and the findings are that since 1904 the property has not been devoted in any manner or degree to the objects for which it was conveyed, namely, "the erection and maintaining of said dam, reservoir, and ditch"; nor does the case of Behlow v. Southern Pacific Railroad Co., 130 Cal. 16, 62 Pac. 295, support the counsel for Los Angeles in their contention that, irrespective of use, the mere existence of the dam prevents the successful assertion of plaintiff's claim. In that case it was held that irregular use of the property for railroad purposes sufficiently complied with the obligation to devote the land to railroad purposes only. But here it was shown that, aside from the occasional conducting to the lake in the park of the rainwater which had filled the reservoir, the city made no pretense of "maintaining" the dam, reservoir, or ditch, or of "making use of the premises" for such maintenance. The lake had other sources of supply, and so little did the city's mandatories depend upon the reservoir as a means of filling the lake in the park that the appliances connected with the reservoir were permitted to get out of repair. In October or November, 1905, the reservoir was drained by the opening of the water gate by a French woman living near—"an act of meanness," as one of the findings characterizes it. During half of 1910 there was no water at all behind the dam, and the water commissioners who held title for the city solemnly declared the property abandoned so far as public use was concerned. Perhaps, as now asserted, this declaration did not bind the city, but, taken with all of the other testimony upon this subject, it has certain evidentiary value which must be regarded.

[7] We fail to find any evidence or findings to support the conclusion of law that "defendants have not ceased to use" the indicated ten acres "in the manner specified in the Griffin deed."

It is contended by the city and admitted by plaintiff that restraints of this character are to be construed strictly against the grantor; but, giving such interpretation to the deed before us, we are compelled to hold that plaintiff is in a position to maintain his action, and to have his title quieted as to all of the land included in the original grant to the city by his predecessor in interest except that part of it to which, by his stipulation, he admits the city has title. This conclusion is supported by such authorities as Papst v. Hamilton, 133 Cal. 631, 66 Pac. 10, Firth v. Marovich, 160 Cal. 257, 116 Pac. 729, Ann. Cas. 1912D, 1190, and Parsons v. Smilie, 97 Cal. 647, 32 Pac. 702.

That part of the judgment from which the city of Los Angeles appeals is affirmed. Those parts of the judgment and the order from which plaintiff appeals are reversed.

We concur: HENSHAW, J.; SHAW, J.

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176 Cal. 488

MASSACHUSETTS BONDING & INS. CO. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (S. F. 8329.)

(Supreme Court of California. Nov. 15, 1917.)

1. MASTER AND SERVANT 🔑417(3) — WORKMAN'S COMPENSATION ACT—CERTIORARI.

Award of Industrial Accident Commission can be annulled by a proceeding in review, if the commission exceeded its powers, if the award was procured by fraud or was unreasonable, or if the findings of fact upon which it was made do not support it; but upon no other grounds, and it cannot be set aside for errors of procedure only or for insufficiency of the evidence, if there is substantial evidence to support it, or for rulings on evidence amounting only to error and not affecting jurisdiction.

2. MASTER AND SERVANT 🔑419—WORKMEN'S COMPENSATION ACTS — POWERS OF COMMISSION—PROCEDURE.

The Workmen's Compensation Act (St. 1913, p. 279) empowers the Industrial Accident Commission to adopt reasonable and proper rules of practice, and it need not follow the practice of the courts, so that notice that an award would be amended, unless good cause against it was shown within 10 days, was not improper.

3. MASTER AND SERVANT 🔑419—WORKMEN'S COMPENSATION ACTS — AWARD — MATTERS CONCLUDED.

Where the insurer and employer did not attack the finding of the original award that the injured person was the employé of the master, it could not, on a proceeding for an amendment of the award, contend that the relationship did not exist.

4. MASTER AND SERVANT 🔑419—WORKMEN'S COMPENSATION ACTS—AWARD — WAIVER OF OBJECTIONS.

Where the Accident Commission gave notice that an award would be amended in the absence of good cause shown, and the insurer appeared and objected on the ground that the relation of master and servant did not exist, its failure to object on other grounds waived them.

5. Master and Servant 🔑419—Workmen's Compensation Acts—Proceeding of Commission—Validity.

If it was error for the Industrial Accident Commission to serve notice that unless the employer or insurer showed good cause the award would be amended, as placing the burden of proof on the employer, such error did not vitiate the amended award.

6. Master and Servant 🔑419—Workmen's Compensation Acts—Temporary Compensation—Effect.

Payment of an award for temporary disability and the release thereon were no bar to the subsequent proceeding for compensation for the permanent disability caused by the same injury.

7. Master and Servant 🔑382—Workmen's Compensation Acts—Awards—Validity.

Under specific provisions of Workmen's Compensation Act, § 32b, a release given on payment of a temporary disability award is not valid unless approved by the commission, or unless it provides for payment of full compensation.

8. Master and Servant 🔑401—Workmen's Compensation Acts—Proceedings—Admissions.

A statement of a physician on which an award is founded, though not sworn to, when made a part of the application for an award, and not controverted, has the same standing as an admission of fact made by the pleadings in an ordinary action at law.

In Bank. Proceeding by J. B. Kelley for workmen's compensation, opposed by C. M. Manley and Jesse Marks, employers, and by the Massachusetts Bonding & Insurance Company, insurer. On application of the insurer for a writ of review of an award by the Industrial Accident Commission in favor of the applicant. Application denied and award affirmed.

John Ralph Wilson, of San Francisco, for petitioner. Christopher M. Bradley, of San Francisco (W. H. Pillsbury, of Oakland, of counsel), for respondents.

SHAW, J. This is an application for a writ of review of an award made by the Industrial Accident Commission in favor of J. B. Kelley, against said petitioner as insurance carrier, and C. M. Manley, and Jesse Marks, as employers of said Kelley.

Kelley was injured in May, 1914. He immediately applied to the commission for compensation, and an award was made on April 28, 1915, allowing him $472.50 as a temporary disability indemnity. This sum was paid in full on May 29, 1915, and Kelley's receipt taken therefor. Thereafter, on January 15, 1917, Kelley applied to the commission for a permanent disability rating, under section 25d of the Workmen's Compensation Act (St. 1913, p. 293), on the ground that his injury had developed into a permanent disability, and that he was entitled to an additional allowance on that account. His application stated the facts, and had attached thereto a certificate of a surgeon describing the permanent disability. Thereupon the commission issued and served upon the petitioner herein a notice stating the fact that the physician's report accompanying Kelley's petition showed that Kelley had suffered a permanent disability equal to 18 per cent. of the total disability, and that, unless good cause to the contrary be shown in writing and filed with the commission within 10 days from the date of said notice, the previous findings and award would be amended so as to provide a further allowance to Kelley of $337.50. Within the 10 days said company filed with the commission an answer in writing, stating that it objected to the proposed amendment, on the ground that at the time of the injury Kelley was not in the employment of Manley, whom alone it had insured, and that it was not responsible for any compensation payments whatever. It made no other objection to the proposed amendment. Thereupon the commission considered the matter, and made an award allowing said Kelley the sum of $337.50, to be paid by said insurance company, C. M. Manley, and Jesse Marks. It is this award which the petitioner here seeks to have annulled by means of a writ of review.

[1] The proceeding in review is not an appeal. The award can be annulled in such proceeding, if the commission exceeded its powers in making it, or if it was procured by fraud, or if it is unreasonable, or if the findings of facts upon which it was made do not support it, but upon no other grounds. Section 84. It cannot be set aside for errors of procedure only, or for insufficiency of the evidence, where there is substantial evidence to support the findings, or for rulings upon the admission or exclusion of evidence, amounting only to error and not affecting the jurisdiction.

[2] The petitioner claims that there was no jurisdiction to make the award, because of the fact that the notice did not state the time for hearing, but merely declared that the proposed amendment would be made unless good cause to the contrary was shown in writing within 10 days. The Workmen's Compensation Act empowers the commission to adopt reasonable and proper rules of practice in proceedings before it. Any notice or method of procedure which does not transgress the constitutional mandate regarding due process of law, or the provisions of the act itself, is within the power of the commission. It is not obliged to follow the methods in use in the ordinary courts of the land. The method here provided gave the parties interested an opportunity to make such objection and opposition before the commission to the proposed amendment as they desired. So far as we can perceive it is not open to any objection on constitutional grounds. The act provides that such awards may be amended, "if opportunity to to heard is given." This method afforded

such opportunity, and does not contravene the provisions of the act in that regard.

[3] The sole objection made by the written answer of the insurance company was without merit. The original findings and award declared that Kelley was in the employment of both Manley and Marks at the time of his injury. This finding and award was not attacked by any proceeding in review, as provided in the act, and it had become final long before the new proceeding was begun. It was conclusive upon the parties with regard to their relation to the injured person.

[4] Accompanying the petition of Kelley for the permanent allowance was the doctor's certificate stating the nature of the disability. The notice to the insurance company referred to this certificate, and stated the intention of the commission to make the amendment of the award, unless good cause to the contrary was shown. The appearance of the insurance company, its objection on the ground that it was not liable at all because Manley was not the employer of Kelley, and its failure to make other objection or to offer any other proof concerning the disability stated in the physician's certificate, was a waiver of any other objection to the proceeding. The procedure adopted by the board is much less formal than that prevailing in the ordinary judicial tribunals, but that fact does not make its awards invalid.

[5] It is claimed that the notice stating that the amendment would be made unless good cause to the contrary was shown placed the burden of proof upon the insurance company instead of upon Kelley, where it belonged. Even if this were true it would not avoid the award. It would be mere error as to the proper method of procedure. In any event the company is not injured thereby, since it did not seek any opportunity to introduce evidence upon the facts alleged against it.

It is not always necessary for a tribunal of this character, or indeed for any tribunal, to have formal evidence offered and received, in order to make an order or judgment. Here the company was fairly informed of the purpose of the commission to make the award upon the conditions stated in the notice. They were advised of the facts upon which it was to be made. Instead of offering evidence to the contrary, they submitted the case upon the facts stated. Their conduct in the matter, although not expressed by any formal writing, was substantially the same as that of one who appears in court and submits his cause upon a demurrer to the allegations of the charge against him. It was an admission of the truth of the allegations. An award made in such a manner is not, for that reason, made without jurisdiction of the cause by the tribunal making it. Nor can it be said that it was made without evidence. The admission of the parties, made by their tacit acquiescence, is equal in value to the formal evidence of witnesses, and may be made the basis of an award.

[6, 7] The payment of the temporary disability award, and the release thereon, was no bar to the subsequent proceeding for compensation for the permanent disability caused by the injury. It did, in terms, purport to release the company from all claims for compensation by reason of the injury, but the money paid was sufficient only to satisfy the award previously made, and there was no consideration for the release of any additional right or of any demand for the permanent disability finally resulting from the injury. Furthermore, by the provisions of the act (section 32b), no release is valid unless it provides for the payment of full compensation, or unless it shall be approved by the commission. This release was not approved by the commission and it did not provide for payment of full compensation. Therefore it is not valid under the act.

[8] The question whether the report of the physician on which the award was founded, and which was not sworn to, was competent evidence does not arise in the case. It was a part of the application made by Kelley, and it was not controverted in any way by the company. As above indicated, it was in substance the same as the allegation of a complaint in a superior court which is not controverted by the answer. The facts stated in it have the same standing as an admission of fact made by the pleadings in an ordinary action at law.

These comprise the objections made to the validity of the award in question. We find no sufficient cause for annulling it.

The application is denied and the award is affirmed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; MELVIN, J.; HENSHAW, J.; VICTOR E. SHAW, Judge pro tem.

34 Cal. App. 737

PEOPLE v. WHITNEY. (Cr. 383.)

(District Court of Appeal, Third District, California. Sept. 29, 1917.)

RAPE ⚷52(1)—STATUTORY OFFENSE—CREDIBILITY AND PROBABILITY OF EVIDENCE.

In a prosecution for statutory rape, evidence by prosecutrix that she slept with defendant during a term of years, in the house, and with the consent of defendant's wife, *held* not too incredible to sustain a verdict of guilty.

Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

George F. Whitney was convicted of a statutory offense, and he appeals. Affirmed.

Hatton & Scott, of Modesto, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

BURNETT, J. Defendant was convicted of statutory rape, the prosecutrix being under the age of consent. She was an adopted child, and had lived with defendant and his wife for six years. She was nearly 18 when the act of intercourse charged in the information is alleged to have taken place. She testified that immediately after being taken into the home of the Whitney's she began to sleep in the same bed with the defendant, and that this practice, with occasional intermissions, was continued during all the years that she lived with them. She further testified that this was agreeable to Mrs. Whitney; in fact, that the latter preferred to sleep alone. She declared also that defendant had improper relations with her at frequent intervals over nearly the whole of this period. She was subjected to a rigid cross-examination covering 250 pages of the transcript, but her testimony was unshaken. In fact, as often happens in such protracted cross-examinations, she fortified and strengthened the impression made by her examination in chief. The only point made by appellant in his brief of nearly 200 pages is that the story is inherently improbable, and therefore it should be rejected by this court and the conviction reversed.

We have taken pains to read with some care all of her testimony, and far from saying that it is altogether incredible, the impression we receive is that it bears the earmarks of truth and sincerity. At any rate, all the considerations advanced by the learned counsel for appellant were for the cognizance of the jury, and we must assume that they received careful and conscientious attention. We may add that the story of the prosecutrix does not approach so near the line of the improbable and incredible as in many convictions upheld by this and other appellate courts. The question has been fully discussed at various times, and nothing of good can be accomplished by attempting to add to what has been said. It is sufficient to refer to the following cases: People v. Kaiser, 119 Cal. 458, 51 Pac. 702; People v. Logan, 123 Cal. 414, 56 Pac. 56; People v. Rongo, 169 Cal. 75, 145 Pac. 1017; People v. Lewis, 18 Cal. App. 364, 123 Pac. 232; People v. Crawford, 24 Cal. App. 403, 141 Pac. 824.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

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34 Cal. App. 734

SATTERWHITE v. GARRISON, County Auditor. (Civ. 2116.)

(District Court of Appeal, First District, California. Sept. 28, 1917. Rehearing Denied by Supreme Court Nov. 26, 1917.)

1. Officers 🔑30 — Eligibility — Holding Other Office.

Const. art. 4, § 19, providing that no senator or member of the assembly shall, during the term for which he shall have been elected, hold or accept any office, trust, or employment under the state, provided that this shall not apply to any office filled by election by the people, applies to a member of the Legislature, who was holding two offices at the time the amendment took effect.

2. Officers 🔑30 — Eligibility — Holding Other Office—"Office, Trust, or Employment Under This State."

A deputy district attorney, though generally known as a county officer, holds an "office, trust, or employment under this state," within Const. art. 4, § 19, prohibiting members of the Legislature from holding any such office, trust, or employment.

3. Officers 🔑30 — Eligibility — Holding Other Office—"Office Filled by Election by the People."

A deputy district attorney does not hold an office filled by election by the people, within the exception contained in Const. art. 4, § 19, as, though the office of district attorney is filled by election, the Political Code, by providing for the appointment, salary, and term of office of the deputy district attorney, recognizes his office as distinct from that of the district attorney.

4. Officers 🔑30 — Eligibility — Holding Other Office.

Const. art. 4, § 19, precludes members of the Legislature from seeking or holding any appointive office or employment in or under any department or subdivision of the general state government by the seeking or holding of which his independent action as such member of the Legislature might be influenced or affected.

Appeal from Superior Court, Alameda County; William H. Waste and William H. Donahue, Judges.

Petition by William T. Satterwhite for a writ of mandate directed to E. F. Garrison, as Auditor of the County of Alameda, State of California. From a judgment for defendant, the petitioner appeals. Affirmed.

D. C. Dutton, of Oakland, for appellant. W. H. L. Hynes, Dist. Atty., and James M. Koford, Asst. Dist. Atty., both of Alameda, for respondent.

PER CURIAM. The petitioner, being a deputy district attorney of the county of Alameda, applied to the superior court for a writ of mandate directed to the defendant, auditor of that county, commanding him to issue and deliver to the petitioner a warrant for the amount of his salary as such deputy district attorney for the period between December 21, 1916, and the end of that month—the defendant having theretofore declined to do so, basing his refusal upon the ground that the petitioner having been elected a member of the Legislature was, by section 19 of article 4 of the Constitution as amended and in effect on said 21st day of December, inhibited from holding any office or employment under the state during the term of his legislative mandate. The trial court upheld the contention of the defendant—which was raised upon demurrer to the petition—denied leave to amend said petition, and entered judgment in favor of defendant for his costs. Petitioner appeals from such judgment.

[1] The first contention of the appellant is

that the amendment to said section of the Constitution taking effect December 21, 1916, does not apply to him for the reason that he was holding the two offices in question at the time said amendment took effect, and that to apply it to his case would be to make the amendment retroactive. It is unnecessary, in our view, to discuss at length this first objection of the appellant as the question was exhaustively considered by the District Court of Appeal for the Third District in the recent case of Chenoweth v. Chambers, 164 Pac. 428, in which the same contention was made and held to be untenable. We are satisfied to follow the reasoning and authority of that case.

[2] It is next urged by appellant that the constitutional inhibition does not apply to him for the further reason that a deputy district attorney is not the holder of an "office, trust or employment under this state." The language of the particular section is as follows:

> "No senator or member of the assembly shall, during the term for which he shall have been elected, hold or accept any office, trust or employment under this state: Provided, that this provision shall not apply to any office filled by election by the people."

While it must be conceded that a deputy district attorney is not one of the state officers provided for by the Constitution and he is what is generally known as a county officer, we think the terms of the Constitution "office, trust or employment under this state" have a much broader signification than that contended for by appellant, and that his office must be held to be covered by them. In People v. Leonard, 73 Cal. 230, 14 Pac. 853, it was held that a supervisor—who also is a county officer—is the holder of a "civil office of profit under this state." So also of a county superintendent of schools in Crawford v. Dunbar, 52 Cal. 39; and of a sheriff in Searcy v. Grow, 15 Cal. 117. We think these cases are not overruled by Nicholl v. Koster, 157 Cal. 416, 108 Pac. 302, which holds that probation officers are not "officers of the state government," but are "minor officers of the local county government"; the term "officers of the state government" being evidently much more restricted and of narrower import than the clause of the Constitution now under consideration.

[3] This second contention of the appellant must therefore be rejected, as also his third, that a deputy district attorney, if the holder of any office at all, occupies one "filled by election by the people," and therefore is not affected by said constitutional provision. The argument in support of this last proposition is that as a deputy district attorney is the holder of no office distinct from his chief, and is in contemplation of law the district attorney, who holds by election, his deputy therefore is the holder of an "office filled by election by the people." But the Political Code of this state by providing for the appointment, the salary, and term of office of a deputy district attorney, recognizes him as an entity distinct from his chief. His office being filled by appointment, it would be absurd to regard it as one "filled by election by the people," and therefore not affected by the constitutional inhibition which we are considering.

[4] Upon the merits of the whole case we are of the opinion that the intent and purpose of the framers in proposing, and of the people in adopting, this constitutional provision was the preclusion of members of the law-making branch of the state government from seeking or holding any appointive office or employment in or under any department or subdivision of the general state government, by the seeking or holding of which his independent action as such member of the Legislature might be in any wise influenced or affected.

For the reasons above set forth the judgment is affirmed.

(34 Cal. App. 742)

CHURCH v. FIDELITY & DEPOSIT CO. OF MARYLAND. (Civ. 1875.)

(District Court of Appeal, Second District, California. Oct. 2, 1917. Rehearing Denied by Supreme Court Nov. 26, 1917.)

1. INSURANCE 🔑665(1) — ACCIDENT POLICY — CAUSE OF INJURY—EVIDENCE—SUFFICIENCY.
Evidence *held* to support judgment in favor of holder of accident policy.

2. INSURANCE 🔑265—ACCIDENT INSURANCE —WARRANTIES—MATERIALITY.
Where the court found that a statement in an application that insured was mentally and physically sound was true, it was immaterial whether or not it was a warranty.

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by Arthur R. Church against the Fidelity & Deposit Company of Maryland. Judgment for plaintiff, and defendant appeals. Affirmed.

A. L. Abrahams, J. Crider, Jr., and Chas. W. Fricke, all of Los Angeles, for appellant. Porter & Sutton, of Los Angeles, for respondent.

SHAW, J. The only point requiring notice in this appeal by defendant from a judgment rendered in favor of plaintiff upon an accident policy issued to him by defendant is whether or not the evidence supports certain findings of the court upon which the judgment is based.

On July 14, 1913, defendant issued to plaintiff, who was a member of the Los Angeles fire department, an accident insurance policy, the express consideration for the issuance of which, other than the premium specified, was "the agreements and statements in the copy of application set forth hereon, which statements the insured makes and warrants to be true by the acceptance of this policy." This copy of application, to which, however, plaintiff did not attach his signature, contained a statement as follows: "I am in sound condition mentally and physically." We may dismiss from consideration the effect of plaintiff's failure to sign this so-called application, and concede for the purposes of this case that his acceptance of the policy to which it was attached was the same in effect as though he had signed the same, for the reason that the court upon sufficient evidence found "that plaintiff was in sound condition, mentally and physically, on the 14th day of July, 1913, at the time said policy was issued." The facts connected with the accident as a result of which plaintiff was injured are as follows: It appears from the evidence that on the evening of April 14, 1914, plaintiff was awakened by a fire alarm, and, in some unexplained manner, fell through the pole hole used by the firemen as a means of descending from the room occupied by them to the ground floor. As a result of this fall the bone designated as the femur of the right hip was fractured. Plaintiff was taken to the receiving hospital, where, shortly after his arrival, he became unconscious, which condition continued for some eight weeks.

The evidence upon which appellant bases its contention that plaintiff was not in sound condition, as found by the court, is that some ten years prior to the time of the issuance of the accident policy, namely, in September, 1904, he, while serving in the fire department was injured by the falling of a roof, a part of which struck him on the head, and, while of insufficient force to knock him down, he was three or four days later, as a result thereof, the subject of a delirious attack. As a remedy for this condition resort was had at the time to a trepanning operation, which afforded immediate relief, and from thence to April 14, 1914, at the time of the injury indemnity for which is herein sought, there was nothing in plaintiff's manner, appearance, complaint, or feeling to indicate that his condition was other than sound, both mentally and physically; in other words, his physical and mental condition was absolutely unimpaired by the operation mentioned. Nevertheless defendant insists that the unconscious condition of plaintiff following the fracture of the hip joint occurring in April 1914, was due, not to such injury, but to the operation in trepanning the skull some ten years prior thereto. And such was the opinion of a medical expert called as a witness on behalf of defendant. As against this testimony, however, was that of plaintiff himself to the effect that since the operation he had never during the intervening time experienced any ill effects therefrom, together with that of his fellow employés that during all of said time he had appeared in a normal condition, and that of other physicians, which clearly tended to negative the testimony given by Dr. French, the expert called on behalf of defendant. Plaintiff was not questioned with reference to whether or not he had previously sustained any accident, nor the nature thereof.

[1, 2] He was not subject to any disease or disorder, and the court was justified in concluding that the unconscious condition following the fracture of the hip was, as stated by one of the medical witnesses, attributable to the shock and suffering which it entailed, rather than to the operation performed ten years before to relieve the pressure upon the brain due to the former accident. While there is some conflict of evidence, that in support of the finding is ample to justify the same. This being true, the question as to whether or not the unsigned application constituted a warranty becomes immaterial; for, conceding it to be a warranty, the finding is that it was true.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

(34 Cal. App. 760)

PEOPLE v. CRANE. (Cr. 374.)

(District Court of Appeal, Third District, California. Oct. 8, 1917.)

1. EMBEZZLEMENT 🔑47 — SUFFICIENCY OF EVIDENCE.

In a prosecution for embezzlement, evidence *held* so insufficient to show that money appropriated was that of the prosecutrix as to render it error not to grant motion for a directed verdict for defendant.

2. CRIMINAL LAW 🔑901—HARMLESS ERROR —EVIDENCE.

Where the court erroneously refused to direct a verdict for defendant at the close of the state's evidence, it was cured by defendant later supplying the required evidence.

3. EMBEZZLEMENT 🔑44(1) — SUFFICIENCY OF EVIDENCE.

Evidence *held* sufficient to sustain a conviction of embezzlement.

4. CRIMINAL LAW 🔑472 — EXPERT TESTIMONY—ADMISSIBILITY.

In a prosecution for embezzlement, where defendant, an attorney, claimed the money was advanced to apply on his fees as well as on the expenses of a suit, and prosecutrix claimed there was a contract for a specified sum, to cover two cases, defendant claiming it covered only the one case, it was error to exclude testimony of an expert as to the reasonable value of defendant's services in the case in which the appropriation occurred.

5. WITNESSES 🔑394 — IMPEACHMENT — REHABILITATING WITNESS.

Where a witness was impeached by testimony that she said she lied for defendant before the grand jury, it was error to refuse to admit a check to show witness was at the place of making such statement before the grand jury met.

6. EMBEZZLEMENT 🔑47—DEFENSES—INSTRUCTIONS.

Where prosecutrix claimed money given defendant attorney, was only to pay for detective services, and that defendant had already received his fees, which defendant denied, it was error to refuse to instruct to acquit if such money was advanced for "fees, costs, and expenses."

Appeal from Superior Court, San Joaquin County; John Hancock, Judge.

H. Stanley Crane was convicted of embezzlement, and he appeals. Reversed.

Ben Berry and La Fayette J. Smallpage, both of Stockton, for appellant. U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

BURNETT, J. The appellant, H. Stanley Crane, was charged by indictment of the grand jury of the county of San Joaquin with the crime of embezzling the property of Mrs. Helen Kleppel. He was thereupon duly tried and convicted of the crime charged. Defendant moved for a new trial, which motion was denied, and he was thereupon sentenced to imprisonment in the state prison for a term of five years. Defendant prosecutes this appeal from the order and the judgment.

The defendant, an attorney at law, was retained by Mrs. Helen Kleppel, the prosecuting witness, to obtain a divorce. It appearing that Mrs. Kleppel's husband contemplated fighting the divorce by cross-complaining that Mrs. Kleppel had been improperly intimate with one Frank Kaplan, defendant decided that detectives would be necessary not only to disprove such a charge against Mrs. Kleppel, but to prove a like charge against her husband. For this purpose, claims the prosecuting witness, defendant demanded $400, which was finally obtained through Kaplan and paid defendant, he having received prior to that time but $20 to cover the costs of commencing suit. It is this $400 which it is charged defendant embezzled. Defendant claims that the money was paid to cover his fees and expenditures in the case as well as detective hire, and that its use lay in his discretion. In opposition to this Mrs. Kleppel seems to have confusedly taken three positions. It appears that at this time defendant was also retained by Mrs. Kleppel's father, H. Buccholz, to collect several debts against Kleppel, amounting to some $1,600, as well as to render other legal services. For these services Buccholz was charged $385. Mrs. Kleppel claims that it was understood that this charge was to include defendant's fee for services in the divorce action. She also claims that defendant promised to conduct her case gratuitously. And she seemed at times to be of the impression that defendant was charging her for her divorce, some $800 (the $400 for detectives and the amount properly chargeable to her father). Defendant claims that no such agreements were had, that the work done for the father was entirely separate and well worth the fee charged, thereby strengthening his claim that the $400 covered only reasonable divorce fees and costs.

Defendant assigns as grounds for reversal: First, that the court erred in the decision of questions of law arising during the course of the trial, in that it denied defendant's motion for a directed verdict, and in that it made erroneous rulings as to the admissibility of evidence; second, that the court erred in instructing the jury; and, third, that the verdict is contrary to the law and the evidence. At the close of the prosecution's case in chief, defendant moved for a directed verdict of not guilty on the ground that it had not been proved that the $400 was the personal property of Mrs. Kleppel, but that it was supplied by Kaplan; and that even if it were Mrs. Kleppel's property, it had not been proved that no detectives were employed.

The only evidence appearing as to the ownership of the money, at the time the motion was made, is as follows:

"Mr. Foltz: Q. Just state what, if any, conversation there was between you and Mr. Crane the first time, about the $400. A. He stated I had to clear myself of that, and have to prove Kleppel's guilt. I told him I was innocent, and it was up, though, to let Mr. Kaplan know about it. So he went with me that evening out to Kaplan's ranch. Mr. Kaplan not being there, we had to go to the Waterloo road. He was working at a place there. Q. Never mind that part of it, that first conversation. Was there any more said between you and him than what you mentioned now—what you just mentioned—anything said about any amount? A. He said he needed $400. I asked him what he wanted it for. He said he needed $400 for that. I said I didn't have that money. Q. Did he tell you at that time what he needed it for? A. He said for detective work. Q. Did he say how many? A. He said he had to hire two detectives. Q. For what purpose, did he state? A. Proving that I was innocent, and finding Kleppel guilty. Q. Then you say you went out to the Waterloo road to Frank Kaplan's place? A. Yes. Q. How far does he live from where your father lives and where you lived? A. About four miles; that is, on the Linden road. He was staying at that time on the Waterloo road, helping some friends out. Q. State whether or not there was any conversation there with Mr. Kaplan and Mr. Crane and you. A. He asked me to go in and get Frank out; then he took Frank up to our ranch, away up on the Linden road, and he had a talk with Frank, and got in the machine at the time. Q. What was said at that time? A. He asked Frank if he was guilty. He stated, 'No.' He said we were both innocent of the charge. And, he said, well, he had to prove that, and he had to have detectives, and that I was to raise $400. Then he wanted Frank to raise it, and he said he didn't see what he had to do with it; he was innocent. Then he says I had to raise that, that was all there was to it. Then he forbid me mentioning the subject. Q. What, if anything, did he say to Frank there at that time? A. Well, * * * he spoke to Frank a few minutes while I went in the house. * * * He told Frank if he didn't clear himself he would be a ruined man. * * * Frank told him he didn't have the money either; neither one of us had it. Q. Then when he got to the Kaplan ranch (subsequently) who did you see? A. He spoke to Mr. Kaplan a long time behind the barn. In the meanwhile Frank went in the house and dressed, and when he came out I asked where he was going. He said he was going to see if he could borrow money from some friend, and then proceeded out to Sperry's addition, and the money was borrowed from a gentleman out there. I don't know the name. * * * Q. Did you see the money paid over? A. No, I didn't see any of that. The only thing I seen was when Frank laid the check down in

Mr. Crane's office, on Mr. Crane's desk. * * * Q. How much was this check for? A. For $400. Q. Who gave that to Mr. Crane? A. Frank gave it to Mr. Crane."

And later the prosecuting witness testifies: "Of course that was the first time he [her father] had heard anything of it, because he had not even known that Frank was paying for these detectives."

Frank Kaplan's testimony appears from the following:

"Q. Just go on and tell all he said about that. A. Well, he said that I would have to clear myself, and the only way to do it would be to raise enough money to employ a couple of detectives to get evidence against Mr. Kleppel; and he said that Mrs. Kleppel didn't have any money, and he thought being that I had been mixed up with it, I ought to help raise the money, and I told him at the time I had nothing whatever to do with it, and that I had no money. So then Mrs. Kleppel— Q. Did you tell him at that time whether—what else did you tell him; go ahead? A. Then Mrs. Kleppel, she wanted to try to raise the money to clear us. Then they went away that night. Q. What, if any, conversation took place at that time between you three? A. Well, he stated that Mrs. Kleppel couldn't get the money, and they wanted me to try and raise the money. * * * Q. Well was there anything finally done about the money at that time? A. Yes. Q. What was done; what agreement was made between you, if any? A. Well, I borrowed the money. * * * Q. Then what did you do after you got the $400? What did you do with it? A. I deposited it in the bank. * * * Q. State whether or not any money was paid—if any check was given to Mr. Crane after that time, after you put the money in the bank. A. Yes, sir."

[1-3] There is nothing in this testimony to suggest that the money was loaned by Kaplan to Mrs. Kleppel. In fact it would indicate just the contrary, that Kaplan borrowed the money and himself paid it as a matter of self-protection. The fact that subsequently Mrs. Kleppel voluntarily promised to and did reimburse Kaplan is of no consequence, and does not serve to disprove that at this time the money paid was Kaplan's. There being no legally sufficient evidence, therefore, to prove that the money alleged to have been embezzled was Mrs. Kleppel's personal property, the court erred in denying appellant's motion for a directed verdict, and such error is reversible, unless subsequently cured. But the required evidence was thereafter supplied by the defendant himself, and we cannot say, therefore, upon the whole record that defendant was prejudiced in said ruling. After testifying that Mrs. Kleppel had spoken to Kaplan about borrowing the money, and that Kaplan had said "he would go to town and raise the money there, or borrow the money there, and would make her the loan," he adds, "I tried to explain to Mr. Buccholz Frank Kaplan had loaned her money to pay the general expenses of her case; that included the employment of detectives." While this evidence is indeed meager, it leaves no doubt in our minds that defendant understood and intended to state that the money was loaned by Kaplan to Mrs. Kleppel. It must have been so understood by the jury, and we cannot say that the conclusion is unwarranted and the error not cured.

Without setting forth the evidence tending to prove that no detectives were employed, it is enough to say that it was sufficient, and although it is of a negative character, this was about the only sort of evidence left open to the prosecution. But here again if we admit that the showing for the people was somewhat inadequate, it was aided by the testimony of the defendant. He admitted that he appropriated $204 of the $400; his claim being that he was entitled to do so under his contract with Mrs. Kleppel. The jury had the right, however, to accept her version of the contract and his as to the use of the money. The amount which he thus admits to have appropriated would satisfy the requirement of the indictment, and in connection with the terms of the trust would make out the offense.

[4] Appellant contends that the court erred in rejecting the testimony of George R. McNoble, an attorney at law, attempted to be used as an expert by defendant. After stating to McNoble in a hypothetical question all the legal services that appellant had rendered Mr. Buccholz, he was asked what he believed would be a reasonable attorney's fee. A general objection to the testimony was sustained. As to this appellant claims that the reasonableness of his charge for the services in the Buccholz Case had an important and relevant bearing upon the question whether he would probably undertake other services without additional remuneration. This is based supposedly upon the theory that lawyers usually charge all that their services are reasonably worth. However, they are not to be distinguished in that respect from the members of other professions or occupations. The rule seems to be that where an express contract is asserted on one side and denied on the other, evidence of the reasonable value of the services is not admissible to affect the probability that an express contract was executed. When it is admitted, however, that an express contract was made, but there is a disagreement as to the amount agreed upon, then such evidence is deemed proper and important. One claim of the prosecuting witness was that there was a contract for a certain amount, but it was to cover two cases. The defendant, on the other hand, insisted that it was intended simply to include his services in the Buccholz Case. Do not these opposing contentions involve the consideration of what was the amount to be paid for each of these cases? And are we not thus confronted by a situation similar to the one mentioned above wherein such evidence is held to be admissible? In other words, it was the contention of appellant that it was agreed that his fee for the Buccholz Case was to be the sum of $385 or about $400, whereas the effect of the testimony of the prosecuting witness is that it was to be less

than that since a portion of it was to cover the other case. We, therefore, have a case for the operation of the rule announced in Ellis v. Woodburn, 89 Cal. 129, 26 Pac. 963, and we think the evidence should have been received.

[5] Appellant claims that he was prevented from rehabilitating witness Helen Spaulding. Miss Spaulding had testified that as stenographer of appellant she had overheard the latter tell Mrs. Kleppel that his charge in her divorce case would be $500, and that she knew the detectives who had been employed. She was, as is easily to be seen, a very important witness for appellant. She was impeached by the testimony of one Mrs. F. G. Schneider to the effect that after testifying before the grand jury, Miss Spaulding had come to the Dameron Hospital and there stated that she had lied for Crane. Appellant thereupon attempted to show that Miss Spaulding had visited the hospital but once as the bearer of a check from Crane to a patient therein, that this was before the hearing before the grand jury, as would be shown by the fact that the check was cashed before the grand jury met. Though Miss Spaulding was allowed to state that her visit to the hospital had been made before the hearing of the grand jury, any testimony as to why she was sent was rejected as hearsay. It is obvious that had this important witness been allowed to answer the question, her rehabilitation in connection with what subsequently could have been shown would probably have been complete. The evidence sought was not subject to the objection of hearsay. It was not offered to prove the truth or falsity of the matters therein contained, but merely as a collateral circumstance relevant to fix the time at which the witness had visited the hospital, and its rejection was as harmful to defendant as the impeachment itself must have been.

[6] As to the instructions requested by appellant and rejected by the court, consideration need only be accorded to one, since the others were covered by instructions given. Appellant requested that the jury be instructed:

> "If you find from the evidence in this case that Mrs. Kleppel paid the defendant the $400 on account of fees, costs, and expenses in her divorce case, you must find the defendant not guilty."

The instruction very clearly contains the gist of appellant's defense. It states the theory upon which the defense was largely conducted. His contention was that he received the money for expenses and to cover his fee. The only evidence in opposition to this was the testimony of the prosecuting witness whose reputation as to truth, honesty, and integrity was bad. In fact, we may say that the case upon its merits is not entirely clear. The showing for the people was rather weak and unsatisfactory. It seems, therefore, especially important that every legal right to which he was entitled should have been accorded to appellant, and we think the jury should have been specifically instructed as requested in reference to this vital contention as to his understanding of the agreement and his appropriation of the money. The general instruction in the language of section 511 of the Penal Code ought to have been supplemented, as suggested, in order that the jury might be fully advised as to the legal bearing of appellant's claim.

We are not prepared to say that the evidence is altogether insufficient to support the verdict, but for the reasons stated, we think the judgment and order should be reversed; and it is so ordered.

We concur: CHIPMAN, P. J.; HART, J.

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34 Cal. App. 754

BEECHAM v. BURNS, City Clerk.

(Civ. 2387.)

(District Court of Appeal, Second District, California. Oct. 4, 1917.)

1. APPEAL AND ERROR 🔑757(1)—BRIEFS—STATEMENT OF FACTS.

In a case in which a clerk's transcript and a reporter's transcript were prepared as prescribed by Code Civ. Proc. § 953a, a brief not containing any part of the judgment roll, but only a statement in the language of appellant's counsel narrating facts said to have been found by the court, and containing no part of the alleged findings except certain documents, and instead of setting out a copy of the portion of the transcript containing testimony offered merely stating that certain facts were shown or that a certain witness testified to a certain fact, and not containing any copy of the record of the judgment or any reference thereto or any statement or copy showing the terms of the notice of appeal, did not comply with section 953c, requiring the parties to print in their briefs or in a supplement appended thereto such portions of the record as they desire to call to the court's attention.

2. APPEAL AND ERROR 🔑1050(1)—EVIDENCE 🔑186(2)—BEST AND SECONDARY EVIDENCE—HARMLESS ERROR.

In an action to compel a city clerk to certify to the sufficiency of a petition for the recall of a trustee in which it appeared that the election returns for the election at which he was elected were lost and could not be found, the former city clerk testified that copies of the results in the several precincts signed by members of the election boards came into his hands; that therefrom he compiled a memorandum showing the results of the election and gave the same data to a newspaper reporter; that he compared the statement printed in the newspaper with his own written statement, and found them in agreement, and thereupon destroyed his own memorandum; that at the time of the canvass of the vote he read off to the canvassing board from the official returns of the several precincts the votes received in each precinct; that thereupon the board passed the resolution declaring the names of the persons elected; that he made a comparison between the returns as read off and the memorandum prepared by him; and that there was no difference between them. Thereupon he was permitted to refresh his memory from the newspaper clipping, and then state the number of votes received by the several candidates, without, however, giving the figures for the several precincts separately. *Held*, that this was substantially the best evidence that could be produced under the circumstances, and it was not prejudicial error to admit it over the objection that it was not secondary evidence, but a mere conclusion of witness as to the contents of the election returns, because it depended upon additions made by the witness.

3. WITNESSES ⟹255(5)—REFRESHING RECOLLECTION—COPY OF MEMORANDUM MADE BY WITNESS.

That the memorandum from which the witness refreshed his memory was a printed copy of the original memorandum which he made raised no legal obstacle to the reception of the testimony.

4. MUNICIPAL CORPORATIONS ⟹159(1)—RECALL OF OFFICERS—PETITION—WITHDRAWAL OF NAMES.

St. (Ex. Sess.) 1911, p. 128, provides relative to the recall of city officers for the filing of a petition that the clerk shall examine and from the registration records ascertain whether the petition is signed by the requisite number of voters, and attach his certificate showing the result; that if he certifies the petition is insufficient it may be supplemented by the filing of additional duplicates of the original petition which shall likewise be examined; and that if the petition be still insufficient, no action shall be taken thereon, but that the petition shall remain on file as a public record. *Held* that, as the clerk has no authority to alter the petition or to receive extraneous evidence of its contents, or to base his certificate upon statements of the electors, but must ascertain from the registration records whether the petition filed is signed by the requisite number of voters, signers may not withdraw their names or have them withdrawn by the clerk after the petition has been filed.

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by William E. Beecham against C. Y. Burns, City Clerk. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

C. W. Lyon and Fredericks & Hanna, all of Los Angeles, for appellant. Roy A. Linn and Muhleman & Crump, all of Los Angeles, and William M. Humphreys, for respondent.

CONREY, P. J. The record on appeal in this case consists of a typewritten "Clerk's Transcript on Appeal" and a typewritten "Reporter's Transcript on Appeal" prepared in the manner prescribed by section 953a, Code of Civil Procedure. Upon such a record it is required that the parties "print in their briefs, or in a supplement appended thereto, such portions of the record as they desire to call to the attention of the court." Section 953c, Code Civ. Proc.

[1] The brief for appellant opens with the statement that this is an action to compel appellant, as city clerk of the city of Venice, to certify to the sufficiency of a certain petition for the recall of J. J. Lewis, one of the city trustees of the city of Venice. Appellant has not printed in or with his brief any part of the judgment roll, but has given us a statement in the language of his counsel narrating facts which he says were found by the court. No part of the alleged findings has been printed, except copies of three documents which, according to the brief, the court found had been filed with the board of trustees of the city by the city clerk, all relating to the proposed recall of Trustee Lewis. So also, referring to some portions of the testimony received at the trial, the brief of appellant informs us that certain facts were "shown," or that a certain witness testified so and so, without setting out a copy of that portion of the transcript containing such testimony. Therefore (although some testimony is properly set forth) it may well be doubted whether appellant has directed our attention to the record in any manner of which we are required to take notice, to an extent which would enable us to apply to the case the principles of law upon which he relies. Probably the appeal is from a judgment rendered in the action, or from some part of such judgment, although the brief does not in terms say so; neither does it contain any copy of the record of the judgment or any reference thereto or any statement or copy showing the terms of any notice of appeal.

In McKinnell v. Hansen, 167 Pac. 887, the writer of this opinion said:

> "Counsel for appellants have not printed in their brief or in any supplement appended thereto any portion of the judgment roll, nor have they printed therein a sufficient portion of the evidence to enable the court to determine the merits of the objections urged in their argument. * * * We are not left in a position where we are able to assume that the quotations in the brief are complete as to the points argued, or to say that the record does not contain the evidence necessary to sustain the findings of fact."

The judgment was affirmed and the decision was, as to the point above stated, approved by the Supreme Court on denial of petition for rehearing. Id., 167 Pac. 888.

In the same case in this court Justice James said:

> "Neither by the statute nor rule of court is a party excused from printing in his brief such portions of the 'record,' which includes both the clerk's and the reporter's transcripts, as he may desire to call to the attention of the appellate court."

While we do not doubt that a judgment herein might be based upon the foregoing grounds alone, we shall pass over these objections so far as to state briefly other reasons why the judgment should be affirmed.

It is argued that the judgment of the lower court in this action should be reversed: (1) Because the court erred in permitting the introduction of incompetent testimony for the purpose of establishing the number of votes cast at the general municipal election held in the city of Venice in April, 1914, and because there is therefore no legal evidence upon which to base a finding of the number of votes cast at that election; (2) upon the ground that the electors signing a recall petition have the right to withdraw their names from such petition after it has been filed with the clerk and at any time until action has been taken thereon.

It is admitted by counsel for appellant that it was shown at the trial that Lewis was elected city trustee at the election of April, 1914, for a term of four years; that it was shown that the election returns for that election could not be found and had not been seen since the time of the city election held in April, 1916; that it was shown that none of the tally sheets in the hands of any election officer could be produced; that the witness Charles S. Thatcher testified that he was city clerk of the city of Venice at and after the April election of 1914, and that he was present when the board of trustees canvassed the votes cast at the April election of 1914. As these are admissions against the interest of appellant, they are, of course, not a part of the record upon which he relies. But when he tells us that said Thatcher testified that the only action taken by the board of trustees was the adoption of a resolution in words and figures as set forth in the brief, and does not give us any copy of the testimony of the witness, he fails to properly present the evidence upon which he relies. If, again, we pass over this objection and assume that, as set forth in the resolution, the canvassing board merely declared the result of the election and did not make any record of the exact number of votes received by the several candidates, we will be brought to the question whether the court erred in permitting certain testimony as secondary evidence whereby to establish the facts which the court is said to have found, viz., that the entire vote cast in the city of Venice for all candidates for the office which the incumbent occupies, at the last preceding general municipal election of that city at which such officer was voted for, was 2,053 votes, and that the number of names necessary to require the calling of a recall election was 514.

[2, 3] By reading that portion of the testimony of Charles S. Thatcher which is set forth in appellant's brief, and by reading in connection therewith the much more complete evidence set forth in the brief for respondent, we find that in the election of April, 1914, there came into the hands of the witness as city clerk "copies of the results" of the votes cast in the several precincts, such copies being signed by the members of the election boards, as required by section 1261, Political Code; that from these so-called "unofficial returns" the witness compiled and made in writing a memorandum showing the results of the election; that the witness gave the same data to a reporter of a newspaper; that a statement covering the same subject-matter was printed in that newspaper on the following day; that the witness compared the printed statement with his written statement, and found that the two tabulations were in agreement; that thereupon he destroyed his own memorandum and kept the newspaper statement in the form of a clipping from the paper. The witness further testified that at the time of the canvass of the vote by the canvassing board he as city clerk read off to the board from the official returns of the several precincts the number of votes that each person received in each precinct; that thereupon the board passed the resolution declaring the names of the persons elected; that he made a comparison between the returns as read off from the official returns and the memorandum which he had prepared and found that there was no difference between them.

Upon the facts thus shown, including the fact of the loss of the official returns, the court permitted the witness to refresh his memory from the newspaper clipping and then to state to the court the number of votes received by the several candidates for the office of city trustee at said election. This is the alleged error. The point presented is not that secondary evidence of the contents of the lost election returns was not admissible; the objection urged is that the evidence received did not constitute such secondary evidence. It is true that the witness testified merely to the number of votes received by each candidate for the office of city trustee at such election in all of the precincts of the city, and did not give the figures for the several precincts separately. Thereby the testimony as given depended upon additions made by the witness, instead of the several items out of which the additions were made. The rule invoked is that the conlusion of the witness is not admissible in evidence, but that he must state the facts from which such conclusion might arise. We think that substantially the evidence was the best that could be produced under the circumstances, and at least it is clear that no prejudicial error was committed. The memorandum showing the votes by precincts was there in the hands of the witness, and the accuracy of his figures as stated in his testimony could have been tested by cross-examination. The fact that the memorandum was a printed copy of the original memorandum which the witness had made raises no legal obstacle to the reception of the testimony. In People v. Brown, 3 Cal. App. 178, 84 Pac. 670, the court, after stating that a witness may refresh his memory from a memorandum written under his direction at the time when the facts were fresh in his memory and he knew the same were correctly stated in the writing, further said that:

> "The rule is not different where the witness has a copy of the original in his hands, which he has compared, and swears that the same is an exact copy of the original memorandum."

In Commonwealth v. Ford, 130 Mass. 64, 39 Am. Rep. 426, where the witness had made a written memorandum of certain facts, which memorandum had been destroyed after it was printed in a newspaper, it was held that the witness might use the printed report for the purpose of refreshing his recollection. The court said:

> "In order to refresh the recollection of a witness, it is not important that the paper, book or memorandum should have been written or printed by the witness himself, or that it should be an original writing. It is sufficient if he saw it while the facts stated therein were fresh in his memory, and he knows that they are correctly transcribed or printed. Upon inspecting it, he can state the facts if thereby called to his recollection."

See note, in which other cases are collated, in Ann. Cas. 1913B, at page 582.

[4] The remaining question in this case is based upon the claim that certain signers of the recall petition requested the clerk to withdraw their names therefrom after the petition was filed with the clerk and before that officer had certified the result of his examination as required by the statute. The statute referred to is found in Statutes Extra Session 1911, p. 128. 1915 Ed., Deering's Gen. Laws, p. 1219. In Laam v. McLaren, 28 Cal. App. 632, 153 Pac. 985, this statute was under consideration, and it was decided that the signers of a recall petition may not withdraw their names therefrom after the petition has been certified to the board by the clerk as sufficient, notwithstanding that the attempted withdrawal preceded formal action on the petition by the board. To the same effect is the decision in Locher v. Walsh, 17 Cal. App. 727, 121 Pac. 712. In neither one of those cases, nor in any decision to which we have been referred, have the courts of this state ruled upon the question of the right of the petitioner to withdraw his name after the petition has been filed and before the clerk has certified its sufficiency. In Locher v. Walsh the statute under consideration, while not the identical statute before us in the present case, was identical therewith as to the provisions here under consideration. The court pointed out that the statute made no provision for the withdrawal of names from the petition, and observed that the statute in its provisions prescribing the clerk's duty to "examine and from the records of registration ascertain whether or not said petition is signed by the requisite number of qualified voters" seems to deal with the petition filed with the clerk, and not a petition after names have been withdrawn therefrom. The statute now before us contains the same words last above quoted, and requires that the clerk attach to said petition his certificate showing the result of said examination. It is then provided that:

> "If by the clerk's certificate the petition is shown to be insufficient, it may be supplemented within ten days from the date of such certificate by the filing of additional papers, duplicates of the original petition except as to the names signed. The clerk shall, within ten days after such supplementary papers are filed, make like examination of the supplementing petition, and if his certificate shall show that all the names to such petition, including the supplemental papers, are still insufficient, no action shall be taken thereon; but the petition shall remain on file as a public record."

The clerk is not clothed with authority to alter the petition when it has been filed; he is not authorized to receive extraneous evidence of its contents, or to base his certificate upon statements made to him by electors who have signed it. His certificate must show the result of an examination whereby "from the records of registration" he shall ascertain whether or not "said petition" is signed by the requisite number of qualified voters. In our opinion, the signers of such petitions may not withdraw their names or have their names withdrawn by the clerk at any time after the petition has been filed. Applying this ruling to the facts as appellant claims that they were in this case, the original and supplemental petitions contained an aggregate number of names of qualified electors exceeding in number the required 514.

The judgment is affirmed.

We concur: JAMES, J.; SHAW, J.

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34 Cal. App. 804

BEECHAM v. BURNS, City Clerk.

(Civ. 2388.)

(District Court of Appeal, Second District, California. Oct. 4, 1917.)

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by William E. Beecham against C. Y. Burns, City Clerk. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Charles W. Lyon and Fredericks & Hanna, all of Los Angeles, for appellant. Roy A. Linn and Muhleman & Crump, all of Los Angeles, and William M. Humphreys, for respondent.

PER CURIAM. This is said to be an action to compel appellant, as city clerk of the city of Venice, to certify to the sufficiency of a certain recall petition for the recall of one Carlos L. Smart, a trustee of that city. In all respects necessary to be considered for the purposes of a decision, this case is like No. 2387, Beecham v. Burns, 168 Pac. 1058, in which our decision is this day filed. Upon the authority of that decision the judgment in this action is affirmed.

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34 Cal. App. 752

FACUNDAS et al. v. CURTIS, City Clerk.

(Civ. 2419.)

(District Court of Appeal, Second District, California. Oct. 4, 1917. Rehearing Denied by Supreme Court Dec. 3, 1917.)

MUNICIPAL CORPORATIONS 🔑159(1)—RECALL—SUFFICIENCY OF PETITION.

The petition for the recall of two trustees, filed with the city clerk, consisted of five sections all fastened together. Each section consisted of three or more sheets fastened together under a separate cover. Showing the signatures and constituting the last page inside the cover of each section was an affidavit of the person who circulated the petition in due form. St. (Ex. Sess.) 1911, p. 128, provides that the signatures to the petition need not be appended to one paper, but that each such separate paper shall have attached thereto an affidavit by a qualified elector of the city or town. *Held*, there being no question as to the sufficiency of the number of signatures, the petition was sufficient under the statute.

Proceedings in mandamus by Walter Facundas and others to compel Fay Curtis, as City Clerk of the City of Taft, to certify the sufficiency of a petition for the recall of two trustees of the city. Peremptory writ issued.

Edson Abel, of Taft, for petitioners. Emmons & Johnstone, of Bakersville, for respondent.

CONREY, P. J. This is a proceeding in mandamus to compel the defendant as city clerk of the city of Taft to certify the sufficiency of a petition for the recall of two trustees of that city.

The only point urged on behalf of the respondent relates to the form of the recall petition. He claims that the petition does not comply with that portion of the statute which reads as follows:

"The signatures to the petition need not all be appended to one paper. * * * Each such separate paper shall have attached thereto an affidavit made by a qualified elector of the city or town, * * * and sworn to before an officer competent to administer oaths, stating that the affiant circulated that particular paper and saw written the signatures appended thereto; and that according to the best information and belief of the affiant, each is the genuine signature of the person whose name purports to be thereunto subscribed, and of a qualified elector of the city or town. * * *" Stats. Ex. Sess. 1911, p. 128; 1915 Ed. Deering's Gen. Laws, p. 1219.

The petition as filed consists of five sections, all fastened together. Each of those sections consists of three or more sheets fastened together under a separate cover. Each section consists of a copy of the petition, followed by the signatures. Following the signatures and constituting the last page inside the cover of that section is an affidavit of the person who circulated the same, in which affiant says:

"That he is a qualified elector of the city of Taft, county of Kern, state of California; that he personally circulated the within and foregoing petition and saw written the signatures appended thereto; that according to his best information and belief, each is the genuine signature of the person whose name purports to be thereunto subscribed, and of a qualified elector of the city of Taft, county of Kern, state of California."

It is our opinion that the petition as thus prepared and filed sufficiently complies with the foregoing provisions of the statute. This being so, and since it is not denied that the number of signatures is actually sufficient to comply with the requirements of the law, as alleged by the plaintiffs herein, we are satisfied that the peremptory writ should issue; and it is so ordered.

We concur: SHAW, J.; JAMES, J.

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34 Cal. App. 749

EISENRING v. SUPERIOR COURT OF CALIFORNIA, IN AND FOR LOS ANGELES COUNTY, et al. (Civ. 2402.)

(District Court of Appeal, Second District, California. Oct. 4, 1917. Rehearing Denied by Supreme Court Dec. 3, 1917.)

DIVORCE ⚷221 — AWARD OF ALIMONY TO HUSBAND—STATUTE.

Under Civ. Code, § 137, providing that when an action for divorce is pending, the court, in its discretion, may require the husband to pay alimony to enable the wife to support herself and her children or to prosecute or defend the action, in a husband's action for divorce, the court had no authority to order the wife to pay the husband suit money and alimony pendente lite, the court's power being restricted in its exercise to the wife, while the law contemplates that the husband, except in the cases provided in section 176, shall support himself from his property or by his labor.

Petition for writ of prohibition by Sarah Eisenring against the Superior Court of the State of California in and for the County of Los Angeles and W. H. Thomas, Judge presiding. Alternative writ made permanent.

Alfred H. McAdoo and Duke Stone, both of Los Angeles, and David E. Bergman, for petitioner. Griffith Jones, of Los Angeles, for respondents.

SHAW, J. Prohibition. In an action for divorce brought by Charles Eisenring against his wife, petitioner herein, the court, upon application therefor by the husband, made an order requiring the wife, at a time specified therein, to pay the husband suit money and alimony pendente lite. She refused to comply with the order; whereupon she was cited to appear and show cause why she should not be adjudged guilty of contempt.

The contention of petitioner is that this order is void, and hence the court had no jurisdiction to proceed against her as for contempt for failure to comply therewith. We are in full accord with this contention.

Concededly authority to make such order finds no support at common law; hence, if authority therefor exists, it must be by virtue of some statutory provision. Section 137, Civil Code, provides that:

"When an action for divorce is pending, the court may, in its discretion, require the husband to pay as alimony any money necessary to enable the wife to support herself and her children, or to prosecute or defend the action."

Clearly the power of the court under this provision is restricted in the exercise thereof to the wife, and no similar provision is made in favor of the husband. To our minds, this section measures the power of the court in the matter of allowing suit money and alimony pendente lite, and, as said in Hagert v. Templeton, 18 N. D. 525, 123 N. W. 283, 25 L. R. A. (N. S.) 234 "was intended to be exclusive and to embrace the entire subject-matter of the allowance of alimony pendente lite." In Groth v. Groth, 69 Ill. App. 68, it is said:

"If alimony from a wife to a husband is a proper thing upon circumstances, legislation is necessary to authorize it. * * * The statute gives her—not him—alimony. To give it to him is not to administer existing, but to make new, law."

To like effect is Greene v. Greene, 49 Neb. 546, 68 N. W. 947, 34 L. R. A. 110, 59 Am. St. Rep. 560; Glynn v. Glynn, 8 N. D. 233, 77 N. W. 594; Brenger v. Brenger, 142 Wis. 26, 125 N. W. 109, 26 L. R. A. (N. S.) 387, 135 Am. St. Rep. 1050, 19 Ann. Cas. 1136; Hoagland v. Hoagland, 19 Utah, 103, 57 Pac. 20.

The law contemplates that the husband, save and except in the cases specified in section 176, Civil Code, shall support himself out of his property or by his labor. The case of Livingston v. Superior Court, 117 Cal. 633, 49 Pac. 836, 38 L. R. A. 175, cited by respondent, was an action brought under this section to compel the wife to support the husband out of her separate property, and upon a trial thereof and the facts being established that he had no separate property, and, in the absence of community property, being unable through infirmity to support himself, as provided in said section, the court made its order requiring the wife to pay him a specified sum monthly. For such action express statutory authority exists; but neither section 176, nor what is said in the Livingston Case, supports respondent's contention. The point here made was urged in the case of Hagert v. Templeton, supra, where the court, having before it a similar question and construing like statutory provisions, held that no authority, statutory or otherwise, existed for the making of an order requiring the wife to pay suit money and alimony to the husband pendente lite.

The alternative writ heretofore issued is made permanent.

We concur: CONREY, P. J.; JAMES, J.

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34 Cal. App. 744

DUNHAM v. McDONALD. (Civ. 1827.)

(District Court of Appeal, Second District, California. Oct. 3, 1917.)

1. Payment ⇨85(1)—"Mistake"—Recovery.

Under Civ. Code, § 1577, defining "mistake" to exist where caused by unconscious ignorance or forgetfulness of a fact past or present, material to the contract, or belief in the present existence of a thing material to the contract which does not exist, or in the past existence of such a thing which has not existed, a party may recover back money paid through error regardless of his own carelessness if the opposite party has not been caused to suffer damage thereby.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Mistake.]

2. Money Received ⇨11—Action—Demand as Prerequisite.

In an ordinary action for money had and received by one party for the use of another, demand is unnecessary before suit is brought, which rule applies generally in all cases where by reason of a contract, express or implied, the obligation of the debtor is fully liquidated, and the duty rests upon him at all times to pay.

3. Payment ⇨89(2)—Mistake—Overpayment—Demand.

Where the cross-complaining defendant was to account to plaintiff according to the several amounts which he was entitled to offset for disbursements, and through mistake did not include in his calculations all of the items he was entitled to charge against plaintiff, plaintiff not having any better knowledge of the circumstances and facts than defendant, a demand for payment was a prerequisite to filing of the cross-complaint for moneys paid over by him on account of the mistake.

4. Payment ⇨89(4)—Recovery of Money Paid by Mistake—Showing of Existing Debt—Pleadings.

It was necessary for defendant to show by appropriate allegation in his cross-complaint for money paid over by mistake to plaintiff that it had not been repaid; i. e., that there was an existing debt.

5. Pleading ⇨147—Allegations of Cross-Complaint Aided by Main Pleadings.

Allegations of the cross-complaint are not to be helped out by any allegations or admissions contained in the main pleadings.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by F. H. Dunham against Wm. Z. McDonald. From a judgment for defendant, plaintiff appeals. Judgment reversed.

Snyder & Woods and W. C. Snyder, all of Santa Paula, for appellant. Geo. L. Keefer, of Los Angeles, for respondent.

JAMES, J. Appeal from an affirmative judgment entered in favor of defendant. Plaintiff brought this action to recover moneys which he alleged remained in the hands of defendant and to which plaintiff was entitled. On the 18th day of August, 1910, pursuant to negotiations theretofore had, defendant addressed a letter to the plaintiff at Santa Paula, Cal., in the following terms:

"I hereby confirm my verbal agreement with you as follows: In case I accept the lease on certain ground owned by G. W. Faulkner and contracted for in that certain lease and agreement dated August 13, 1910, I have agreed with you: First. Out of any profits coming to me, either in land, cash, royalty, or otherwise, after I have settled with Consulting Geologist H. R. Johnson, whose portion of all such is to be one-eighth interest. Second. And after I have deducted the actual expenses incurred by reason of the geological examination of the leased lands and the exploitation of said leased lands by development, sale or otherwise, then from the interest then remaining to me in such lands, cash, or royalty, or otherwise, I am to give you the equivalent of one-fourth of all such remaining interest so accruing to me, either in land, cash, royalty or otherwise, that may be received therefrom by me, which is to be in full payment to you for all your services rendered in aiding me to procure said lease."

Written acceptance of this proposition was made by the plaintiff. Thereafter defendant disposed of his rights in the land and lease. Plaintiff in his complaint alleged that defendant received the sum of $13,500 as consideration for his rights in the land, but that defendant by communications and statements led the plaintiff to believe that defendant only received the sum of $10,000, that settlement was made upon the basis of the $10,000 consideration, and that after October 22, 1912, plaintiff for the first time learned that defendant had received more than $10,000 for his interest in the land and lease. The prayer of the complaint was for judgment for the sum of $765.62. Defendant in his answer took no issue upon the allegation in plaintiff's complaint that he had led plaintiff to believe in the manner alleged that the total consideration for the sale of his interest in the land was the sum of $10,000. He proceeded, however, after admitting that the sum of $13,500 was received, to allege that that sum was the gross amount, and that the defendant had expended such a sum of money on account of the disbursements mentioned in the written contract as to result in his having overpaid the plaintiff. Defendant filed a cross-complaint in which he sought to recover the sum of $749.29 on account of such alleged overpayment. It is upon the prayer of this cross-complaint that recovery was allowed to the defendant by the court. A second amended cross-complaint was filed during the course of the trial. Oral demurrer was made thereto that the alleged cross-complaint did not state facts sufficient to constitute a cause of action. No objection was made to the form of the demurrer, which was promptly overruled by the trial judge, and it was stipulated that the allegations of the cross-complaint might be deemed to be denied. The trial then proceeded. It is the contention of appellant first that the cross-complaint did not state facts sufficient to constitute a cause of action; that the court erred in overruling the demurrer. It is argued first that there was no sufficient statement of facts entitling the defendant to maintain any claim on the account by reason of any alleged mistake. Particularly is it urged that the facts as alleged constituting the mistake are not such as to afford ground for a cause of action. In that part of the amended cross-complaint most material to this consideration is the following:

> "That on or about August 4, 1911, and January 26, 1912, when defendant paid respectively $437.50 and $1,750 to plaintiff, and which sums make up the $2,187.50 received by plaintiff, the expenses above mentioned had been incurred, and paid by plaintiff, and through the First National Bank of Ventura, Cal., and through the Ventura Development Company of Ventura, and defendant thought he had all the items of said expense well in mind, but through inadvertence and unconscious forgetfulness of some of said items of expense he made a clerical error in computation, and overpaid plaintiff the sum of $749.29; and defendant alleges that he did not realize his said mistake in overpaying plaintiff until plaintiff commenced this action, and then defendant for the first time got together vouchers from said development company and said bank for the actual and necessary expenses connected with the said transaction, which vouchers were the means of proving to defendant that he made the said mistake. Wherefore defendant prays for judgment against plaintiff for the sum of $749.29 and for defendant's costs in this action."

[1] It does reasonably appear from the allegation quoted that all of the matters which the defendant alleged he had overlooked were within his easy reach; in other words, that the means of knowledge was at hand at all times. However, by a statute of this state (section 1577, Civ. Code) mistake is defined to exist where it is caused by:

> "(1) An unconscious ignorance or forgetfulness of a fact past or present, material to the contract; or (2) belief in the present existence of a thing material to the contract, which does not exist, or in the past existence of such a thing, which has not existed."

It appears to be the settled law that a party may recover back money paid through error, regardless of his own carelessness, with the condition only that the opposite party has not been caused to suffer damage thereby. In the case of National Bank of California v. Miner, 167 Cal. 532, 140 Pac. 27, quoting from a New York decision, our Supreme Court declares:

> "'It is now settled, both in England and in this state, that money paid under a mistake of fact may be recovered back, however negligent the party paying may have been in making the mistake, unless the payment has caused such a change in the position of the other party that it would be unjust to require him to refund.'"

Under such a state of the law the cross-complaint of the defendant, while showing negligence on his part, nevertheless, no affirmative allegations appearing in the answer to bring the case within the exception noted, did contain facts, so far as the alleged mistake was concerned, to entitle defendant to recover. Also included within the general grounds of demurrer were the objections that the amended cross-complaint failed to state facts sufficient to constitute a cause of action: (1) Because it was not alleged that demand for the payment of the money had been made of the cross-defendant prior to the filing of the cross-complaint; (2) it was not alleged that the money had not been paid.

[2] In the ordinary action for money had and received by one party for the use of another, demand is unnecessary to be made before suit is brought. Quimby v. Lyon, 63 Cal. 394. This rule applies generally in all cases where by reason of a contract, express or implied, the obligation of the debtor is fully liquidated and the duty rests upon him at all times to pay. See Pierce v. Whiting, 63 Cal. 538. We apprehend that this duty to pay does not arise until the debtor has knowledge, or should have knowledge by reason of the circumstances, that he actually owes the claimant money. If he does not know and under the circumstances is excused from inquiring to ascertain the fact, then it would seem that he should be entitled to have demand made upon him and the opportunity to settle before suit. This case, under the allegations of the amended cross-complaint, is of that complexion.

[3] The defendant in his cross-complaint

referred to the same contract which we have quoted hereinbefore, from which it appears that he was to make his accounting to the plaintiff according to the several amounts which he was entitled to offset, and which disbursements he himself was to make. He alleges that through mistake he did not include in his calculation all of the items which he is entitled to charge against the plaintiff. He does not allege that the cross-defendant had any better knowledge of the circumstances and facts than he had. Under such circumstances we think that a demand for payment was a prerequisite to the filing of the cross-complaint.

[4] It seems too clear for argument that it was necessary also to show by appropriate allegation in the cross-complaint that the money claimed by the defendant of the plaintiff had not been paid—in other words, that there was an existing debt.

[5] Allegations of the cross-complaint are not to be helped out by any allegations or admissions contained in the main pleadings. Coulthurst v. Coulthurst, 58 Cal. 239; Harrison v. McCormick, 69 Cal. 616, 11 Pac. 456. For the reasons last stated, we think that the demurrer to the amended cross-complaint should have been sustained.

Other objections made by the appellant require an examination of the evidence to determine their validity, insufficiency of the proof being assigned. As the action of necessity must be retried, and different evidence may be offered at that time, we do not think it profitable to enter upon an examination of that portion of the record.

The judgment is reversed.

We concur: CONREY, P. J.; SHAW, J.

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34 Cal. App. 739

CARTER v. INDUSTRIAL ACC. COMMISSION OF CALIFORNIA et al.

(Civ. 1709.)

(District Court of Appeal, Third District, California. Sept. 29, 1917. Rehearing Denied Oct. 24, 1917; Denied by Supreme Court Nov. 26, 1917.)

1. MASTER AND SERVANT ⟿362—WORKMEN'S COMPENSATION ACT—RIGHT TO COMPENSATION.

An employer is not liable under St. 1913, p. 279, to pay workmen's compensation if the injury did not occur in the usual course of his business prior to amendment of 1917 (St. 1917, p. 831).

2. MASTER AND SERVANT ⟿362—WORKMEN'S COMPENSATION ACT—RIGHT TO COMPENSATION.

A purchaser of grain on the cars who, owing to a shortage of cars, casually employed the applicant to help load grain left by the sellers on the platform, was not liable to pay compensation; the work not being in the usual course of his business.

Certiorari to State Industrial Accident Commission.

Application by Roy E. Ladd for workmen's compensation, opposed by C. T. Carter, employer. To review an award of the Industrial Accident Commission in favor of the applicant, the employer brings certiorari. Award annulled.

Daly Robnett, of Alturas, for petitioner. Christopher M. Bradley, of San Francisco, for respondents.

BURNETT, J. This case comes up on certiorari to review the findings and award of the Industrial Accident Commission in favor of Roy E. Ladd against C. T. Carter. From the return to the writ it appears that Carter was engaged in the business of buying and shipping grain; that he had purchased about 60 carloads of wheat in Modoc county f. o. b. the cars at the nearest railroad station. After the sellers (farmers) had loaded part of the grain, a shortage of cars occurred, necessitating the placing of several loads upon the railroad platform awaiting the arrival of the cars. When the required cars arrived, the farmers, whose duty it was to load the grain, were at their homes, some 12 miles from the station, and in order to avoid the delay incident to sending for them, Carter employed Ladd for four days to load the grain that was on the platform. It was while loading this that Ladd slipped and broke his kneecap, for which injury the commission awarded him indemnity against Carter. As a basis for his protest Carter claims that Ladd was not an "employé" within the terms of the Workmen's Compensation Insurance and Safety Act, since his employment was both casual, and not in the usual course of the business or occupation of Carter. Respondents admit that Ladd was a "casual" employé, but insist that "loading grain" was a part of the usual course of the business of Carter. The sole question for determination is, then, whether upon the facts as disclosed by the record "loading grain" was included within the usual course of Carter's business, which was buying and shipping grain.

[1, 2] Respondents claim that, as grain cannot be bought and shipped without loading it, loading is an incident of shipping. Though this is quite true, it does not necessarily follow that loading grain was within the usual course of business of Ladd's employer. There is no evidence in the record that such was the case. It does appear, however, that of the 60 carloads more than 59½ were loaded by the sellers, and both buyers and sellers testified that the general custom in that community was for the sellers to do all loading, and that the buyer had nothing whatever to do with it. The

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⟿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes occasion calling for the employment of the applicant was accidental and unforeseen, and, as appears from the custom, wholly excluded from Carter's usual course of business. The argument of respondents might well be carried a step further to the effect that the hauling of the grain was an incident to the shipping, since only by that means could the grain be brought to the station. Yet, had Carter found it necessary in an emergency to cart one or two loads from the ranches some 12 miles distant, we do not believe that it could be correctly said under the facts of this case that carting grain was a part of his usual course of business. No more, then, was the loading.

The decided cases in this state interpreting said provisions of the statute excluding from its operation one who is a casual employé and whose employment is not in the usual course of the business of the employer, when carefully considered, seem to uphold petitioner's contention herein. They involve different facts, but the principles therein stated are controlling here. It is sufficient to refer to Maryland Casualty Co. v. Pillsbury, 172 Cal. 748, 158 Pac. 1031; London, etc., Co. v. Industrial Accident Commission, 173 Cal. 642, 161 Pac. 2; La Grande Laundry Co. v. Pillsbury, 173 Cal. 777, 161 Pac. 988. We may repeat that, while the loading of the grain was a necessary incident to the shipping, and that without said loading the shipping and sale could not be had, yet it is perfectly plain that the loading was not within the usual business of the employer. The employment must come within the normal operations of the usual and ordinary business of the employer in order to make him liable. This usual and ordinary business here did not involve the loading of the grain, but embraced simply the purchase and transportation after the grain was loaded upon the cars.

In other words, the applicant was casually employed to do work which was not ordinarily and usually done by or under the direction of the employer in the business in which he was engaged, and if we are to be guided by the language of said act in force at the time of the accident, we must reach the conclusion that the applicant was not entitled to recover. The law, it may be said, was amended by the Statutes of 1917 (page 831), so that no longer is the employment required to be within the usual course of the business of the employer, and if such had been the law when this unfortunate occurrence happened there could be no doubt of the legality of the award, but, as the law existed at that time, we see no escape from the conclusion that the award should be annulled, and so it is ordered.

We concur: CHIPMAN, P. J.; HART, J.

35 Cal. App. 14

YOLO WATER & POWER CO. v. INDUSTRIAL ACC. COMMISSION OF CALIFORNIA et al. (Civ. 1707.)

(District Court of Appeal, Third District, California. Oct. 16, 1917.)

1. MASTER AND SERVANT 🔑417(7)—WORKMEN'S COMPENSATION PROCEEDINGS—REVIEW OF FINDINGS.

An award of the Industrial Accident Commission must be sustained if there is any evidence to support its finding that the injured person was an employé of the party from whom compensation is sought.

2. MASTER AND SERVANT 🔑361—COMPENSATION FOR INJURIES—RELATION OF PARTIES.

An employer's foreman had full authority to hire whatever help he needed, and did hire men admitted to be employés of his employer, and also hired men and teams for a lump sum, and on at least one occasion hired a team separately. He also furnished his own team on some occasions, and the injured person at the time of his injury was driving the foreman's team. The foreman directed the drivers to exactly the same extent as other employés, and intended to engage the injured person as an employé of his employer, and the injured person, who had worked for the employer on numerous occasions, intended to work as usual as its employé. The foreman made no profit on the injured person's services as driver, the injured person being paid the usual wages for driving, and the foreman retaining the amount usually paid for a team. *Held*, that the injured person was an employé of the general employer, and not an employé of the foreman; the contention that, when the foreman obtained a team and man together, he stood in the position of contractor, being without merit.

Proceedings under the Workmen's Compensation Act (St. 1913, p. 279) by Pietro Supparto to obtain compensation for personal injuries, opposed by the Yolo Water & Power Company, alleged employer. Compensation was awarded, and the employer files a petition for writ of review against the Industrial Accident Commission, Pietro Supparto, and W. C. Wallace. Award affirmed.

Theodore A. Bell, of San Francisco, and Arthur C. Huston, of Woodland, for petitioner. Christopher M. Bradley, of San Francisco, Warren H. Pillsbury, of Oakland, and A. C. Murray, of Woodland, for respondents.

BURNETT, J. [1] This case comes up on certiorari to review the finding of the Industrial Accident Commission to the effect that Pietro Supparto, at the time of his injury, was an employé of the petitioner. Petitioner claims that the evidence shows solely that Supparto was an employé of Wallace, and therefore the commission acted beyond its jurisdiction in awarding Supparto compensation against petitioner. If there be any evidence to support the finding of the commission, its award must be sustained. Western Indemnity Co. v. Pillsbury, 172 Cal. 807, 159 Pac. 721.

[2] W. C. Wallace was petitioner's foreman, employed at a wage of $5 a day. He had full authority to hire whomever he pleased to assist him in the company's work. It is admitted that men so employed were employés of the company, and were so recorded on the company's books, receiving $2.25 per day. But when a team and a man were hired a lump sum of $4.50 was paid, and the man's labor was not segregated upon the company's books, but it appears that the man always received $2.25, and $2.25 went for the team.

Very often Wallace furnished his own team, among others used by the company, and sometimes employed one of the men on his own ranch to drive it. Wallace directed the performance of the work as foreman, and, as far as indicated by the record, directed drivers to exactly the same extent as he did the undoubted employés working under him for petitioner. Supparto had always dealt with Wallace as foreman, had worked for petitioner under him innumerable times as a laborer, and had always been paid by check by petitioner directly, with the exception that upon one occasion a few days before his accident he had worked as a driver, for which he had not been paid at the time of his injury. On the day of the accident Supparto had applied as usual to Wallace for work, and Wallace had told him he could use him on the Central canal. Thereupon Wallace with Supparto drove to the canal, and proceeded to unload hay, when the injury occurred. Under these circumstances petitioner claims that the facts come squarely within the case of Western Indemnity Co. v. Pillsbury, supra, and that Supparto was an employé of Wallace, with whom the corporation contracted, so it is claimed, to furnish teams. The position of petitioner is that, when Wallace employed a man merely, he was an employé, that, when a team was furnished separately (as Wallace testified was done on at least one occasion), the driver was an employé, but when Wallace obtained a team and man together, then he stood in the position of a contractor to furnish teams for their work, though he still continued also in the capacity of foreman. The contention of petitioner seems to us very technical and unsubstantial.

There is abundant evidence to support the award, and the Western Indemnity Case is clearly distinguishable. Supparto testifies that he intended to work as usual as an employé of the company, and not of Wallace, on the day of his injury, and Wallace in his verified answer and testimony declares that he intended to engage Supparto as an employé of the company. Wallace made no profit on Supparto's services as driver. Supparto was paid $2.25 per day for driving, which was petitioner's regular rate of pay for workmen, and Wallace retained $2.25 a day for his team.

In the Western Indemnity Co. Case it clearly appears that Stevens was engaged in a permanent business of "teaming and grading," and contracted to furnish teams and drivers for the work. In the present case Wallace was not by trade a contracting teamster, and the evidence is too vague and indefinite to warrant a finding that Wallace had contracted to furnish teams. The evidence as a whole indicates rather that Wallace regarded himself as foreman, and in that capacity employed men and teams. Wallace could not have sued petitioner for breach of contract for failing to accept teams tendered by him, nor could petitioner have sued Wallace for failure to furnish teams, because of this indefiniteness. Stevens did not act as foreman for Tittle, hiring and discharging his men, as did Wallace here, but worked under the foreman of the general contractor. Had Stevens been discharged, his teams must necessarily have been ruled off the work with him. But for aught that appears here Wallace could have been discharged, and yet the teams secured by him retained. There are other points upon which the cases can be distinguished, but the above are sufficient to deprive the case cited of the force claimed for it by petitioner.

To recapitulate: The evidence shows that Wallace was authorized to employ laborers for petitioner, and, acting under that authority and as the agent for the corporation, he did employ the applicant to do work for said petitioner, and while so engaged as such employé in the very work for which he was employed, said applicant was injured. Not only would we be entirely unwarranted in annulling the award, but it should be said that under the evidence the commission could not have reached a different conclusion.

The award is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

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35 Cal. App. 11

McCULLEY et al. v. FEE et al. (Civ. 1702.)

(District Court of Appeal, Third District, California. Oct. 16, 1917.)

RECEIVERS ⚿212 — PURCHASES — LIABILITY OF CREDITORS—PRINCIPAL AND AGENT.

Merely because some of the creditors, on the advice of whose attorney a receiver was appointed, became sureties on his bond, they are not liable, on the theory of his being their agent, for purchases made by him; they in his conduct as receiver having had nothing to do, and in no way having constituted him their agent in the purchase.

Appeal from Superior Court, Modoc County; Clarence A. Raker, Judge.

Action by R. E. McCulley and another against C. H. Fee and others. From an adverse judgment, plaintiffs appeal. Affirmed.

B. B. Robinson, of Cedarville, and C. S. Baldwin, of Alturas, for appellants. Jamison & Wylie, of Alturas, for respondents.

CHIPMAN, P. J. Plaintiffs, as copartners, brought the action against defendants to recover for the value of certain wagons alleged to have been sold and delivered by plaintiff to defendant W. R. Wilkinson, who, it is alleged, was at the time acting in the capacity of receiver of Fandango Lumber Company, a corporation. The remaining defendants are alleged to have been creditors of the said corporation, and that defendant Wilkinson was appointed as said receiver at their suggestion, and that, in the conduct of the business of the said corporation by said Wilkinson under said appointment as receiver, he was acting as their agent. It is alleged, also, in the complaint, that Wilkinson has departed from the state and still continues to absent himself from the state. He was not served with summons, as we understand, and the theory of the complaint was, and the claim now made is, that the defendants other than Wilkinson are liable upon the theory that Wilkinson was their agent. The case was tried by the court without a jury, and the defendants had judgment for their costs, from which plaintiffs appeal.

It appears that one E. G. Peterson commenced an action in the superior court of Modoc county against the said Fandango Lumber Company, a corporation, the Sunset Lake Lumber Company, a corporation, and W. R. Wilkinson, trustee, as defendants, to recover judgment for claims held by sundry creditors of said Fandango Lumber Company previously assigned to plaintiff in the action. Pending the action and upon the complaint therein and the affidavit of the plaintiff, said W. R. Wilkinson was appointed receiver of the assets and property of the defendants. It appeared, also, that previous to the appointment of the receiver the said Wilkinson had been made trustee by a trust deed made by the directors of the Fandango Lumber Company conveying its property in trust to Wilkinson for the benefit of the creditors of said corporation. This trust deed is not in the record. The order of appointment of Wilkinson as receiver recited that he was appointed "with the usual powers of receivers in such cases upon his filing a bond with the clerk of this court and executed to the state of California in the penal sum of $10,000 conditioned for the faithful performance and discharge of his duties in the usual form." Wilkinson executed a bond as required by the court as principal, and among the sureties on his bond were the defendants Fee, Lowell, Stephens, and Peterson.

The court found:

> "That in the transactions between the said W. R. Wilkinson with the plaintiffs in this case as set forth in their complaint filed herein, including the trading of lumber belonging to the said Fandango Lumber Company for wagons, the said W. R. Wilkinson had no order or authority from the court for so doing, nor was he acting under any authority or direction of these defendants now in court or any of them, or at their instance or upon their behalf, nor was he in doing any of said acts acting as receiver as aforesaid, but was acting wholly and entirely in his individual capacity and not otherwise."

Upon the claim made by plaintiffs that Wilkinson was acting in the capacity of agent for defendants, and hence that the latter are liable as principals, the court made the following finding:

> "That the said W. R. Wilkinson was not, when acting as receiver as aforesaid, in any way or manner the agent of these defendants now in court or of any of them, and was not their agent, nor was he acting under any authority or direction from them or any of them in the purchase of the said wagons from plaintiffs as set forth in the said complaint, and had no authority to bind, nor did he bind, these said defendants in any way as agent for them, or otherwise in the purchase of said wagons or any of them."

As to the averments in the complaint that Wilkinson, as receiver, made representations to the plaintiffs that in the purchase of said wagons he was acting as such receiver and was making the purchases for the use and benefit of said Fandango Lumber Company and defendants as creditors thereof, the court finds as follows:

> "That any representations that were made by the said W. R. Wilkinson at the time of the purchase of the wagons from plaintiffs as set forth in the complaint were made by him without any authority from these said defendants or any of them, and without their knowledge, and that no part or portion of said wagons, or any profit in any way that may have been derived therefrom by the said W. R. Wilkinson, was ever received or had by the said defendants now in court or any of them."

Appellants state in their brief that:

> "Respondents in this case are not sued because they were bondsmen of Wilkinson, neither are they sued for damages for malicious abuse of process, or malicious prosecution. The case was based and tried on the theory of agency, and, according to the view of appellants, the facts fit that theory of the law."

Some question is raised as to the validity of Wilkinson's appointment as receiver, appellants claiming that it was void. Whatever view may be taken of this question, it is clear from the evidence that he was acting in that capacity apparently in good faith, and whatever he did was done under the claim of being receiver in the action. While appellants do not claim that the respondents other than Wilkinson were liable on their bond, they do claim, however, that because of the fact that they became sureties for Wilkinson, and that he was acting for the benefit of the creditors of said Fandango Lumber Company, Wilkinson must be held to have acted for them and as their agent.

The finding of the court that Wilkinson made the purchases without any authority from the said respondents, or any of them, and without their knowledge, and that they received no benefit from said purchases. is fully supported by the evidence.

So far as we can discover from the record, Wilkinson was appointed receiver upon the advice of the attorney for all the creditors, of whom respondents are but a part and that these respondents became sureties for Wilkinson in good faith, believing that the appointment of a receiver was for the benefit and advantage of all the creditors; but, in the conduct of Wilkinson as receiver, these respondents had nothing to do and in no way, so far as the evidence discloses, constituted Wilkinson as their agent in the purchase of the wagons sold to him by plaintiffs. We are unable to perceive any ground upon which the said respondents can be held liable in this action.

We are of the opinion that the findings are supported by the evidence and that they are ample to support the judgment.

Judgment is therefore affirmed.

We concur: HART, J.; BURNETT, J.

(34 Cal. App. 785)

ALLEN v. CHATFIELD. (Civ. 2218.)

(District Court of Appeal, First District, California. Oct. 15, 1917.)

1. PARTIES 🔑7(2)—"TRUSTEES OF EXPRESS TRUSTS"—CONTRACTS FOR BENEFIT OF ANOTHER.

One taking a contract to purchase land in his name for the benefit of another became a trustee of an express trust, and could sue thereon in his own name alone, under Code Civ. Proc. § 369, providing that certain trustees could sue without joining the beneficiary.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Trustee of Express Trust.]

2. ASSIGNMENTS 🔑117—ASSIGNMENTS OF INTEREST AS SECURITY—WHO MAY SUE.

One assigning a contract to purchase land for the purpose of raising money to pay on such contract retains the title to the contract, and may sue thereon in his own name in view of Civ. Code, § 2924, providing that a transfer of interest in land as security is to be deemed a mortgage, and section 2888, providing that, notwithstanding an agreement to the contrary, a contract for a lien transfers no title.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Edward O. Allen against Thomas F. Chatfield. Judgment for plaintiff, and defendant appeals. Affirmed.

Theodore J. Savage, of San Francisco, for appellant. Henry Eickhoff, of San Francisco, for respondent.

KERRIGAN, J. The object of this action was to recover $5,000 paid by the plaintiff to the defendant on account of the purchase of certain real property according to the terms of a written contract.

The facts of the case and the controversy arising out of the transaction, with the exception of the points raised upon this appeal, were fully presented to the Supreme Court in a former appeal taken herein and determined by that court in a very comprehensive opinion written by Mr. Justice Shaw. Allen v. Chatfield, 172 Cal. 60, 156 Pac. 47. A second trial being had, the defendant for the first time raised the point that plaintiff was not the real party in interest, and therefore not entitled to recover. Upon this issue the trial court, upon the evidence introduced, found against the contention of the defendant, and gave judgment in favor of the plaintiff for the amount of his demand, from which judgment defendant prosecutes this appeal.

It appears from the evidence without conflict that plaintiff took the contract here involved in his own name, but for the benefit of another person; and it is the defendant's contention that such other person is the real party in interest, and the one entitled to sue upon the contract, and not the plaintiff.

[1] Having taken the contract in his name for the benefit of another, plaintiff became a trustee of an express trust, and was therefore authorized to sue in his name alone. The Code of Civil Procedure (section 369) provides:

> "An executor or administrator, or trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the persons for whose benefit the action is prosecuted. A person with whom, or in whose name, a contract is made for the benefit of another, is a trustee of an express trust, within the meaning of this section."

The reason for the exception established by this section of the Code of Civil Procedure readily reaches also the case of an agent contracting in his own name for an undisclosed principal or group of principals.

> "The defendant contracted directly with plaintiff as a principal, and in such a case the law allows the agent treated as a principal to sue in his own name on the contract, whether the fact of agency was or was not known to the other contracting party. 1 Chit. Pl. 8; Pom. Code Rem. §§ 141, 177; Mechem, Ag. § 755; Phillips v. Henshaw, 5 Cal. 509; Du Bois v. Perkins, 21 Or. 189, 27 Pac. 1044." Tustin Fruit Ass'n v. Earl Fruit Co., 6 Cal. Unrep. Cas. 37, 53 Pac. 693.

> "In Code pleading since the year 1848 the trustee of an express trust has stood in all the Codes as one of the few exceptions to the rule that a civil action must be brought in the name of the real party in interest." 30 Cyc. 85.

See, also, Martin v. Mask, 158 N. C. 436, 74 S. E. 343, 41 L. R. A. (N. S.) 641, and notes.

> "It [the exception] is intended manifestly to embrace, not only formal trusts declared by deed inter partes, but all cases in which a person, acting in behalf of a third party, enters into a written, express contract with another, either in his individual name, without description, or in his own name expressly in trust for or on behalf of or for the benefit of another, by whatever form of expression such trust may be declared. It includes, not only a person with whom, but one in whose name a contract is made for the benefit of another." Considerant v. Brisbane, 22 N. Y. 389.

Section 369 of the Civil Code of Procedure of California corresponds with legislation to the same effect found in other states. Under such provisions it has been held that the person in whose name the contract was made might sue to enforce his causes of action from it arising because, while he is not technically what would at common law have been called "a trustee of an express trust," yet the statute referred to expressly provides that this term shall include "a person with whom or in whose name a contract is made for the benefit of another." Cremer v. Wimmer et al., 40 Minn. 511, 42 N. W. 467.

> "It is further argued for the appellant that plaintiff is not the real party in interest, and no facts are stated in the complaint showing him to be the trustee of an express trust, and therefore his action cannot be maintained. We think the complaint sufficient, and the action properly brought. A trustee of an express trust is a person with whom, or in whose name a contract is made for the benefit of another, and he is authorized to sue without joining with him the persons for whose benefit the action is prosecuted. Code Civ. Proc. sec. 369." Walker v. McCusker, 71 Cal. 594, 598, 12 Pac. 723, 725.

The real beneficiary of the contract might in due time and in his own name have proceeded to secure its benefits, but the rights of the trustee in this respect remained unaffected. Being the trustee of an express trust, he could also, by virtue of the provisions of section 369 of the Code of Civil Procedure, have maintained a like suit. Horseshoe Pier, etc., v. Sibley, 157 Cal. 442, 108 Pac. 308.

> "As the plaintiff held the legal title, it did not concern the defendant, whether he held it in trust for Mrs. Townsend or not. So far as concerned the defendant, he was the real party in interest, and might sue in his own name. Walker v. McCusker, 71 Cal. 594 [12 Pac. 723]." Anson v. Townsend, 73 Cal. 415, 15 Pac. 49.

[2] It is true, as claimed by defendant, that prior to the commencement of this action plaintiff had assigned this contract to one E. P. Vandercook; but it also appears that the assignment was made for the purpose of securing repayment to Vandercook of the sum of $1,000 advanced by him to be used, and which was used, in making a payment to defendant on account of said contract. The transaction then, while it conferred upon Vandercook a lien, did not vest in him the absolute ownership of the contract, but the plaintiff retained sufficient interest therein to authorize him to sue upon it.

> "Every transfer of an interest in property other than in trust, made only as a security for the performance of another act, is to be deemed a mortgage, except when in the case of personal property it is accompanied by actual change of possession, in which case it is to be deemed a pledge." Civ. Code, § 2924.

It was competent for the plaintiff to show that the so-called assignment was intended to be only a pledge to secure payment of the $1,000 advanced by Mr. Vandercook.

> "The fact that a transfer was made subject to a defeasance on a condition, may, for the purpose of showing such transfer to be a mortgage, be proved (except as against a subsequent purchaser or incumbrancer for value and without notice), though the fact does not appear by the terms of the instrument." Civ. Code, § 2925.

> "Notwithstanding an agreement to the contrary, a lien or a contract for a lien, transfers no title to the property subject to the lien." Civ. Code, § 2888.

Construing this section, it was held that under the provisions of the Civil Code even a mortgagor giving a chattel mortgage is not thereby divested of his title to the property, but still remains its owner, while the mortgagee has only a lien thereon, citing Civil Code, § 2888; Bank of Ukiah v. Moore, 106 Cal. 673, 39 Pac. 1071; Shoobert v. De Malta, 112 Cal. 218, 219, 44 Pac. 487, 53 Am. St. Rep. 207.

The judgment is affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

34 Cal. App. 771

ANDERSON v. WILSTRUP. (Civ. 2119.)

(District Court of Appeal, First District, California. Oct. 10, 1917.)

BROKERS 🔑43(3)—EMPLOYMENT TO SELL LAND—WRITING—DESCRIPTION OF LAND.

An agreement authorizing or employing a broker to sell real estate, required by Civ. Code, § 1624, subd. 6, to be in writing, sufficiently describes the property, the state, county, street, and road of location being given, together with the acreage and a specific description of the character of the improvements thereon.

Appeal from Superior Court, Marin County; Edgar T. Zook, Judge.

Action by A. H. Anderson against H. Wilstrup. Judgment for defendant, and plaintiff appeals. Reversed, with direction.

James M. Thomas, of San Francisco, for appellant. Thos. P. Boyd, of San Rafael, for respondent.

KERRIGAN, J. By this action plaintiff sought to recover the sum of $312.50 as a commission alleged to have become due from defendant upon a broker's written contract for the sale of land.

The only point involved in the case is whether or not the authorization of sale describes the property sufficiently to satisfy the statute of frauds (Civ. Code, § 1624, subd. 6). It was conceded at the trial that, if such description be sufficient, plaintiff was entitled to a judgment.

The trial court found in favor of the defendant, and this appeal is from the judgment thereupon entered.

The portion of the contract pertinent to the question involved is as follows:

> "For and in consideration of the services to be performed by A. H. Anderson I hereby employ him as my sole and exclusive agent to sell for me that certain real property situate in the county of Marin, state of California, and described as follows, to wit: 68½ acres on Olive avenue or Black Point road, barn, chicken house 26x40, Brooder house, 14x30, windmill, well

and spring, house of five rooms, running water, 14 acres marsh land."

We are of the opinion that this description contains all of the particulars necessary to identify the premises to be sold, and substantially meets the requirements of the statute. The office of a description is not solely to identify the land, but also to furnish a means of identification. Accordingly, it has been held that a contract to employ a broker to sell real estate will not be declared void merely because of a defect, uncertainty, or ambiguity in the description of the property, but that such defect may be cured, though not created, by such evidence. Proulx v. Sacramento Valley Land Co., 19 Cal. App. 529, 126 Pac. 509. It is only where the question remains a matter of conjecture what property is intended that instruments affecting land will be held void for uncertainty. While it is usual in the case of country lands to describe them with reference to townships, sections, courses, surveys, monuments, and, also by reference to land of adjoining owners, these modes are not exclusive. It often happens that contracts of this character are entered into hastily and under such circumstances as to make it impractical to obtain this specific description for inclusion in the contract. To reject the description here involved would be to declare that only the usual method here indicated might be followed. Courts hold that contracts of this character must specifically or with sufficient certainty describe and identify the land. This, we think, has been done in the present instance. The state, county, street, and road are given, together with the acreage and a specific description of the character of the improvements contained thereon. If for convenience a more exact location was desired in order to identify the property, a mere inquiry as to whether the vendors owned the exact acreage as located, or a reference to the public county records, would have afforded the information. Hines v. Copeland, 23 Cal. App. 36, 136 Pac. 728.

For the reasons given, the judgment is reversed, and the trial court directed to render judgment in favor of appellant in accordance with the prayer of the complaint.

We concur: LENNON, P. J.; RICHARDS, J.

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35 Cal. App. 5

COHN v. HARADA. (Civ. 1693.)

(District Court of Appeal, Third District, California. Oct. 16, 1917.)

1. SALES ⚷82(2)—DELIVERY—PAYMENT—PRESUMPTIONS.
The law implies that payment for personalty sold should be made on delivery.

2. SALES ⚷353(4) — ACTIONS — PLEADING — SUFFICIENCY.
Complaint in action for price of horses is not demurrable for mere failure to allege at what time payment was to be made.

3. SALES ⚷52(7)—ACTIONS—EVIDENCE—SUFFICIENCY.
Evidence in action for price of horses wherein defendant sought rescission on the ground of fraud, *held* to sustain judgment for plaintiff.

4. CONTRACTS ⚷270(1) — RESCISSION — DILIGENCE.
Under specific provisions of Civ. Code, § 1691, the right of rescission must be promptly exercised.

5. SALES ⚷124—RESCISSION—DILIGENCE.
Where defendant purchased horses from plaintiff at his farm and took them to a livery stable at a different city, his subsequent notice to plaintiff that the horses were at such stable, and subject to plaintiff's order, was not sufficient tender to support rescission.

Appeal from Superior Court, San Joaquin County; George F. Buck, Judge.

Action by M. Cohn against N. Harada. Judgment for plaintiff, and defendant appeals. Affirmed.

A. H. Carpenter, of Stockton, for appellant. Snyder & Snyder, of Stockton, for respondent.

CHIPMAN, P. J. The plaintiff alleges in his complaint that he sold and delivered to defendant two horses on December 11, 1916, for which defendant promised and agreed to pay plaintiff the sum of $375; that the whole amount thereof is still owing and unpaid with interest thereon from the 11th day of December, 1916, at the legal rate.

Defendant demurred generally to the complaint on the ground of insufficiency of facts, based upon the failure of the complaint to allege at what time payment was to be made for said horses. The demurrer was overruled and defendant answered, denying the averments of the complaint; admitted that on December 11, 1916, plaintiff sold to defendant two horses for the said sum and alleged that by the contract of sale, plaintiff "warranted said horses to be sound and not over five years of age at that date, and thereby induced defendant to purchase the same, and to promise to pay the above-named sum therefor"; alleged that all of plaintiff's representations as to said horses' soundness and age were false and untrue; that, in fact, said horses were, and each of them was, over the age of five years and unsound in this: "That the hock on one of the legs of each of said horses had been wrenched, and then blistered for the purpose of removing a spavin and the effects of such unsoundness"; that the purchase price agreed upon was $375 and no more, and that on said date, plaintiff "gave a written bill of sale of said horses to defendant, who could not read it, wherein it was falsely and fraudulently provided that defendant should pay plaintiff the further sum of $20 in case one of said mares had a colt"; alleged that said provision for the payment of said further sum was unauthorized and formed no part of said agreement for sale, and was "falsely and fraudulently inserted therein for the purpose of injuring and defrauding defendant out of the above-named sum," and that upon the discovery by the defendant of said unauthorized provisions in said agreement, defendant "promptly rescinded the said agreement of sale and served" notice upon the plaintiff on December 20, 1916, and alleged that defendant "returned said two horses to the place from which he received them, to wit, the stables of Casper Stein," in the city of Stockton, "where said two horses are now, and ever since have been, subject to plaintiff's order." It was stated in said notice that the two horses delivered to defendant on December 11, 1916, were not as warranted "in respect to age and soundness, and that the insertion of $20 in the price to be paid therefor was fraudulent and unauthorized."

The cause was tried by the court without a jury and the court made the following findings:

First. That on the 11th day of December, 1916, plaintiff sold and delivered to defendant two horses for which defendant agreed to pay the sum alleged in the complaint, to wit, $375.

Second. That defendant has not paid said sum or any part thereof and the whole amount is due, together with interest from the 11th day of December, 1916, at the legal rate.

Third. That it is not true that by said contract of sale or otherwise, plaintiff warranted said horses to be sound and not over five years of age at that date, or that he warranted said horses to be sound or over said age at that date, or that plaintiff by said or any warranty, induced defendant to purchase the said horses or either of them.

Fourth. That it is not true that all or any of plaintiff's representations as to the soundness or age of said horses were then or otherwise false or untrue and that it is true that one of said horses was at said time of the age of five years and one thereof was of the age of six years, and it is not true that either of said horses was unsound in the respect mentioned in defendant's answer or at all.

Fifth. That plaintiff on the 14th day of December, 1916, gave a written bill of sale of said horses to defendant (the date of the instrument is December 11th—the finding evidently a clerical error), which contained a provision for the payment of the further sum of $20 in case one of said mares had a colt, but it is not true that said provision was false and fraudulent or that any provision of said contract was false or fraudulent or that the insertion of said provision for the payment of said further sum of $20 was unauthorized or was no part of said agreement of sale or was falsely or fraudulently inserted therein, but that it is true that said provision was inserted in said writing in accordance with the agreement and sale and in accordance with the agreement of plaintiff and defendant and without any fraud on the part of plaintiff.

Sixth. That it is not true that as soon as defendant, as claimed by him in his answer, "discovered that said warranty was, as so alleged by him, false in the particulars mentioned in his answer, or in any particulars, or that as soon as defendant had, as so alleged by him, discovered that plaintiff had changed the terms of said agreement in said bill of sale or had thereby attempted to defraud and cheat him out of the additional sum of $20, as so alleged by him, he promptly rescinded the said agreement; that it is not true that said defendant promptly rescinded said agreement; that it is true that defendant did not, at any time, promptly rescind said agreement; and it is not true that defendant on the 20th day of December, 1916, or at any other time, returned said two horses to the place from which he had received them, and that it is not true that he had received said two horses, or either of them from the stables of Mr. Casper Stein" in the city of Stockton, Cal.

Seventh. That it is true defendant caused to be served upon plaintiff the notice dated December 20, 1916, set forth in defendant's answer, which said notice was served upon plaintiff on said date.

As conclusions of law, the court found that plaintiff is entitled to judgment against defendant in the sum of $375, with interest at the legal rate from December 11, 1916, and for costs of suit. Judgment was accordingly entered from which defendant appeals.

[1, 2] No special demurrer was interposed. The complaint alleged the delivery of the horses to have been made on December 11, 1916, the date on which the sale was made, and the law implies that payment should be made on delivery. The demurrer was properly overruled.

A suggestion is made in appellant's brief that the contract came within the statute of frauds, being for a price over $200. The statute was not pleaded in any manner nor was the question raised upon the admission of testimony at any time during the trial. The defendant admitted in his answer that plaintiff sold the horses to him and alleged that a written bill of sale was given by plaintiff to defendant. The contract, in fact, was fully executed.

[3] We have examined the evidence brought up by the record and are entirely satisfied that there is sufficient to support all the findings. Briefly, the transaction was as follows: The defendant is a Japanese farmer somewhat extensively engaged in the farming business in the island country near Stockton. He testified that he had been so engaged for several years and had bought and used many horses for farming purposes. He met the plaintiff in Stockton on December 11, 1916, and from him learned that he had two horses

which he would sell; they both went to plaintiff's farm a short distance from Stockton where defendant examined the horses very carefully, and after much bargaining, the sale was effected, as plaintiff testified, upon the following terms: That defendant was to pay $375 for the two horses and that as plaintiff had agreed to pay $20 for the services of a stallion, should one of the mares prove to be with colt, plaintiff insisted that defendant should pay that further sum of $20 if the mare should have a colt, and this the defendant finally agreed to do. Whereupon plaintiff delivered the horses to defendant at the ranch and the parties returned to Stockton where defendant placed the horses in care of the person in charge of the stable mentioned in the answer, with instructions to take care of them for defendant. The parties then went into a nearby store where a clerk wrote out the agreement found in the record and plaintiff testified that it was written at the dictation of the defendant and was as follows:

Stockton, Cal., Dec. 11, 1916.
M. Cohn
Sold to W. Harada
1 Queen 2 mares $375.00
1 John
5 years old to date
If mare has colt the buyer has to pay seller $20.00.
Paid M. Cohn
Dec. 11-1916.

Defendant also at the same time signed a check made out by the same clerk on a Stockton bank in favor of plaintiff for the sum of $375, which plaintiff deposited in his bank the same or following day. Three or four days later he received a postal card from the bank notifying him that payment had been stopped. He immediately hunted up defendant and demanded to know for what reason the payment had been stopped, and was told that it was because of the clause in the bill of sale with regard to the $20 in relation to the prospective colt. Whereupon plaintiff immediately—on December 15th—commenced the action. Five days later defendant served his written notice of rescission alleged in the complaint.

There was no evidence that plaintiff gave a warranty as to the age or soundness of the horses, nor is there evidence that defendant was induced to purchase the horses by reason of any warranty. The burden was on defendant not only to prove the warranty, but that he relied upon it.

The memorandum was written by a clerk in the store to which the parties went because neither plaintiff nor defendant could write or read in the English language except to write his name. The clerk, so far as appears, knew nothing of the terms except as he was told by one of the parties. Plaintiff testified that defendant dictated the terms, but, whether he or plaintiff did it, both were present and heard what was told to the clerk, and the memorandum was handed to defendant. There is no pretense that the clerk inserted anything in the memorandum other than as was dictated to him either by defendant or in his presence and hearing.

[4] Upon the question of rescission we think, under the circumstances shown, the court was justified in finding that defendant "did not promptly rescind the agreement," and "did not return or offer to return said horses to the place where he received them." The right of rescission must be promptly exercised. Civ. Code, § 1691.

[5] Defendant did not return or offer to return the horses to the place where they were delivered to him, which was at plaintiff's ranch. It was not sufficient tender to say to plaintiff, as the notice did:

> "Said horses are now at the stables of Mr. Casper Stein, at No. 47 E. Sonora street, Stockton, Cal., subject to your order."

We can discover no ground for a reversal and the judgment is therefore affirmed.

We concur: HART, J.; BURNETT, J.

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35 Cal. App. 17

ALDERSLEY v. McCLOUD et al.

(Civ. 1725.)

(District Court of Appeal, Third District, California. Oct. 16, 1917. Rehearing Denied by Supreme Court Dec. 13, 1917.)

1. Words and Phrases—"Moreover."

The word "moreover" means "beyond this" or "besides this."

[Ed. Note.—For other definitions, see Words and Phrases, Moreover.]

2. Trusts 🔑191(1)—Trust Deed—Power of Sale—Disposal of Proceeds.

Where the purpose of a trust deed is the application of income from land to the use of the beneficiary, a power of sale as the trustees "may deem best for the interest of their trust" was sufficient direction for disposal of the proceeds, as prescribed by Civ. Code, § 857, before its amendment.

3. Trusts 🔑191(1)—Trust Deed—Power of Sale.

Where a trust deed gives a power of sale, it necessarily gives power to convey in fee.

4. Trusts 🔑242—Trust Deed—Power of Sale—Surviving Trustees.

Under a trust deed, wherein land was held in trust solely for the benefit of another, conveyance of one of several trustees of any personal interest he might have in the trust estate did not affect the power of surviving trustees to sell for purposes of the trust as far as conveying the land in fee was concerned, where power of sale was given the survivors.

Appeal from the Superior Court of Butte County; H. D. Gregory, Judge.

Suit in partition by Lyell K. Aldersley against Julia A. McCloud and others. Decree for defendants, and plaintiff appeals. Affirmed.

Clarence N. Riggins, of Napa, and George F. Jones, of Oroville, for appellant. Carleton Gray, of Oroville, for respondents.

HART, J. This is a suit in partition, the object of which is to secure a decree partitioning and dividing between the parties hereto, according to their respective interests therein, the three several tracts of land specifically described in the complaint. These several tracts of land are separately described in as many subdivisions of paragraph 3 of the complaint.

The court made and caused to be entered an interlocutory decree whereby it directed the partition between the plaintiff and the defendant Julia A. McCloud of the tract described in subdivision 3 of paragraph 3 of the complaint, and dismissed the action in so far as it relates to the other lands described in the complaint. The decree, so far as the two last mentioned tracts are concerned, is a final judgment, and it is from said judgment or so much of the decree as directs the dismissal of the action in so far as it relates to the lands described in subdivisions 1 and 2 of paragraph 3 of the complaint that this appeal is prosecuted. The appeal is upon the judgment roll alone. All the facts, however, are set out in the court's findings.

The history of this case is substantially given and some of the salient facts hereof were presented and considered by the Supreme Court in the recently decided case of In re James Aldersley's Estate, 163 Pac. 206. The appeal in that case arose over objection to an order settling the first and final account of Ellen Williams, the administratrix of the estate of James Aldersley, deceased, and involved, as the present appeal involves, the question of the scope and effect of certain deeds of trust. The facts which it is necessary to consider here are stated by the Supreme Court in the opinion in said case as follows:

> "She [Ellen Williams] died pending probate, and Elbert Aldersley succeeded her as administrator of the said estate, while her daughter, Julia A. McCloud, became her administratrix and legal representative. The case turns upon the validity of certain trust deeds, and the distribution to be made of the moneys received from the sale of the trust property.
>
> "John Aldersley was the father of four children, all of whom were living at the time of his death. In 1882 he conveyed a certain parcel of land, known as tract No. 1, to three of his children, Ellen Williams, Edwin and William K. Aldersley, in trust for the benefit and use of his son James, who is the decedent in this estate. On June 10, 1889, John Aldersley made a second conveyance of another parcel of land, designated herein as tract No. 2, to the said grantees, also in trust for the benefit and use of said James. On December 4, 1891, John Aldersley died intestate, leaving his four children as heirs; his wife having predeceased him. Thereafter, on February 13, 1892, James Aldersley, who in 1884 had received a patent from the United States government to a certain homestead, designated herein as tract No. 3, conveyed the land to the same grantees on like terms of trust as the other deeds. Thus the two brothers and the sister held the three parcels of land, which were as a matter of fact contiguous tracts, aggregating 440 acres, all in trust for the benefit and use of their brother James. The three conveyances by which this result was accomplished were substantially identical in form, the provisions pertinent to the consideration of the questions raised by this appeal reading as follows:
>
> "'* * * That said party of the first part, in consideration, * * * does grant, bargain, convey, and confirm unto said parties of the second part or the survivors of them, their heirs and assigns forever: All that certain tract of land situate, lying and being * * * in the county of Butte, state of California. * * *
>
> "'To have and to hold the above-granted premises together with the appurtenances and every part thereof unto said parties of the second part, their survivors and assigns, forever in fee, upon trust, nevertheless, and to and for the uses, interests, and purposes hereinafter limited, described, and declared, that is to say:
>
> "'First. To receive the rents, issues, and profits of said premises, and apply the same to and for the use, purpose, support, and maintenance of said James Aldersley for and during the term of his natural life.
>
> "'Second. After the death of James Aldersley to convey the said premises by deed to said parties of the second part or their survivors or survivor living at the death of said James Aldersley, their heirs and assigns.
>
> "'Third. In case the said parties of the second part deem it advisable or if it becomes necessary to sell the said before-described premises any time prior to the decease of said James Aldersley, said parties of the second part, or the survivor, shall have full power and right to sell and convey said premises upon such terms and price as they may deem best and for the interest of their trust. * * *'
>
> "William K. Aldersley died on February 15, 1906, leaving four children, who are the contestants herein. Elbert Aldersley, already mentioned as the administrator of the estate of James Aldersley, is one of these children. Thereafter, in pursuance of the terms of the trusts, Ellen Williams and Edwin Aldersley took charge of the property. * * * On June 26, 1909, the three tracts of land were conveyed to Julia A. McCloud in consideration of $1,400 in cash and her promissory note secured by mortgage for $1,750. It was stated in the deeds from the trustees that the transfer was made because it was deemed 'advisable and necessary for all persons interested in said property to sell all of the said real property.' The conveyances were effected in one transaction by four separate grant, bargain, and sale deeds, each naming Julia A. McCloud as the grantee in fee, to wit: A deed of tracts Nos. 1 and 2 by Edwin Aldersley and Ellen Williams, trustees; a deed of tract No. 3 by Edwin Aldersley and Ellen Williams, trustees; a deed of tracts Nos. 1, 2, and 3 by Edwin Aldersley and Ellen Williams individually; and a deed of tracts Nos. 1, 2, and 3 by James Aldersley individually. After Julia A. McCloud took possession of the property, the trustees and James ceased to live thereon. James died intestate on April 25, 1913."

In addition to the facts above narrated, the following further facts were found by the court in the present case, viz.: That the said William K. Aldersley, on the 15th day of October, 1903, by a deed of gift, conveyed to the plaintiff herein all his right, title and interest in and to all the lands granted in trust to the trustees by John Aldersley; that said deed to the plaintiff was on the 26th day of August, 1914, duly recorded in the office of the county recorder of Butte county; that the plaintiff is one of the children of said William K. Aldersley.

It is conceded by the appellant that the deeds to Julia McCloud passed all the interest in the property owned by James Aldersley, Edwin Aldersley, and Ellen Williams, they having joined in the deeds, and thus personally bound themselves. It is admitted that the plaintiff did not join in these deeds.

It is contended that the trust deeds did not vest in the trustees the fee in the lands which are the subject thereof, but that they conveyed only such estate therein as was necessary for the purposes of the trust, and that, since the trust was to exist only during the life of James Aldersley, title to the property vested in the plaintiff and the defendant as successors in interest to John Aldersley's heirs. Or, to state the position of counsel for the appellant on this proposition in their own language, it is as follows:

> "The only estate that the trustees had was the legal title for the life of James Aldersley. The fee at all times remained in John Aldersley, and after his death in his heirs; the plaintiff having a one-fourth interest in the fee at the time of the deed to Julia A. McCloud. The utmost that can be said as to the effect of this conveyance (the deed to Julia McCloud) would be that the trustees thereby conveyed such interest as they had in the property, and therefore conveyed the title to the property during the equitable life estate of James Aldersley. But the trustees did not at the time or at any time have the fee or any title to the fee in the property, the remainder over, after the death of James Aldersley, had no title thereafter, and therefore had no interest in that title, and could not convey the same."

It is further contended that the provision as to the sale of the property by the trustees is void as a trust to sell "because a trust for purposes of sale" under subdivision 1 of section 857 of the Civil Code must be mandatory, and not discretionary, but that (so the argument further proceeds), even if said provision was otherwise valid, it must fall because it relates to, and is therefore inseparably connected with, the provisions of the second paragraph of the trust deeds (the trust to convey), which is invalid. Estate of Fair, 132 Cal. 523, 60 Pac. 442, 64 Pac. 1000, 84 Am. St. Rep. 70; Id., 136 Cal. 79, 36 Pac. 306. It is further argued that the trust to sell is void because "the deeds did not contain any direction for the application or disposal of the proceeds, as required by the language of the Code above quoted (Civ. Code, § 857), unless, indeed, the provision be found in paragraph 2, which is void."

The further point is urged that the power to sell is a mere collateral or naked power, not being coupled with an interest; hence, so it is argued, said power expired with the death of John Aldersley, and that therefore the conveyance by the trustees to Julia A. McCloud was wholly void, the further argument being advanced that, to perpetuate the life of the power beyond the decease of John Aldersley, the interest with which it must be coupled must be one arising by virtue of the trusteeship or created by the deeds of trust themselves; that the interest accruing to the trustees by reason of heirship, having no connection with the trust created by the deeds, cannot have the effect of reviving the power revoked by the death of the trustor.

[1] Taking up first the points made against the validity of the power with which the trustees are invested by the deeds of trust to sell the property, it is conceived that a reply thereto is to be found in the opinion in the case of Estate of James Aldersley, supra. Referring to that provision in the said deeds, the court in that case said:

> "This presents the question whether the attempted sale of the three tracts to Julia A. McCloud passed any interest which James at the time possessed in the property, and, if so, the proportion of the consideration received therefrom which properly belongs to his estate. It is conceded that the trustees had no power of sale other than the power granted under the provisions of the third paragraph. But it is insisted that that provision is void principally because it is inseparable from the provision of the second paragraph. We find no merit in the contention. The deeds expressly provide that such a sale should be made whenever the trustees 'deem it advisable,' or if it becomes necessary. To hold as contended that the third paragraph only authorizes a sale for the purposes of carrying out the provisions of the second paragraph, referring to the distribution of the principal, is to give the language used a strained construction which is neither required by the context of the instruments, nor in harmony with the obvious intention of the trustors. But even if the provision be merely regarded as a power of sale, the validity of the sale cannot be questioned."

It is true that the court, following the use of the above language, declared that it was in that case concerned only with the interest of James Aldersley in the property and the effect of the sale upon said interest, and further said that the fact that James Aldersley gave his personal or individual deed to Julia A. McCloud, "purporting to convey the title to the three tracts of land to her," in itself "is sufficient to remove all doubt that the title which James possessed in the tracts has passed to the grantee." But this language may not be construed to mean (as counsel for the appellant seem to construe it) that the court intended to say that the sale by the trustees under the power to make the same provided in the deeds, while valid as to James, was not valid as against the other heirs of John Aldersley. Indeed, the language of the opinion immediately following that above quoted herein clearly shows that the court did not intend to state therein any such proposition or to convey any such impression. It will be noted that the language is:

> "But even if the provision be merely regarded as a power of sale, the validity of the sale cannot be questioned. *Moreover* [italics ours], as has been stated, James, for a valuable consideration, personally gave his deed to Julia A. McCloud," etc.

The word "moreover" means "beyond this" or "besides this"; so that the meaning of the opinion, to paraphrase the language, is: That the sale by the trustees was not only valid and conveyed full title to Julia A. McCloud, but that all possible doubt of James' interest in the three tracts having been conveyed to her is wholly removed by the personal deed of James himself, for a valuable consideration, conveying to her whatever interest he possessed in the property described in the trust deeds.

[2] While, as in effect above stated, we think it is clear that the conclusion of the Supreme Court that the sale by the trustees was valid answers all the points made here by the appellant against the validity of the trust to sell and the sale (for it is inconceivable that the sale should be valid and the trust to sell be invalid), there is, nevertheless, one of the points so made to which we may properly give brief specific attention. As seen, the appellant contends that the provision in the deeds authorizing the trustees, under the circumstances specified, to sell the property, is invalid, "because the deeds did not contain any direction for the application or disposal of the proceeds, as required" by section 857 of the Civil Code, as that section read at the time the deeds here were made and before the amendment thereof so that trusts for the purpose of conveying property may legally be created. The language of said section, as it originally read, and which is pertinent to this point, is:

> "Express trusts may be created for any of the following purposes: 1. To sell real property, and apply or dispose of the proceeds in accordance with the instrument creating the trust."

The clause in the deeds empowering the trustees to sell the property provides, as we have seen, that such sale may be made, if the trustees deem it advisable, upon such terms and at such price as they "may deem best for the interest of their trust." The rational, and indeed, it seems to us, the natural, interpretation of that language, viewed in the light of the explicitly explained purpose of the trust, gives to it but one meaning, which is this: That, if found by the trustees to be for the best interest of the beneficiary for whose benefit the trust was created to sell the property, and thus convert the subject-matter of the trust into money, they were to adopt that course and so administer the trust in the changed form as that the beneficiary should receive, not the principal, but whatever income that might be derived therefrom. Thus the provision refers, not to the second paragraph of the deeds, as counsel mantain, but to the first paragraph, which establishes and vests in the beneficiary whatever beneficial or equitable interest he acquired in the lands by virtue of the deeds of trust; and thus the beneficiary would receive, as fully as though the corpus of the trust property remained in the form of land, the issues or profits (the interest) accruing from the investment or the loaning of the money. Thus, it seems to us, a direction for the application of the proceeds of the sale according to the terms of the instrument creating the trust is clearly, and indeed unquestionably, implied. There can be no doubt that a court of equity, testing the meaning of the provision according to the principles which govern that court, would so decree, if the trustees failed or refused to apply whatever the money earned to the "use, support, and maintenance of James Aldersley." Of course, like the land, had the subject of the trust so remained, the principal sum of money, upon the death of James, would have gone to the estate of the trustor, he having died before the death of James, and the trust to convey being void.

[3] To the point first above stated, namely, that the trustees, holding at no time the fee in the property or the remainder over upon the death of James Aldersley, could not, therefore, convey the fee, the answer is that, while it is true that they were not vested with the remainder in fee after the termination of the equitable estate of James, there was, nevertheless, necessarily vested in them, as trustees, such an estate in the lands conveyed as was essential to the accomplishment of the valid purposes of the trust. Hence the right to sell necessarily carried with it the authority to convey the fee. Morffew v. S. F. & S. R. Co., 107 Cal. 587, 595, 40 Pac. 810, 813; Estate of James Aldersley, supra. In the first-mentioned case it is said:

> "The quantity of interest which passes to the trustee in case of an express trust is commensurate with the necessities of his office; the trustee shall have an estate in fee, if that is necessary, to enable him to perform the duties imposed upon him, although it is not in terms given to him by the instrument creating the trust; on this principle a devisee of lands in trust to sell clothes the trustee with the fee, because necessary to the execution of the trust, the rule being compendiously stated that the trustee 'will take an estate adequate to the execution of the trust—no more nor less.'" Perry on Trusts, § 320; Young v. Bradley, 101 U. S. 787, 25 L. Ed. 1044.

Quite plainly, if this proposition were not sound and unimpeachable, the provision for the sale of the property would be meaningless and wholly nugatory, and the full and proper execution of the ultimate purpose of the trust, according to the best interests of the cestui que trust, might be entirely frustrated. What could the trustee sell, if not a full and complete title to the entire estate in the land? But the soundness of the proposition above stated is too obvious to require further notice of it.

[4] It will not, of course, be contended that, if the provision authorizing the sale of the land is valid, as we hold, upon the authority of In re James Aldersley's Estate, supra, that it is, the right to sell and convey the fee was affected either by the death of William K. Aldersley (one of the trustees) or by the fact that said William K. attempted to convey to the plaintiff, prior to the conveyance of the land by the trustees to Julia A. McCloud, whatever interest he (Wm. K.)

might have had as an heir in the estate of John Aldersley.

The deeds to the trustees not only conveyed to them, for the purposes of the trust, the property and vested in them the powers essential to the execution of the trust, but also conveyed the lands to and vested such powers in the remaining trustee or trustees, upon the death of one or more of them. Not only is this true, but paragraph 3 of the deeds, providing for the sale of the property, itself contains a like provision; that is to say, it provides that the power of sale shall be in the trustees named or their survivor. Thus it is clear that the right to sell continued to exist in the surviving trustees, after the death of William K. Aldersley. And obviously his deed to the plaintiff could not have the effect of destroying that right. Of course, the plaintiff, as the successor of his father, William K. Aldersley, is entitled to whatever interest he would legally be entitled to from his father's one-fourth interest in the estate of John Aldersley; but the lands having been sold by the trustees, by virtue of the right thus given them by the trust deeds, prior to the death of James, the deed from William K. to the plaintiff was without force and effect, so far as are concerned said lands.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

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35 Cal. App. 1

CURTIN v. BLACK OAK DEVELOPMENT CO. (Civ. 1674.)

(District Court of Appeal, Third District, California. Oct. 16, 1917.)

1. Appeal and Error 🔑527(2)—Record—Oral Decision of Court.
A statement of facts made by the trial judge in rendering his oral decision in a case in which the court made no findings, even though printed in the record, could not be treated as forming part of the record nor used to supply findings or to influence the judgment in any way.

2. Appeal and Error 🔑931(3)—Presumptions—Findings to Support Judgment.
The District Court of Appeal must presume that the trial judge found every fact warranted by the evidence which is necessary to support the judgment.

3. Attorney and Client 🔑166(1)—Actions to Recover Disbursements—Evidence.
In an action by an attorney who acted as defendant's agent in disbursing certain funds in connection with the purchase of land, and who claimed to have made a payment out of his own funds with the knowledge and acquiescence of defendant's president on a claim which he might have paid out of defendant's funds, evidence *held* sufficient to warrant a finding that defendant's president knew nothing about the payment until suit was brought.

Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

Action by J. B. Curtin against the Black Oak Development Company. From a judgment for defendant, plaintiff appeals. Affirmed.

C. H. Grayson, of Sonora, for appellant. Oliver B. Wyman, of San Francisco, for respondent.

CHIPMAN, P. J. Plaintiff commenced the action to recover from defendant the sum of $500 alleged to have been "advanced and loaned to defendant by plaintiff for its use and benefit." The cause was tried by the court and defendant had judgment for its costs. Findings of fact were waived by the respective parties. Plaintiff appeals from the judgment and has brought up the record of the evidence taken at the trial.

The following facts appeared: On December 6, 1907, the owners of the Black Oak group of mines in Tuolumne county, agreed to sell the same to one S. A. Knapp for $202,500, to be paid before April 6, 1911, and among the conditions of the agreement was one which provided for the payment out of the purchase price of all debts of the owners. On December 5, 1910, Charles E. Knox, now president of defendant corporation, obtained from said owners an extension until April 6, 1913, to pay said purchase price. The Black Oak Development Company was formed with Charles E. Knox as its president. On April 3, 1913, respondent paid into the First National Bank of Sonora the purchase price and a sum additional to pay the assumed interest covering the two years' extension period, the amount paid being $227,500. Appellant was made disbursing agent of these funds.

On August 17, 1906, the owners of the Black Oak group of mines in Tuolumne county executed to Hales & Symons, a corporation, a mortgage on said mines for $10,000, and on the same day Thomas A. Fisher, who, at that time, had two mortgages on the same property, assigned both mortgages to said Hales & Symons as additional security for said loan as he (Fisher) had signed the note to Hales & Symons for the owners of said mines. Hales & Symons afterwards transferred these three mortgages to one G. B. Wilson of Philadelphia; said G. B. Wilson died, and these three mortgages were transferred by his heirs to his son, G. B. Wilson, Jr., and on October 9, 1912, said G. B. Wilson, Jr., transferred these three mortgages to Black Oak Development Company, respondent herein.

Hales & Symons, while it held said three mortgages, employed F. P. Otis, an attorney at law, to bring, and he did bring, suit in the superior court of Tuolumne county to foreclose the same, which suit was still pending during all the period the different assignments of these mortgages were made. In fact, these foreclosure suits were not settled until May, 1914. On March 18, 1913, said F.

P. Otis served a demand on appellant and said bank, claiming $805.70 as attorney's fees for bringing said foreclosure actions. Appellant is an attorney at law and was representing all the parties, including Black Oak Development Company, as its attorney. Charles E. Knox was the president of Black Oak Development Company, and the payment of the $500 here in question was made by appellant, as he alleged in his complaint, as an advance and loan to respondent.

The plaintiff testified that he and Mr. Knox met in the directors' room of the First National Bank of Sonora for the purpose of examining and passing upon the various claims of creditors of the owners of said property; that among others was the claim of Mr. Otis for attorney's fees in the matter of bringing the foreclosure actions above referred to. He testified that he and Mr. Knox discussed the matter and they were both of the opinion that the claim was too much and should be reduced, and witness informed Mr. Knox that he would fight it out with Mr. Otis; that he would do the best he could to get it reduced. He testified that upon completing the business for the day and after Mr. Knox had said to him, "See what you can do; see if you can't get it cut down"—referring to Mr. Otis' claim—they left the directors' room and going out into the front part of the bank met Mr. Otis. The plaintiff had wrapped up his check book which he used to draw on the purchase price fund, and also the papers he had used in the directors' room, preparatory to leaving for Sacramento. Upon meeting Mr. Otis after going out of the directors' room, Mr. Knox standing by but taking no part in the conversation, Mr. Otis again demanded his fee, and thereupon plaintiff stated that it was too much, but said substantially, "Otis, if you will reduce your fee to $500, I will pay it now." Otis agreed to the proposition and plaintiff thereupon drew his check against his personal account for $500, gave it to Mr. Otis, and took his receipt for the same. Plaintiff testified that several times afterwards he called the attention of Mr. Knox to the matter, who promised that it would be adjusted. It seems to be conceded that Mr. Curtin might properly have drawn the check against the funds in the bank for the payment of various creditors of the owners.

Mr. Knox testified that the first time he saw the demand of Mr. Otis for the attorney's fee was when he was served with the complaint in this action, and he further testified that he had never promised to pay or reimburse plaintiff for any attorney's fee paid Mr. Otis on the basis of Otis' written demand and that he had no authority on behalf of the Black Oak Development Company to enter into an agreement with plaintiff to pay Mr. Otis any "claim against the purchase price of the Black Oak Mines," and that he did not know Mr. Otis personally and had no recollection of ever having seen him.

Plaintiff has stated in his brief what is claimed to be a summing up of the evidence by the court in rendering its oral decision in the case in which the court is said to have stated that plaintiff "acted in good faith and did what he thought was for the interest of Black Oak Development Company to do," adding:

> "I do not think, however, the mere request from Mr. Knox to try and get a reduction of the amount claimed by Mr. Otis was an authorization or direction to Mr. Curtin to pay this amount out of his own funds. I am of the opinion that this was a voluntary payment and cannot be recovered back. There was plenty of money in the bank, which was paid over as the purchase price of the mines, and out of which Mr. Otis could have been paid then. The fact that Mr. Curtin was in a hurry to get to Sacramento did not justify him to pay this demand out of his own funds, and I cannot see that he is entitled to recover it back in this action. It was a voluntary payment and defendant declines to pay it, and I think its position is correct and judgment will be entered for defendant."

[1] By the statement of facts purported to have been made by the trial judge, printed in appellant's brief, appellant's testimony as to what occurred in the directors' room and upon meeting Mr. Otis in the bank, seems to have been accepted by the court as true and, had the court made findings to the same effect, we think a conclusion of law might well have been drawn different from that which was reached by the court. But no such or any findings of fact were made, and the record nowhere discloses the view the court took of the evidence. Had the statement printed in appellant's brief found its way into the record, it could not here be treated as forming any part of it; nor can it be used to supply findings or to influence the judgment in any way. People v. Quong Sing, 20 Cal. App. 26, 33, 127 Pac. 1052.

[2, 3] This court must presume that the trial judge found every fact warranted by the evidence which is necessary to support the judgment. Certain facts and circumstances appeared not above shown which had more or less bearing upon the issues. But upon the important facts immediately connected with the payment by plaintiff of the Otis claim and explanatory of the circumstances under which it was made, the evidence is conflicting and the court would have been warranted in finding that Mr. Knox knew nothing about plaintiff's having paid Mr. Otis out of his own funds until this suit was brought. Not only will error never be presumed, but every presumption will be indulged in favor of upholding the judgment. Bliss v. Sneath, 119 Cal. 526, 529, 51 Pac. 848.

We cannot say that there was not sufficient evidence to support every finding necessary to support the judgment.

The judgment is therefore affirmed.

We concur: HART, J.; BURNETT, J.

34 Cal. App. 776

IMPERIAL LAND & STOCK CO. v. OSTER.
(Civ. 1900.)

(District Court of Appeal, Second District, California. Oct. 11, 1917. Rehearing Denied Nov. 3, 1917; Denied by Supreme Court Dec. 10, 1917.)

1. CORPORATIONS 🔑90(3)—ACTION FOR ASSESSMENT ON STOCK—PREMATURITY.

A corporation's action for a delinquent stock assessment was not prematurely brought before the day fixed for the sale of delinquent stock.

2. CORPORATIONS 🔑90(2)—COLLECTION OF DELINQUENT ASSESSMENT ON STOCK—REMEDIES OF COMPANY—STATUTE.

On the day of delinquency in payment of a stock assessment, the stockholder owed the money to the corporation, which had two remedies open to it, one to collect the debt as a debt simply, the other to resort to the more extraordinary proceeding of selling the stock under permission of Civ. Code, § 349, to satisfy the debt.

3. CORPORATIONS 🔑169—COLLECTION OF DELINQUENT ASSESSMENT ON STOCK—SALE—NOTICE.

If a corporation proposed to subject to sale the stock of a stockholder delinquent in paying an assessment, that could only be done by sale after public notice, as the statute requires, and no right to sell could accrue until the sale had been duly advertised and the date of sale arrived.

4. CORPORATIONS 🔑90(2)—SUBSCRIPTION TO STOCK—PROMISE TO PAY IN INSTALLMENTS—ACTION.

Had a corporation's complaint against its stockholder alleged that the contract of subscription contained an agreement by the stockholder to pay for the stock in certain installments at specified times, the company could have maintained an action directly upon the promise.

5. CORPORATIONS 🔑89(2)—MATURING LIABILITY OF STOCKHOLDER ON CALL FOR SUBSCRIPTION—STATUTES.

Where a corporation, suing its stockholder, alleged no specific agreement whereby the stockholder's obligation to pay calls upon his stock was fixed as to the time thereof in advance, the stockholder's liability was to respond upon calls duly made, and, no provision of the by-laws of the corporation being shown, the directors, in making their calls, were governed by the procedure outlined in Civ. Code, § 331 et seq., and where the form prescribed was strictly followed, notice of the assessment or call being given by publication, and mailing of notice, that was all the notice the stockholder was entitled to in order to mature the debt and fix his liability, and further demand on him before suit was not necessary.

6. CORPORATIONS 🔑89(4)—CALL FOR SUBSCRIPTIONS—EQUALITY WITH OTHER STOCKHOLDERS.

A corporation had the right to call against the stock of only two stockholders such an amount of their subscription as would produce enough money to make their payments equal to the payments already made by other stockholders.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by the Imperial Land & Stock Company, a corporation, against Frank F. Oster. From judgment dismissing the action, plaintiff appeals. Judgment reversed.

F. A. Leonard and George W. Hellyer, both of San Bernardino, for appellant. Alfred H. McAdoo, Frank C. Sherrer, and Frank F. Oster, all of Los Angeles, for respondent.

JAMES, J. This is an action to recover from defendant the principal sum of $1,600, which in the complaint it was alleged was owing to the plaintiff corporation by reason of an assessment levied or call made against the defendant on account of corporate stock owned by him. The complaint stated the necessary facts as to the subscription for the capital stock having been completed. It was then alleged that on the 12th day of October, 1909, at defendant's request, plaintiff issued to him 100 shares of its stock of the par value of $100 each, on account of which purchase there was then paid the sum of $100. It was then alleged that at the time of the issuance of the stock it was understood and agreed between plaintiff and defendant that the defendant would pay all calls and assessments on the stock to the extent that the par value thereof remained unpaid, which unpaid amount was alleged to be, on the 8th day of November, 1909, the sum of $9,900. It was then alleged that between the 8th day of November, 1909, and the 9th day of December, 1914, defendant had, in response to divers calls made by the corporation, paid installments upon the balance due on the stock, which payments, together with the initial payment made, amounted to the sum of $42.50 per share. It was alleged that on the 9th day of December, 1914, there had been paid on all other stock subscribed, except that issued to defendant and one Adams (the latter having paid $38.50 per share), the sum of $58.50 per share. It was further alleged that on the 9th day of December, 1914, plaintiff was indebted to divers creditors in sums aggregating more than $50,000, and was without means with which to satisfy the claims of creditors, or to pay expenses or to conduct its business; that on the said 9th day of December, at a regular meeting of the board of directors, a resolution was unanimously adopted levying an assessment of $16 per share upon the stock held by the defendant and $20 per share upon the stock held by Adams; that in the resolution it was specified that the assessment should be immediately payable to the secretary, and that the 13th day of January, 1915, was the day fixed by the resolution upon which the assessment should become delinquent, and that in the same resolution the 3d day of February, 1915, was fixed as the date of sale of any stock which might become delinquent thereunder; that the secretary of the plaintiff was by said resolution directed to give notice as provided by law of such assessment and to perform all other proper acts and things necessary to be done. Allegations follow showing that the proper notice of assessment was published; and it was then alleged that on the 13th day of January, 1915, being the day upon which the assessments were to become delinquent, the board of directors adopted a resolution whereby the corporation waived further proceedings for the sale of stock and elected to proceed by action to recover the amount of the assessment so levied. This suit was commenced on January 18, 1915. The defendant filed a demurrer, which was overruled, and later made his answer to the complaint. At the time set for trial, and preliminary thereto, defendant objected to any evidence being offered, and asked that the action be dismissed, assigning several reasons as grounds for the motion. The trial judge sustained the objection, and the action was dismissed, and this appeal, taken by the plaintiff from that judgment, followed. In the judgment the court recites the grounds upon which the dismissal was ordered, which are as follows:

> "(1) That said action as shown affirmatively by the complaint was prematurely brought, in that the complaint was filed on January 18, 1915, while the notice of assessment contained in the complaint recited and contained the statement that defendant's stock would be sold on February 3, 1915, for failure to pay said assessment, and that under the law, and in particular under section 341 of the Civil Code of the state of California, defendant had the right to pay said assessment at any time before February 3, 1915, with the only additional penalty added for delaying until such date of being required also to pay the actual costs of advertising.
>
> "(2) That it was not alleged in plaintiff's complaint that defendant was given or had any notice of the election by the plaintiff to proceed under section 349 of the Civil Code before the filing and institution of this action.
>
> "(3) That it was not alleged in plaintiff's complaint that any demand was made on defendant to pay the assessment sued upon, after plaintiff had elected to proceed under section 349 of the Civil Code.
>
> "(4) That the assessment sued upon was void under the provisions of section 332 of the Civil Code.
>
> "(5) That the assessment sued upon was void because upon the face of the complaint said assessment affirmatively appeared to be unequal and not uniform and a discrimination against defendant.
>
> "(6) That said assessment was void under section 333 of the Civil Code.
>
> "(7) That the election by plaintiff to proceed under section 349 was illegal, irregular, and void in that it affirmatively appeared that plaintiff was not treating defendant with equality and uniformity in that as to defendant there purported to be an election to waive further proceedings to collect the assessment by sale of the stock and to proceed by personal action, while as to the other stockholder against whom assessment was levied there was no such purported or attempted waiver of such further proceedings."

[1] The complaint of the plaintiff, with its amendments, to our minds, stated a good cause of action. The action was not prematurely brought because brought before the day fixed for the sale of delinquent stock. The regularity of the procedure up to and including the resolution declaring an election to be made by the board of directors to waive the sale of stock seems not to be questioned by respondent. His position is, however, that while the board of directors had the right, under section 349, Civil Code, on the day specified for declaring the stock delinquent, to waive further proceedings for the sale of the stock, the right of action to collect the debt did not accrue until the day of the sale had arrived, because, he argues, up to that time he might have paid the assessment and charges and relieved himself of the debt. The infirmity of this position is that the debt had already become a fixed and matured charge against the stockholder.

[2] On the day of delinquency the stockholder owed the money to the corporation. It had two remedies open to it: one to collect the debt as a debt simply; the other to resort to the more extraordinary proceeding of selling the stock under permission of the statute to satisfy that debt. The debt being a matured charge, under the law it was the duty of the defendant to pay it, and it was the privilege of the corporation to sue for it if it was not paid.

[3] If the corporation proposed to subject the stock of the stockholder to a sale—in other words, divest him of his ownership in it—that could only be done by sale after public notice as the statute requires. No right to sell the stock could accrue until the sale had been duly advertised and the date of sale had arrived. The case of San Bernardino I. Co. v. Merrill, 108 Cal. 490, 41 Pac. 487, is cited by respondent. That case goes no further than to hold that at the time the waiver of the right to sell stock is made there must be a live proceeding pending, which, if pursued to its end, would result in a valid sale of the stock. In other words, if the proceeding looking to a sale of the stock is invalid, or if some step of a jurisdictional nature has been neglected, then no right of waiver exists, for the reason that there is nothing to waive. That decision does not hold that suit may not be brought in a proper case before the date fixed for the sale under the assessment.

Up to this point we have referred to the proceeding as one to collect an assessment against the stock of respondent. Actually it was to enforce a call made for unpaid subscription money. The allegations of the complaint were ample to show the contractual obligation on the part of respondent to pay the par value of the stock.

[4] Had the complaint alleged that the contract of subscription contained an agreement of respondent to pay for his stock in certain installments at specified times, we think that an action could have been directly maintained upon the promise. Such is generally the tenor of the decisions and text-books. Cook on Corporations (6th Ed.) § 104 et seq. However, no specific agreement was here alleged by which the obligation of respondent to pay

calls upon his stock was fixed as to the time thereof in advance.

[5] Hence his liability was to respond upon calls duly made (San Joaquin L. & W. Co. v. Beecher, 101 Cal. 70, 35 Pac. 349), and as no provision of the by-laws of the corporation is shown which might affect that matter, the directors in making their calls were governed by the procedure outlined in the statute, which is found in section 331, Civil Code, and sections immediately following it (Cook on Corporations [6th Ed.] § 115; Helliwell on Stock and Stockholders, § 280). The form prescribed by the statute was strictly followed. Notice of the assessment or call was given by publication and by mailing of the notice to respondent, and this was all the notice that respondent was entitled to in order to mature the debt and fix his liability. It was not necessary to make further demand on him before bringing suit. See text-book of Mr. Cook mentioned above, at section 120, and cases cited.

[6] Some complaint is made that, because all of the stockholders were not subjected to the call made, the assessment was invalid because unequal. It will be remembered that the call was only for such an amount against the stock of respondent and Adams as would produce enough money to make their payments equal to the payments already made by other stockholders. This the corporation undoubtedly had the right to do, as no inequity would result. It has been held that assessments may be so equalized. Brockway v. Gadsen, etc., Co., 102 Ala. 620, 15 South. 431; Cook on Corporations, above cited, § 114.

In our opinion none of the grounds upon which the dismissal was ordered are tenable.

The judgment is reversed.

We concur: CONREY, P. J.; SHAW, J.

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34 Cal. App. 799

PILSTRAND v. GREENAMYRE et al.
(Civ. 1738.)

(District Court of Appeal, Third District, California. Oct. 16, 1917.)

1. MECHANICS' LIENS ⚷231—DESTRUCTION OF BUILDING—EFFECT.

A mechanic's lien does not attach to the land after the building's destruction, and probably does not survive as to the land if the building's destruction occurs after filing of the lien.

2. JUDGMENT ⚷28—JOINT JUDGMENTS—VALIDITY.

A joint personal judgment against two defendants in a mechanic's lien case will be entirely reversed where there is no evidence to support it as to one defendant.

Appeal from Superior Court, Plumas County; J. O. Moncur, Judge.

Mechanic's lien proceedings by John Pilstrand against Harold H. Greenamyre and George M. Stivers. Judgment for plaintiff, and defendants appeal. Reversed.

L. N. Peter and L. H. Hughes, both of Quincy, for appellants. M. C. Kerr, of Quincy, for respondent.

BURNETT, J. This is an action for a personal judgment against defendant Greenamyre and to foreclose a mechanic's lien for work alleged to have been performed by respondent, Pilstrand, for appellant Greenamyre in or about a building on land of which Greenamyre was in possession under an agreement of sale from appellant Stivers, who is the owner of the land. The lower court rendered a decree in favor of plaintiff, Pilstrand, against both defendants, and this appeal is from the judgment. Since this appeal was perfected, so it is stated by respondent, and not denied by appellant, the building has been totally destroyed by fire, without insurance, and Greenamyre has abandoned all interest in the property and removed therefrom.

It is therefore the claim of respondent that the question before us is moot, and that the appeal should be dismissed. But accepting the fact as stated, the question would then arise whether a mechanic's lien fully perfected by filing the same upon the completion of the building survives the destruction of the building and continues thereafter on the land which was found to be necessary to and for the convenient use and occupation of the building.

[1] There is some apparent conflict in the authorities as to whether the lien attaches to the land at all events. On the one hand, it is held by those jurisdictions adopting the so-called Pennsylvania rule that the lien includes the land only as an incident to the lien on the building, and when the building is destroyed, the lien ceases. On the other hand, it is held that the lien attaches to the land originally, and not alone as an incident to the lien on the building. The difference, however, will be found to arise from a difference in the text of the mechanic's lien laws rather than from any real difference in principle. In California the so-called Pennsylvania rule is followed. It has thus been decided that the destruction of the building prior to its completion destroys the lien, though the claim was subsequently filed against the land. Humboldt Lumber Mill Co. v. Crisp, 146 Cal. 686, 81 Pac. 30, 106 Am. St. Rep. 75, 2 Ann. Cas. 811; Watson v. Alta Investment Co., 12 Cal. App. 560, 108 Pac. 48. Where the building is completed, but destroyed without fault of either party, prior to the filing of any claim, the same conclusion is reached, and the lien is held to suffer the same fate as the building. Kern v. San Francisco Co., 19 Cal. App. 157, 124 Pac. 862. In Chenoweth v. Spencer, 64 Or. 540, 131 Pac. 302, Ann. Cas. 1914D, 678, it appears that land was held under contract of purchase. The vendee contracted for the erection of a building, and work was started. The materialmen filed their liens, but before completion the building

was destroyed. Under statutes the same as those in California, it was held that the lien was destroyed. There can be no difference in principle between the above case and the case where, as here, the building is both completed and the claim filed prior to the destruction of the building. Whatever lien exists upon the land does so only because primarily it existed upon the building, for the convenient use and occupation of which the land is included. There can be no doubt that, if no incidential right was given against the land upon which the building rests, but the building was solely liable to the lien, a destruction of the building, even after completion and the filing of the claim, would necessarily work a loss of the lien. There would be nothing left to which the lien could fasten. It can hardly be doubted, then, that the lien ceases to exist upon the land, for the principal carries with it the incident. And it is so held in Gross v. Camp, 4 Pa. Co. Ct. R. 461; Baird v. Otto, 12 Pa. Co. Ct. R. 510; Campbell v. Coolbaugh, 3 Luz. Leg. Reg. (Pa.) 93. In Baird v. Otto the court, after citing cases holding that the lien is destroyed where the building is destroyed before the claim is filed, declares:

> "Nor is the principle any different where the building is destroyed after the lien is filed. * * * The filing of the lien and the proceedings subsequently taken thereon are merely the statutory methods presented for enabling a contractor or builder to enjoy the fruits of his lien which the law gives him. His situation is that by the statute he has a lien upon the 'building,' and the statute incidentally adds as much of the realty as the enjoyment of the building requires, but if the building is gone, there is no longer any of the realty required for the use for that building, and the supplemental right to add any of the realty to the building disappears with the destruction of the building."

However, this question was not before the trial judge, and is not presented by the record before us. We merely suggest the foregoing in view of the possibility of a new trial.

[2] There is sufficient evidence to support a personal judgment against appellant Greenamyre, but no such judgment was rendered; it being, if anything, joint against both defendants. There was no evidence to show the personal liability of Stivers. We cannot, therefore, affirm the judgment in any respect, but must reverse it, and this will carry with it the enforcement of the lien.

The judgment is reversed.

We concur: CHIPMAN, P. J.; HART, J

(34 Cal. App. 789)

NASON et ux. v. FELDHUSEN et al.

(Civ. 1716.)

(District Court of Appeal, Third District, California. Oct. 15, 1917. On Motion for Rehearing, Nov. 15, 1917.)

1. Appeal and Error 🔑616(2) — Record — Authentication of Affidavits.

On appeal from an order changing the place of trial, the court will not consider an affidavit setting forth a change of the place of business of a defendant corporation, where such affidavit is filed after the date for hearing is set in the appellate court and is not authenticated as prescribed by Supreme Court rule No. 29 (119 Pac. xiv), providing that in all cases of appeal from the orders of the superior courts the papers and evidence used and taken on the hearing of the motion must be authenticated by incorporating the same in a bill of exceptions, except where another mode is provided by law.

2. Venue 🔑5(4) — Residence of Defendants — Actions in Personam — Cancellation of Contract.

An action, the gist of which is an alleged fraud whereby defendants induced plaintiff to enter into a contract for the purchase of certain corporate stock giving a mortgage for the unpaid balance thereof, praying a rescission of the contract of purchase, an accounting, and an injunction, is one in personam and must be tried in the county wherein the defendants reside, under Code Civ. Proc. § 395, requiring certain actions to be tried in the county in which defendants reside at the commencement of the action.

3. Venue 🔑16½ — Residence of Defendants—Actions in Personam.

Where a local action is joined with a personal or transitory action, the defendants are entitled to have it tried in the county wherein they reside.

On Motion for Rehearing.

4. Appeal and Error 🔑837(9) — Matters Considered.

On appeal from an order changing the place of trial to the county wherein defendants resided, an affidavit setting forth a subsequent change of residence cannot be considered, since the record submitted for review cannot be made in the appellate court.

5. Venue 🔑80—Jurisdiction after Removal—Removal of Defendants.

The jurisdiction of an action by the court of a county to which it has been removed cannot be defeated by the removal of a defendant from such county subsequent to the making of the order.

Appeal from Superior Court, San Joaquin County; C. W. Norton, Judge.

Action by Winfield R. Nason and wife against Henry Feldhusen and others. From an order changing the place of trial, plaintiffs appeal. Affirmed, and rehearing denied.

L. T. Hatfield, of Sacramento, for appellants. Dunn & Brand, Wm. E. Kleinsorge, and Elliott & Atkinson, all of Sacramento, for respondents.

HART, J. Plaintiffs appeal from an order of the superior court of San Joaquin county, in which court the action was commenced, changing the place of trial to the county of Sacramento. It is the contention of appellants that "the purpose of the action is to bring about the rescission of a contract and secure the cancellation of a note and deed of trust given by plaintiffs, appellants, to Henry Feldhusen and A. M. Mull as trustees for California Guaranty Life & Accident Insurance Company. The real estate involved is situated in the county of San Joaquin. Appellants have at all times resided in the county of San Joaquin, and the contract was entered into there. The position of respondents is that "the gist of the action is fraud. Such an action is a personal or transitory action, and the defendants are entitled to have it tried in the county in which they or some of them reside."

In addition to the defendants above named, 20 individuals, who at different times had been directors of the defendant corporation, the insurance company, were joined as defendants. None of the individual defendants resided in the county of San Joaquin, and the greater portion of them resided in Sacramento county. The defendants, the insurance company and Sacramento Bank, were corporations whose principal place of business was in the county of Sacramento.

It is alleged in the complaint, which was filed in April, 1915, that in the month of February, 1913, and prior thereto, plaintiff Winfield R. Nason was the owner of 109 acres of land in San Joaquin county, against which there was outstanding a deed of trust to secure the payment of an indebtedness of $5,300, owed by him to the San Joaquin Valley Bank; that in the months of February and March, 1913, Perry Gum and E. E. Shook, acting as agents of the insurance company, visited the farm of plaintiffs "and, for the purpose of inducing plaintiff Winfield R. Nason to subscribe to stock therein, represented to him that the corporation had a capital stock of $350,000, substantially all of which had been subscribed for," the par value of the shares of said stock being $1, but that the intrinsic value thereof was $2.50 per share; that within a few days the corporation would apply for a license to begin business as an insurance company; that the condition of sales and subscription was such as to justify the statement that all of the capital stock would be sold within 60 days. It is then alleged that said agents assured said plaintiff:

> "That if he would subscribe for 1,000 shares of said capital stock at $2.50 per share, the dividends on such stock would amount to enough to pay off his indebtedness to the San Joaquin Valley Bank within five years * * * and that if plaintiff would make such subscription for 1,000 shares of stock as aforesaid, the insurance company would loan him a sufficient amount of money to pay off said indebtedness to the San Joaquin Valley Bank, and pay for said 1,000 shares of stock and take a deed of trust upon the property in the sum of $7,500."

It is further alleged that said agents made statements to the effect that certain of the defendants were directors of the insurance company and that each of them was a stockholder to the extent of $10,000; that said plaintiff in March, 1913, subscribed for 1,000 shares of the stock of said insurance corporation at the price of $2.50 per share; that the company loaned him $7,500, of which sum $5,300 was paid to said San Joaquin Valley Bank, the balance being applied to the purchase price of said stock, the loan being represented by a promissory note, the payment of which was secured by a deed of trust in which defendants Feldhusen and Mull were named as trustees. Plaintiff paid interest on said loan to and including the 1st day of April, 1914. It is alleged that said statements of Gum and Shook relative to the status of the insurance company, the amount of subscriptions, etc., were false; that if it had not been for such representations said plaintiff Winfield R. Nason would not have subscribed for said stock.

The complaint then sets forth that in October, 1914, plaintiffs learned that the directors of the insurance company had determined to abandon all attempts to engage in business and to go into liquidation, and that an arrangement had been made with defendant Sacramento Bank by which all assets of the insurance company were delivered to said bank; that the deed of trust referred to was assigned to said bank in December, 1914. Further allegations of fraud are contained in the complaint, and it is therein stated that plaintiffs are unable to ascertain the true state of affairs with respect to the money and other assets of the insurance company, and that no accounting has been made by its officers that is available to plaintiffs. It is then alleged:

> "That unless restrained and enjoined from so doing Sacramento Bank will proceed to cause the trustees under the deed of trust of plaintiffs to sell the property of plaintiffs described in said deed of trust for the purpose of discharging the indebtedness represented therein * * * and that said property will be sold and disposed of."

The prayer of the complaint is that defendants be enjoined from disbursing any of the funds of the insurance company; that Sacramento Bank, J. M. Henderson, Jr., A. M. Mull, and Henry Feldhusen be enjoined from taking any action for the purpose of selling the property of plaintiffs under said trust deed; that said last-named defendants be required to reconvey to plaintiffs said property "absolved from the payment of any portion of said note in excess of $5,300"; that defendants be restrained from taking any action tending to the distribution of the assets of the insurance company, or that plaintiff receive back from the insurance company said sum of $2,200 with interest; that an accounting be rendered by the officers of the insurance company; that a receiver be appointed to take charge of the company's assets, and for general relief.

The court issued an order directing defendants to show cause, on May 3, 1915, why a temporary injunction should not issue as prayed for. On April 27, 1915, the following papers were filed by defendants: (1) Demurrer to the complaint; (2) demand for change of place of trial; (3) affidavit of merits; (4) notice of motion for change of place of trial; (5) notice of motion to strike out portions of the complaint. The order changing the place of trial was entered on June 7, 1915.

On October 2, 1917, the day upon which

this action was set for oral argument in this court, counsel for appellants filed what is termed: "Memorandum of Suggestion of Change of Principal Place of Business of California Guaranty Life & Accident Insurance Company," in which it is stated that since December 20, 1916, the principal place of business of said corporation has been in the county of Alameda. Attached thereto is an affidavit setting forth the fact of said change of place of business.

[1] 1. The document last mentioned, even if the fact of the change of the principal place of business of the corporation defendant since the commencement of this action and the making of the order changing the place of trial could in any event properly exert any influence in the determination of the ultimate legal issue submitted by this appeal, cannot be considered by this court, for the reason that the memorandum and the affidavit therein contained are not authenticated as a part of the record in the case, as required by rule 29 of the Supreme Court (119 Pac. xiv). Melde v. Reynolds, 120 Cal. 237, 52 Pac. 491; Herrlich v. McDonald, 80 Cal. 472, 22 Pac. 299; Von Glahn v. Brennan, 81 Cal. 261, 22 Pac. 596; Spreckels v. Spreckels, 114 Cal. 60, 45 Pac. 1022; Skinner v. Horn, 144 Cal. 279, 77 Pac. 904; Manuel v. Flynn, 5 Cal. App. 319, 328, 90 Pac. 463.

[2] 2. Section 392 of the Code of Civil Procedure provides that actions for the recovery of real property, or of an estate or interest therein, or for the determination, in any form, of such right or interest, and for injuries to real property, must be tried in the county in which the subject of the action, or some part thereof, is situated, subject to the power of the court to change the place of trial, "as provided in this Code."

Section 393 of said Code provides that other specifically designated actions shall be tried in the county in which the cause, or some part thereof, arose, subject to the like power of the court to change the place of trial.

Section 394, among other things, provides that an action or a proceeding against a county or city, or a city and county, may be commenced and tried in such county, or city and county, unless such action or proceeding is brought by a county, or city and county, in which case it may be tried in any county, or city and county, not a party thereto.

Section 395 reads, in part, as follows:

> "In all other cases, the action must be tried in the county in which the defendants, or some of them, reside at the commencement of the action, or if it be an action for injury to person or property, or for death from wrongful act, or negligence, in the county where the injury occurs, or the injury causing death occurs, or in the county in which the defendants, or some of them, reside at the commencement of the action."

The learned counsel for the appellants contends and in his brief declares:

> "If it is not a case in which parties are authorized to repudiate the transaction on the ground of fraud and failure of consideration, then of course it does not state facts sufficient to constitute a cause of action, but if it does state facts sufficient to state a cause of action, then in the opinion of counsel for appellants, the action should be tried in the county of San Joaquin, for the reason that the whole basis of the action is to relieve real estate situated in San Joaquin county from a lien that was procured through fraud, and is a direct proceeding to eliminate that lien. If it is a proper case for the cancellation of a lien procured by fraud, we feel justified in asking this court to reverse the order changing the place of trial to the end that it may be tried in the county in which the real estate is located, and where the fraud was perpetrated."

It is very clear to our minds that the learned counsel thus falls into error as to the theory or main object of the action as made by his pleading. It is quite obvious that the main object of the action, under the averments of the complaint, is not to remove a lien procured by alleged fraud upon the real estate referred to. The gist of the action, as it is stated in the complaint, lies in the alleged fraud by which the defendants induced the plaintiff to enter into the contract for the purchase of a certain number of shares of the corporation's stock, and its object is to secure a rescission of that contract. If this be not true, then the complaint states no cause of action at all. It is true that it is alleged that the trust deed to the land referred to was procured by fraud and as a part of the alleged fraudulent transaction, but the effect of the allegations in that particular can go no further than to disclose one of the incidental results flowing from the alleged fraudulently procured contract for the sale and purchase of the stock. The complaint, as suggested, states no cause of action for a rescission of the deed of trust, but, to the contrary, itself discloses by its averments that a rescission or cancellation of that instrument cannot be had; for, conceding that the contract for the sale and purchase of the stock was procured and brought about through fraud, the complaint shows that the plaintiffs are indebted to the corporation in the sum of $5,300, secured by the trust deed mentioned in the complaint, and that said sum was loaned by the corporation to the plaintiffs to enable them to lift a mortgage upon the land held by the San Joaquin Valley Bank as security for a loan in a like sum, that they did so extinguish their obligation and mortgage to the bank with the money so obtained, and that the corporation has not been repaid that money. Whatever might have been the character of the general transaction between the corporation and the plaintiff resulting in the execution of the trust deed—even if characterized to some extent by fraud on the part of the corporation—no court would be authorized to cancel the deed so long as the debt to secure the payment of which said deed was given remained unpaid, there being no allegation or claim that the debt thus secured is not an honest and just one.

As before stated, the only question which may be adjudicated herein, under the averments of the complaint, is whether, because the sale to the plaintiffs of the stock in the corporation was consummated through the misrepresentation and fraud of the latter or its agents, the plaintiffs are entitled to have said contract set aside and thus be entitled to a cancellation of their indebtedness to the corporation in the sum paid by them for the stock. And, assuming that the plaintiffs are entitled, under the averments of their complaint, or in this action, to an accounting to determine the amount due on the indebtedness secured by the trust deed, still the action is no less one in personam. An action for an accounting is an equitable proceeding and is a personal action; so is an action for an injunction, and in this case the averments and prayer for both an accounting and an injunction restraining the trustees from selling the property under the trust deed involve relief merely incidental to the principal object of the action, viz. to declare the sale of the stock void and set it aside on the ground that it was brought about by the fraud of the vendor.

[3] But, even if it were necessary to concede that the object of the action was partly to recover real property or for the determination of a right or interest therein, the right of the defendants herein to have the action tried in the county of their residence cannot, under the averments of the complaint, be gainsaid; for, as a general rule, where a local action is joined with a personal or transitory action, the defendant is entitled to have it tried in the county in which he resides. Le Breton v. Superior Court, 66 Cal. 27, 29, 4 Pac. 777; Smith v. Smith, 88 Cal. 572, 26 Pac. 356. In the latter case, the court says:

> "When, however, the subject-matter of the action is local, and the judgment which is sought is to operate directly upon that subject-matter, it is provided that the action shall be tried in the county where the subject-matter of the action is situated. * * * The plaintiff cannot, by uniting in his complaint matters which form the subject of a personal action with matters which form the subject of a local action, compel the defendant to have both those matters tried in a county other than that in which he resides. It is only when real estate alone is the subject-matter of the action that the provisions of section 392 can be invoked against a defendant who resides in a county different from that in which the land is situated. If, in his complaint, the plaintiff joins with such a cause of action another which is not embraced in its provisions, or if he also seeks a remedy against the defendant upon matters which are not embraced within the provisions of this section, his action becomes one of those 'other cases' provided for in section 395, which the defendant is entitled to have tried in the county of his residence."

As we have shown, and as is clearly so upon the facts as pleaded in the complaint, the judgment herein sought cannot operate upon the land which is the subject of the deed of trust, nor even upon the deed of trust itself. No decree affecting either would come within the scope of the action as made by the complaint.

Our conclusion is that the action is purely transitory and that since at the time of the commencement of the action the defendants resided in Sacramento county, the principal place of business of the corporation being then also in said county, the order appealed from was legally and properly made. It is accordingly affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

On Motion for Rehearing.

PER CURIAM. The appellants ask for a rehearing of this cause, and in their petition cite the case of Pilstrand v. Greenamyre et al., 168 Pac. 1161, as authority for their position that the affidavit filed in this case while it was pending in this court on appeal, setting forth that the corporation defendant, after the order made by the court below changing the place of trial of this action from San Joaquin to Sacramento county, had changed its principal place of business from Sacramento county to Alameda county, may be considered by this court in determining whether the court below was warranted in ordering a change of the venue of the action. The case named was an action for the foreclosure of a mechanic's lien subsisting upon a building which was erected by the appellant Greenamyre upon land of which he held possession under an agreement of sale with the owner. While said case was pending on appeal and undisposed of, the building upon which subsisted the lien therein sought to be foreclosed was destroyed by fire. This fact was called to the attention of this court in the brief of respondent and was not denied by the appellant, and the former insisted that the question before us had become moot and asked for a dismissal of the appeal. The question whether a mechanic's lien, fully perfected upon the completion of the building, survived the destruction of the building and continued thereafter on so much of the land as was found necessary to the convenient use and occupation of the building was discussed in the opinion in that case, but it was entirely obiter and advanced merely as a guide to the court below in the event of another trial of the case. In other words, the fact, if it was a fact, that the building had been destroyed after the cause had been tried and an appeal taken therein was not considered as established, but upon the hypothesis that such was the fact and that it would enter as an issue into the case upon a retrial thereof, we ventured our view of the law as applied to such a situation. We may add that the judgment in that case was reversed because, while there was no evidence disclosed by the record that supported a personal judgment against Greenamyre, a joint personal judgment was nevertheless rendered and entered against both Greenamyre and his codefendant Stivers. So much, then, for the case relied upon by the appellants herein upon the point above suggested. It is obviously no authority supporting the position of appellants here. Nor would it be in our opinion, even if it were true that this court had dismissed the appeal upon satisfactory proof that, for any reason, the question submitted for decision therein had become moot, there being no analogy between such a proceeding and the proposition contended for here.

We may well repeat here the very obvious proposition briefly stated in the original opinion, viz.: That an appellate court, in reviewing an order such as the one from which this appeal is prosecuted, is required to confine itself in the consideration thereof to the evidence, papers, documents, etc., constituting the record upon which the order is predicated and such evidence, papers, and documents, to be properly before the appellate court, for consideration in connection with the review of such order, must be authenticated in the manner prescribed either by the rule laid down by the supreme court or by law. See rule 29, Supreme Court (119 Pac. xiv). The obvious purpose of the authentication so required is to show upon what evidence or papers the court below made its order, and thus enable the reviewing court to determine whether, upon the record as made before it, the court below was legally authorized to make the order complained of.

[4] It is plainly manifest that in no case in which the appellate jurisdiction of the appellate courts of this state is invoked can the record submitted for review be made in said courts, and this would certainly be the result in this case were we required to hold that the affidavit referred to might be considered on this appeal.

[5] But still another answer may be made to the proposition urged by counsel, and that is that jurisdiction of said action by the court of the county to which the cause has been removed cannot be defeated by the removal of one or even all the defendants from the latter county subsequently to the making of such order.

Appellants also insist that we reached an erroneous conclusion on the general proposition involved in the appeal, but we have sufficiently expressed our views thereon in the former opinion and from the views so expressed, and the conclusion following therefrom, we see no reason for receding.

The petition for a rehearing is denied.

CALIFORNIA REPORTER

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176 Cal. 499

PRODUCERS' TRANSP. CO. v. RAILROAD COMMISSION OF CALIFORNIA et al. (L. A. 4230.)

(Supreme Court of California. Nov. 17, 1917. Rehearing Denied Dec. 17, 1917.)

1. Eminent Domain 🔑2(1) — Taking Private Property for Public Use.

Neither by Const. art. 12, § 23, providing that every private corporation operating any pipe line within the state for the transportation of crude oil to or for the public is hereby declared to be a public utility subject to such control and regulation by the Railroad Commission as may be provided by the Legislature, nor St. 1913, p. 657, to the same effect, can the state subject private property to a public use or confer authority upon the Railroad Commission to assume control of private pipe lines engaged in the transportation of crude oil; as neither by act of the Legislature nor the declaration of the state Constitution can private property be taken for public use without compensation.

2. Carriers 🔑5—Pipe Lines — Control by Railroad Commission.

In view of St. 1913, p. 657, declaring that every individual or association transporting oil by means of pipe lines "directly or indirectly to or for the public for hire" are declared to be common carriers and subject to the Public Utilities Act (St. 1911 [Ex. Sess.] p. 18), and Const. art. 12, § 23, to the same effect, a petitioner incorporated for, and now engaged in, transporting oil for profit, having seized private property alleging that it was necessary for the construction of its pipe line through and by means of which it purposed to serve the public, is subject to the Public Utilities Act, and an order of the Railroad Commission requiring it to show cause why it should not file rates and schedules was warranted.

3. Carriers 🔑5 — Rates — Pipe Lines —Dedication of Private Property for Public Use—Evidence.

That petitioner availed itself of the right of eminent domain in condemning property for the right of way over which it constructed its pipe line must be deemed conclusive evidence of a dedication of the property for public use, since by Code Civ. Proc. § 1238, it could not have secured such right other than in behalf of a public use.

4. Carriers 🔑5 — Common Carriers — Powers of Railroad Commission.

As the jurisdiction of the Railroad Commission to make the order requiring petitioner to show cause why the commission should not make an order requiring petitioner to file schedules of rates, etc., depended upon whether petitioner was a common carrier transporting oil by its pipe line, the commission had power to determine the business in which petitioner was engaged.

5. Carriers 🔑18(1)—Railroad Commission —Review.

On writ to review proceedings of Railroad Commission requiring petitioner to show cause why commission should not make an order requiring petitioner to file schedules of its rates as a common carrier, the question presented being as to the power of the commission, objections based upon apprehension of results from further action by the commission were immaterial.

In Bank. Application by the Producers' Transportation Company against the Railroad Commission of the State of California, Max Thelen and others, as members, for a writ of review against said Commission. Order of Railroad Commission affirmed.

Lewis W. Andrews, Thomas O. Toland, A. V. Andrews, and Andrews, Toland & Andrews, all of Los Angeles, and Paul M. Gregg, of San Luis Obispo, for petitioner. Douglas Brookman, of San Francisco, for respondents.

SHAW, Judge pro tem. Upon application by petitioner therefor, a writ of review was issued in the above-entitled proceeding directed to the Railroad Commission, in obedience to which respondent has certified to this court the record of its proceedings and order therein made affecting petitioner and which it challenges as being in excess of the jurisdiction of that tribunal.

In 1913 the Legislature of the state enacted a statute, designated as chapter 327, and found in the Statutes of 1913, at page 657, wherein the Legislature, among other things, declared that:

> "Every private corporation and every individual or association of individuals, * * * (b) owning, operating, managing or controlling any pipe line or any part of any pipe line, plant or equipment for the transportation of crude oil, petroleum or the products thereof, directly or indirectly, to or for the public, for hire, compensation or consideration of any kind, paid or received, directly or indirectly, for such transportation, and which said pipe line, plant or equipment is constructed or maintained upon, along, over or under any public highway, and in favor of whom the right of eminent domain exists, * * * is hereby declared to be a common carrier and subject to the provisions of the act known as the 'Public Utilities Act,' approved December 23, 1911."

On August 11, 1913, the commission, of its own motion, made an order requiring petitioner to appear before the commission at a specified time and place and show cause why the Railroad Commission should not make its order requiring petitioner to file with the commission schedules of its rates and charges for the transportation of crude oil, petroleum and the products thereof, and its rules and regulations in connection with such transportation, and otherwise to comply fully with the provisions of said chapter 327 of the Laws of 1913. In response to this order and citation, petitioner appeared at hearings at which evidence was adduced touching the question as to whether or not it was subject to the Public Utilities Act (St. 1911, Ex. Sess. p. 18). The result of such hearings was a finding to the effect that petitioner was a common carrier and public utility in the transportation of crude oil, petroleum, and the products thereof, by means of pipe lines from the San Joaquin valley oil fields, and, as such, subject to the Public Utilities Act of this state; and thereupon the commission ordered that petitioner file with the commission schedules of its rates and charges for the transportation of crude oil, petroleum, and products thereof by means of pipe lines from the San Joaquin valley oil fields, in the state of California, and its rules and regulations in connection with such transportation.

Petitioner was incorporated under the laws of this state in June, 1909, for the purpose, among other things, of establishing "a general transportation business for the purpose of transporting * * * any of the oils * * * produced * * * by this corporation, or any other person, firm, partnership, association, or corporation, and for conducting the business of * * * carrying oils, petroleum," etc. Its formation was due to the activities of the Independent Oil Producers' Agency, the membership of which at said time consisted of about 100 different and independent producers of oil, and which membership, on August 1, 1913, up to which time no oil producer desiring to avail himself of the privilege had been refused admission to membership, had increased to the number of 175 (and all of whom were dependent upon unsatisfactory means for the transportation of their products to the markets). In order to finance the undertaking, the cost of which was some $3,500,000, furnished by the Union Oil Company, which owns practically all the stock of the Transportation Company, each member of the Independent Oil Producers' Agency was required to sign a contract covering a term of years expiring January 1, 1920, agreeing to deliver to the agency for transportation and sale all of the oil produced by him on specified lands, the covenants of which contract ran with and bound the lands of the producer; and in turn the Independent Oil Producers' Agency, on June 11, 1909, made a contract with the Producers' Transportation Company whereby the latter was given the exclusive right for a period of ten years from that date to transport at specified rates all crude oil controlled by the agency, and a contract similar in terms was required to be executed on the part of each member of the agency to the Transportation Company. On June 24, 1909, the Producers' Agency made a contract with the Union Oil Company constituting the latter the exclusive sales agent for a period of ten years of all the oil controlled by the agency, agreeing to give such agent a stipulated commission for services so performed. The Producers' Transportation Company produces no oil, but is operated solely as a carrier of oil for profit. Its pipe lines extend from the oil fields to Port Harford on the shores of the Pacific Ocean in San Luis Obispo county, in connection with which terminus the Union Oil Company has erected storage facilities, and from which point, by means of oil vessels owned and chartered by said last-named company, it handled the oil, conveying it to market, for which an additional charge is made. In reaching Port Harford the pipe line extends in part over certain highways and streets, and a portion of the right of way over which it is constructed was acquired by the Producers' Transportation Company in proceedings in eminent domain wherein it alleged that it was "engaged in the business of transporting oil by means of pipe lines as a common carrier for hire," which allegation was by the court found to be true, and it was thereupon adjudged that the use of the land sought to be condemned was a public use authorized by law, and that petitioner as a common carrier of oil for hire had the right to condemn the same as a right of way over which to construct its pipe lines.

It thus appears that by its articles of incorporation petitioner declared that its purpose was to construct a pipe line, and by means thereof engage in a general transportation business of oil produced by any person, firm, or association, that, claiming to be an agent of the state in charge of a public use, it seized private property, alleging that it was necessary for use in constructing this pipe line, through and by means of which it proposed to serve the public, and that during all the time since completion thereof it, without discrimination, in accordance with the intention so to do as declared in its articles of incorporation, has, through and by means of said pipe line, transported oil produced "by any person, firm, partnership, association, or corporation" applying for such service. True, it required such applicant to comply with its rules, exactions, and regulations, among which was membership—refused to none, however—in the Producers' Agency, an incident of which was that for the term ending January 1, 1920, they should appoint the agency to act for them in the transportation and sale of their oil.

[1] By the provision referred to only those persons and associations transporting oil by means of pipe lines "directly or indirectly, to or for the public, for hire" are declared to be common carriers and subject to the Public Utilities Act. A like provision is found in section 23, art. 12, of the state Constitution, which provides that:

> "Every private corporation * * * operating * * * any * * * pipe line * * * within this state, for the transportation or conveyance of * * * crude oil, * * * either directly or indirectly, to or for the public, and every common carrier, is hereby declared to be a public utility subject to such control and regu-

lation by the Railroad Commission as may be provided by the Legislature."

Neither by the provision of the act in question nor the provision of the Constitution can the state subject private property to a public use, nor confer authority upon the Railroad Commission to assume control of private pipe lines engaged in the transportation of crude oil. Neither by act of the Legislature nor by declaration of the state Constitution can private property be taken for public use without compensation therefor. Del Mar Water Co. v. Eshleman, 167 Cal. 666, 140 Pac. 591, 948.

Where, however, the owner of property voluntarily devotes it to a public use, he in effect grants to the public an interest in such use, and to the extent of the interest so devoted to the public the public may insist upon a voice in the control and regulation thereof.

[2] That petitioner, in the indirect manner stated, voluntarily assumed the duty of and embarked upon the business of a public carrier in transporting oil for hire, in our opinion, admits of no doubt. The conditions imposed, subject to which it transported oil, however burdensome, applied alike to all producers seeking its service; and subject to compliance therewith it carried everybody's oil to market. It is not the ipse dixit of the law, but the fact that petitioner has voluntarily devoted its property to a public use, which justifies the control assumed by the Railroad Commission. The facts bring the case within the principle enunciated in what is known as the Elevator Cases, entitled Brass v. North Dakota, 153 U. S. 391, 14 Sup. Ct. 857, 38 L. Ed. 757, Budd v. New York, 143 U. S. 517, 12 Sup. Ct. 468, 36 L. Ed. 247, and Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77, in the latter of which the court, speaking through Chief Justice Waite, says:

> "When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control."

The evidence upon which the commission based its action in making the order shows that petitioner by its voluntary act devoted its property, indirectly at least, to the use of the public in transporting oil, and that, conceding its right, in the absence of an irrevocable dedication to discontinue the conduct of such public business, nevertheless until such discontinuance its tolls, rules, and regulations are subject to the control of the commission.

[3] A further and more potent reason, however, for upholding the action of the Railroad Commission is found in the fact that petitioner availed itself of the right of eminent domain in condemning property for the right of way over which it constructed its pipe line. To our minds, this must be deemed conclusive evidence of a dedication of such property to public use, since it could not have exercised such right other than in "behalf of a public use" (section 1238, Code Civ. Proc.) as "an agent of the state or person in charge of such use" (section 1001, Civ. Code). In State ex rel. Turnpike Co. v. American & E. News Co., 43 N. J. Law, 381, it is said:

> "The fact that the Legislature has granted the right to take private property clearly evinces a legislative intent to lay such companies under an obligation to the public to permit the use of their lines by all persons, under reasonable regulations; and in accepting the benefit of this law, the recipient of the same assumes the performance of this duty to the public."

As appears from the record, petitioner asserted and proved that it was a common carrier in the transportation of oil, thereby bringing itself directly within the provisions of the Constitution (section 23, art. 12) hereinbefore referred to. Having thus acquired such right of way by holding itself out as a common carrier and as agent of the state in charge of a public use, without which it could not have seized property vested in private ownership, it should not now be heard in disclaimer of the profession so made and upon the faith of which judgment in its favor condemning the property to the public use of which it was in charge, was rendered.

[4] The contention that the commission had no power to determine the character of the business conducted by petitioner is without merit. While, as said in Holabird v. Railroad Commission, 171 Cal. 691, 154 Pac. 831, "no proceeding is authorized for the mere purpose of determining this question with respect to any person or corporation," nevertheless, under section 60 of the Public Utilities Act, the commission is authorized, "of its own motion, or upon the complaint of any person, to inquire into any act or thing done by any public utility, and to make such order therein as may be necessary to compel such public utility to comply with the law or with the orders or rules of the commission," but it does not authorize a proceeding for the sole purpose of inquiring and determining whether a particular person or corporation is carrying on a public utility or is engaged in a private enterprise. The jurisdiction of the commission to make the order depended upon the existence of certain facts, namely, whether petitioner was engaged in the business of a common carrier in the transportation of oil, and for the purpose of determining its jurisdiction it was vested with power to determine the facts upon the existence of which it was authorized to make the order.

> "Where the jurisdiction of a board depends on the existence of certain facts, the board has jurisdiction to determine whether or not those facts exist." Great Western Power Co. v. Pillsbury et al., 170 Cal. 180, 149 Pac. 35.

In this proceeding we are not concerned with the contracts made between petitioner and the Producers' Agency, upon the faith of which it is claimed the pipe line was constructed. They are not affected by the order made. If such contracts are valid, no legal action had by the commission could impair the obligation thereof; if invalid, the argument based thereon is without force.

[5] Since the question presented is one as to the power of the commission, not as to its policy, as to which it may be said to have plenary power, the numerous objections based upon apprehension of results which may follow future action taken by the commission become immaterial, and hence need not be considered.

The order, in so far as it affects petitioner, is affirmed.

We concur; ANGELLOTTI, C. J.; SLOSS, J.; MELVIN, J.; HENSHAW, J.; SHAW, J.

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176 Cal. 518

ASSOCIATED PIPE LINE CO. v. RAILROAD COMMISSION OF CALIFORNIA et al.

ASSOCIATED OIL CO. v. SAME.

(S. F. 7376, 7377.)

(Supreme Court of California. Nov. 20, 1917.)

1. Carriers 🔑5 — Common Carriers — Pipe Line Companies — Statutes — Construction.

St. 1913, p. 657, regulating pipe line companies or other instrumentalities, or persons transporting oil, petroleum, or its products, enacted in pursuance of Const. art. 12, § 23, authorizing the Legislature to regulate such business, applies only to persons or other agencies transporting oil or its products to or for the public.

2. Carriers 🔑4—"Common Carrier."

One who offers to carry goods for any person between certain termini, and who is bound to carry for all who tender their goods and the price of carriage, is a "common carrier."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Common Carrier.]

3. Carriers 🔑1—Common Carriers—Pipe Line Companies — Statutes — Construction.

Where pipe line companies, transporting oil, made no irrevocable dedication of property to public use, such as the exercise of the power of eminent domain, in order to make them subject to the regulation of Const. art. 12, § 23, and St. 1913, p. 657, regulating common carriers of oil by pipe line, or otherwise, it must be shown that they voluntarily devoted their facilities to the indiscriminate use of the public for hire, so as to become common carriers.

4. Carriers 🔑4 — Pipe Line Companies — Regulation — Public Carriers—"Common Carriers."

Pipe line companies, owning oil fields and transporting only oil produced therein, or purchased by them from other producers for the operation of their own business, not constituting a monopoly of the transportation, are not common carriers of oil, within Const. art. 12, § 23, or St. 1913, p. 657, regulating common carriers of oil for hire, or otherwise, and need not file schedules of rates with the Railroad Commission.

5. Eminent Domain 🔑2(1) — "Taking" Property Without Compensation—Pipe Line Companies.

Subjecting property of a pipe line company to the use of the public in the common carriage of oil constitutes a "taking" thereof and requires just compensation.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Taking.]

6. Carriers 🔑2—Constitutional Law 🔑297 — Eminent Domain 🔑2(1) — Taking Property Without Compensation — Pipe Line Companies—Due Process of Law.

St. 1913, p. 657, § 1, subsec. "d," and section 2, declaring every individual, association, or corporation using, operating, owning, managing, or controlling any oil pipe line a common carrier, is void and unconstitutional, and in violation of Const. U. S. Amend. 14, as taking private property without compensation, and without due process of law, although tolls for services are allowed, since elements of damage due to the subjecting of the property to public services, not covered by charges for services performed, are not thereby compensated.

In Bank. Two applications for writs of review by the Associated Pipe Line Company, Incorporated, and the Associated Oil Company, Incorporated, to review and annul orders of the State Railroad Commission and its members, requiring the petitioners to file schedules of rates and charges. Orders annulled.

Edmund Tauszky, Henley C. Booth, and Stanley Moore, all of San Francisco, for petitioners. Douglas Brookman, of San Francisco, for respondents.

SHAW, Judge pro tem. These are proceedings in certiorari whereby each of the petitioners seeks the review and annulment of an order made by the Railroad Commission, requiring them to file with said commission schedules of their rates and charges for the transportation of crude oil, petroleum, and the products thereof, by means of pipe lines from the San Joaquin Valley oil fields, in the state of California, and their rules and regulations in connection with such transportation.

The proceeding initiated of its own motion by the commission, under and by virtue of chapter 327 of the laws of California found in Statutes of 1913, p. 657, is entitled:

"In the Matter of the Compliance by Oil Pipe Lines with Provisions of Chapter 327 of the Laws of 1913, Declaring Certain Corporations, Associations and Individuals to be Common Carriers and Public Utilities, and Subject to the Provisions of the Public Utilities Act."

Its declared purpose was an investigation to determine what corporations and associations were subject to the provisions of said act of the Legislature. Pursuant to an order therein made, petitioners and a number of other corporations engaged in the transportation of crude oil and its products by means of pipe lines appeared before the commission at a stated time and place to show cause why each of them should not file with the commission the data and information therein specified, and otherwise comply with the law.

At the hearing had evidence was adduced touching the subject of inquiry, upon which the commission made its findings and order which it is sought herein to have annulled.

Section 23, art. 12, of the Constitution of California, as amended in October, 1911, pursuant to which the act in question was adopted, is as follows:

> "Every private corporation, and every individual or association of individuals, owning, operating, managing, or controlling, any commercial railroad, interurban railroad, street railroad, canal, pipe line, plant, or equipment, or any part of such railroad, canal, pipe line, plant or equipment within this state, for the transportation or conveyance of passengers, or express matter, or freight of any kind, including crude oil, or for the transmission of telephone or telegraph messages, or for the production, generation, transmission, delivery or furnishing of heat, light, water or power, or for the furnishing of storage or wharfage facilities, either directly or indirectly, to or for the public, and every common carrier, is hereby declared to be a public utility subject to such control and regulation by the Railroad Commission as may be provided by the Legislature, and every class of private corporations, individuals, or associations of individuals hereafter declared by the Legislature to be public utilities shall likewise be subject to such control and regulation. The Railroad Commission shall have and exercise such power and jurisdiction to supervise and regulate public utilities, in the state of California, and to fix the rates to be charged for commodities furnished, or services rendered by public utilities, as shall be conferred upon it by the Legislature, and the right of the Legislature to confer powers upon the Railroad Commission respecting public utilities is hereby declared to be plenary and to be unlimited by any provision of this Constitution."

By this provision of the Constitution the people of the state, however novel, if not startling, the proposition may be, have in clear and unmistakable language declared:

> That "every class of private corporations, individuals, or associations of individuals hereafter declared by the Legislature to be public utilities, shall * * * be subject to * * * control and regulation" by the Railroad Commission, as provided by the Legislature, and this without reference to the character of the business, whether it be a bootblack stand, grocery store, or agricultural pursuit conducted in a purely private capacity; and, further, that "the right of the Legislature to confer powers upon the Railroad Commission respecting public utilities, is hereby declared to be plenary and to be unlimited by any provision of this Constitution."

[1] Acting in pursuance of the power so conferred, the Legislature adopted the act referred to as chapter 327, section 3 of which provides that:

> "Any pipe line constructed, acquired, owned, operated, maintained, managed or controlled by any private corporation, or individual or association of individuals, for any of the purposes or under any of the conditions specified in section 1 or section 2 of this act, is hereby declared to be a public utility and subject to the provisions of the Public Utilities Act."

Referring to section 1, divided into four subdivisions, we find that by subdivisions designated (a), (b), and (c) the Legislature declares to be common carriers and subject to the provisions of the Public Utilities Act every private corporation, individual, or association of individuals—

> (a) engaged in transporting crude oil, petroleum or the products thereof through a pipe line, "directly or indirectly, to or for the public, for hire, compensation or consideration of any kind, paid, given, extended or received, directly or indirectly, for such transportation"; (b) any like person or body "in favor of whom the right of eminent domain exists," engaged in such transportation to or for the public for hire, through a pipe line "constructed or maintained upon, along, over or under any public highway"; (c) any corporation, individual or association of individuals transporting crude oil, petroleum or the products thereof, to or for the public, for hire "or otherwise," by means of a pipe line "constructed, operated or maintained across, upon, along, over or under the right of way of any railroad corporation or other common carrier required by law to transport crude oil, petroleum or products thereof, as a common carrier."

Restated, subdivision (a) of section 1 embraces only those engaged in the business of transporting oil as common carriers. Subdivision (b) is the same as subdivision (a), except that the act in its operation is restricted to those in whom the power of eminent domain exists (though not exercised), and whose pipe lines are constructed over public highways. Subdivision (c), retaining the provision that the transportation be for the public for hire, adds after the word "hire" the words "or otherwise," and restricts the operation of the provision to pipe lines constructed along the rights of way of common carriers required to transport oil. It thus appears that subdivisions (a), (b), and (c) of section 1 apply solely and alone to those who, by means of pipe lines, are engaged in the transportation of crude oil and its products to or for the public.

As bringing the petitioners within the provisions of these subdivisions, the commission found as a fact that in the transportation of crude oil and its products by means of pipe lines from the San Joaquin Valley petitioners were common carriers thereof, or, in the language of the statute, they were engaged in transporting such articles "to or for the public for hire." In our opinion, there is no evidence to support this finding as to either of the petitioners.

[2] In his work on Carriers, Mr. Moore, at page 20, vol. 1, defines a common carrier as:

> One who "holds himself out as such to the world; that he undertakes generally and for all persons indifferently to carry goods and deliver them for hire; and that his public profession of his employment be such that, if he refuse, without some just ground, to carry goods for any one, in the course of his employment and for a reasonable and customary price, he will be liable to an action."

It is one who offers to carry goods for any person between certain termini and who is bound to carry for all who tender their goods and the price of carriage.

[3] Whether the business conducted by petitioners was that of a common carrier as thus defined was a question of fact, since it

may not be said that the intention of the Legislature in enacting subdivisions (a), (b), and (c) of section 1 of the act was to subject to public use pipe lines engaged in the business of transporting oil other than for the public. Indeed, such legislation, if attempted, would have been futile, since under the Fourteenth Amendment of the federal Constitution no state shall deprive any person of property without due process of law, and to take or devote private property to public use without compensation is such deprivation. The record discloses no action on the part of either petitioner which constitutes an irrevocable dedication of its property to a public use, such as the exercise of the sovereign power of the state in eminent domain. Wyman on Public Service Corporations, § 214; State ex rel. Turnpike Co. v. Am. & E. News Co., 43 N. J. Law, 381. Hence, in order to bring petitioners within the purview of the provisions under consideration, it must have been made to appear that they had voluntarily devoted their transportation facilities to the indiscriminate use of the public for hire, thus constituting them common carriers.

As to the Associated Pipe Line Company, the evidence shows that it was incorporated in August, 1907, "for the acquisition, construction, leasing, owning, maintenance, and operation, but not as a common carrier, of pipe lines for transportation of oil within the state of California, together with necessary pumping stations thereunder." At the time in question the Southern Pacific Company was, through a subsidiary company known as the Kern Oil & Trading Company having charge of its oil bureau, engaged in developing oil lands owned by it in Kern county, the production from which was intended for its own use, and, as a means of delivering the oil so produced to points along its line of railroad, it joined with the Associated Oil Company in the construction of two pipe lines, the aggregate daily carrying capacity of which, in 1913, was 38,000 barrels. The cost of construction represented by the capital stock of the Associated Pipe Line Company was equally divided between the Associated Oil Company and the Kern Oil & Trading Company, and under their agreement, no charge being made for the transportation of oil other than the actual cost of operation and maintenance of the pipe line, each was entitled to one-half the carrying capacity of said lines, one of which was known as the Rifle line, being 281 miles in length, and the other, known as the Hot line, 138 miles in length. At all the times since the construction of these pipe lines the Kern Oil & Trading Company has devoted its one-half of the carrying capacity of said lines solely and alone to the transportation of oil produced by it and delivered to its proprietary company, the Southern Pacific Company, for the sole use of the latter. In 1913 such use amounted to 19,000 barrels per day, which was one-half of the full carrying capacity. The other interest in the capacity of said pipe lines so owned by the Associated Oil Company has never at any time since the construction thereof been devoted to the carrying of oil or products other than those either produced by the Associated Oil Company or purchased in the oil field by it in its business of producing, buying, and selling oil, both in crude and refined forms. In 1913 its daily production of oil amounted to 16,500 barrels, and at the same time it was purchasing about 30,000 barrels per day, which, as found by the commission, amounted to about 22 per cent. of the entire production of the state. It thus appears that one half of all the oil transported through these pipe lines was produced by the Kern Oil & Trading Company, so owned by the Southern Pacific Company, for the use of the latter, and the other half so transported was either produced or bought by the Associated Oil Company, by whom it was transported and delivered to itself at the termini of said pipe lines.

With reference to the other petitioner, Associated Oil Company: As stated, it had a daily production of 16,500 barrels and acquired by purchase 30,000 barrels per day, making a total of 46,500 barrels; hence, its one-half the capacity of the Associated Pipe Line Company being only 19,000 barrels per day, left an amount for transportation by other means of 27,500 barrels. For the purpose of such transportation, it, in addition to ownership in the Associated Pipe Line Company, owns a pipe line running from the oil fields to Gaviota, and one from the Coalinga field to Monterey, the capacity of each of which is some 15,000 barrels per day. At no time since the construction thereof has the Associated Oil Company transported any oil through either of these pipe lines, save and except such as it produced, together with that so purchased in the field and transported for delivery to itself at the termini of said pipe lines, where it was sold to consumers in its crude or refined form, or reshipped to other points for sale to consumers. The only efficient means of transporting oil from the San Joaquin Valley oil fields, which in July, 1913, as found by the commission, amounted to some 6,500,000 barrels, was by means of pipe lines of the petitioners and those of a number of other companies engaged in the transportation of oil, all of which product, except that produced by the Kern Oil & Trading Company and Associated Oil Company, together with the 30,000 barrels per day purchased by said last-named company, was transported through and by means of such other independent pipe lines in which petitioners had no interest.

[4] We are unable to perceive anything in the facts established which does not compel the conclusion that petitioners were engaged in a purely private business of transporting

oil through these pipe lines. Respondent lays great stress upon a decision of the United States Supreme Court entitled U. S. v. Ohio Oil Co., 234 U. S. 548, 34 Sup. Ct. 956, 58 L. Ed. 1459. To our minds, there are many features of this case which clearly distinguish it from that at bar. In the Ohio Oil Company Case it appears that the Standard Oil Company had acquired control of all pipe lines to which the oil fields east of California were tributary, thus giving it a monopoly of the means of transportation; that a part of the pipe lines constituting the system were in fact common carriers. Having thus made itself master of the fields without the necessity of owning them or producing any oil itself, it, through its subordinates, refused to carry oil unless the same was sold to it, or to its subsidiaries and through them to it, on terms dictated by itself. It was there held that since, subject to such condition of sale to it, the company carried everybody's oil to market, the act of Congress declaring the pipe lines so operated to be common carriers was not a taking of the property for the use of the public, since upon the facts found such pipe lines had been by the owners thereof devoted to public use. In the case at bar a large part of the oil transported through the pipe lines by the Associated Oil Company is produced by it. The amount of 30,000 barrels per day purchased bears a comparatively small proportion to that produced in the oil fields tributary to its lines. The fact of such limited purchase, in competition with a number of other oil pipe line companies to which said oil field is tributary, cannot, under the opinion in the Ohio Oil Company Case, however interpreted, be deemed to constitute it a common carrier, or engaged in transporting oil for the public. Indeed, the opinion of the Supreme Court in the case of U. S. v. Uncle Sam Oil Co., found in the same book (page 561), is authority for holding the contrary view. The fact that "the business is such that the public needs the use in the same, and that the conduct of the same is a matter of consequence," as found by the commission, is immaterial to the question. In one of the so-called elevator cases, that of Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77, it is said:

> "When, therefore, one devotes his property to a use in which the public has an interest, he, in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created."

But so long as he uses his property for private use, and in the absence of devoting it to public use, the public has no interest therein which entitles it to a voice in its control. Other cases to the same effect are Budd v. New York, 143 U. S. 517, 12 Sup. Ct. 468, 36 L. Ed. 247; Weems Steamboat Co. v. Peoples' Co., 214 U. S. 345, 29 Sup. Ct. 661, 53 L. Ed. 1024, 16 Ann. Cas. 1222; Monongahela Nav. Co. v. U. S., 148 U. S. 336, 13 Sup. Ct. 622, 37 L. Ed. 463, and Del Mar v. Eshleman, 167 Cal. 666, 140 Pac. 591, 948. Indeed, our attention is directed to no authority in this state or elsewhere holding otherwise.

Subbdivision (d) of section 1 embraces every one—

> "owning, using, operating, managing or controlling, directly or indirectly, or participating in the ownership, use, operation, management or control, directly or indirectly, under lease, contract of purchase, agreement to buy and sell, or other contractual or tacit agreement or arrangement of any kind or character whatsoever, of any pipe line, or pipe lines, or any part of any pipe line, or pipe lines, plant or equipment, or pipe line system, or any part of any pipe line system, for the transportation of crude oil, petroleum or the products thereof, of and from, or of, or from any oil field or place of production within the state of California, to any distributing, refining, or marketing center or reshipping point therefor within said state, whereby, or under, or through which, directly or indirectly, such corporation, or any corporation or association of corporations, or individual or association of individuals secures, or is enabled to secure, or attempts to secure, or tends to secure, the control of, or monopoly of the purchasing of, or the control of, or monopoly of the transportation of such crude oil, petroleum or the products thereof."

As bringing petitioners within this provision of the act, the commission found that "the purpose of chapter 327 of the Laws of 1913 is to terminate and prevent a monopoly in the oil pipe line business," and found as a fact that the Associated Oil Company and Associated Pipe Line Company, together with three other companies named as engaged in like business, "have secured the control and monopoly of the transportation of crude oil, petroleum, and the products thereof from the San Joaquin Valley oil fields," and that, while section 5 of the act excepts from the provisions thereof companies, individuals, and associations the nature and extent of whose business is not of public interest or consequence, "the five companies (among which were petitioners) serving the San Joaquin Valley fields cannot be regarded as coming within the exception," and further found as a fact that the nature and extent of the business of said five companies, including petitioners, "is such that the public needs no use in the same, and the conduct of the same is not a matter of public consequence."

The finding as to the control and monopoly secured by petitioners is attacked upon the ground of insufficiency of evidence to support the same. The evidence touching the subject is most meager and unsatisfactory. In effect it shows that five companies, including petitioners, operating pipe lines in transporting oil, a part of which was produced by each of them, were also buyers of crude oil in the fields from the independent producers thereof, who, since none of said companies transported oil other than that produced by themselves or such as they acquired by purchase, had no efficient means of shipping their oil to market, and hence contracted to sell the same to some one of those companies at prices agreed upon; that there was no agreement, tacit or otherwise, shown to exist between the companies as to the price which they should pay in contracting for the purchase of oil; that during most of the time the production of oil was largely in excess of the demand therefor, and little, if any, difference was paid by the companies in contracting for the purchase of oil; hence convenience and economy in delivery of the oil both as to the purchaser and buyer might well be deemed a controlling factor in making such contracts. While the position of petitioners and owners of the other pipe lines gave them, as found by the commission, an advantage over the independent producers in transporting their product, thus affording an opportunity enabling them to enter into an unlawful combination in restraint of trade, our attention is directed to no evidence which in the slightest degree tends to establish such fact.

[5, 6] However this may be, and conceding the evidence ample to support the finding, such fact cannot warrant the taking of private property for public use without compensation for which no provision is made or contemplated. True, the exaction of tolls for actual service will be allowed, but there are elements of damage due to the subjection of the property to the public service not covered by charges for service performed for which no compensation is made. That subjecting petitioners' property to the use of the public as common carriers constitutes a taking of the same, admits of no controversy.

> "Whenever a law deprives the owner of the beneficial use and free enjoyment of his property, or imposes restraints upon such use and enjoyment that materially affect its value, without legal process or compensation, it deprives him of his property within the meaning of the Constitution. * * * It is not necessary, in order to render a statute obnoxious to the restraints of the Constitution, that it must in terms or in effect authorize the actual physical taking of the property or the thing itself, so long as it affects its free use and enjoyment, or the power of disposition at the will of the owner." Forster v. Scott, 136 N. Y. 577, 32 N. E. 976, 18 L. R. A. 543; Monongahela Nav. Co. v. United States, 148 U. S. 312, 13 Sup. Ct. 622, 37 L. Ed. 463.

Under the Public Utilities Act the Railroad Commission, as an instrumentality of the state, is authorized to supervise and regulate every public utility in the state, with power to fix tolls and charges exacted for the service performed; but it has no power to declare what shall constitute a public utility. But this, argues respondent, is a function of the Legislature. Not so. The Legislature possesses no such power. It cannot by its edict make that a public utility which in fact is not, and take private property for public use by its fiat that the property is being devoted to a public use. If under the broad language used in section 23, art. 12, of the Constitution that "every class of private corporations, individuals or associations of individuals hereafter declared by the Legislature to be public utilities shall * * * be subject to * * * control and regulation" of the Railroad Commission, the Legislature can by its mere fiat, without notice or opportunity to be heard, and in the absence of any provision for compensating the owner thereof for damage, subject petitioners' pipe lines to the demands of the public because the private use thereof tends to create a monopoly or enables the owner thereof to secure a monopoly, it can with equal propriety declare a grocer or dry goods store employing more than a specified number of clerks to be a public utility, or, without such or any qualifications, declare that all pipe lines used in transporting oil shall be common carriers of oil. Indeed, as to corporations, this is precisely what it has attempted to do by section 2 of the act, which provides that every corporation owning a pipe line, through and by means of which it transports oil is declared to be a common carrier and subject to the provisions of the Public Utilities Act; the only limitation thereon being, as provided in section 5, that it shall not apply where the nature and extent of the business is such that the public needs no use in the same. That such provisions constitute a taking of private property by the state for public use, without due process of law, which is prohibited by the Fourteenth Amendment to the Federal Constitution, must be conceded. Mr. Lewis, in his work on Eminent Domain (3d Ed.) § 11, says:

> "A law which authorizes the taking of private property without compensation * * * cannot be considered as due process of law in a free government." Chicago, etc., R. R. Co. v. Chicago, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 979.

1. The evidence is insufficient to justify the finding that petitioners in operating their pipe lines in transporting oil, came within the provisions of subdivisions (a), (b), and (c) of section 1 of the act.

2. Subdivision (d) of section 1 and section 2 of the act are, except perhaps as to corporations acquiring such pipe lines after the passage thereof, unconstitutional and in violation of the Fourteenth Amendment to the federal Constitution, in that they contemplate the taking of private property in the absence of any provision made for compensating the owners, and without due process of law.

Our conclusion renders it unnecessary to consider other grounds upon which petitioners attack the action of the Railroad Commission.

The orders, in so far as they affect petitioners, are annulled.

We concur: SLOSS, J.; MELVIN, J.; HENSHAW, J.; SHAW, J.

176 Cal. 543

SAVINGS UNION BANK & TRUST CO. v. CROWLEY. (S. F. 7297.)

(Supreme Court of California. Nov. 23, 1917. Rehearing Denied Dec. 20, 1917.)

1. **EXECUTORS AND ADMINISTRATORS** 🔑450—**ACTIONS—SUFFICIENCY OF EVIDENCE.**

In an action by an executor against the testator's widow involving a dispute as to the ownership of dividends on corporate stock, evidence *held* sufficient to support findings that the husband pledged the stock to the wife to secure the payment of his notes to her, that the certificates of stock were delivered to and retained by her, and that the notes had not been paid.

2. **APPEAL AND ERROR** 🔑931(1) — **PRESUMPTIONS—FINDINGS.**

The presumption of payment of the notes arising from long lapse of time could not avail against the court's finding of nonpayment based upon the payee's testimony that no part of the debt had been paid.

3. **EXECUTORS AND ADMINISTRATORS** 🔑431(2) — **LIMITATION OF ACTIONS** 🔑167(1) — **WITNESSES** 🔑133—**PRESENTATION OF CLAIMS—COMPETENCY OF WITNESSES—NATURE OF ACTION.**

An action by a stockholder's executor to recover dividends, in which the stockholder's widow was substituted as defendant and set up a claim to the dividends under a pledge of the stock to her to secure the payment of notes, was not an action on the notes nor a claim against the estate, and the widow's rights were exactly the same as if she were suing the corporation, and hence the running of limitations or the nonpresentation of the notes as a claim against the estate were not defenses, and the widow was not incompetent as a witness, under Code Civ. Proc. § 1880, subd. 3, providing that parties or assignors of parties or persons in whose behalf an action or proceeding is prosecuted cannot be witnesses against an executor or administrator upon a claim or demand against the estate as to any matter of fact occurring before the death of the decedent.

4. **CORPORATIONS** 🔑123(8)—**PLEDGE OF STOCK—EXTENT OF LIEN—DIVIDENDS.**

Under Civ. Code, § 2989, providing that the increase of property pledged is pledged with the property, a pledge of corporate stock carries with it a pledge of the dividends.

5. **LIMITATION OF ACTIONS** 🔑167(1)—**OPERATION AND EFFECT — EFFECT ON LIEN OF PLEDGEE.**

Where defendant lawfully acquired possession of certificates of stock as pledgee during the existence of the obligation secured, and was still in possession of them, her lien remained in full force, and she could not be divested of it without a prior satisfaction of the debt, notwithstanding the running of limitations against the secured debt.

6. **CORPORATIONS** 🔑123(10) — **RIGHTS OF PLEDGEES OF STOCK—COLLECTION OF DIVIDENDS.**

A lawful pledgee of corporate stock could collect the dividends from the corporation and apply them in satisfaction of the secured debt.

7. **WITNESSES** 🔑59—**HUSBAND AND WIFE—ACTIONS BETWEEN WIFE AND HUSBAND'S EXECUTOR.**

Code Civ. Proc. § 1881, subd. 1, provides that a husband cannot be examined for or against his wife without her consent, nor a wife for or against her husband without his consent, nor can either without the consent of the other be examined as to any communication during the marriage, but that this exception does not apply to a civil action or proceeding by one against the other. Civ. Code, § 158, provides that either husband or wife may enter into any engagements or transactions with the other or with any other person respecting property which either might if unmarried. *Held*, that a wife, in an action between her and her husband's executor involving the ownership of dividends on stock which she claimed was pledged to her to secure the payment of notes, could testify to the declarations of her husband concerning the delivery of the notes and certificates of stock to her, as the action was such an action or proceeding as is excepted by section 1881.

Department 1. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by the Savings Union Bank & Trust Company, as executor of Timothy Jay Crowley, deceased, against the Pleasant Valley Farming Company, in which Katherine S. Crowley was substituted as defendant. From a judgment for defendant, and an order denying a new trial, plaintiff appeals. Affirmed.

See, also, 30 Cal. App. 144, 157 Pac. 516; 30 Cal. App. 535, 159 Pac. 194.

Sullivan & Sullivan and Theo. J. Roche, and Wm. H. Chapman, all of San Francisco, for appellant. O'Gara & De Martini and Bert Schlesinger, all of San Francisco, for respondent.

LAWLOR, J. Plaintiff appeals from the judgment for defendant, and from an order denying a new trial.

Timothy Jay Crowley died January, 1913. At the time of his death he was the owner of 106 shares of the capital stock of the Pleasant Valley Farming Company, represented by certificates numbered 3 and 8. In March and May, 1913, dividends were declared on the Crowley stock amounting to $11,978. In June, 1913, plaintiff commenced this action against the Pleasant Valley Farming Company for the dividends, on behalf of the estate. By stipulation, the farming company was released from all liability, upon its deposit of the money in a bank selected by the trial judge, and the defendant, Katherine S. Crowley, widow of the deceased, was substituted and permitted to file her answer setting out her claim to the dividends. Her answer alleged, and the court found it to be the fact, that the deceased was at his death indebted to the defendant in the sum of $7,500 and interest, evidenced by four promissory notes properly executed and delivered to the defendant; that no part of the principal or interest of the notes had ever been paid, and that these notes were secured by the two certificates of stock above mentioned. It was accordingly held that these certificates in the possession of the defendant constituted a valid pledge of the stock in question, and entitled her to collect her debt out of the dividends deposited by the Pleasant Valley Farming Company, the surplus to go to the plaintiff.

[1, 2] Appellant contends that the evidence

is insufficient to justify the findings that the deceased ever delivered the certificates of stock to the respondent in pledge, or that such certificates were ever pledged to secure the payment of the notes in question, or that respondent retained possession of the certificates in pledge or otherwise, or that the notes themselves had not been fully paid long prior to the declaration of the dividends in suit. Practically the only evidence touching these particulars is the testimony of the respondent, Mrs. Crowley, and the notes and certificates themselves. Mrs. Crowley stated that all four notes, though bearing different dates, were delivered to her by her husband at the same time, in 1907, as evidence of his indebtedness to her, and that together with the notes he delivered to her the two certificates of stock, which he told her would secure the notes. Upon three of the notes was the statement, in the handwriting of Crowley, that they were secured by stock of the Pleasant Valley Farming Company, or the Pleasant Valley Stock Farm. The body and signature of the notes were shown to be in Crowley's handwriting. The certificates bore the blank indorsement of the deceased. Upon the face of the certificates was the provision that they were transferable upon the books of the company by indorsement and delivery. Mrs. Crowley also testified that when she received the notes and certificates she wrapped all of them into a single package and placed them in a safe deposit box rented by her husband, to which she had access, and which she used for her personal belongings. The package was found to be intact upon the death of Crowley, and was identified by respondent as the one she had placed in the deposit box. Upon the question of payment, respondent stated that no part of the principal or interest had ever been demanded or paid. Appellant's proof of joint savings accounts between Mrs. Crowley and her husband, and the testimony of D. J. Murphy and his wife, are not sufficient to show that the notes had been paid. Neither can the presumption of payment arising from long lapse of time, contended for by appellant, avail against the finding of the court based upon the evidence above set out. It is the only direct evidence upon the subject and is clearly sufficient to justify the findings.

[3-6] A number of points are made by appellant in its brief, several of which can be treated together. Appellant claims that respondent's answer is, in fact, a complaint on the promissory notes to which the following defenses are available: (1) The notes are barred by the statute of limitations; (2) the debt having lapsed, the lien upon the stock and dividends is extinct; (3) the action being upon a claim against the estate, the answer is fatally defective in not showing a prior presentation of the claim to the executor; (4) under the provisions of the Code of Civil Procedure (section 1880, subd. 3), the respondent could not testify to the transaction. A sufficient answer to all of these contentions is that the action is not upon a claim against the estate, that is, the respondent is not suing upon the notes in question; the action is really one in which the appellant is seeking to secure a return of the pledged dividends without paying the debts which the dividends secure. Respondent's rights are exactly the same as if she were suing the Pleasant Valley Farming Company; appellant must show that the respondent has no right to collect the dividends from the farming company. The law generally, and in this state, is that a pledge of stock carries with it a pledge of the dividends. Civ. Code, § 2989; McAulay v. Moody, 128 Cal. 202, 208, 60 Pac. 778; Jones on Pledges and Collateral Securities, § 398.

Furthermore, the respondent having lawfully acquired possession of the certificates as pledgee during the existence of the obligation, and being still in possession of them when the action of appellant was filed, her lien remained in full force, and she could not be divested of it without a prior satisfaction of the debt. This principle has been laid down in earlier adjudications of this court, and is by analogy to the rule that the mortgagee in possession cannot be disturbed even though the statute has run upon the obligation, until the debt is first satisfied. Bridge v. Connecticut Mut. Life Ins. Co., 167 Cal. 774, 141 Pac. 375; Puckhaber v. Henry, 152 Cal. 419, 93 Pac. 114, 125 Am. St. Rep. 75, 14 Ann. Cas. 844; Cushing v. Building Ass'n, 165 Cal. 731, 737, 134 Pac. 324; Zellerbach v. Allenberg, 99 Cal. 57, 69, 33 Pac. 786; Spect v. Spect, 88 Cal. 437, 26 Pac. 203, 13 L. R. A. 137, 22 Am. St. Rep. 314. The respondent being the lawful pledgee of the stock, she could, as such pledgee, collect the dividends from the farming company and apply them in satisfaction of the notes. Since we are not here concerned with an action upon the notes nor a claim upon the estate, the running of the statute of limitations and the extinction of the right of action upon the notes are immaterial; no claim against the estate need have been presented (In re Galland, 92 Cal. 293, 28 Pac. 287), and the limitation on the right of respondent to testify to the transaction, under section 1880, Code of Civil Procedure, was inapplicable. Myers v. Reinstein, 67 Cal. 89;[1] Booth v. Pendola, 88 Cal. 36, 43, 23 Pac. 200, 25 Pac. 1101; Poulson v. Stanley, 122 Cal. 655, 55 Pac. 605, 68 Am. St. Rep. 73.

[7] The remaining point made by appellant is that the court erred in permitting respondent to testify to declarations of her husband concerning the delivery of the notes and certificates of stock to her, on the ground that by the law of this state neither spouse can, without the consent of the other, testify as to any communications made by one to the other during marriage, citing section 1881, subd. 1, Code of Civil Procedure.

[1] 7 Pac. 192.

Respondent contends that no decision in this jurisdiction has extended the restriction beyond confidential communications, and by reason of the freedom of contract between husband and wife either should be allowed to testify freely to business communications. Section 1881 declares that the rule there stated, excluding testimony by one spouse of declarations by the other made during marriage, "does not apply to a civil action, or proceeding by one against the other." The Civil Code (section 158) provides that "either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might if unmarried." The protection of the right to contract with each other respecting their separate property requires that each should be allowed to testify concerning such contracts, in case of an action between them thereon. This is such an action or proceeding within the meaning of section 1881, and the prohibition therein does not apply. Under that section, the wife can testify to communications made to her by her husband constituting the contract between them, or affecting her rights thereunder. Emmons v. Barton, 109 Cal. 669, 42 Pac. 303, was not a case of that character, and what is there said has no application here.

Judgment and order affirmed.

We concur: SHAW, J.; SLOSS, J.

176 Cal. 553

GEORGE v. TRINITY CHURCH et al.

(L. A. 3716.)

(Supreme Court of California. Nov. 23, 1917. Rehearing Denied Dec. 20, 1917.)

NEGLIGENCE 🔑55—INJURY TO SUBCONTRACTOR'S SERVANT—LIABILITY OF CONTRACTOR.

For injury to servant of subcontractor from giving way, through weakening of supports, of a scaffolding built for subcontractor by contractor at a time and under circumstances when the subcontractor was by the contract bound to construct it, the contractor is not liable; he not having been bound to keep it in repair or to inspect it against weakening of supports.

In Bank. Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Action by Clarence Eugene George against Trinity Church and another. From judgment for plaintiff against defendant Magnus Johnson, and from an order denying motion for new trial, said Johnson appeals. Reversed.

Richards & Carrier, of Santa Barbara, and George H. Moore, of Los Angeles, for appellant. G. H. Gould, of Santa Barbara, for respondent.

MELVIN, J. Action for damages against two defendants. Each appeared separately. Judgment was entered in favor of defendant Trinity Church after its motion for nonsuit was granted. Johnson, the other defendant, made a similar motion, which was denied. Against him the jury rendered a verdict in the sum of $5,000, and judgment for that sum with costs was entered. Johnson appeals from the judgment and from an order denying his motion for a new trial.

The plaintiff was injured by reason of the breaking of a scaffolding upon which he was at work in a new building erected for Trinity Church. He was an employé of the subcontractors, Smith & Stalhuth, engaged in doing the stonework required in the construction of the building.

Trinity Church employed Magnus Johnson to superintend the erection of its new building in accordance with certain plans and specifications. In the written contract between the church and Johnson it was provided that the latter should give the same attention to the building as would be given by a person constructing it under contract, so far as direction and superintendence were concerned, except that he should not be required to pay for labor or for material used in the construction of the building save a mixer, a buzz saw, and scaffolding planks, which he was to furnish.

In the contract for the cement, stone, and concrete work Trinity Church was designated as "owner," Johnson as "contractor," and Smith & Stalhuth as "subcontractor." This agreement provided, among other things, that the subcontractor should set up any scaffolding that might be specially required for his work. In the specifications accompanying the earlier contract by which Johnson agreed to supervise the building it was set forth that the carpenter was to "set up all scaffolding and staging that may be required for the erection of the building." Johnson was to hire all workmen; was to have control of the work subject to the supervision of the architects; and was to pay the men weekly, receiving reimbursement from the church at the beginning of the following week upon presentation of his payroll. The church was to pay for all materials used in the work at least monthly, and it was set forth in the agreement that "subcontractors shall be paid by the party of the first part [the church] upon certificate of the architects." Johnson's compensation was to be a fixed sum if the building should be erected for the estimated cost, but his compensation was to be increased or diminished in a manner provided in the writing, according to the completion of the building for less or more than the estimate.

It appears without conflict or question that plaintiff was an employé of the subcontractor. Indeed, he so testified himself, saying that he was hired and paid by Mr. Smith, of Smith & Stalhuth. He was a mason engaged in "pointing" the stone—the last stage in the completion of the work. A "ledger" of the scaffold upon which he was standing gave way, causing his fall and consequent injury.

It was charged in the complaint that the defendants after the erection of the platform (which later gave way under plaintiff's weight) had, with gross negligence, removed the wooden supports necessary to sustain the "ledgers" or transverse pieces of wood which were nailed to uprights of the staging and upon which the boards of the platform rested. Appellant insists that, although the scaffolding was erected originally by the carpenter in his employ, it was then suitable for all purposes; that it was constructed for the stone masons and at their special instance; that there is no evidence that he or any one in his service weakened the platform by removing the supports of the ledgers; and that, if they were removed (and there is evidence to indicate such fact), the removal came at a time when the duty of inspection and safe maintenance rested, not upon him, but upon the subcontractor. We think this position is well taken.

Respondent points to evidence of the removal of another scaffolding in an adjoining aisle. It is argued that the long ledgers of the other scaffolding which had been nailed to the uprights of the one at which the accident occurred probably afforded some support to the platform, and that this being removed by appellant's workmen weakened the structure. Therefore it is argued that the overt act of appellant was the occasion of the injury. Respondent also cites the statement of Mr. Jacobs, one of the men in charge of the carpenters, to the effect that:

> "If they had nailed that ledger after they cut it off, as it ought to have been, you [respondent] would have been all right."

Appellant, on the other hand, calls attention to the testimony of certain of plaintiff's witnesses that the "ribbons" or supports nailed under the "ledgers" were so near to the stone columns as to interfere with washing and pointing said columns, and we are asked to infer that these "ribbons" were removed by those whom they thus inconvenienced. But there is no evidence to justify a conclusion that the weakening of the platform was done by servants of either respondent or appellant. Hackett, who was employed by the subcontractor, testified that the scaffold was erected by the carpenter for the use of the masons and at his special request. He also said that it had supported the weights of workmen and materials far in excess of the strain upon it at the time of the collapse. Thus we have uncontradicted testimony of the suitability of the scaffold when built. True, it was not constructed by Smith & Stalhuth's men, but it was built for the subcontractor at a time and under circumstances when, under the contract, said subcontractor was bound to set up any scaffolding specially required for the work. Neither Trinity Church nor Johnson was bound to keep the platform in repair nor to inspect it vigilantly from time to time to see that its supports were not weakened. Cotter v. Lindgren, 106 Cal. 602–606, 39 Pac. 950, 46 Am. St. Rep. 255. This is a case in which the general contractor (even if we treat Johnson as one in view of the peculiar terms of his contract of employment) may not be held responsible for injuries caused by the fault of a subcontractor. A subcontractor bears the same relation to the contractor that the latter does to his employer, and the rule governing each status is the same. Boswell v. Laird, 8 Cal. 469, 68 Am. Dec. 345; Barton v. McDonald, 81 Cal. 265, 22 Pac. 855; O'Hale v. Sacramento, 48 Cal. 212; Stewart v. California Improvement Co., 131 Cal. 125, 63 Pac. 177, 724, 52 L. R. A. 205; Lauthan v. Hewes, 138 Cal. 116, 70 Pac. 1065; Green v. Soule, 145 Cal. 96, 78 Pac. 337; Fay v. German General Benevolent Society, 163 Cal. 118, 124 Pac. 844.

There is nothing in Fountain v. Willard-Slater Co., 172 Cal. 129, 155 Pac. 630, which conflicts with our conclusions in this case. In that case the general contractor not only erected, but maintained, a temporary staircase for the use of all persons employed in the building. It was held that a servant of a subcontractor might recover for injuries from the general contractor. The facts of the two cases are very different, and the two decisions not at all in conflict.

The judgment and order are reversed.

We concur: ANGELLOTTI, C. J.; HENSHAW, J.; SHAW, J.; SLOSS, J.; LORIGAN, J.; VICTOR E. SHAW, Judge pro tem.

(176 Cal. 563)

In re HINKEL'S ESTATE.

HINKEL v. HINKEL et al. (S. F. 8317.)

(Supreme Court of California. Nov. 24, 1917.)

1. Executors and Administrators 🔑314(3) — Distribution — Contest of Will — Effect.

The fact that a will is still open to contest at suit of a minor or nonresident does not necessarily preclude distribution where the other heirs have made an agreement for distribution under which a sufficient amount will be retained by one heir to pay the claim of the contestant should he succeed.

2. Executors and Administrators 🔑314(3) —Distribution—When Decreed—"Little Indebted."

Whether an estate is little indebted under Code Civ. Proc. § 1661, providing for partial distribution where the estate is but little indebted, is to be determined, not by the amount of the debts, but by their relation to the value of the estate, and an estate is little indebted when its amount over and above debts is sufficient to allow the distribution to be made without danger to the rights of creditors.

3. Executors and Administrators 🔑314(3) —Inventories—Estoppel.

Where certain heirs made an agreement for distribution, and subsequent thereto one heir was appointed executrix, she could not either as executrix or as an individual assert that the property inventoried by her was not a part of the estate for the purpose of partial distribution either as against the other heirs or creditors.

4. Executors and Administrators ⟹314(3)—Distribution—Agreement—Estoppel.

Where several heirs agreed to an early distribution on a stipulated basis, and further agreed to give aid to prevent the overthrowing of the will, their petitioning for distribution immediately *held* not to depend on the admission of the will to probate, and they were not estopped to ask distribution by their agreement.

5. Executors and Administrators ⟹299—Distribution—Bonds—Time.

Under specific provisions of Code Civ. Proc. § 1661, where the time for filing claims had expired when a decree for distribution was made, it was unnecessary to require the distributee to give a bond.

Department 1. Appeal from Superior Court, City and County of San Francisco; Jas. M. Troutt, Judge.

Proceedings in the matter of the estate of William Hinkel, deceased, wherein John Hinkel and another petitioned for partial distribution, and from the decrees granting such petitions, Elizabeth Hinkel, as executrix, appeals. Affirmed.

John C. Quinlan, of San Francisco, for appellant. A. L. Weil, A. Caminetti, Jr., Stafford & Stafford, and W. P. Caubu, all of San Francisco, for respondents.

SLOSS, J. Elizabeth Hinkel, as executrix of the last will of William Hinkel, deceased, appeals from two decrees of partial distribution made in favor of John Hinkel and Edgar W. Hinkel, respectively.

On November 4, 1914, William Hinkel's will was admitted to probate, and Elizabeth Hinkel and Oliver L. Jones were appointed executrix and executor. The will bequeathed to each of seven nephews and nieces, children of the decedent's brother Charles, $3,000; to a niece and nephew, children of a sister, $3,000 each; to the widow, Elizabeth Hinkel (who prosecutes this appeal as executrix), the decedent bequeathed $100,000, in lieu of her community interest. The other provisions of the will are not material here.

A proceeding for revocation of probate was instituted by John Hinkel, a brother of William Hinkel, and two sisters of said decedent. In June, 1915, after a trial of the contest, probate of the will was revoked. On July 2, 1915, the three contestants, together with eight of the nieces and nephews named in the will as legatees in the sum of $3,000 each, entered into a written compromise agreement with Elizabeth Hinkel and Oliver L. Jones. The instrument provided, in effect that the said contestants and legatees (parties of the second part in said writing) transfer all of their rights and interests in the estate to Elizabeth Hinkel and Oliver L. Jones (designated as parties of the first part); that Elizabeth Hinkel and Oliver L. Jones agree to pay to John Hinkel $6,000, to the two sisters $5,000 each, and to the nephews and nieces joining in the agreement $3,000 each. The amounts so agreed to be paid aggregate $40,000. "All said sums," it is provided, "shall be paid to the parties as above indicated, whether said will shall be sustained or revoked by order of court, as soon as distribution can be had in the estate of William Hinkel, deceased, and out of the first moneys distributed therefrom." Elizabeth Hinkel and Oliver L. Jones grant to said parties the right to compel distribution to John Hinkel, as trustee for such other parties, of the sums to be paid out of the share or legacy to which Elizabeth Hinkel and Jones may be entitled, either as heirs at law of William Hinkel, deceased, or as beneficiaries under his will. The parties of the first part assign to John Hinkel, as security for the performance of the agreement, all of their interest in the estate. It is also provided that, if any property claimed to belong to the estate shall be determined to be the separate property of Elizabeth Hinkel, such separate property is also transferred to John Hinkel as security for the performance of the agreement. The parties of the second part agree to co-operate in good faith with the parties of the first part in sustaining the validity of the paper filed as the last will and testament of William Hinkel, deceased, "and to that end will, upon request of the parties of the first part, participate in and join in a petition to the court to vacate the judgment and grant a new trial in the proceedings for the revocation of probate of said will." On March 27, 1916, Elizabeth Hinkel, as party of the first part, entered into an agreement with O. B. Martin, guardian of the person and estate of Edgar W. Hinkel, as party of the second part. This agreement, after reciting the admission to probate of the will, the institution of the proceeding for revocation of probate, the judgment revoking the probate, and the consent of the contestants to the granting of a motion for new trial, declares that the party of the second part transfers to the party of the first part all his right, title, and interest in the estate of William Hinkel. Elizabeth Hinkel agrees to pay to Edgar W. Hinkel the sum of $4,250; "that said sum of $4,250 shall be paid to said party of the second part whether said will shall be sustained or revoked by order of said court, as soon as distribution can be had in the estate of William Hinkel, deceased, and out of the first moneys distributed therefrom, after the payment of the moneys agreed to be paid to John Hinkel as trustee under the agreement dated July 2, 1915." The party of the second part consents to the dismissal of the will contest, and agrees to co-operate in good faith with the party of the first part in sustaining the validity of the paper filed as the last will of William Hinkel, deceased, and to that end agrees, on request of the party of the first part, to participate and join in a petition to grant a new trial in the matter of the revocation of probate. It is further agreed that the party of the second part may apply to the court for an order or decree distributing to him the sum of $4,250.

After the making of these agreements a new trial was, by consent of the parties, granted in the proceeding to revoke probate, the contest was dismissed, and Elizabeth Hinkel and Oliver L. Jones were reappointed executrix and executor. John Hinkel petitioned for the partial distribution to him of the $40,000 which, under the first agreement, he was to receive as trustee for the various parties to the compromise, and O. B. Martin, as guardian of Edgar W. Hinkel, filed a like petition for the distribution of $4,250 to him.

Both petitions were granted, and Elizabeth Hinkel, as executrix of the will, appeals from the decrees thus made.

Jones did not join in the appeal. It is contended by one of the respondents that, in the absence of proof of the conditions defined in section 1355 of the Code of Civil Procedure, one of two executors cannot alone take an appeal from an order affecting both in their representative character. We do not find it necessary to pass on this point, as we have reached the conclusion that the decrees appealed from should be affirmed on the merits.

[1] One of the points made by the appellant is that a contest of the will had been instituted by Robert Hinkel, a minor, and that this contest was still pending when the decrees of partial distribution were made. But the fact that a will is still open to contest at the suit of a minor or a nonresident does not necessarily preclude a distribution. Estate of Pritchett, 52 Cal. 94. The agreements provide that the amounts therein specified shall be paid whether the will be sustained or overthrown. In either event the interest of the contracting parties will be sufficient to permit such amounts to be paid without impairing the ability of Robert Hinkel to receive his share, if he should be successful in his contest.

[2] The condition of the estate, as shown by the record, was not such as to preclude a partial distribution. The appraised value of the estate was over $290,000, and it appeared that there had been an increase of $25,000 over the value as fixed by the appraisement. Suits and claims presented against the estate up to the time of the filing of the petitions aggregated about $71,000. While the time for presenting claims had not expired when the petitions were filed, it had run out when the decrees of distribution were made. Section 1661 of the Code of Civil Procedure provides for a partial distribution where "the estate is but little indebted." Whether an estate is little indebted is to be determined, not by the amount of the debts, viewed absolutely, but by their relation to the value of the estate. In re Crocker, 105 Cal. 368, 38 Pac. 954. An estate is little indebted when the amount of the estate over and above the debts, is sufficient to allow the distribution to be made without danger to the rights of creditors.

[3] The inventory contains the statement that the executors are unable to state whether the property "is community or separate property of Elizabeth Hinkel, or partly community and partly separate property of Elizabeth Hinkel." Any question in this regard is one which concerns Elizabeth Hinkel in her individual right, rather than as executrix. As an individual she would be in no position to contest the distribution, since, by the compromise agreement, she transferred any part of the estate that might be her separate property as security for the performance of the agreement. Furthermore, both agreements plainly contemplated that the sums agreed to be paid were to be distributed out of the estate of William Hinkel. Under these conditions Elizabeth Hinkel cannot now assert, either as executrix or as an individual, that the property inventoried by her and her coexecutor was not a part of the estate for the purpose of this partial distribution. On like considerations, she would be estopped, as against creditors who might be affected by the distribution, to claim, as her separate property, the funds necessary to the payment of their demands.

[4] The fact that in both contracts the parties contracting with Mrs. Hinkel and Jones agreed that they would co-operate in sustaining the will affords no answer to a demand by them for distribution. There is no claim that the evidence shows any past failure on the part of any of them, and the continuance of such co-operation, up to the completion of the final settlement of the estate, is not made a condition precedent to their right to receive the money. On the contrary, each agreement declares plainly that the moneys agreed to be paid were to be distributed as soon as distribution could be had. Nor was it a condition to the right to receive the money by order of distribution that the will should be upheld. It is true that a party interested in an estate may by agreement estop himself from asking for a partial distribution. Estate of Glenn, 153 Cal. 77, 94 Pac. 230; Estate of Colton, 164 Cal. 1, 127 Pac. 643. But the agreements in this case, looking as they did to the earliest possible distribution, irrespective of the final outcome of the efforts to have the will admitted to probate, furnish no support for a claim of estoppel against the respondents here.

[5] In the order making distribution to Edgar W. Hinkel the court did not require the distributee to give a bond. As already

stated, the time for filing claims had expired when the decree was made, and under the provision of section 1661 of the Code of Civil Procedure the court was therefore authorized to dispense with the bond.

The agreement with Edgar W. Hinkel provided, as we have above stated, that the sum to be paid thereunder should be paid only after the payment of the moneys agreed to be paid to John Hinkel as trustee. But the court found that such trustee, for whose benefit and protection this clause was obviously inserted, had expressly waived any objection to the granting of distribution to Edgar W. Hinkel, and had consented thereto. There is, therefore, no substantial ground of objection to the two distributions being ordered at the same time.

The decrees appealed from are affirmed.

We concur: SHAW, J.; LAWLOR, J.

176 Cal. 557

SPIERS v. SPIERS et al. (S. F. 7282.)

(Supreme Court of California. Nov. 22, 1917. Rehearing Denied Dec. 20, 1917.)

NEW TRIAL 🔑108(2)—GROUNDS—NEWLY DISCOVERED EVIDENCE—SUFFICIENCY.

In an action to quiet title to lands, where the judgment, locating a section corner, was supported by unsatisfactory evidence, a new trial should have been granted, on discovery of an assistant to the original surveyor, whose affidavit identified a certain mound of stones as the corner, and the further discovery of the mound of stones, whose existence was not known at the time of the trial.

Department 1. Appeal from Superior Court, Lake County; M. S. Sayre, Judge.

Action by Joshua Spiers against Elizabeth Spiers and another. From a judgment for plaintiff, and an order denying motion for new trial, defendants appeal. Judgment vacated, and order reversed.

H. B. Churchill, of Lakeport, and Charles Stewart and J. E. Pemberton, both of San Francisco, for appellants. C. M. Crawford, of Lakeport, for respondent.

SHAW, J. The defendants appeal from the judgment and from an order denying their motion for a new trial.

The complaint stated a cause of action to quiet title to a parcel of land described as lot 2, of section 5, township 11 north, range 7 west, in Lake county. The defendants are the owners of lot 1, adjoining lot 2 on the east. The only point in dispute is the location of the division line between the two parcels. The position of this line is controlled by the location of the northeast corner of section 5, which is also the northeast corner of lot 1. It does not appear that the corner at the intersection of the division line of the lots with the north line of section 5 was fixed and monumented by the government survey. The quarter section corner, being the northwest corner of lot 2, was fixed, and the monument still remains. The position of the division line is to be fixed by ascertaining the location of the northeast corner of the section, and dividing the distance between that and the quarter section corner. The parties differ solely with respect to the location of the said northeast corner of the section, it being also the northwest corner of section 4.

The plaintiff derives title to lot No. 2 from the United States under a recent entry as a homestead claim. The defendants deraign title from the United States to lot 1, through Charles C. Copsey, who entered upon and obtained title thereto about the year 1877. Near the division line are situated certain mineral springs, known as Copsey's Springs. Aside from these springs, the land is of little value, and the controversy arises from the claim of the plaintiff that the easterly line of lot 2 is only 8 feet west of the main spring of said Copsey's Springs, and that several of the springs are included in lot 2; whereas, the contention of the defendants is that said line is some 200 feet westerly of said springs.

The court found that the monument set for the northeast corner of section 5 had been obliterated, so that its location could not be ascertained, and that the location thereof must be determined by what is known as the proportional method. The surveyors of the plaintiff testified that they found the corner monument at the northwest corner of lot 2, being the quarter section corner on the north side of section 5, and then proceeded easterly on the section lines of sections 5 and 4, and were unable to discover or locate any government monuments of the section or quarter section corners, until they reached the northeast corner of section 4; that thereupon they concluded that the common corner of sections 4 and 5 was to be treated as a "lost corner" and its location fixed by the proportional method. Accordingly they divided the distance between the known monuments into six equal parts, and located the section corner by measuring off four of these parts to the east, and two to the west, between the section corner and the quarter section corner of section 5. The court found in accordance with this survey and gave judgment accordingly. The effect was to fix the division line as above stated, 8 feet west of the main Copsey Spring.

We have concluded that the court erred in refusing to grant the motion for a new trial for newly discovered evidence. This renders it unnecessary to consider the sufficiency of the evidence to sustain the findings of the court, except so far as its weakness may tend to explain our conclusion as to the necessity of a new trial. The field notes of the government survey state that the monument was set at the northeast corner of section 5 "on top of ridge, bearing south 30 degrees east, and north 30 degrees west." The court fixed this corner in a depression easterly of the ridge and not on top thereof. The field notes state that at a point 2 chains east of said corner the "trail from Copsey's Springs to Lower Lake bears north and south." The plaintiff's surveyors were unable to find this trail. The testimony in behalf of the defendants tended to show that it was discoverable, and that by that mark the corner fixed by the court is too far to the east. Defendant's witnesses testified that they found a mound of stones near the top of the ridge, but a little farther west than they expected to find it, which they accepted as the section corner. The survey of sections 4 and 5 was made in 1876. The government survey of the sections immediately north, lying in township 12, was made in 1883 and 1884. The field notes of that survey state that the monument set for the northeast corner of section 5, by the previous survey, was discovered. There was an offset of 12 chains between the section corners of township 12 and those of township 11, in which this land is situated. The field notes of township 12 state that the section corner between sections 32 and 33, on the township line, was 12.05 chains west of the said monument for the northeast corner of section 5, and that the surveyor found the post set in said monument and destroyed that part of the mark thereon relating to township 12. There was evidence to the effect that the monument set for the corner between sections 32 and 33 was found, and that it was situated 12 chains west of the mound of stones which defendants claim to be the northeast corner of section 5. There was also testimony that Copsey, who was in possession of lot 1 for many years under his government title, had claimed that his northeast corner was on top of the ridge aforesaid, and that the western line of lot 1 was on the hillside west of the springs, and several hundred feet away.

Copsey's Springs were discovered by C. C. Copsey prior to the government survey in 1876, and at that time he was in possession thereof and was conducting a health resort thereon. Shortly after that survey was approved he made entry thereon and secured a patent for lot 1, and thereafter, evidently believing that it included all of the springs aforesaid, he continued to occupy and use the place as before, and erected buildings and other improvements thereon. As he was occupying the springs when the government survey was made, and took them up for entry very shortly afterwards, when the corners and marks of the survey must have been visible and well known, and as his main purpose was to secure possession of the springs, it is improbable that he should have been mistaken in the location of the springs with reference to the boundary lines. His conduct is strong evidence against the finding of the court. These circumstances sufficiently show that the location of the corner as fixed by the court was at all events not the location thereof as fixed by the original government survey. The discovery of any additional evidence tending to fix the location "on top of ridge," as stated in the field notes, would be strong reason for directing a new trial.

It is not clear that either the court below or the surveyors for the plaintiff correctly understood the rule with respect to the application of the proportional method of locating lost corners. In Weaver v. Howatt, 161 Cal. 84, 118 Pac. 522, the court said:

> "The trial court must ascertain, as near as may be, where this monument was set by the government surveyor. If the exact spot cannot be found, it must, if possible, decide from the data appearing in evidence its approximate position, and the proportional method is to be used only when no other reasonable method is possible, and it must be so used that it does not contradict or conflict with the official data that are not impeached, and which, when not impeached, confine the actual position within certain limits. The application of the proportional method must, in that case, be also confined to the same limits."

And further:

> "It is for the trial court, upon all the evidence, to fix the place at a point where it will best accord with the natural objects described in the field notes as being about it, and found to exist on the ground, and which is least inconsistent with the distances mentioned in the notes and plat."

This doctrine was affirmed in Weaver v. Howatt, 171 Cal. 302, 152 Pac. 925, being a second appeal upon the same case after an intervening trial. It is doubtful whether or not, in view of this rule, the court could in any event relocate the corner otherwise than "on top of ridge" referred to in the field notes. The newly discovered evidence would tend at least to locate it much nearer to that point.

The affidavits in support of the motion for a new trial show that the only surviving member of the crew of assistants of the government surveyor for the survey of 1876, was one William Blann, who resided in Woodland, in Yolo county. The map and field notes of the survey, a copy of which was introduced in evidence at the trial, did not give the names of the assistants. After the trial the fact that Blann was one of them, and that he was living in Yolo county, was discovered. He was taken to the premises, and made affidavit that the mound of stones claimed by the defendants to be the true location of the corner in dispute is the same mound of stones which he assisted to set for that corner in making the survey of 1876. There was no evidence given at the trial by any witness who claimed to have seen this mound at or near the time of the making of the survey. By counter affidavits it was shown that Blann had resided at Lower Lake, near the premises in question, for many years prior to 1897, and that he then removed to Woodland, Yolo county, where he has ever since resided, and that the record of the government survey, showing his name as one of the assistants, was in the land office at San Francisco. It may be conceded that, so far as Blann's evidence is concerned, the court below may in its discretion have properly refused a new trial, on the ground that due diligence was not exercised in endeavoring to find it before the trial. Nevertheless it tends to throw doubt upon the accuracy of the court's finding.

But the affidavits of defendants further show that after the trial the defendant Hoberg and others made a careful search of all of the north line of section 4, and that at a point some 43 chains easterly from the northeast corner of section 4 they found a mound of stones with a decayed square stake lying therein marked on its north side with the characters "¼ S"; that it showed great age, and that the south side was so weatherbeaten that nothing could be discovered thereon; that the mound was covered and hidden by a low, thick holly berry bush, which had apparently grown over and around it after it had been made. The field notes of the survey state that the surveyor set a post in a mound of stones at said quarter section corner, marked on the north and south sides, respectively, with the aforesaid characters. This evidence is not contradicted by counter affidavits. It is almost conclusive evidence of the location of the quarter section corner on the north line of section 4. The fact that the plaintiff's surveyors, three in number, searched this line and were unable to find this corner, that the defendants' surveyor had also searched the line before the trial, and failed to find it, and that it was so concealed by the bush as above mentioned, sufficiently absolves the defendants from the charge of lack of diligence in failing to discover it before the trial. Its position has an important bearing on the proportional method of location. If it be admitted that the evidence of Blann should be disregarded, and that the monument claimed by the defendants to be the northeast corner of section 5 must also be disregarded, and the corner treated as a lost corner, then, in applying the proportional method, this newly found quarter section corner must be taken as the eastern limit of uncertainty, and the space between that quarter section corner and the quarter section corner on the north line of section 5, is the distance which is to be divided into four parts. According to the affidavits, if this is done, and the section corner located accordingly, the corner of section 5 would be fixed some 200 feet westerly of the location thereof as established by the court, and the division line in dispute would be a corresponding distance westerly of the springs in question, thus saving to the defendants the property which they and their predecessors in interest had for so many years in good faith enjoyed and claimed. While this court seldom interferes with the discretion of the trial court in denying a motion for a new trial for newly discovered evidence, yet, in view of the peculiar nature of the question involved, we believe this to be one of the exceptional cases in which the action of the court below in refusing a new trial should be overruled.

The judgment is vacated, and the order denying a new trial is reversed.

We concur: SLOSS, J.; LAWLOR, J.

(176 Cal. 534)

BOGGESS et al. v. INDUSTRIAL ACCIDENT COMMISSION et al. (S. F. 8349.)

(Supreme Court of California. Nov. 22, 1917.)

MASTER AND SERVANT 🔑375(2)—COMPENSATION FOR INJURIES—"ARISING OUT OF AND IN COURSE OF EMPLOYMENT."

An employé returning from a place where he had gone on his own affairs had reached a point from which he intended taking a stage to his employer's mine, when he met the employer's superintendent, who asked him to assist in loading goods into auto trucks, telling him that the employer would pay him for his time, and as a matter of convenience offering to let him ride on the truck instead of taking the stage. While on the trip to the mine, he sustained an injury. *Held*, that the accident did not happen in the course of the employment, or arise out of the employment, as his going to the mine on the truck instead of by stage was no part of his service.

In Bank. Proceedings under the Workmen's Compensation Act by Jack Fenner to obtain compensation for personal injuries, opposed by R. A. Boggess, employer, and the Employers' Liability Assurance Corporation, Limited, insurer. Compensation was awarded, and the employer and the insurer apply for a writ of review against the Industrial Accident Commission and Jack Fenner. Award annulled.

Redman & Alexander, of San Francisco, for petitioners. Christopher M. Bradley, of San Francisco, for respondents. S. S. McCahill, of San Francisco, for applicant.

SHAW, J. The Industrial Accident Commission made an award in favor of Jack Fenner to compensate him for injuries which he suffered from an accident which he claims arose out of his employment and happened in the course thereof. The petitioners ask that the said award be annulled, on the ground that the finding of the commission that the accident happened in the course of employment and arose out of it, is not sustained by any evidence.

Fenner was a miner employed to work as such in a quicksilver mine owned by Boggess, known as the Abbott Mine, situated near

Wilbur Springs, some 30 miles from the town of Williams, on the Southern Pacific railroad. A few days before the accident he was given leave of absence to go to Sacramento on his own affairs, and he was to return and resume work when his business was concluded. After transacting his business there he returned to Williams, intending to take the stage from Williams, to Wilbur Springs. At Williams he met Luther Johnson, who was the bookkeeper for Boggess, and who acted as superintendent of the mine in the absence of Boggess. Johnson had come to Williams with two auto trucks for the purpose of taking goods therein from Williams to the mine. Fenner told Johnson that he intended to go to Wilbur Springs on the stage. Thereupon Johnson told him that he wanted to load the trucks and return to the mine that day, and suggested that Fenner assist in the loading, saying that they could get them loaded in time for Fenner to go to the mine in the truck, instead of taking the stage to Wilbur Springs, and that Boggess would pay him for the time occupied in loading the trucks. Fenner assented to this and proceeded to assist in loading the trucks. Thereupon Johnson started with the trucks for the mine and Fenner accompanied him. Somewhere on the road, while Fenner was riding on the truck driven by Johnson, the accident happened whereby he received the injury for which the compensation was awarded. While on the journey from Williams to the mine he was engaged in no service whatever for Boggess. His duties as a miner did not require him to assist in loading trucks at Williams, but it was understood at the time he was employed as a miner that he was to do any work which he was directed to do, and it occasionally happened that miners were detailed to do work of this character outside. All these facts are established by the evidence without conflict.

It is apparent that the accident did not happen in the course of the employment, and that it did not arise out of the employment. Fenner was on leave to go from the mine to Sacramento on business of his own, and he was to return to the mine as soon as his business was concluded. There was no evidence showing or tending to show that the employment at Williams provided not only that he was to help unload the truck, but also that he was then, as a part of his service, to travel on the truck to the mine. On the contrary, his employment by Johnson to load the truck was temporary only and for the sole purpose of getting the truck loaded. His going to the mine on the truck, instead of by stage, was arranged merely as a matter of convenience to him. It was no part of his service. He was still in the process of returning to the mine in the pursuance of the arrangement by which he had left it temporarily. He has no more right under the law to claim compensation from Boggess for the injury which happened to him on the journey to the mine on the truck than he would have had if he had been riding on the stage as he first intended.

For these reasons we are of the opinion that the commission was not justified in making any award against Boggess.

The award is annulled.

We concur: ANGELLLOTTI, C. J.; SLOSS, J.; MELVIN, J.; HENSHAW, J.; VICTOR E. SHAW, Judge, pro tem.

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176 Cal. 530

CASUALTY CO. OF AMERICA v. INDUSTRIAL ACCIDENT COMMISSION et al.

(S. F. 8267.)

(Supreme Court of California. Nov. 22, 1917.)

1. Master and Servant 🔑371—Workmen's Compensation Act—Liability.

An employer cannot be required to pay compensation, unless the accident arises out of and in the course of the employment.

2. Master and Servant 🔑405(4) — Workmen's Compensation Act—Injuries "Arising Out of and" in Course of Employment—Evidence.

Evidence *held* insufficient to show that the accident for which compensation was sought arose out of and in the course of the employment of the deceased workman.

In Bank. Application by Anna I. Anderson for Workmen's Compensation, opposed by the National Ice & Cold Storage Company, employer, and the Casualty Company of America, insurer. Certiorari by the insurer to review an award of the Industrial Accident Commission in favor of applicant. Award annulled.

D. Hadsell, of San Francisco, Joe G. Sweet, of Berkeley, and E. A. Ingalls, of San Francisco, for petitioner. Christopher M. Bradley, of San Francisco, for respondent.

ANGELLOTTI, C. J. This is a proceeding in certiorari to review an award made by the Industrial Accident Commission in favor of Anna I. Anderson, widow of John A. Anderson, on the theory that the death of the latter was the result of injury received by him in the course of and arising out of his employment by the National Ice & Cold Storage Company, a corporation, the petitioner, being the insurance carrier of said company. The award is assailed on the ground that there was not sufficient evidence to sustain the finding of the commission that the injury arose out of and happened in the course of his employment.

Anderson was fatally injured during the evening of July 22, 1916, while on duty on the employment premises as an employé of the ice and cold storage company, by falling from one of the upper floors of the company's building down the elevator shaft of a small platform elevator, used by employés, to the basement. The commission found that:

> "Said employé being about to use an elevator on the employer's premises, stepped into the elevator shaft and fell to the bottom of the shaft, the elevator having been moved the moment before, by another employé, unknown to said employé Anderson."

The elevator was operated by the employé having occasion to use it, and could be brought to any particular floor by one on that floor by means of the rope by which it was operated, unless held in place or locked by a device thereon.

The evidence we think, shows without substantial conflict that the employé who moved the elevator just before the accident, one Brigham, was on the top floor of the building, which he called the third floor, and that he was moving it up to that floor from some lower floor at which Anderson had just left it for some purpose, and was there attempting to use it again, when he fell. In other words, Anderson was not on the top floor when he attempted to use the elevator, but was on some lower floor. The evidence of Brigham, whose work was wholly on the top floor, was clear and positive to the effect that while there he had occasion to go to the first floor and went to the elevator shaft, rang the bell to warn others of his intended use of the elevator, and pulled the rope to bring the elevator up to that floor. He saw no sign of the presence of deceased at the time. We read the finding of the commission that the deceased "stepped into the elevator shaft and fell to the bottom of the shaft, the elevator having been moved the moment before by another employé" as evidencing their conclusion that deceased stepped into the shaft below the elevator, owing to the same having been just moved up the shaft by Brigham. In other words, they concluded that deceased was not then on the top floor. The only possible doubt as to this being the fact arises from the evidence as to a declaration made by the deceased to his wife the day after the injury, and one to his brother-in-law within three or four days after the injury. The latter testified that he asked deceased how the accident occurred and he said:

> "I was on the third floor and took the elevator to come down. I stepped down below the third floor, and just as I was stepping on the elevator again, some one pulled the rope and I fell and lost my balance."

The wife testified that he said to her "that he was on the third floor and as he took the elevator to go down, he stepped down between the elevator and the third floor, and just as he stepped down some one pulled the rope and he lost his balance and fell." What he meant by the "third floor" does not clearly appear, and the declarations are very uncertain and vague as to just how the accident occurred. In any event, as before stated, we think the finding of the commission substantially disposes of any theory that deceased was attempting to get on the elevator at the top floor, and is in accord with the clear and positive testimony of Brigham that deceased was then on a floor below the top floor, and about to take the elevator therefrom. We have discussed this matter at some length because we consider it a vital factor in the case.

The deceased was employed as a "dump tender" or "ice puller"; his duty being to handle ice for storage and shipment on the ground floor. The ice was manufactured above and sent to this ground floor by an elevator, where it was taken in charge by deceased and others in that department. Deceased had no expressly assigned duty which would take him to any other floor of the plant. However, both deceased and others working in the same line did occasionally go to the top floor for the purpose of ascertaining there from the person in charge whether any more ice was to be sent down, and if so, how much. We may assume for the purposes of this decision that if deceased was on such an errand at the time of the accident, and was then taking the elevator at the top floor to return to the ground floor, it might be held that he was acting in the course of his employment and that the accident arose out of his employment. But, as we have seen, it must be held that he was not taking the elevator at the top floor, and there is not a scintilla of evidence to indicate that he was on any such errand. The accident occurred during the evening of Saturday, July 22, 1916, an hour or so before the end of decedent's shift. Decedent had taken off his working garb and had on his street clothes at the time. The object of his leaving the ground floor and going to an upper floor is not indicated by any of the testimony. There is not a suggestion that any duty of his employment then called him from the ground floor, except in so far as it is suggested that he might have gone to the top floor to ascertain if any more ice was to be sent down. But even this cannot account for his presence on a lower floor and his attempt to take the elevator therefrom. Brigham testified that shortly before the accident, from the top floor he saw deceased take the elevator and come up and get off at a lower floor, and go out of his sight. This floor he said was not one of the ice floors, but the floor on which was "the cold storage room," "where they store produce or anything that they had in storage." It is not pretended that any duty of his employment called decedent to that floor, or that he had any right to be there. Brigham substantially testified that decedent did not come to the top floor at all on this occasion.

[1] An employer cannot be held liable under our compensation act unless the accident arises out of and in the course of the employment, and of course it devolves on a claimant to establish this fact by evidence from which such a conclusion is fairly inferable. As is stated by learned counsel for respondent:

"It is not always an easy matter to define the ambit of the employment and to draw a strict line about the duties, both expressly assigned and also the activities expected and permitted, incidental to assigned duties."

[2] But here, in view of the admitted facts, considered in connection with what we deem established by the record as to the situation of deceased at the time of the accident, there appears no warrant for holding that the accident arose out of and in the course of the employment. It happened during the hour when deceased was obligated to be on duty, and also on the premises of the employer, but the record negatives any inference that decedent, in leaving and going away from the floor where it was his business to be, was engaged on any mission having any connection, direct or indirect, with the service for which he was employed.

The award of the Industrial Accident Commission is annulled.

We concur: SLOSS, J.; MELVIN, J.; SHAW, J.; HENSHAW, J.; VICTOR E. SHAW, Judge pro tem.

(176 Cal. 537)

In re HARKNESS' ESTATE. (S. F. 8093.)

(Supreme Court of California. Nov. 22, 1917.)

1. TAXATION ⟹900(3) — INHERITANCE TAX — ASSESSMENT—SETTING ASIDE ORDER—SHOWING AND DISCRETION.

Even if, instead of being limited to motion for new trial as for newly discovered evidence, the state's representative can, as for mistake in not discovering and presenting declarations of deceased bearing on his residence, move, under Code Civ. Proc. § 473, to set aside order fixing inheritance tax, on the basis of deceased having died a resident of another state, still the showing to be made on such a motion, and the discretion of the trial court in passing on it, are the same as on a motion for new trial for newly discovered evidence.

2. TAXATION ⟹900(3) — INHERITANCE TAX — ASSESSMENT — SETTING ASIDE ORDER — DISCRETION—RESIDENCE OF DECEASED.

There was no abuse of discretion in holding, by denial of motion to set aside order fixing inheritance tax, on the basis of deceased being a nonresident, that newly discovered declarations of deceased that he was a resident of the state, taken in connection with the facts already produced, would not change the result reached, that he died a resident of Kentucky, where for more than 20 years he had maintained a home, never closed, with four or five servants, a string of horses, and several automobiles; his declarations being made after he had closed up his house in California, and his filing of income tax return in San Francisco being while he was detained by illness at his daughter's home, so that there was no longer time to file it elsewhere.

Department 1. Appeal from Superior Court, San Benito County; John L. Hudner, Judge.

In the matter of the estate of Lamon V. Harkness, deceased. From an adverse order, the State Controller appeals. Affirmed.

Robert A. Waring, Inheritance Tax Atty., of Sacramento, and Edwin H. Pennock, of Los Angeles, for appellant. McCutchen, Olney & Willard, of San Francisco (Murray, Prentice & Howland, of New York City, of counsel), for respondent.

LAWLOR, J. This appeal is taken by John S. Chambers, as controller of the state of California, from an order refusing to vacate a prior order fixing the inheritance tax in the above entitled matter.

Lamon V. Harkness died intestate on January 17, 1915, at the home of his daughter, Myrtle H. Macomber, in San Benito county in this state. Mrs. Macomber petitioned the superior court of said county for letters of administration on the ground that the decedent died in San Benito county, leaving estate therein and elsewhere in California and being a nonresident of said state. Upon the hearing of the petition counsel for the controller appeared and questioned the witnesses, including the petitioner and her husband, on the subject of the residence of decedent. The court found the residence of decedent to be in Kentucky, and on June 29, 1915, letters of administration were issued to Myrtle H. Macomber. On September 28, 1915, the matter of fixing the inheritance tax due on the estate of the decedent came on for hearing before the inheritance tax appraiser of the county, and Mr. and Mrs. Macomber were again examined by appellant's counsel as to the residence of the decedent. Thereafter an inheritance tax report was prepared in the office of counsel for appellant, containing the finding that the decedent was a resident of Kentucky at the time of his death. This report was duly filed with the court December 14, 1915. On December 28, 1915, the court made its order confirming said report and fixing the inheritance tax due out of the estate at $123,787.74 upon upwards of $2,000,000 of real and personal property in this state. On June 22, 1916, the controller gave notice to the administratrix of a motion to vacate the order on the ground that it had been taken against him through his mistake, inadvertence, surprise, and excusable neglect, for the reason that he had failed to discover and present to the court, either before or at the time the order was made, certain declarations made by the decedent to the effect that he was a resident of this state. Affidavits in support of the motion were filed the same day. The motion came up for hearing and argument, and on August 28, 1916, the court made its order denying the motion. From this order the controller appeals.

The facts from which the last residence or domicile of the decedent must be determined are not in dispute. Lamon V. Harkness was a widower, and a retired business man of considerable means. For upwards of 20 years he had been building up a very pretentious home near Donerail, Ky. There he also maintained an extensive stock farm, where he bred horses as his hobby. Only about two years in all were spent away from Kentucky, and these were taken up with traveling and visiting his daughter in California, his son in New York, and daughter in Pittsburgh, Pa. He also owned a home in New York City and another on Long Island. But the former was kept boarded up, and he had never spent a night in the latter. The decedent first came to California about 1900, stopping at a hotel in Pasadena. Thereafter, Mr. and Mrs. Macomber having established themselves in Pasadena, the decedent visited them there and bought a house adjoining theirs, in order to give it to his daughter, who, however, never accepted it, because of the expense of upkeep. But she did furnish it with her own furniture and installed her own servants. The decedent made several trips to this house, the last in 1906, but never staying more than about three months in any one year. He would bring with him only a small trunk and a hand bag, and never brought any servants. When the decedent left Pasadena in 1906, he never again returned to it, and the home was boarded up and put in the hands of agents for sale by Mr. Macomber, for the reason that decedent said he was never going there again. At about this time the Macombers bought a ranch in San Benito county, and decedent visited them there for a week. In 1913 he came again to stay for the holidays, but was taken sick and forced to remain several months. The last visit to California was made the following year, at the urgent request of his daughter and his physician, who recommended the change for decedent's health. It was on this visit, while staying at the home of his daughter, that decedent died. He owned a piece of mountain land adjoining the Macomber ranch, which land he had bought to keep off poachers and to give to his son-in-law. At the time of his death he also owned other pieces of property in Pasadena and stock in the Standard Oil Company of California. Besides considerable real and personal property in Kentucky, the decedent had a great deal of property in New York and elsewhere. From these facts the lower court concluded that the residence of decedent at the time of his death was in Kentucky.

The declarations relied upon by the controller to prove an intent to reside in California appear in certain affidavits and baggage declarations of the decedent. In 1910 and in 1912 the decedent was assessed in New York on personal property. On each occasion he made an affidavit in Kentucky stating that he was temporarily sojourning in Donerail, Ky., and was a resident of Los Angeles county, Cal. In 1911 and 1912, upon arriving from Europe, the decedent, in declaring his baggage, stated that he resided in Los Angeles county, Cal. The controller also relies upon the fact that, while decedent was visiting his daughter in 1914, he filed his federal income tax return in San Francisco, and that such return contains the printed instruction that it is to be filed in the district in which the person filing it resides. These various declarations were not discovered by appellant until after the order fixing the inheritance tax had been made. His contention is that they are an expression of decedent's intention to reside in California, and therefore throw sufficient doubt upon the correctness of the original order to warrant a new investigation of the facts.

The administratrix has interposed several objections to a consideration of the merits of the order of the lower court. They are: (1) That the order fixing the inheritance tax is a probate order, and no appeal is provided in section 963, Code of Civil Procedure, from an order refusing to vacate the original order; (2) that appellant is bound by the adjudication of nonresidence in the order granting letters of administration; (3) that no notice of motion to vacate was served on the heirs, who were not represented at the hearing of the motion; (4) and that, in any event, no showing was made of mistake, inadvertence, surprise, or excusable neglect, but at most only one of newly discovered evidence as ground for a new trial.

[1] Whether or not the remedy in case of newly discovered evidence, where the party has been represented at the trial, is restricted to a motion for a new trial, or also comprehends proceedings under section 473, Code of Civil Procedure, has not as yet been decided in this state. See McKinley v. Tuttle, 34 Cal. 235. But none of the objections raised by respondent need be passed upon at this time, for the reason that it does not appear upon a review of the facts that the trial court in denying the motion abused its discretion. Assuming, for the purposes of this case only, that appellant was not restricted to a motion for a new trial, but could also properly proceed under section 473, Code of Civil Procedure, still the showing to be made on the motion and the discretion of the trial court in passing upon it must be the same as in a motion for a new trial on the ground of newly discovered evidence. It is well settled that on a motion of that character there must be a reasonable probability that upon a retrial the newly discovered evidence will change the result, and that "the question as to the effect of the newly discovered evidence upon the case is, from its nature, peculiarly one that is addressed to the discretion of the trial court," and, "unless the appellate court can plainly see that this discretion has been abused, that the showing made was of such a character as to make it manifest that the case would or should result differently on a new trial, in view of the newly discovered evidence, the order of the

trial court refusing a new trial will not be disturbed." People v. Sing Yow, 145 Cal. 1, 78 Pac. 235. See, also, Estate of Emerson, 170 Cal. 81, 148 Pac. 523; People v. Oxnam, 170 Cal. 211, 149 Pac. 165; Atkinson v. Western Dev. Syndicate, 170 Cal. 511, 150 Pac. 363; Hayne on New Trial and Appeal, § 91.

[2] In the case at bar anything that might have been construed as an act of residence in Los Angeles county on the part of decedent had ceased in 1906, and the only facts pointing to residence in San Benito county were the purchase of the mountain land referred to and occasional visits with his daughter. There were no indications whatever, no showing that the decedent looked upon any part of California as his home, from which an intent to reside here could be gathered. In fact, it does appear that he disliked California and had to be urged to even visit here. In Kentucky, however, he did maintain an actual home, where he was cared for by his servants and surrounded by his friends and all the things he had enjoyed for over 20 years. This home place was never closed, and there were always four or five servants in attendance, a string of horses in the stables, and seven or eight automobiles in the garage.

To rebut the strong presumption of intention to reside in Kentucky arising from these facts, appellant relies upon the declarations above outlined. That they are some evidence of intent goes without saying. But they are by no means conclusive, and must be considered along with the circumstances under which they were made and other facts appearing in evidence. Jacobs, Law of Domicile, § 463. Even written declarations must give way if inconsistent with actual conduct. Holt v. Hendee, 248 Ill. 288, 93 N. E. 749, 21 Ann. Cas. 202; In re Morgan's Estate, 95 Misc. Rep. 451, 159 N. Y. Supp. 105. Here the decedent's statements that he resided in Los Angeles county were made years after he had closed up his house there, and during that period decedent had not spent even a day in that county. The filing of the income tax return in San Francisco appears to have occurred while decedent was detained at his daughter's home by illness, so that there was no longer time to file it elsewhere. In this state of the evidence it cannot be said that the trial court abused its discretion in holding that the newly discovered declarations, taken in connection with the facts already produced, would not change the result reached that the decedent died a resident of Kentucky.

This determination of the case makes it unnecessary to consider other points raised by appellant.

Order affirmed.

We concur: SHAW, J.; SLOSS, J.

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176 Cal. 548

GIANNINI v. CAMPODONICO. (S. F. 7235.)

(Supreme Court of California. Nov. 23, 1917.)

1. NEGLIGENCE 🔑33(1)—PRIVATE BUILDINGS—DUTY AS TO TRESPASSERS AND LICENSEES.

As against a trespasser or mere licensee, the owner of property owes no duty to keep the premises in safe condition; the only duty being to abstain from willful or wanton injury.

2. NEGLIGENCE 🔑32(1)—PRIVATE BUILDING—DUTY AS TO INVITEE.

To one who has been expressly or impliedly invited upon the premises the duty exists to exercise due care not to injure him or permit the premises to be in such condition that injury results.

3. NEGLIGENCE 🔑32(2)—PRIVATE STABLE—INJURY TO CHILDREN—INVITATION OF EMPLOYÉ.

The cleaning of defendant's private stable being a duty easily performed by his stableman, the stableman's request of a boy 14 years old to clean the stable was unauthorized, and could impose no additional duty upon defendant.

4. NEGLIGENCE 🔑32(2)—PRIVATE STABLE—INVITEE—EVIDENCE.

The cleaning of defendant's private stable being a duty easily performed by his stableman, the stableman's promise to pay a 14 year old boy to clean the stable could not make the boy an invitee, rendering defendant liable for injuries from a defective door, and prior services could not raise such relation, especially where not brought home to defendant.

5. NEGLIGENCE 🔑39—PLACES ATTRACTIVE TO CHILDREN—PRIVATE STABLE—"ATTRACTIVE NUISANCE."

A private stable is not an "attractive nuisance," merely because boys like to congregate in and around it.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Attractive Nuisance.]

6. NEGLIGENCE 🔑39—PLACES ATTRACTIVE TO CHILDREN—PRIVATE STABLE.

Where a minor 14 years of age was present in defendant's private stable by request of the stableman, the "turntable cases" doctrine could not be invoked; it being essential that the minor should have been attracted to the premises by a childlike curiosity.

Department 1. Appeal from Superior Court, City and County of San Francisco; Marcel E. Cerf, Judge.

Action by Gerald Giannini, a minor, by Esther Giannini, his guardian ad litem, against Henry Campodonico. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Reversed.

Fred L. Dreher, of San Francisco, for appellant. Arthur H. Barendt, of San Francisco, for respondent.

LAWLOR, J. Plaintiff, through his guardian ad litem, brought this action to recover for personal injuries sustained while in a private stable of the defendant, and alleged to have been caused by the negligence of the defendant. This is an appeal by the defendant from a judgment for plaintiff and from an order denying a new trial.

The evidence produced on behalf of the

respondent shows that the plaintiff, Gerald Giannini, was 14 years old and resided across the street from the stable owned by the defendant, who employed a colored stableman to take care of the horses and wagons and keep the stable in order. On the morning of the accident respondent saw the stableman leaving in a buggy and at that time the stableman requested the boy to clean the stable during his absence and promised to pay him a nickel upon his return. A small door, which was a part of a large sliding door, was left open for the boy. Subsequently the respondent and two other boys entered the stable, and while respondent was on the premises the large sliding door fell, breaking respondent's leg and inflicting other injuries. It appears that a large number of boys frequently congregated about the stable, and at times went into the stable while the stableman was there, but at no other time did any of the boys enter while the stableman was away. Upon several occasions respondent performed errands for the stableman at the latter's request and received some sort of remuneration. It also appears that at times the stableman and the defendant himself would drive the boys away from the stable. The door which fell down had previously been out of order, and the stableman had attempted to remedy the defect. At the close of the trial in the lower court, respondent, with leave of the court, amended his complaint to allege that the stable was attractive to children, presumably to bring the case within the rule of the "turntable cases."

[1, 2] Upon behalf of defendant evidence was produced to show that the stableman had not requested respondent to clean the stable and had not left the small door open for him, but that in fact respondent upon this occasion was a trespasser. The stableman also testified that he had never employed respondent to do any work about the stable, and defendant himself stated that whenever he saw any of the boys around the stable he drove them away. But, disregarding the testimony advanced by defendant, and looking only to the case as presented by the respondent, no ground for holding the defendant liable appears. It is well settled that as against a trespasser or mere licensee the owner of property owes no duty to keep the premises in safe condition. The only duty is to abstain from willful or wanton injury. In other respects one who thus enters upon the premises does so at his own risk and subject to all the ordinary risks which attach to such premises. Means v. Southern Cal. Ry. Co., 144 Cal. 473, 77 Pac. 1001, 1 Ann. Cas. 206; Kennedy v. Chase, 119 Cal. 637, 52 Pac. 33, 63 Am. St. Rep. 153; Schmidt v. Bauer, 80 Cal. 565, 22 Pac. 256, 5 L. R. A. 580. It is only in the case of one who has been expressly or impliedly invited upon the premises that the duty exists to exercise due care not to injure him or permit the premises to be in such condition that injury results. 29 Cyc. 453.

[3] The first question is whether the request of the stableman in this case is such an invitation as to render the respondent an invitee. Without regard to defendant's testimony that he forbade the stableman to permit any one else to do the work about the stable, the facts themselves show that the duties of the stableman were of such a menial character that the position could not have carried with it the implied right to delegate the work or hire others to assist in the same. See Curry v. Addoms, 166 App. Div. 433, 151 N. Y. Supp. 1017; Formall v. Standard Oil Co., 127 Mich. 496, 86 N. W. 946. In fact, the duties were such that the stableman could very easily perform them without aid. It must therefore be held that the request to do the work was unauthorized, and could not impose any additional liability upon the defendant. The case last cited is one particularly applicable upon its facts, and there a like conclusion was reached. See, also, Nofsinger v. Goldman, 122 Cal. 609, 616, 55 Pac. 425; Clark v. A. T. & S. F. R. Co., 164 Cal. 363, 128 Pac. 1032.

[4] Respondent seeks to bring this case within the rule announced in several decisions in other states, where it is held that one who at the unauthorized request of an employé performs a service in which the former or his employer is also interested, as a shipper's teamster putting a freight car in place, that person occupies a middle position between a licensee and a servant and can hold the owner of the car for any injuries received. See Thompson on Negligence, § 4986. But there seems to be only one case, Cleveland Terminal Ry. v. Marsh, 63 Ohio St. 236, 58 N. E. 821, 52 L. R. A. 142, where the mere payment for the service raises a sufficient interest in the work performed to bring the person within the above-mentioned rule. Without expressing any opinion upon the propriety of this rule in other cases, we cannot see how the mere payment by the unauthorized employé can change the relation of the employer to the third party from one of nonliability to one of liability. There are numerous cases which hold that a bystander, who performs a service at the request of an employé who has no authority to make the request, is as to the employer a mere volunteer, to whom the employer owes no duty to safeguard from negligence. McDaniel v. Highland Ave. R. Co., 90 Ala. 64, 8 South. 41; Ga., etc., Ry. Co. v. Propst, 83 Ala. 518, 3 South. 764; Flower v. Penna. R. Co., 69 Pa. 210, 8 Am. Rep. 251. For the employé to pay the bystander for the work done can upon no basis of reasoning create a liability where none existed before. In the case at bar, therefore, the stableman's promise to pay respondent to clean the stable could not make the latter an invitee. Neither can prior serv-

ices raise such a relation, especially where it is not pretended that they were brought home in any way to the defendant. The fact that respondent is a minor does not give him any greater rights under the circumstances. "That might excuse him from concurring negligence, but cannot supply the place of negligence on the part of the company, or confer an authority on one who has none. It may excite our sympathy, but cannot create rights or duties which have no other foundation." Flower v. Penna. R. Co., supra.

[5] The only remaining question is whether the stable constitutes an "attractive nuisance" within the doctrine of the "turntable cases." That doctrine was adopted in this state in the case of Barrett v. Southern Pacific Co., 91 Cal. 296, 27 Pac. 666, 25 Am. St. Rep. 186, and is usually applied to instances where the owner of land has erected upon it dangerous machinery, the consequences of meddling with which are not supposed to be fully comprehended by infant minds. In Peters v. Bowman, 115 Cal. 345, 47 Pac. 113, 598, 56 Am. St. Rep. 106, the rule was characterized as exceptional and "not to be carried beyond the class of cases to which it has been applied." This court, in Cahill v. Stone Co., 153 Cal. 571, 96 Pac. 84, 19 L. R. A. (N. S.) 1094, applied the rule to a heavily loaded push car which the defendant had allowed to stand upon tracks in a thickly populated district, where small children were known to play upon this car, which had not been made fast, and, being upon a down grade, was used to ride upon by children, in the process of which one of them was injured. But the court in that case expressly rested the decision upon the ground that the car, situated as it was, was dangerous machinery peculiarly attractive to children, who might be injured in riding upon it, though not comprehending the danger involved. We have not such a case here. If a stable is an attractive nuisance merely because boys like to congregate in and around it, then any place where boys like to play comes within the same category, yet it is clear that such is not the law. Peters v. Bowman, supra; Loftus v. Dehail, 133 Cal. 214, 65 Pac. 379.

[6] Moreover, it is an essential ingredient of a cause of action to which the "turntable cases" doctrine applies that the minor should have been attracted to the premises by a childish curiosity and desire to play thereon. Union Stockyard, etc., Co. v. Butler, 92 Ill. App. 166. In this case the reason for respondent's presence in the stable was the request of the stableman, and there is no pretense that upon this occasion the attraction of the stable had any influence whatever upon his visit there.

The result reached renders unnecessary any consideration of alleged errors urged by appellant.

For the reasons above given, the judgment and order are reversed.

We concur: SHAW, J.; SLOSS, J.

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176 Cal. 507

HENSHAW et al. v. FOSTER et al., Board of Sup'rs of San Diego County, et al.

(L. A. 5218.)

(Supreme Court of California. Nov. 19, 1917.)

1. Waters and Water Courses ⚷182 — Municipal Water District — Interference with Powers of Cities.

St. 1911, p. 1290, as amended by St. 1911, (Ex. Sess.) § 92, providing that the people of one or more municipalities in any county, with or without incorporated territory in the county, may organize a municipal water district, by proceedings therein provided, does not contravene Const. art. 11, § 19, empowering any municipality to establish and operate public works for supplying its inhabitants with water and authorizing it to furnish such service to inhabitants and people outside its boundaries, provided that it shall not furnish service to the inhabitants of any other municipality supplying the same service to such inhabitants without the consent of such other municipality.

2. Constitutional Law ⚷63(1)—Taxation ⚷38—Waters and Water Courses ⚷182—Municipal Water Districts—Delegation of Taxing Power.

St. 1911, p. 1290, as amended by St. 1911 (Ex. Sess.) p. 92, authorizing the people of several municipalities in a county to organize a municipal water district, and delegating to the district's board of directors its corporate authority, power to tax with reference to its affairs, does not contravene Const. art. 11, §§ 12, 13, denying power to the Legislature to tax counties, cities, or other municipalities for county, city, or other municipal purposes, or to delegate power to any one else to control or supervise any county, city, or municipal affairs, but authorizing it to, by general law, vest in the corporate authorities thereof power to tax for such purposes.

3. Constitutional Law ⚷283 — Waters and Water Courses ⚷182—Due Process —Formation of Municipal Water District.

St. 1911 p. 1290, as amended by St. 1911 (Ex. Sess.) p. 92, authorizing the people of several municipalities of a county to organize a municipal water district, the directors of which may tax for its purposes, does deprive a citizen of property without due process, because no inhabitant of the proposed district has opportunity, save by his vote, of declaring his unwillingness to come within its limits and under the authority of its officers, the board of supervisors, if the proper number of names are attached to the petition for formation of the district being required to call the election.

In Bank. Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by William G. Henshaw and another against Joseph Foster and others, as members of and constituting the Board of Supervisors of the County of San Diego, and another, for injunction. From an adverse judgment, plaintiffs appeal. Reversed.

S. M. Marsh, Dist. Atty., and E. V. Winnek, both of San Diego, for appellants. Sweet, Stearns & Forward, of San Diego, for respondents.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

MELVIN, J. Respondents, who are owners of land in the county of San Diego, brought this action to enjoin the board of supervisors of that county from calling an election for the purpose of determining whether or not a district to be known as the San Diego municipal water district should be incorporated under the provisions of an act entitled "An Act to provide for the incorporation and organization and management of municipal water districts, and to provide for the acquisition or construction by said districts of waterworks, and for the acquisition of all property necessary therefor, and also to provide for the distribution and sale of water by said districts," approved May 1, 1911, together with the amendment thereto approved December 24, 1911, and the further amendment thereto approved May 29, 1915 (St. 1915, p. 921). A petition signed by the requisite number of qualified electors within the territory proposed as that of the contemplated district had been duly filed. The real property of the taxpaying plaintiffs is within this territory. The district, as outlined in the petition, includes lands not now within any municipality, as well as the territory of three incorporated cities, San Diego, East San Diego, and La Mesa, and that of one irrigation district known as La Mesa, Lemon Grove, and Spring Valley irrigation district. The plaintiffs alleged in their pleading that by the calling and holding of the election certain of their constitutional rights would be violated. To their complaint a demurrer was interposed and was overruled by the court. The supervisors and county clerk refusing to plead further, judgment was accordingly entered. By it the plaintiffs were given the injunctive relief for which they had prayed. From said judgment this appeal is taken.

[1] Respondents set forth in their complaint and here contend that the act of the Legislature under which the petitioning electors proposed to organize the district was in violation of section 19 of article 11 of the Constitution of California. That section provides that:

> "Any municipal corporation may establish and operate public works for supplying its inhabitants with light, water, power, heat, transportation, telephone service or other means of communication. * * * A municipal corporation may furnish such services to inhabitants outside its boundaries; provided that it shall not furnish any service to the inhabitants of any other municipality owning or operating works supplying the same service to such inhabitants, without the consent of such other municipality, expressed by ordinance."

It is their contention that since the three cities mentioned above (each being vested with the power of furnishing its inhabitants with water) are included within the limits of the proposed district, there would be necessarily an intolerable clash of authority between the governing bodies of these municipalities and the trustees of the water district, if it should be established. In support of this contention they rely principally upon the declarations of this court in the opinion in Matter of the Petition of the Sanitary Board of the East Fruitvale Sanitary District, 158 Cal. 453, 111 Pac. 368. In that proceeding the court was considering the effect of the annexation of the territory of a sanitary district to a city, and it was held that the minor municipal corporation was merged in the major one and lost its identity. The language of the court upon which respondents place the greatest emphasis is as follows:

> "It is a well-settled doctrine that 'there cannot be at the same time, within the same territory, two distinct municipal corporations exercising the same powers, jurisdiction and privileges' 1 Dillon on Municipal Corporations (4th Ed.) § 184; King v. Pasmore, 3 Term R. 199, 243; Bloomfield v. Glen Ridge, 54 N. J. Eq. 276, 283 (33 Atl. 925). Accordingly, it is generally held that where one municipal corporation is annexed to another the annexing city takes over the functions of the annexed municipality, and the latter by virtue of the annexation is extinguished, and its property, powers, and duties are vested in the corporation of which it has become a part. 28 Cyc. 217; Mt. Pleasant v. Beckwith, 100 U. S. 514, 528 [25 L. Ed. 699]; Adams v. Minneapolis, 20 Minn. 484 (Gil. 438); People v. Supervisors, 94 N. Y. 263; Stroud v. Stevens Point, 37 Wis. 367; Schriber v. Langlade, 66 Wis. 616, 29 N. W. 547, 554. If this be true where one of two municipal corporations having co-extensive powers is annexed to another, the same result must follow a fortiori where a public corporation having powers more limited than those of a municipal corporation is annexed to a city which possesses all of the powers of the corporation which has been annexed to it and others in addition."

This declaration is by no means decisive of the problem presented by the appeal now before us. Indeed, it is of little value, for it is not, as is the complaint herein, based upon constitutional grounds at all. In the next paragraph of the opinion the following language is used:

> "These rules do not rest upon any theory of constitutional limitation. In the absence of any constitutional restriction, the Legislature has absolute power over the organization, the dissolution, the extent, the powers, and the liabilities of municipal and other public corporations established as agencies of the state for purposes of local government. In re Madera Irrigation District, 92 Cal. 296, 27 Am. St. Rep. 106, 28 Pac. 275, 675 [14 L. R. A. 755]. What shall be the effect of the enlargement or diminution of the boundaries of such corporations, or of the consolidation of two into one, or of the annexation of the territory of one into another, is a question to be answered by a determination of the legislative intent. The cases above cited declare the result of such action under laws which do not show affirmatively an intent to continue the existence of two separate public corporations within the same territorial limits."

In the statute before us the legislative intent is declared in plain language. The second section of the original act is as follows:

> "The people of any county or portion of a county, whether such portion includes unincorporated territory or not, in the state of California, may organize a municipal water district under the provisions of this act by proceeding as herein provided." Stats. 1911, p. 1290.

The corresponding section of the amending act approved December 24, 1911, is as follows:

> "The people of any city and county, or of one or more municipal corporations in any county with or without unincorporated territory in such county, in the state of California, may organize a municipal water district under the provisions of this act by proceeding as herein provided." Extra Sessions, Stats. 1911, p. 92.

In the case of Pixley v. Saunders, 168 Cal. 152, 141 Pac. 815, it was held that the inclusion of a part of a sanitary district within a subsequently incorporated town neither destroyed the autonomy of the district nor relieved the land within both municipalities from taxation by the properly constituted authorities of the district. While concededly both corporations had jurisdiction of matters of sanitation, it was held in that case that the Legislature may provide for the formation of districts for the sanitation of territories which might not be adequately reached by means available to the purely local jurisdiction of municipal corporations already existing within them. In that case the act under review did not as clearly as does this statute, provide that any district formed thereunder might include other municipalities, but it did provide for the formation of a district in *any part of the state* and in one of the sections relating to dissolution of sanitary districts reference was made to "any incorporated city or town that may be in occupation of a considerable portion of the territory of the district." Reasoning from these expressions this court concluded that it might "be fairly inferred that the Legislature intended that sanitary districts might embrace both incorporated and unincorporated territory." In the case at bar the reason for a like conclusion with reference to municipal water districts is much stronger because in the statute providing for their creation and operation we discover the legislative design of permitting the formation of districts for the convenient and economical development of a water supply within an area physically appropriate for such purpose without unduly restricting the powers of the inhabitants and their privileges by reason of the existence of smaller political entities situated within the larger tract and possessing powers somewhat similar to those secured for the corporation embracing the larger territory. The purpose is beneficent. By the law and under its sanctions the people of one or more municipalities with the adjacent territory may unite for the joint benefit of all forming a municipal corporation through which they may accomplish that which it would be impossible for any one of the constituent municipal or suburban units to perform. Unless grave constitutional reasons impel this court to the contrary, such an act will be upheld. In re Madera Irrigation District, 92 Cal. 296–310, 28 Pac. 272, 675, 14 L. R. A. 755, 27 Am. St. Rep. 106. We do not discover that section 19 of article 11 contains any constitutional inhibition upon such legislation.

[2] We will next examine the contention of respondents that the statute in question is contrary to the provisions of the twelfth and thirteenth sections of article 11. Those sections are as follows:

> "Sec. 12. The Legislature shall have no power to impose taxes upon counties, cities, towns or other public or municipal corporations, or upon the inhabitants or property thereof, for county, city, town, or other municipal purposes, but may, by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes.
>
> "Sec. 13. The Legislature shall not delegate to any special commission, private corporation, company, association or individual any power to make, control, appropriate, supervise or in any way interfere with any county, city, town or municipal improvement, money, property, or effects, whether held in trust or otherwise, or to levy taxes or assessments or perform any municipal function whatever, except that the Legislature shall have power to provide for the supervision, regulation and conduct, in such manner as it may determine, of the affairs of irrigation districts, reclamation districts or drainage districts, organized or existing under any law of this state."

Respondents take the position that the act in question violates the above-quoted sections 12 and 13, because "it delegates to some one other than the corporate authorities the power to assess and collect taxes for city and municipal purposes." This argument, like the other objection discussed herein, is based in part upon the supposed exclusive authority conferred by section 19 of article 11 upon cities. But, as we have seen, that article applies not merely to cities and towns but to all municipal corporations, and power to acquire and sell water may be given to municipalities larger in territory and including within themselves cities and towns or similar corporations. This is done in the statute before us not in opposition to section 12, but by general provisions which vest in the corporate authorities of the district the power to assess and collect special taxes for the purposes contemplated. The corporate authority of such a district is the board of directors, and to that board is delegated the taxing power not in relation to matters of a purely local character in the included city or cities, but having reference to the affairs of the larger municipality, embracing within it the others of lesser areas. In this view of the statute there is no violation of section 13 because the Legislature does not delegate to the directors control or supervision of any of the purely local affairs of the cities, but by general law enables the inhabitants of a district including cities to form a district and to elect their own taxing board to raise the necessary funds for district purposes. As the court declared in the opinion in the Madera Irrigation District proceeding, the liability to the district of the inhabitants of an included town is similar to that of the same inhabitants for their proportion of the indebtedness of the county within which they reside.

[3] The statute is also attacked in the complaint as being contrary to the provisions of the Fourteenth Amendment of the Constitution of the United States and those of section 13 of article 1 of the Constitution of California. It is argued that since no inhabitant of the proposed district has an opportunity, save by his vote, of declaring his unwillingness to come within its limits and under the authority of its officers, and since the board of supervisors, if the proper number of names are attached to the petition for the formation of the district, must call the election, the result may be to deprive the citizen of property without any opportunity of being heard. Appellants concede that there is no provision for a hearing before a tribunal clothed with authority to act on the matter of the extent of the district and the exclusion of lands therefrom. The statute requires publication of notice containing the text of the petition, the boundaries of the proposed district, and the date when the petition will be presented to the supervisors. But it is provided that:

> "When such petition is presented the board of supervisors shall give notice of an election to be held in said proposed water district for the purpose of determining whether or not the same shall be incorporated."

Respondents assert that there is no provision for a hearing of the property owner's objections at any time, and Brookes v. City of Oakland, 160 Cal. 423, 117 Pac. 433, is cited as authority for declaring the act unconstitutional. That was a case in which this court was considering a statute giving to a city council power to create sewer districts within the city whenever, in the judgment of the council, such course should seem proper. Such a proceeding was one directly affecting private property. An important distinction is to be observed between a proceeding which has for its purpose the making of a local public improvement and one for the creation of a district having extensive powers. As Mr. Justice Shaw said in delivering the opinion in Wilcox v. Engebretsen, 160 Cal. 288–293, 116 Pac. 750, 752:

> "Another distinction is to be made between the proceedings of a board or council acting in pursuance of some delegated legislative authority in creating or extending a political subdivision of the state, as a county or a city, a proceeding which does not directly affect private property, and proceedings to open, grade, regrade, or improve a street, which do directly charge or affect private property. People v. Ontario, 148 Cal. 632, 634, 84 Pac. 205; People v. Loyalton, 147 Cal. 779, 82 Pac. 620; Dean v. Davis, 51 Cal. 412; In re Madera Irr. Dist., 92 Cal. 323, 27 Am. St. Rep. 106, 14 L. R. A. 755, 28 Pac. 272, 675. The creation of a city and the annexation of territory thereto are matters delegated to the Legislature, acting by means of general laws, by which some board or council is invested with authority in that behalf. If the statute provides that such proceeding may be begun by the filing of a petition with the particular board or council having the authority, the fact that such body acts upon a petition which does not appear bad upon its face, and proceeds thereon according to law, is usually held to be conclusive of the sufficiency of the petition against any collateral attack."

It has been held that where no discretionary power is vested in any legislative body with regard to the boundaries of a territory proposed for annexation to a city, the act is not for that reason unconstitutional (People v. Town of Ontario, 148 Cal. 627, 84 Pac. 205); that in the formation of a town the finding of the supervisors that the petition is regularly signed by inhabitants of the proposed territory is conclusive (People v. Town of Loyalton, 147 Cal. 774, 82 Pac. 620); that a taxpayer may not restrain collection of a tax assessed against his land as a part of a levee district regularly formed after petition to the supervisors (Dean v. Davis, 51 Cal. 406); and that the organization of an irrigation district under the "Wright Act" does not violate the constitutional provision regarding "due process" (In re Madera Irrigation District, supra). Respondents insist that we are here dealing with a matter directly affecting private property. They call attention to the fact that in Fallbrook Irrigation District v. Bradley, 164 U. S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369, the Supreme Court of the United States declared the necessity for a hearing "at some time to those interested upon the question of fact whether or not the land of any owner which was intended to be included would be benefited by the irrigation proposed," and that the Wright Act was upheld upon the express declaration of the court that an appropriate hearing before the board of supervisors is in that act provided. Notwithstanding any expressions in the Fallbrook Irrigation Case, we are committed to the reasoning of the Madera District Case, which was followed in People v. Ontario long after the decision in the other case had been made. In the opinion in the Madera District Case the irrigation district was treated as a public corporation to be invested with certain political duties to be exercised in behalf of the state. That a water district such as the one sought to be established in San Diego county is also such a corporation may not be doubted under the authority of that decision. The statute in its scope is even broader than the Wright Irrigation Act, and is quite as complex in its details as is that law. To classify a district created under its sanction with a sewer district such as that described in the Brookes Case would be to disregard the distinction pointed out in Wilcox v. Engebretsen. The following quotation from In re Madera Irrigation District, supra, seems to us to be conclusive upon the matter of the constitutionality of the statute:

> "The constitutionality of the act in question is further assailed upon the ground that it makes no provision for a hearing from the owners of the land prior to the organization of the district. But the steps provided for the organization of the district are only for the creation of a public corporation to be invested with certain political

duties which it is to exercise in behalf of the state. (Dean v. Davis, 51 Cal. 406.) It has never been held that the inhabitants of a district are entitled to notice and hearing upon a proposition to submit such question to a popular vote. In the absence of constitutional restriction, it would be competent for the Legislature to create such public corporation, even against the will of the inhabitants. It has as much power to create the district in accordance with the will of the majority of such inhabitants. It must be observed that such proceeding does not affect the property of any one within the district, and that he is not by virtue thereof deprived of any property. Such result does not arise until after delinquency on his part in the payment of an assessment that may be levied upon his property, and before that time he has opportunity to be heard as to the correctness of the valuation which is placed upon his property, and made the basis of his assessment. He does not, it is true, have any opportunity to be heard, otherwise than by his vote in determining the amount of bonds to be issued, or the rate of assessment with which they are to be paid; but in this particular he is in the same condition as is the inhabitant of any municipal organization which incurs a bonded indebtedness, or levies a tax for its payment. His property is not taken from him without due process of law, if he is allowed a hearing at any time before the lien of the assessment thereon becomes final. (People v. Smith, 21 N. Y. 595; Gilmore v. Hentig, 33 Kan. 170 [5 Pac. 781]; Hagar v. Rec. Dist. No. 108, 111 U. S. 701 [4 Sup. Ct. 663, 28 L. Ed. 569]; Davies v. Los Angeles, 86 Cal. 46 [24 Pac. 771])."

Respondents also attack the petition and question the validity of the proceedings based thereon because of the inclusion within the boundaries of the proposed district of La Mesa, Lemon Grove, and Spring Valley irrigation district. This contention is sufficiently answered by the discussion of their objections based upon the fact that cities were also to be included within the boundaries of the district.

The demurrer to the complaint was erroneously overruled. Therefore the judgment is reversed, with instruction to the superior court to sustain the said demurrer.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; SHAW, J.; LAWLOR, J.; VICTOR E. SHAW, Judge pro tem.

HENSHAW, J., being disqualified, does not participate in the foregoing decision.

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34 Cal. App. 330

TERRY v. SOUTHERN PAC. CO.

(L. A. 3954.)

(Supreme Court of California. Sept. 14, 1917.)

MASTER AND SERVANT 🔑86 — INJURIES TO SERVANT — RECOVERY — INTERSTATE COMMERCE.

In the absence of evidence as to the exact work in which the employé was engaged when injured, whether intrastate or interstate, the employer's liability is not governed by the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1916, §§ 8657-8665]).

In Bank. Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by J. V. Terry against the Southern Pacific Company. There was judgment for plaintiff and order denying new trial, and defendants appealed, and the judgment was affirmed whereupon defendants applied for a hearing in the Supreme Court. Application denied.

The following is the opinion of James, J., in the District Court of Appeal, concurred in by Conrey, P. J., and Works, Judge pro tem.:

An appeal was taken herein from the judgment entered in favor of the plaintiff and from an order denying to the defendant a new trial. Plaintiff sued to recover damages for personal injuries alleged to have been sustained while he was employed by the defendant corporation. He charged in his complaint that the defendant was negligent in failing to place guards and lights about a "transfer pit" into which plaintiff fell while at work during the nighttime. Defendant admitted the employment of the plaintiff. That the plaintiff suffered the injuries complained of was denied in the answer. It was alleged affirmatively that the plaintiff failed to use ordinary care, and was himself guilty of negligence by which his alleged injuries were produced. It was then alleged in defense that plaintiff's own negligence, contributing to produce his injuries, "was not slight in comparison with gross negligence, if any, of this defendant, and that if this defendant was guilty of any negligence whatever in the premises, the said plaintiff was guilty of equal negligence at least, directly and proximately causing and contributing to said accident." There followed in the answer a further special plea that the accident was caused through a risk incident to the business in which the plaintiff was employed, which risk was one which was assumed by the plaintiff. The jury assessed damages in plaintiff's favor in the sum of $3,500.

Plaintiff testified that he was working at the time he suffered the injuries complained of as night foreman of boilermakers in the yards of the defendant corporation in Los Angeles; that in passing between the boiler shop and machine shop, across or about a transfer table used for the purpose of distributing locomotives in the shops, he slipped and fell into the pit which was at the sides of the transfer table; that there was no other way of crossing the pit except in the manner then used by him. He further testified that several men had fallen into the pit before and that he (the plaintiff) had at different times called attention of his superior to the conditions, and had urged that there be some lights provided in order that accidents might be avoided. He did not testify that there was any promise to erect lights. On cross-examination he was asked particularly to describe the general conditions of the place as they were at the time of the accident. In response to questions he testified that there were engines lined up all about the shop and pit—passenger engines and freight engines. He said: "Any engine that was supposed to be repaired. All engines under repair were moved by this transfer pit and transfer track engines not in operation, all engines under repair were transferred back and forth over the pit." This question was then asked: "Those included passenger engines used outside of Los Angeles and outside of this state?" There was an objection that the question asked for immaterial matter, which objection being overruled, the witness answered: "I will answer any engine brought in the shop to be repaired, no matter where it came from, was transferred back and forth; whether they were local or through passenger."

The defendant called as a witness Patrick Sheedy, its superintendent of motive power.

This witness was asked particularly as to the kind of repair work which was done at the shops where the plaintiff was employed; the purpose of the defendant being to show that the business there transacted was all connected with interstate commerce. This line of testimony was objected to, and the court at one point suggested that it might be admitted by agreement and they might "check up" on the law later. Sheedy described the character of work done at the railroad shops. He first said that it was interstate business entirely, unless some outside party wanted work done, which was often the case; that the transfer table was used for the purpose of transferring engines used on interstate trains to the repair shops. While he gave it as his conclusion that the business of the shops was all connected with interstate traffic, on cross-examination he said: "Interstate commerce is traffic between two states. As to in what sense this table can be traffic between two states, it handles equipment used for that purpose. They can be run over it. It stays where it is all the time, and does not go with the train into another state. We use it on all equipment of the company. We have divisions that don't go into another state, and going to Sacramento is not in another state. If we run a train to Sacramento and got broken equipment we would use that table on that engine. We use it on the San Francisco line engines." The other testimony introduced had to do particularly with the question of the character of the injuries suffered by the plaintiff, which testimony tended to create a conflict in the evidence. As to that matter no question is here presented, for it is conceded that the verdict of the jury upon that subject is conclusive.

The chief propositions upon which appellant relies for a reversal depend altogether upon whether under the issues made in the case the rules governing the right of recovery are those attending the application of the federal Employers' Liability Act, or those prescribed by the statutes of this state. There is no dispute, and the proposition seems to be conceded, that a state court may take jurisdiction of an action for damages under the federal Employers' Liability Act, as well as an action under the state law. The alleged injuries suffered by the plaintiff were caused on the 14th day of June, 1913, at which time the statute of this state denied to a defendant a defense based upon any alleged assumption of risk by its employé, and also provided that the contributory negligence of an employé "shall not bar a recovery therein where his contributory negligence was slight and that of the employer was gross, in comparison, but the damages may be diminished by the jury in proportion to the amount of negligence attributable to such employé. * * *" Stats. of 1911, p. 796. It is admitted that under the federal statute the doctrine of assumption of risk was available to its fullest extent in defense of an action by an employé against his employer. Appellant offered instructions, which were refused by the court, first to advise the jury that the work in which the respondent was engaged at the time he suffered his alleged injuries was service relating to interstate commerce; second, that the risk of the injuries suffered was assumed by respondent as an incident to his contract of employment. Respondent's answer to the offered instructions is: First, that no issue was raised as to the work being interstate work; second, that the defense of assumption of risk was insufficiently pleaded. If respondent's first proposition is to be sustained, then the second needs no discussion. As we have before suggested, there was no question made but that the state court had jurisdiction of the action whether it was governed by the provisions of the federal act or those of this state. This being true, it has been held, and we think with the best of reasons, that if a defendant engaged both in interstate and intrastate commerce, when sued in a state court, desires to invoke the federal statute for its protection, such option may be exercised by specially pleading that matter; that in the absence of such a pleading it will be presumed that the work performed by the plaintiff was intrastate and not interstate. "Nor do we think there was error in striking the evidence tending to show that plaintiff was at the time he received the injury engaged in interstate commerce. The fact that he was so engaged had not been alleged in the petition nor asserted in the answer, so that whether he was so engaged was not in issue. As argued, it is not necessary to plead the statutes of the United States; but, to invoke their benefit, facts rendering these applicable should be pleaded. All essential under the state law was proof that the injury was received because of the negligence of the company in the use or operation of its railway within the state, for until the contrary was made to appear it will be presumed to have been engaged in intrastate commerce. The evidence was rightly excluded." Bradbury v. Chicago, R. I. & P. Ry. Co., 149 Iowa, 51, 128 N. W. 1, 40 L. R. A. (N. S.) 684. There being no plea offered in this case that the work the employé was engaged in was interstate commerce, defendant was not entitled to introduce evidence supporting such an issue.

The evidence was not received without objection so as to entitle appellant to argue that a mutually assumed issue is sustainable without pleading. Assuming that the plea of assumption of risk was a good plea in so far as it presented ultimate facts on such an issue, this plea could not be made to take the place of the necessary pleading of the matter last referred to. The evidence which it is claimed was admitted as showing that the risk was assumed, and also that an issue was assumed as to that matter, was evidence all competent to be shown for the purpose of measuring the conduct of the respondent at the time he suffered his injuries in the determination of the question as to whether he alone was then at fault. His familiarity with the premises and knowledge of the dangerous conditions surrounding them were all facts pertinent to be considered by the jury in passing upon the question as to whose negligence caused the injuries, wholly aside from any consideration of the plea of assumption of risk. If we were to lay aside our conclusions as just announced and concede that the issue of assumed risk was properly before the jury, it is apparent from the record that there was no testimony whatsoever tending to show what particular work plaintiff was employed in at the time—whether interstate or intrastate. The testimony went to the character of the business being done at the shops, and that testimony showed that such business was of a mixed kind—that both interstate and intrastate repair work and some "outside work" was there performed. We do not understand it to be the law that merely because the greater amount of business which a carrier is doing at the time happens to be interstate, its liability is determined accordingly under the federal statute; but the test rather is what particular work is the employé then engaged in, as referable to the two classes, interstate or intrastate? This court gave some consideration to that question in Smith v. Industrial Accident Commission of the State of California, 26 Cal. App. 560, 147 Pac. 600, and we cite Zikos v. Oregon R. & Navigation Co. (C. C.) 179 Fed. 893; Howard v. Illinois Central R. R. Co., 207 U. S. 461, 28 Sup. Ct. 41, 52 L. Ed. 297; Southern Pacific Co. v. Pillsbury, 170 Cal. 782, 151 Pac. 277, L. R. A. 1916E, 916. The latter decision is cited by appellant as being in full accord with its view of the law, but a careful reading of it, in connection with Zikos v. Oregon, etc., Navigation Co., supra, leads us apart from rather than toward an agreement with that contention. It will have been noted that the appellant, in addition to its plea of assumption of risk, which was inapplicable under the state law, did very fully plead the defense under the state statute of the contributory negligence of the plaintiff and as to the character or quantity of that negligence as compared with any negligence of the defendant. It is evident that the pleader intended fully to avail himself of the defenses under the state statute. That the attempt to establish matters not available under the California law as it existed at the time failed by reason of the imperfections pointed out we are fully convinced.

The judgment and order are affirmed.

Henry T. Gage, W. I. Foley, and W. I. Gilbert, all of Los Angeles, for appellant. E. B. Drake, of Los Angeles, for respondent.

PER CURIAM. The application for a hearing in this court after decision by the District Court of Appeal of the Second Appellate District is denied.

We deem it proper to say that we base our denial upon the last ground stated in the opinion of the District Court of Appeal, viz., that it is apparent from the record "that there was no testimony whatsoever tending to show what particular work plaintiff was employed in at the time—whether interstate or intrastate." We are in entire accord with what is said by the District Court of Appeal on this point.

We are not to be taken as intimating any opinion as to what the situation would have been if, notwithstanding the absence of any issue as to the character of the work made by the pleadings, there had nevertheless been evidence tending to show that the plaintiff, at the time of the accident, was engaged in interstate commerce work.

176 Cal. 585

BIENFIELD v. VAN NESS. (S. F. 7573.)

(Supreme Court of California. Dec. 4, 1917. Rehearing Denied Jan. 3, 1918.)

1. Pleading 🔑205(5)—General Demurrer—Uncertainty.

An allegation that a demand for the amount of an assessment for street improvement was made upon defendant or his agents, if defective, is only uncertain, and is not reached upon general demurrer.

2. Municipal Corporations 🔑567(2) — Street Improvements — Enforcement — Pleading.

In an action to foreclose a lien for street assessment, an allegation that the board of public works "duly and regularly" fixed a day when it would take final action on said resolution passed on March 25, 1914, and that on April 15, 1914, the board "duly and regularly" made its report recommending the doing of the work sufficiently showed that 20 days elapsed between the resolution and the report, especially in view of Code Civ. Proc. § 456, providing that it is not necessary to state facts conferring jurisdiction on a board, but that it is sufficient to allege that a determination of a board has been "duly given or made," and the pleading showed a compliance with an ordinance requiring that the board of public works, after preparing the specifications for an improvement, shall pass a resolution of its intention to recommend to the supervisors the making of the improvements, and in said resolution shall fix a day when the board shall determine whether or not it will recommend the work, which day shall be not less than 20 days after the passage thereof.

3. Municipal Corporations 🔑567(2) — Street Improvements — Enforcement — Pleading.

Where improvements were to be curbs and sidewalks, an allegation that notices were posted along the line of improvement on each quarter block was a sufficient statement that they were posted in front of the quarter blocks.

4. Municipal Corporations 🔑567(2) — Street Improvements — Enforcement — Pleading.

Where notice of street improvements, required to be posted at the place of proposed improvements, were alleged to have been given, allegations omitting to state that the notice contained the matter required by ordinance as to time and manner of making objections, was cured by a further allegation that later the board "duly and regularly made an assessment," under Code Civ. Proc. § 456, providing that statement that a judgment or determination of a board or court was "duly given and made," is sufficient.

5. Municipal Corporations 🔑568(3) — Street Improvements — Assessments — Demand—Proof.

An affidavit that demand had been made on an owner or his agent, for payment of a street assessment, sufficiently showed a demand, where there was no evidence that no demand had been made; demand on an agent being good.

6. Municipal Corporations 🔑533—Street Improvements—Assessments—Demands.

Where an ordinance required a return to state the "nature" and "character" of a demand for payment of an assessment for street improvements, and provided that, if neither the owner nor his agent can be found, demand may be made on the lot, a return is sufficient, without specifying whether demand was made on the agent or the owner, the requirement as to the nature and character of the demand referring to the question whether the demand is personal, that is, upon the owner or his agent, or constructive, that is, by outcry upon the premises.

7. Municipal Corporations 🔑542—Street Improvements — List of Unpaid Assessments—Error in Name.

Where the list of assessments remaining unpaid, given in a subsequent part of the return, gives the name of a lot owner as "F. C. V." instead of "T. C. V.," and the original return shows the letter "F" was first written and the letter "T" written over it, the error was clerical and immaterial.

8. Municipal Corporations 🔑519(2) — Street Improvements — Delinquent Assessments—Authentication—Lien of Contractor.

That a copy of a list of unpaid assessments for street improvements recorded in the assessment book was not authenticated by the signature of the secretary of the board of public works, did not invalidate the contractor's lien on the lots, where the original return was authenticated.

9. Municipal Corporations 🔑320—Street Improvements — Formalities — Powers of Supervisors.

Under San Francisco Charter (St. 1911, p. 1691) art. 6, c. 2, § 33, authorizing the board of supervisors to provide a procedure for the improvement of streets, an ordinance not requiring formalities as to assessments, warrants, diagram, or affidavit of demand on nonpayment, or other formalities, could be adopted, subsequent to notices necessary to acquire jurisdiction, and hence a provision that no proceeding shall be held invalid for disregard of such formalities was authorized; the effect being that the provisions concerning the form of affidavits and demands and nonpayment of the assessment or warrant are only directory.

Department 1. Appeal from Superior Court, City and County of San Francisco; James M. Seawell, Judge.

Action by D. L. Bienfield against T. C. Van Ness, Jr., to foreclose a lien for a street assessment. Judgment for plaintiff, and defendant appeals. Affirmed.

W. H. Chapman and R. M. F. Soto, both of San Francisco, for appellant. Jesse A. Mueller, of San Francisco, for respondent. Fabius T. Finch, of San Francisco, amicus curiæ.

SHAW, J. The defendant appeals from a judgment in favor of the plaintiff, foreclosing a lien upon the defendant's property for a street assessment for the improvement of the crossing of Beach and Taylor streets in San Francisco.

The assessment was not made under any of the statutes of this state relating to such matters, but upon the procedure provided by Ordinance No. 2439 (New Series) of the city and county of San Francisco, approved September 4, 1913. This ordinance was adopted under and by virtue of the power given to the board of supervisors of San Francisco, by section 33, chapter 2, of article 6, of the San Francisco charter. Stats. 1911, p. 1691. This section authorizes the board of supervisors to adopt an ordinance providing a method of procedure for the improvement of streets within the city, and for the assessment of the expenses thereof upon private property. Mardis v. McCarthy, 162 Cal. 98, 121 Pac. 389; Hayne v. San Francisco, 162 Pac. 625. The ordinance in question is similar to the Improvement Act of 1911 (Stats. 1911, p. 730), and in its main features not unlike the so-called Vrooman Act.

The appellant claims that the complaint is defective in several particulars, and that the evidence does not sustain the conclusion that the assessment upon which the foreclosure is based was legal and valid.

[1] 1. The complaint alleges that the demand for the amount of the assessment was made "upon said T. C. Van Ness, Jr., or his agents." The claim is that this averment is in the disjunctive, and that it does not appear whether the demand was made upon Van Ness or upon his agents. The demurrer was general. There was no demurrer for uncertainty. If this is a defect, it amounts to an uncertainty only, and cannot be reached upon general demurrer.

[2] 2. The ordinance requires that the board of public works, after preparing the specifications, shall pass a resolution of its intention to recommend to the supervisors the making of the improvements, and in said resolution shall fix a day when the board shall determine whether or not it will recommend the work, which day shall be not less than 20 days after the passage thereof. Appellant insists that the complaint does not sufficiently show a compliance with this provision. It alleges that the board of public works "duly and regularly" fixed a day when it would take final action on said resolution; that this was done on March 25, 1914; that on April 15, 1914, the board "duly and regularly" made its report to the supervisors recommending the doing of the work. This shows that final action upon the resolution was taken on April 15, 1914, one day more than 20 days after March 25, 1914, the date of the adoption of the resolution of intention. Furthermore, the allegation that the action of the board was "duly and regularly" taken is a sufficient statement of the fact that the board had previously taken all the steps necessary to give it the authority to take such action. Code Civ. Proc. § 456. The objection is therefore not well taken.

[3] 3. The work to be done was the construction of curbs, sidewalks, and other improvements connected therewith in the street, at the crossing aforesaid. The allegation that the notices of street work were posted along the line of the improvement contemplated, and on each quarter block, is a sufficient statement that the notices were posted in front of the quarter block. Being on each quarter block and along the line of the improvement which is situated in the street, they must of necessity be in front of the blocks.

[4] 4. The complaint alleged that said notices were so posted, each "being headed 'Notice of Improvement,' in letters of not less than one inch in length, and in legible character, stating the fact of the passage of said resolution, its date, and, briefly, the work and improvement proposed, and referring to said resolution of intention for further particulars." The ordinance provides that such "notices shall also state that all objections to the proposed improvement must be filed, in writing, with the secretary of the board before the day fixed in the said resolution of intention for action thereon by said board," and that the notice shall indicate said day. It is objected that the complaint is insufficient because it does not state that the notices contained these requirements. It is to be observed that it does not state that the notices did not contain the above matter required by the ordinance. All these proceedings were required to be complete before the making of the assessment. The complaint, further on alleges that on September 24, 1914, the board of public works "duly and regularly made an assessment to cover the sum due for the said work so performed and specified in said contract," referring to the contract and work upon and for which the assessment was made. In virtue of the provisions of section 456 of the Code of Civil Procedure, we must hold that this is a sufficient allegation that all the steps preceding the making of the assessment, necessary to authorize the board to make it, had been taken in the manner provided by law. This cures the aforesaid defect, if it be one.

[5] 5. It is claimed that the evidence does not show that any legal demand for payment was ever made. The affidavit showing demand and nonpayment, constituting the return to the assessment, was introduced in evidence. It shows that on October 14, 1914, the plaintiff "called upon the following persons assessed, or their agents, and demanded payment of the amount assessed to each, respectively," and thereupon named among the persons the following: "Lot No. 9, T. C. Van Ness, Jr., 275 feet, $327.94." The objection is that this does not show whether the demand was upon Van Ness or upon his agents. We cannot perceive how the defendant could be in any wise prejudiced thereby. There was no showing at the trial, and it is not contended in the briefs, that the demand was not in fact made, or that he would or could have done anything in a different manner than he did if the demand was upon himself instead of upon his agents, or that he suffered any injury or prejudice whatever by reason of any defect in the manner of making the demand. A demand either upon himself or upon his agents would be a good demand. Under these circumstances the objection will not be entertained. The mere fact that the evidence shows that it was made on one or the other, but is not certain as to the particular one, furnishes no ground for reversal.

[6] It is objected further that the return showing a demand stated in the disjunctive

as aforesaid, is not in the form required, and that this invalidates the plaintiff's claim of lien. The ordinance provides that the return to the warrant shall state "the nature, character and date of the demand." The words "called upon the following persons assessed or their agents," respectively, were followed by a list of all the lot owners. It is further provided that if neither the owner nor his agent can be conveniently found, demand may be made upon the lot. The requirement as to the nature and character of the demand refers to the question whether the demand is personal, that is, upon the owner or his agent, or constructive, that is, by outcry upon the premises. Upon this theory the return is sufficient in this respect without specifying the particular instances in which the demand was upon the owner and which upon the agent.

[7] 6. The further objection is made that the list of assessments remaining unpaid, given in a subsequent part of the return, gives the name of the owner of lot No. 9, as F. C. Van Ness, Jr., instead of T. C. Van Ness, Jr. The original return shows that the letter "F" at this place was first written, and that the letter "T" was written over it. The error was purely clerical and is too trifling to deserve notice.

[8] 7. It appears that in recording the return in the assessment book the copy therein written was not authenticated by the signature of the secretary of the board of public works. In decisions concerning the requirement for the recording of returns of this character in proceedings under the statutes such as the Vrooman Act and the act of 1911, which are similar to the ordinance in question, it has been decided that the omission of the authentication to the return, as recorded in the assessment book, is not fatal to the validity of the lien of the contractor, if in fact the return itself is properly authenticated. In this case the return to the assessment was complete and perfect in itself, and it was all duly entered in the assessment book. The failure of the secretary to attach to the record his signature thereto, does not render the lien invalid or prejudice the holder of the warrant. S. F. v. Certain Real Property, 50 Cal. 188; Gillis v. Cleveland, 87 Cal. 219, 25 Pac. 351.

[9] 8. Finally, the objections to the formal sufficiency of the assessment and return, or affidavit of demand and nonpayment, are all disposed of by the following provision of the ordinance:

> "No assessment, warrant, diagram or affidavit of demand and nonpayment after the issue of the same, and no proceedings prior to the assessment, shall be held invalid by any court for any error, informality or other defect in the same, where the resolution of intention of the board of public works to recommend to the supervisors the ordering of the improvement has been actually published and posted and the notices of improvement posted as in this ordinance provided."

It would have been within the power of the supervisors to have adopted an ordinance which did not require the formalities above referred to in the proceedings subsequent to the giving of the notices necessary to acquire jurisdiction of the proceeding.

> "It must be equally competent to provide, in the law itself, that a disregard of its provisions as to any of these intermediate proceedings shall not be fatal to the validity of the assessment, or that after a given stage in the matter has been reached all inquiry as to such proceedings shall be cut off, and they shall be conclusively presumed to have been performed in the manner required by law." Chase v. Trout, 146 Cal. 362, 80 Pac. 85.

The effect of the above curative clause of the ordinance is to make the other provisions of the ordinance respecting the form of the affidavit of demand and nonpayment of the assessment or warrant directory only, and to prevent a failure to observe the same from having the effect of invalidating the lien upon the property.

These comprise all the objections made to the judgment appealed from. None of them being fatal thereto, the appeal is ineffectual.

The judgment is affirmed.

We concur: SLOSS, J.; LAWLOR, J.

(176 Cal. 602)

TOWER v. HUMBOLDT TRANSIT CO.

(S. F. 7556.)

(Supreme Court of California. Dec. 6, 1917. Rehearing Denied Jan. 3, 1918.)

1. STREET RAILROADS ⚿93(½)—INJURIES ON TRACK—LIABILITY.

Where plaintiff, a girl subject to fainting fits, fainted on a street railway's track, so that she was run over by a car, the railway was not liable to her unless its failure to avoid striking her was due in some way to want of ordinary care on the part of the railway or its servants.

2. NEGLIGENCE ⚿121(1)—PRESUMPTION.

Negligence is not presumed, and the party asserting it must prove its existence by a preponderance of the evidence.

3. STREET RAILROADS ⚿112(2) — INJURIES ON TRACK—RES IPSA LOQUITUR.

The doctrine of res ipsa loquitur has no just or proper application to the case of a collision between a street car and a pedestrian on the street. The presumption of negligence arises only where the occurrence is such as ordinarily does not happen without negligence on the part of the party charged, as in the case of explosion of a boiler, etc.

4. STREET RAILROADS ⚿85(1)—USE OF STREET BY CAR AND OTHER VEHICLES OR PERSONS—SUPERIOR RIGHT.

As between street cars and other vehicles or persons on the public streets, neither party has a superior right, and neither is bound to exercise a higher degree of care than the other.

5. TRIAL ⚿252(9)—INSTRUCTION—MISLEADING CHARACTER.

In an action against a street railroad for injuries to a girl on its track, the instruction that it was a rule of law that, when the thing which causes an action is shown to be under the management and control of defendant, and the accident is such as ordinarily does not happen if those in control use proper care, it affords reasonable evidence, in the absence of explanation, that the accident arose from lack of ordinary care, was misleading, as inapplicable to the facts, in that it could not be said that in the ordinary course of things a street car does not run into a person on the street if it is properly operated.

6. STREET RAILROADS 🔑118(1)—INJURIES ON TRACK—INSTRUCTION.

In such action such instruction so framed that the jury must have understood that plaintiff was not bound to prove negligence on the part of the street railway, in that it told the jury that such negligence was presumed if plaintiff showed she was rightfully on the track, and was run over and injured by a street car managed and controlled by the street railway, was erroneous.

7. TRIAL 🔑296(7)—INSTRUCTIONS—CURE OF ERROR.

The effect of such instruction was not cured by other parts of the charge, where on several occasions, in instructing at the railway's request that plaintiff must establish negligence by a preponderance of the evidence, the court qualified by restating the substance of the instruction.

8. APPEAL AND ERROR 🔑843(3)—REVIEW—PRESUMPTION IN FAVOR OF TRIAL COURT.

Evidence which is a part of the main case will presumably be introduced in proper sequence on second trial.

9. STREET RAILROADS 🔑113(1)—WITNESSES 🔑268(1)—CROSS-EXAMINATION—INJURIES ON TRACK—EVIDENCE.

In a young girl's action for injuries against a street railway, where the railway contended that plaintiff attempted to bring the injuries on herself, the court should have been liberal in allowing it to cross-examine her more or less with respect to her movements and actions during the several hours following her departure from her home on the day of the accident before the accident itself, and to prove her conduct during such period by other witnesses; such evidence being relevant as bearing on plaintiff's state of mind.

10. EVIDENCE 🔑472(7)—OPINION.

In such action plaintiff's father should not have been permitted, over proper objections, to testify he had seen certain letters written by plaintiff, and then, without producing the letters, or accounting for their absence, to state his conclusion that they evidenced a given state of mind in the writer; for, had the letters been produced, that question was for the jury rather than the witness.

11. TRIAL 🔑228(3)—INSTRUCTIONS.

The court should state rules of law in general terms, rather than elaborate matters of evidence so as to come perilously close to, if not over, the line separating a charge of law from an instruction on the facts.

Department 1. Appeal from Superior Court, Humboldt County; George D. Murray, Judge.

Action by Gwynedde A. Tower against the Humboldt Transit Company. From a judgment for plaintiff and an order denying its motion for new trial, defendant appeals. Judgment and order reversed.

Coonan & Kehoe, of Eureka, for appellant. Pierce H. Ryan, of Eureka, for respondent.

SLOSS, J. This is an action to recover damages for personal injuries. At the time of the occurrences in controversy the plaintiff was a minor of the age of about 16 years. The trial resulted in a verdict and judgment in her favor. The defendant appeals from the judgment and from an order denying its motion for a new trial.

The defendant owns and operates a system of electric cars in the city of Eureka. The claim of the plaintiff was that on January 12, 1913, she was run over by one of defendant's cars, sustaining injuries which required the amputation of her right arm and her right leg. The complaint was in four counts. Each of the four alleged that plaintiff was lawfully upon the track of the defendant. The first count alleged in general terms that plaintiff was injured through the careless and negligent manner in which the car was operated. The second ascribed the injuries to the negligent failure of the motorman to lower or "trip" the fender with which the car was equipped. The third counted on the failure to provide the car with sufficient brakes or other appliances for stopping the car. The fourth set up the negligence of the motorman in failing to keep a lookout for persons on the track, and thereby failing to discover the presence of the plaintiff on such track.

The defendant denied all of the allegations of negligence, denied that plaintiff was ever run over by defendant's car, and alleged that plaintiff's injuries were caused by her own negligence, and that of her parents.

A brief statement of the outstanding features of the case is necessary to an understanding of the points urged for reversal. The defendant operates a single-track road along E street, which at the place with which we are concerned is an outlying and little frequented thoroughfare, with a rough surface, more or less overgrown with grass and weeds. E street runs north and south, and is intersected by Harris, Grotto, and Henderson streets, the last named being the most northerly of the three. The accident occurred between Grotto and Henderson streets. Between Harris and Grotto streets the defendant maintains a diamond switch or turnout for the passage of its cars. There is a sidewalk on the westerly side of E street. The incidents in controversy took place about 6 o'clock on the evening of January 12, 1913. The sun had already set, and it was dark, or between dusk and dark. There had been some rain or fog during the day, and the roadway on E street was muddy. Shortly before the accident one of the defendant's cars had come southerly on E street. At the switch it met and passed car No. 11, which was going northerly, and which, as plaintiff claims, inflicted the injuries complained of. The case sought to be established by the plaintiff was, in effect, this: She had for a considerable time been subject to occasional, but sudden, attacks of fainting or unconsciousness, lasting from 10 to 30 minutes. She testified that on the evening in question she was walking along the sidewalk on E street, when she observed a cat on the other side of the street. Her interest was, for some reason, attracted, and she crossed the street to approach the cat. As she started to return to the sidewalk, she saw the south-bound car coming, and, after waiting for it to pass, was proceeding on her way across the track, when she fainted. She remained unconscious until she felt something strike her leg and arm repeatedly and with great force. Witnesses who were on the passing car heard screams. The car was stopped, and several men, including the motorman and the conductor, walked back a short distance and found the plaintiff lying by the side of the track with her right arm and right leg crushed and mangled.

The plaintiff produced no witnesses who had seen her lying on the track. The motorman who was operating the car testified that he had kept a lookout ahead, and had seen no person or object on or between the rails. His story was that, as he approached the place where plaintiff was found, he saw to the left of the track, and a couple of feet from it, some dark object which he took to be a buggy or automobile robe. He then began to slow down the car. Just as he was about to pass the object, he noticed a movement, and thought that the dark mass might be the body of some person. He then brought the car to a standstill. There was considerable testimony pro and con regarding the condition of the brakes. The defendant also offered evidence that plaintiff had made verbal and written statements which could fairly be interpreted as admissions that plaintiff had intentionally brought the injuries upon herself. The plaintiff, in rebuttal, sought to weaken or destroy the effect of these declarations by testimony tending to show that she was not in a normal condition of mind when she made the statements.

It is not necessary to go beyond this incomplete summary of the evidence, or to attempt any discussion of the persuasive force of the showing on either side. For present purposes, it is enough to say that a careful reading of the record produces a very substantial doubt concerning the true state of facts. It is beyond question that there was ample evidence upon which the jury might have found that there was no proof of negligence on the part of defendant's employés contributing to the injuries complained of by the plaintiff. We are not intimating that the evidence was not sufficient to support a verdict in plaintiff's favor. The point is, merely, that the real merits of the case, as disclosed by the evidence, are at the least so doubtful as to require careful consideration of substantial errors which may have had an important influence in leading the jury to the verdict which it found. In other words, the case is not one in which grave error can be disregarded under the provision of section 4½ of article 6 of the Constitution.

[1] The essential point in controversy was whether the defendant had negligently run its car upon and over the plaintiff when she was lying unconscious on the track in the path of the approaching car. Her alleged position on the track and her condition at the time were in dispute. But even if it be said that her position was as claimed by her, it was still necessary, before liability could be imposed on the defendant, to show that the failure to avoid striking her was due to some want of ordinary care on the part of the defendant or its servants.

[2] It is a mere commonplace of the law to say that negligence is not presumed. The party asserting it must prove its existence by a preponderance of evidence. Nevertheless, the court instructed the jury as follows:

> "It is a rule of law in this state that, when the thing which causes an accident is shown to be under the management and control of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management and control use proper care, it affords reasonable evidence, in the absence of any explanation by the defendant that the accident arose from want of ordinary care. * * *
>
> "In further explanation of this rule of law, applying it only to the first cause of action, you are instructed that, if the plaintiff has proved by a preponderance of evidence that at the time and place mentioned in the complaint she was lawfully on the track of the defendant's street railroad, that while thereon she was run over by a street car passing along said track, and was injured thereby as alleged in the complaint, and that the said car was managed, operated, and controlled entirely by the defendant, then the plaintiff has made out a prima facie case, and from such circumstances, if they have been proved, the law presumes that the defendant was negligent, and the burden is then cast upon the defendant to show that it was not negligent or careless or reckless in the operation of said car."

[3-5] By this instruction the court sought to define and apply to this case the doctrine of res ipsa loquitur. The rule is well known, and has often been recognized by this court. Bush v. Barnett, 96 Cal. 202, 31 Pac. 2; Judson v. Giant Powder Co., 107 Cal. 549, 40 Pac. 1020, 29 L. R. A. 718, 48 Am. St. Rep. 146; O'Connor v. Mennie, 169 Cal. 217, 146 Pac. 674, and cases cited. It has, however, no just or proper application to the case of a collision between a street car and a pedestrian on the street. The presumption of negligence arises only where the occurrence is such as ordinarily does not happen without negligence on the part of the party charged, as, for example, in the case of the explosion of a boiler (Posey v. Scoville [C. C.] 10 Fed. 140), or of a powder mill (Judson v. Giant Powder Co., supra), or the fall of a workman's tool from a building upon a person on the street (Dixon v. Pluns, 98 Cal. 384, 33

Pac. 268, 20 L. R. A. 698, 35 Am. St. Rep. 180). It is true that in the first part of the instruction complained of the court incorporates this condition. But the difficulty is that there is, in a case like this, no foundation in fact for assuming or finding the existence of the condition. As between street cars and other vehicles or persons on the public streets, neither has a superior right, and neither is bound to exercise a higher degree of care than the other. It cannot be said that "in the ordinary course of things" a street car does not run into a person on the street if the street car is properly operated. On the contrary, the mishap is quite as likely to be due to the fault of the person struck, or of some third person, or to some unforeseen and unpreventable cause, as to the negligence of those operating the car. At best, the instruction was inapplicable, and therefore misleading.

[6] But, beyond this, the court, when it undertook to amplify the rule and apply it specifically to the facts of the particular case, framed its declaration in such form that the jury must have understood that the plaintiff was not bound to prove negligence on the part of the defendant. It told the jury that such negligence was presumed if plaintiff showed: (1) That she was lawfully on the track; (2) that she was run over and injured by a street car; and (3) that said car was managed and controlled by the defendant. That she had a lawful right to be on the track, in the path of an approaching car, was not questioned. In fact, the court specifically instructed the jury that plaintiff was entitled, equally with the defendant, to go upon or across the street wherever she pleased, and that defendant had no superior right in the space between the tracks, except the part where its cars actually were. Nor was it disputed that the cars running on the track were under the control and management of the defendant company. All, then, that the plaintiff was by this instruction required to show was that she was run over and injured by one of the defendant's cars. In effect, the instruction made mere proof of the accident or injury suffice to impose on the defendant responsibility for such injury. This is not the law. 36 Cyc. 1582; H. S. S. R. Co. v. Hildreth, 72 Ark. 572, 82 S. W. 245; Boyd v. Boston E. R. Co., 224 Mass. 199, 112 N. E. 607.

We have in a number of cases held that a presumption of negligence arises where a passenger on the car of a common carrier receives injury from the operation of the car. Bush v. Barnett, supra; McCurrie v. S. P. Co., 122 Cal. 558, 55 Pac. 324; Osgood v. Los Angeles Traction Co., 137 Cal. 280, 70 Pac. 169, 92 Am. St. Rep. 171; Housel v. Pac. El. Ry. Co., 167 Cal. 245, 139 Pac. 73, 51 L. R. A. (N. S.) 1105, Ann. Cas. 1915C, 665. The rule is, in such cases, rested upon the high degree of care required of a carrier toward its passengers, and the defendant's greater ability to show the causes of the accident. But even in actions by passengers the rule that negligence is presumed from the fact of injury is not universal. Wyatt v. Pac. El. Ry. Co., 156 Cal. 170, 103 Pac. 892. At any rate, the reasons justifying the rule in such cases do not exist here.

[7] It cannot be said that this was an isolated instruction, or that its effect was cured by other parts of the charge. On several occasions, in instructing the jury, at defendant's request, that the plaintiff must establish negligence by a preponderance of the evidence, the court was careful to add, as a qualification, a restatement of the very matter we have been discussing.

The expression of our views regarding the nature of the evidence makes it unnecessary to say anything further to show the prejudicial character of the instructions in this regard.

[8] There are many other assignments of error, but we do not think it necessary to discuss them in detail. Most of them relate to points which will probably not be presented on a second trial. There are, for example, many objections to the offering of evidence by way of rebuttal instead of on the case in chief. Any evidence so offered which was a part of the main case will, presumably, be introduced in proper sequence. So, too, there is no reason to anticipate a recurrence of an alleged attempt by the plaintiff to impeach her own witness. We need not, therefore, inquire whether the course pursued was proper. Certain questions are raised with reference to the pleadings. In so far as they have importance, we may assume that the court below will, before another trial, grant leave to both parties to make proper amendments, and to thus obviate unnecessary obstacles to an examination of the merits. We do not express any opinion regarding the sufficiency of the evidence to establish certain contentions of the respondent, since the testimony on another trial may not be identical with that which has already been given.

[9] One or two suggestions may be made for the guidance of the court and the parties in trying the case anew. In view of the defendant's contentions regarding the plaintiff's conduct in connection with the accident, we think the court should have been more liberal in allowing the defendant to cross-examine her with respect to her movements and actions during the several hours following her departure from her home on the day of the accident and prior to the occurrence of the accident itself. For like reasons, the defendant should have been allowed to prove her conduct during this period by other witnesses. Evidence on this line was relevant as bearing upon plaintiff's state of mind, and consequently upon the probability of her having attempted to bring the injuries upon herself.

[10] It need, perhaps, hardly be said that plaintiff's father should not have been permitted, over proper objections, to testify that he had seen certain letters written by the plaintiff, and then, without producing the letters or accounting for their absence, to state his conclusion that they evidenced a given state of mind on the part of the writer. Even if the letters themselves had been produced, it was for the jury, rather than the witness, to draw such conclusion.

[11] Plaintiff's instruction 27 should not have been given in the form in which it was proposed. As it reads, it is open to the objection that it is argumentative and goes too elaborately into the particular facts relied on by the plaintiff. It is better for the court to state rules of law in general terms, rather than to so elaborate matters of evidence as to come perilously close to, if not over, the line which separates a charge of law from an instruction on the facts.

The judgment and the order denying a new trial are reversed.

We concur: SHAW, J; LAWLOR, J.

(176 Cal. 592)

SHEAN et al. v. WEEKS et al. (S. F. 7593.)

(Supreme Court of California. Dec. 5, 1917.)

1. Landlord and Tenant 🔑134(5)—Covenants—"General Confectioner."

Evidence *held* insufficient to show that the term "general confectioner" had by general usage acquired the meaning of including the restaurant business, so that the starting of a restaurant by another was not a breach of a covenant not to rent a part of a building to sell "merchandise of the same character."

2. Customs and Usages 🔑15(1)—Construction of Words—Usage.

The ordinary meaning of words used in a business cannot be changed, except by proof of general usage by those engaged in the particular trade, or by proof that the parties to a contract used it in the special sense contended for.

3. Injunction 🔑62(2) — Landlord and Tenant—Covenants — Restrictions on Business.

Where a landlord covenanted not to rent another part of his building to any business selling candy, ice cream, light lunches, soda water, or other things sold in the business of general confectionists, injunction will not be granted to enjoin the installing of a restaurant where the "light lunch" feature was not relied on for the injunction; the injunction being desired to enjoin the operation of the restaurant altogether.

Department 1. Appeal from Superior Court, Alameda County; M. T. Farmer, Judge.

Action by L. F. Shean and J. L. Taylor to enjoin A. J. Weeks, Albert M. Vail, Henry R. Vail, and Grace McLeod from operating a restaurant. Judgment for defendants, and plaintiffs appeal. Affirmed.

Thomas H. Laine and Lawrence M. Phillips, both of San Francisco, and Dixon L. Phillips, of Hanford, for appellants. Elliott Johnson and R. W. Palmer, both of San Francisco, for respondents.

SHAW, J. The plaintiffs appeal from a judgment in favor of the defendants. The record is presented in typewriting, as provided in section 953a of the Code of Civil Procedure.

The action was begun on March 6, 1915, to enjoin the breach by the defendants of a covenant of a lease executed by the defendant Weeks to the plaintiffs, on September 1, 1914, the defendants other than Weeks being the lessees of Weeks under a subsequent lease.

The lease to the plaintiffs was for a portion of the ground floor of the building formerly known as Berkeley Inn, and included a space fronting 37 feet on Telegraph avenue, and 136 feet on Bancroft way. The covenant which it is alleged was broken is as follows:

> "It is understood that the lessees are at present carrying on in the store space fronting on Telegraph avenue the business of general confectionists and are engaged in the manufacture and sale of candy, ice cream, light lunches, soda water, etc., and the lessor agrees that he will not during the term of this lease, carry on, or conduct, or permit to be carried on or conducted, under any lease or letting, upon any portion of the premises owned by him at said corner of Bancroft way and Telegraph avenue, any business which shall involve the selling or handling or manufacturing of merchandise of the same character as that sold or handled or manufactured by the lessees, their assigns or subtenants, in the course of their business as general confectionists."

On December 16, 1914, Weeks leased to the defendants Elbert M. Vail and Henry R. Vail all of the premises referred to in the aforesaid covenant, except the part thereof previously leased as aforesaid to the plaintiffs. Thereafter said lessees and the defendant McLeod established a restaurant and a cafeteria on parts of the premises so leased to them by Weeks.

The complaint alleges:

> That "a large and important part of plaintiffs' business so conducted consists of the serving of hot and cold lunches, meals and food, to the public, to be eaten at tables provided by plaintiff on the premises, and also to be carried away in bulk by the purchasers thereof; that such lunches, meals, and food are served by plaintiffs in said establishment on the demised premises continuously from 8 o'clock a. m. until midnight each day;" and that the said Vail and others, lessees of Weeks, are carrying on in another part of the premises "a restaurant, café, cafeteria, eating house, and lunch room, in which lunches, meals, or food are served to the patrons thereof at tables therein provided, or are carried away in bulk by said patrons."

The room in which the said defendants carried on said business was in a portion of the premises owned by Weeks, referred to in the aforesaid covenant. It is claimed by the plaintiffs that the business so carried on by Vail and others is of the same character as the business of plaintiffs as "general confectionists," and that it conflicts therewith, and takes from the plaintiffs a large and valuable portion of their custom.

The court found:

> "That there is no substantial conflict in the business allowed to be carried on by the defendant Weeks on the premises described in the complaint, to wit, the hotel and restaurant business, and the cafeteria business, with the business being carried on by plaintiffs, namely, the general confectionery business."

The appellants contend that this finding is contrary to the evidence. The daily menu of the plaintiffs' establishment included such articles as Eastern oysters, roast sirloin of beef, braised lamb, chicken pie, meat roll, veal fricassee, chipped beef in cream, home-made corn beef hash, and Boston baked beans. It is not denied that these dishes are usually served only in restaurants and hotels. The plaintiffs say that the words "candy, ice cream, light lunches, soda water, etc.," in the covenant "were merely intended as a brief description of the general confectionery business to be carried on by the lessees, and the true method of determining the rights of the parties is to arrive at the ordinary business significance of the term 'general confectioner,' as understood by men engaged in the same business." This necessarily involves the proposition that the term "general confectionist" used in the covenant has, by the general usage of the trade, acquired a meaning broad enough to include the business of serving such articles of food as those above mentioned, in connection with other lighter foods contained in the plaintiffs' daily bill of fare.

[1] The evidence does not establish this proposition. One witness testified that he was manager of an establishment in Oakland which he called a confectionery and refused to call a restaurant, but at which, in addition to confections, there were served many kinds of substantial foods similar to those served by the plaintiffs as above mentioned, and embracing many of the dishes usually served in ordinary restaurants. He further testified that at the present time this kind of business was ordinarily handled by such establishments as his own, that lately almost every confectioner was doing it, and that it was customary for general confectioners such as himself to handle what is "called the light lunch feature of the business," and to sell hot lunches in the middle of the day, and salads at all hours. There was no other evidence given in support of the plaintiffs' theory. This testimony does not establish the fact that the term "general confectioner" had by general trade usage acquired a meaning broad enough to include the carrying on of a restaurant such as that conducted by himself or by the plaintiffs. It tends to show that many confectioners were extending their business so as to include a restaurant as a part thereof, but it does not prove that they spoke of that branch as a confectionery. On the other hand, there was testimony to the effect that in 12 confectioneries carried on in Berkeley, Oakland, and San Francisco nothing more substantial in the way of eatables was served to customers than sandwiches and salads, except in one, which added hot beans to the menu. The evidence indicates that these 12 comprised the greater part of the principal confectioners in the three cities named. This testimony would justify the conclusion that it was not the general usage of the trade to carry on a restaurant in connection with the confectionery, although it was done by many persons engaged in that business, and it tends to disprove the claim that the term "general confectioner" had acquired the meaning upon which the plaintiffs insist.

[2] The ordinary meaning of words cannot be changed, except by proof of general usage by those engaged in the particular trade, or by proof that the parties to the contract used it in the special sense contended for. The evidence falls far short of these requirements.

[3] From all the evidence we think the court was warranted in holding that the covenant did not authorize an injunction against the carrying on of a restaurant or cafeteria in other parts of the building, and that the finding is correct so far as that point is involved. Plaintiffs' counsel do not claim relief for any other breach. They put their case, as the complaint indicates, wholly on the theory that the covenant gave them the exclusive right to carry on a restaurant in the building, and restricted the use of the other parts thereof to other purposes. No point is made upon the proposition that the restaurant and cafeteria serve "light lunches" contrary to the express terms of the covenant. The plaintiff Shean testified that it was not the light lunch feature that the plaintiffs objected to, but that what they wished to prevent was the selling of meals in the rival places. We may therefore assume that the violation of the "light lunch" restriction was not urged in the court below as ground for the injunction sought, and that the breach for that part of the covenant was not considered by the plaintiffs as of substantial importance, but, for the purposes of the case, was waived by them.

This conclusion renders it unnecessary to consider the other points urged in the brief of the appellants. If the business carried on by the defendants did not substantially conflict, in the manner complained of, with that for which the plaintiffs' premises were leased to them, as embraced in the covenant aforesaid, plaintiffs are not entitled to an injunction.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.

176 Cal. 576

In re MATTHEWS' ESTATE.

MATTHEWS et al. v. LEONARD.

(L. A. 5085.)

(Supreme Court of California. Nov. 30, 1917. Rehearing Denied Dec. 29, 1917.)

1. WILLS 🔑202—ESTATES CREATED—CONSTRUCTION—DEATH OF PRIMARY LEGATEE.

Where testatrix bequeathed money to a daughter, who predeceased her, and after the daughter's decease made a codicil reaffirming the will without mentioning such bequest, Civ. Code, § 1310, providing that, when any estate is devised to one who dies before the testator leaving lineal descendants, they shall take the estate, did not have the effect of passing the legacy to the son and sole heir of the deceased legatee, since such statute relates to the time of the death of the testatrix, and not to the time of the death of the original legatee, and hence the republication was not in effect the making of a legacy to the son so as to preclude him from claiming as a pretermitted heir under section 1307.

2. WILLS 🔑10—CAPACITY TO TAKE.

Since under Civ. Code, § 1275, a testamentary disposition may be made only to any person capable by law of taking, a gift by will to one who is dead at the date of the making of the will is void.

Shaw and Sloss, JJ., dissenting.

In Bank. Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

Proceedings in the estate of Marie A. Matthews, deceased. From a decree for partial distribution in favor of Howard Leonard, Lee R. Matthews and Grace Leore Payne appeal. Affirmed.

E. J. Fleming, B. F. Woodard, and Fred L. Hamblin, all of Los Angeles, for appellants. H. T. Morrow and William L. Kuehn, both of Los Angeles, for respondent.

MELVIN, J. Appeal from a decree of partial distribution.

[1] Marie A. Matthews died testate. On the 6th of May, 1902, she had made a will by which, among other provisions regarding her property, she had bequeathed $10 to her daughter, Mary Louise Leonard, the mother of Howard Leonard, respondent herein. Mrs. Leonard died in 1907 and in the following year her mother made a codicil by which she referred to and ratified and confirmed her will of May 6, 1902, in every respect save so far as any part of it was inconsistent with the codicil. No reference was made in the codicil to the death of Mary Louise Leonard, daughter of the testatrix, but by that instrument the amount given to Lee R. Matthews, a son of Marie A. Matthews, was increased. Respondent contends that the republication of the will by the execution of the codicil after the death of Mary Louise Leonard without mention of her son, Howard Leonard, makes him now a pretermitted heir, and the probate court so held. Appellants, on the other hand, are of the opinion that Howard Leonard is entitled to take under the will by right of representation only the amount of the legacy intended originally for his mother. They say that immediately upon the death of his mother, respondent became the real legatee under the will; that section 1310 of the Civil Code then became incorporated in and was a part of the will; and that the subsequent republication of the will by the execution of a codicil merely confirmed the position of respondent as the representative of his mother under the will. The principal fault with this reasoning is that section 1310 of the Civil Code relates to the time of the death of the testatrix, and not to the time of the decease of the original legatee. It is a statute of distribution, and has reference to the conditions existing at the time of the death of the maker of the will if the provisions of that instrument remain unchanged. The death of his mother did not have the effect of erasing her name from the testament and writing in that of Howard Leonard in its place, because, of course, he could take the legacy intended for his mother in any case only in the event of his surviving his grandmother.

It seems clear, therefore, that when the will was republished by the execution of the codicil, the legacy to Mrs. Leonard was void, as being an attempted gift by will to a dead person, and that the failure to mention Howard Leonard in the republication made him a pretermitted heir. Section 1307, Civ. Code. That the making and publishing of the codicil amounts to a republication of the will as amended by the codicil has been held many times. The rule is thus stated in 40 Cyc. 1216, 1217:

> "The general doctrine is well settled that a codicil executed with the formalities required by statute for the execution of wills operates as a republication of a will, so far as it is not altered or revoked by the codicil, if the intention of the testator is not thereby defeated; and the two are to be regarded as but one instrument, speaking from the date of the codicil."

Our own Civil Code by section 1287 announces the same rule. In Payne v. Payne, 18 Cal. 303, it is held that the republication of the will is tantamount to the making of that will de novo and that the new will so made speaks as of the date of republication. The same rule is declared in varying, but unmistakable, language in such cases as In re Ladd, 94 Cal. 670, 30 Pac. 99; Estate of Hayne, 165 Cal. 568, 133 Pac. 277, Ann. Cas. 1915A, 926; Estate of Cutting, 172 Cal. 191, 155 Pac. 1002. True, it is subject to the exception that the intention of the testator or testatrix must be preserved, if possible (40 Cyc. 1221), and courts have in many instances refrained from applying the rule regarding republication by codicil with all the severity that would attend the interpretation of a new will by which all previous wills had been set aside. Estate of McCauley, 138 Cal. 432, 71 Pac. 512, is an excellent example of the application of the exception.

In that case it was held that, where valid bequests to charity had been made by the terms of the will, they were not nullified by a republication due to a codicil having no special reference to the said bequests, such republication occurring within 30 days of the death of the testatrix, notwithstanding the fact that under section 1313 of the Civil Code an original bequest in trust for charitable uses fails if the donor dies within 30 days of the execution of the testament. But in that case, as the learned commissioner very clearly demonstrated in the discussion of the law applicable to the facts appearing in the record, there was no doubt that the testatrix intended her bequests first made in the will to stand unaffected by the codicil. In the case at bar we cannot say that Mrs. Matthews' intentions had not changed. They must have changed, because the daughter to whom she had intended to leave a legacy of $10 had died. Either she intended the legacy to go to her grandson as the representative of his mother, or she forgot him, or, believing that the bequest had lapsed by reason of Mrs. Leonard's death, she wished to die intestate as to her grandson. In the McCauley Case there had been no change in conditions between the time of the valid bequests to charity and the execution of the codicil. Since by section 1292 of the Civil Code a will may only be revoked by express language, and since by the codicil Mrs. McCauley did not revoke, but reaffirmed, the valid bequests made in the earlier will, they were held good as against the limiting statute. If without express revocation of her original will Mrs. McCauley had made a new will embodying all that the former testament had contained regarding the bequests to charity with other provisions equivalent to those which she chose instead to put in the codicil, the two wills would have been admitted to probate and construed together (section 1296, Civ. Code), and the bequests to charity would, of course, have been held valid. Therefore it was very properly decided in the construction of the McCauley will that the testatrix might do by codicil that which she might have done by a valid will supplemental in character to one previously made.

But in this case the testatrix has omitted expressly to provide for Howard Leonard, the issue of her daughter, either in the original will or the codicil, and it does not appear from either that the omission was intentional. The fact that by force of section 1310, Civil Code, he might take his mother's legacy, if the codicil had not been executed, does not answer the requirement of section 1307, Civil Code, which, according to our interpretation, contemplates express provision by the testatrix for such issue, unless it be made to appear by the will that the omission was intentional. It is true that all the requirements of section 1307 were satisfied as to the original will, for at that time there was no issue of any deceased child, the mother of Howard Leonard being alive. There was provision for her, and the statute was satisfied as to her. In re Barter, 86 Cal. 444, 25 Pac. 15. There was then no obligation to provide for her issue. But the situation had entirely changed when the codicil was made. Howard Leonard had then become the issue of a deceased child. In so far as the requirements of section 1307, Civil Code, are concerned, the situation must be determined as of the date of the codicil. Estate of Hayne, supra. If Mrs. Matthews, after the death of her daughter, had made a new will either mentioning or omitting reference to Mrs. Leonard, such a will would not include Howard Leonard, and he would be a pretermitted heir. We see no escape from the conclusion that her republication of the will amounted to an attempt to bequeath property to a deceased person, and that it must be viewed exactly as if a new will had been executed.

[2] Appellant concedes that a legacy to a deceased child leaving issue is void. It was so held in effect by this court in Ex parte Ross, 140 Cal. 282, 73 Pac. 976, although it is to be remembered that section 1310 of the Civil Code as it then existed had no reference to bequests, and could not, therefore, in any view of the law be applicable to the facts of that case. It has since been amended to include bequests within its purview. Nevertheless the reasoning of the opinion in that case supports the conclusion that an attempt to bestow property by will upon one who has died prior to the making of the will is of no force, and renders the will to that extent void. "A gift by will to one who is dead at the date of the making of the will is void." 40 Cyc. 1052. "A testamentary disposition may be made to any person capable by law of taking the property so disposed of" (section 1275, Civ. Code), and of course a dead man or woman may not take property.

In Lindsay v. Pleasants, 39 N. C. 320, the court was considering a will by which a testator had bequeathed property in equal shares to his wife and nine children, but at the time of the making of the will three of the children had died, and this fact was known to the testator. It was held that the children of the deceased children could not take by force of an act providing that, when any person shall bequeath or devise to his child or children, and such child or children shall have died in the lifetime of the testator, the said legacy or devise shall take effect and vest a title to the property described and mentioned in the issue of such child or children—a provision very similar to section 1310 of our Civil Code in its present form. The court said:

> "The case before us is not within the definition of a lapsed legacy or devise, and therefore it is not aided by the above statute. The Legislature never thought of a case like this, and has not provided for it. It is a devise and be-

quest to no one in esse, or that can ever come in esse. It is a void devise and bequest ab initio of three-tenths of the residuum of the slaves and land and other property, directed to be turned into money, and divided among the widow and the aforenamed children."

A similar situation was considered in the case of Doe on the Demise of Hearn v. Roe, Casual Ejector, and Cannon, Tenant in Possession, 4 Houst. (Del.) 20, 15 Am. Rep. 701, and it was held that a devise to a deceased person was a void, and not a lapsed, devise. Other authorities supporting this rule are Billingsley v. Tongue, 9 Md. 575; Twitty & Churchill v. Martin, 90 N. C. 643; Scales v. Scales, 59 N. C. 172. In Stennett v. Hall, 74 Iowa, 279, 37 N. W. 332, it appeared that counsel on both sides admitted or at least did not deny that a bequest to one who had died before the execution of the will was void. The invalidity of that clause being virtually conceded, the court did not feel called upon to consider the question of its validity. However, the judgment was affirmed, and the case is authority for the rule stated.

We conclude, therefore, that the execution of the codicil republished the will as of the date of said codicil; that, so republished, it gave a legacy to a person then dead; that such legacy was void; that respondent was not mentioned in the republication of the will; and that therefore he takes, not under section 1310, Civil Code, as representing his deceased mother, but under section 1307 of the same Code as a pretermitted heir.

The decree from which the appeal is taken is affirmed.

We concur: ANGELLOTTI, C. J.; LORIGAN, J.; HENSHAW, J.

SHAW, J. I dissent. The case of the respondent rests upon the rule that the republication of a will by a codicil, whether express or implied, carries forward the language and effect of the original will to the date of the codicil, so that its effect will depend upon the conditions existing at that time, and upon the further proposition that a testamentary provision for a person who is dead at the time it is made is void. These propositions are well established, but I do not think they determine the case.

The respondent contends that the rule that the reaffirmation of a will by a codicil carries forward its effect to the date of the codicil is rigid and unvarying. This is not the effect of the authorities. The rule had its origin in England at a time when, under the ecclesiastical law, property acquired after the execution of a will, and before the death of the testator, did not pass by the will, and the principal effect of the rule was to make the general dispositions of the will include all property acquired up to the date of the codicil. All the text-writers remark that since the act of parliament providing that a will shall speak at the death of the testator, and, so far as its terms are sufficient therefor, disposes of all property held by the testator at his death, this rule has been of less importance, and is much less frequently invoked.

The two propositions, that the execution of a codicil does not revive in favor of the children of the legatee a legacy which had lapsed by the death of the legatee after the making of the will and before the execution of the codicil, and that the codicil does not renew a legacy which, in the interval, had been adeemed or satisfied by the testator, are as well established as the rule carrying forward the language of the will to the date of the codicil. The principle on which these two propositions rest, especially that relating to ademption, is that the mere republication of a will by means of a codicil does not always change the legal effect of the will as it exists at the time the codicil is executed. If events occurring after its execution have removed one of the objects of the will, or canceled some of its provisions, and thereby changed its legal effect, the subsequent execution of the codicil does not, in the absence of express words, change the situation. If a legacy has lapsed, it remains lapsed; if it has been adeemed, it remains satisfied and extinguished. In the latter case, if the rule that the codicil carries forward the language of the will to the date of the codicil were applied, the effect would be to renew the legacy as given by the original will. But, as above stated, the contrary is held, and the legal effect of the will, coupled with the subsequent ademption, remains unaffected by the codicil. 1 Jarman on Wills, *158; Powys v. Mansfield, 3 My. & Cr. 376, 40 Eng. Rep. 971.

If we apply the same principle to the present case, we will find that it upholds the present will as it was before the codicil was made, with respect to the legacy to the daughter of the testatrix, who was the mother of the respondent. The legatee being a daughter, and the respondent being her surviving child, the legacy had not lapsed. See Civ. Code, § 1310. The rule that a lapsed legacy is not revived is therefore not even technically applicable. By force of section 1310 this legacy had not lapsed, but had been merely transferred at the death of the legatee, to her surviving child. It was operative as a provision in his favor at the time the codicil was executed. Consequently the will then made a valid disposition in favor of that child. The testatrix must be presumed to have known the law and to have made the codicil with that knowledge. She knew of the death of her daughter. Therefore at the time she made the codicil she must be presumed to have known that her pre-existing will made a valid provision for this child, and must likewise be presumed to have reaffirmed it with knowledge of its effect in that particular, and to have intended thereby to continue that provision in existence.

Section 1307 of the Civil Code, relating to pretermitted heirs, applies only where a testator "omits to provide in his will for any of his children, or for the issue of any deceased child." Here, as we have seen, there was a provision in the will, as reaffirmed, for the child, Howard Leonard, a provision which the testatrix is presumed to have had in mind in making the codicil. There was no omission to provide for him and consequently no basis for the claim that he is a pretermitted heir.

All of these rules are but applications of the paramount rule that the courts will always, if possible, ascertain the intent of the testator, and will carry out that intent so far as it is lawful. A republication of the will at a later date implies that the testator intended it to be operative as of that date, so far as its language would make it so, and so far as the law permitted; therefore the courts so hold. If a legacy was adeemed, a subsequent republication would not, of itself, carry any implication of an intent to give it again to the same person. Nothing but express words would do that. Hence the courts hold that such adeemed legacy is not renewed by a codicil. So, by like reasoning, where a legacy is given to a relation who afterward dies, leaving a surviving child to whom the legacy would pass by force of the law, a subsequent republication raises no inference of an intent to revoke the provision thus remaining operative, and accordingly the courts should infer an intent to leave it in force. See Estate of McCauley, 138 Cal. 435, 71 Pac. 512.

I concur: SLOSS, J.

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176 Cal. 572

DIXON et al. v. BARTLETT. (S. F. 7567.)

(Supreme Court of California. Nov. 26, 1917.)

1. Limitation of Actions 🔑148(4) — New Promises to Pay—Foreign Notes.

A promise to pay a note made in another state merely extends the time for suing on the note, and does not create a new cause of action, or change the obligation to other than a foreign note, barred in two years by Code Civ. Proc. § 339, subd. 1.

2. Limitation of Actions 🔑148(4) — New Promise—Admission of Liability.

A letter to partners stating: "As to what I owe you, F., * * * you will be paid. As for Jack, there are some things between us that need adjusting. It was my impression that the notes did not run out for another year"—was sufficient to support a finding that there was a new promise to pay.

3. Appeal and Error 🔑907(2)—Appeal on Judgment Roll—Presumptions—Evidence.

In an appeal on the judgment roll alone, it is conclusively presumed that the evidence supports the findings.

4. Limitation of Actions 🔑142 — New Promise—Promise to One Partner.

A promise made to one partner to pay a partnership debt inures to the benefit of all the partners, and all may sue thereon.

5. Limitation of Actions 🔑179(3) — New Promise—After Time Expired—Pleading.

An allegation that "on March 9, 1912," in "a writing signed by the defendant, in consideration of the foregoing facts, he acknowledged said indebtedness and promised to pay the same" is sufficient as pleading the legal effect of a new promise after limitations has expired, as a contract may be pleaded as to its legal effect, as well as in hæc verba.

Department 1. Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by Frank W. Dixon and John F. Stebbins, copartners as Dixon & Stebbins, against Harry J. Bartlett. Judgment for plaintiffs, and defendant appeals. Affirmed.

Peck, Bunker & Cole, of San Francisco, for appellant. L. P. Forestell, of San Francisco, for respondents.

SHAW, J. The defendant appeals from the judgment upon the judgment roll alone. The complaint alleges that the defendant, in the state of Nevada, executed to the plaintiffs as copartners, a note of the following tenor:

> "Round Mountain, Nevada, 12/9—'08. One day after date I promise to pay Dixon & Stebbins, or order, $2,806.00 (twenty-eight hundred and six dollars), for value received, with interest at the rate of 1 per cent. per month until paid. Henry J. Bartlett"

—and that thereafter, on March 9, 1912, and on September 23, 1909, in San Francisco, Cal., "in a writing signed by said defendant, in consideration of the foregoing facts, he acknowledged said indebtedness and promised to pay the same," but that he has not paid the same or any part thereof. The answer alleged that the action was barred by the two-year statute of limitations. Code Civ. Proc. § 339, subd. 1.

Finding V is in part as follows:

> "That on or about the 9th day of March, 1912, and on September 23, 1909, at the city and county of San Francisco, state of California, in writings signed by the defendant, Henry J. Bartlett, he acknowledged the indebtedness evidenced by said promissory note and promised to pay the same. * * * The letters above mentioned are as follows, to wit."

The finding then sets out a copy of the two letters referred to—one dated March 9, 1912; the other, September 23, 1909.

[1] It is unnecessary to state the contents of the letter of September 23, 1909. The note fell due on December 10, 1908, and, being executed in the state of Nevada, the statute of limitations would bar an action thereon at the expiration of two years thereafter. Code Civ. Proc. § 339, subd. 1. This letter was written from San Francisco and was signed within the two years. Where a new promise is made before the action on the original debt is barred, the debtor—

"does not make himself liable a second time for the same debt, and the old promise is not merged in the new; he merely continues his original liability for a longer term. In other words, he merely waives so much of the period of limitations as has run in his favor." S. P. Co. v. Prosser, 122 Cal. 417, 52 Pac. 836, 55 Pac. 147.

It starts anew the period of limitation. The action must, in that event, be upon the original obligation and not upon the new promise. McCormick v. Brown, 36 Cal. 180, 95 Am. Dec. 170.

[2] This promise, therefore, if it be such, merely fixed September 23, 1909, as the beginning anew of the period of limitation applicable to the previous note. That note was executed in Nevada, and the subsequent promise, made before it was outlawed, did not convert it into a contract executed in California. It remained a note executed out of the state, as before, and consequently the period of limitation applying to it was the two-year limitation applying to the original note. The action was begun more than two years after the date of this promise. The result is that, whether the period of limitation be computed from the maturity of the note or from the date of the promise in 1909, the action was barred before the complaint was filed. The judgment, therefore, if upheld, must be deemed to be based upon the new promise contained in the letter of March 9, 1912. This letter was addressed to Dixon. The greater part of it is devoted to subjects not connected with any indebtedness. After referring to the fact that he had failed in some enterprises which he had previously had on hand, but was working on other prospects, he wrote the paragraph containing the new promise. It reads as follows:

> "As to what I owe you, Frank, you need never worry; every dollar due you will be paid. As to Jack, there are some things between us that need adjusting and a settlement. It was my impression that the notes did not run out for another year."

The letter was signed by the defendant. There is nothing in it to indicate who was referred to as Jack; but, as the other letter set forth in the findings addressed the plaintiff Stebbins as "Jack," it may be assumed that the reference was to Stebbins.

[3, 4] The question is whether this is a promise to pay the partnership debt owing by the defendant to the two plaintiffs. In considering an appeal on the judgment roll alone, it is conclusively presumed that the evidence supports the findings. The finding here is that by this letter the defendant promised to pay the note in question. If by the aid of any reasonably conceivable extrinsic evidence, the language of this promise to pay could have been shown to refer to the partnership note, and the reference to the settlement between the writer thereof and "Jack" to refer to another note or transaction, then the new promise is established. If it refers to the partnership note, it is an express promise to pay the same, although made to one of the partners alone. A promise made to one partner to pay a partnership debt inures to the benefit of all the partners, and all may sue thereon. Bates on Partnership, §§ 437, 1019.

The letter begins with the phrase, "Yours of the 22d received." This shows that it was a reply to a letter previously received by Bartlett from Dixon, the contents of which are not before us. It is conceivable that Dixon's letter, or some other evidence, made the meaning of the defendant's letter plain to the effect above indicated. The statement in the paragraph quoted, that it was Bartlett's impression that the "notes" did not run out for another year, lends force to the idea that Dixon had referred to some other note due to Stebbins alone, to which the phrase quoted regarding a settlement with "Jack" related. This inference is somewhat strengthened by the contents of the letter of 1909, written to Stebbins, which refers to transactions between them in which it does not appear that Dixon had any interest. In the absence of the evidence we must presume that there was extrinsic evidence so explaining the meaning of the Bartlett letter as to make the promise to pay refer to the partnership note.

The case of White v. Williams, 1 Wilm. W. & H. Q. B. Reps. 52, was similar to the case at bar. There the two plaintiffs sued as partners on a partnership demand. The debtor had written a letter to White alone, saying "that he would call in a few days and pay White's account." It was not shown that White alone had any account to which the letter could refer. The court held that the letter was "sufficient to take the case out of the statute of limitations," but granted a new trial because there was no evidence of the amount of the debt. Upon the record before us we must conclude that the findings are sufficient to support the judgment.

[5] It is further contended that the complaint is founded on the note, and not on the new promise, as is required when the new promise is made after the period of limitation has expired. A contract may be pleaded according to its legal effect, as well as in hæc verba. The allegation that "on March 9, 1912," in "a writing signed by said defendant, in consideration of the foregoing facts, he acknowledged said indebtedness and promised to pay the same," is sufficient as a pleading of the new promise of the defendant according to its legal effect. Porter v. Elam, 25 Cal. 292, 85 Am. Dec. 132. We find no error in the record.

The judgment is affirmed.

We concur: SLOSS, J.; LAWLOR, J.

176 Cal. 569

HAMILTON v. BAKER-HANSEN MFG. CO.
(S. F. 7481.)

(Supreme Court of California. Nov. 26, 1917.)

1. ATTACHMENT 🔑107 — AFFIDAVIT—STATEMENT OF AMOUNT OF INDEBTEDNESS.

An affidavit for attachment, stating that, "in addition to certain claims for damages for breach of contract hereinafter referred to," defendant is indebted to plaintiff in the said action for $375, etc., sufficiently stated the amount of defendant's indebtedness, as required by Code Civ. Proc. § 538; the inclusion of the quoted words being merely surplusage, not rendering the amount of the indebtedness uncertain.

2. ATTACHMENT 🔑248—MOTION TO DISSOLVE —QUESTIONS CONSIDERED.

A motion to dissolve an attachment cannot be turned into a demurrer to the complaint.

3. ATTACHMENT 🔑248—MOTION TO DISSOLVE —QUESTIONS CONSIDERED.

On motion to dissolve an attachment for failure of the affidavit to state a basis therefor, the only question is whether the cause of action which is stated or attempted to be stated is one upon which attachment will issue.

4. ATTACHMENT 🔑8 — CLAIM AUTHORIZING ATTACHMENT—LIQUIDATED SUM.

As plaintiff who sued for breach of contract upon which he advanced money and received nothing could recover as damages money so paid, the sum was certain and liquidated upon which attachment properly issued.

5. ATTACHMENT 🔑14—NATURE OF CLAIM—PORTION OF AMOUNT SUED FOR.

That plaintiff has in his complaint demanded other sums than the liquidated amount attached is immaterial, as the indebtedness set up in the affidavit of attachment need not include all the damages claimed in the complaint.

6. ATTACHMENT 🔑103 — AFFIDAVIT — SUFFICIENCY—NATURE OF CAUSE OF ACTION.

The statement in the affidavit of attachment that the money was due upon an implied contract, when in fact it was due upon an express contract, did not make the affidavit defective, as it need not appear in the affidavit whether the contract is express or implied, so long as it is a contract for the direct payment of money, and if that is stated, any further recital is only surplusage, and may be disregarded.

Department 1. Appeal from Superior Court, Alameda County; Everett J. Brown, Judge.

Action by E. B. Hamilton against the Baker-Hansen Manufacturing Company. From an order refusing to dissolve an attachment, defendant appeals. Affirmed.

Clayberg & Whitmore and H. L. Clayberg, all of San Francisco, for appellant. P. J. O'Dea and Louis Horwitz, both of San Francisco, for respondent.

LAWLOR, J. This is an appeal from an order refusing to dissolve an attachment. The complaint shows the action to be one for damages for breach of a written contract between the parties for the conveyance of certain patent rights and delivery of two automobile starters by defendant to plaintiff. It is alleged that defendant has entirely failed to perform the contract or any part thereof. As damages the plaintiff claims $375 as having been advanced to the defendant on account of the contract, and other sums for salaries paid, obligations incurred and profits which she would otherwise have made. The affidavit for attachment states:

> "That in addition to certain claims for damages for breach of contract hereinafter referred to, defendant in said action is indebted to her in the sum of three hundred and seventy-five ($375.00) dollars * * * upon an implied contract for the direct payment of money, to wit: A written contract, * * * and the plaintiff has paid the defendant under such contract three hundred and seventy-five dollars on account of the consideration of said contract, and the defendant has breached such contract and has not performed the same in whole or in any part, and the plaintiff is entitled to the repayment of said sum. * * *"

[1] The first ground of defendant's motion to dissolve the attachment is that the affidavit does not state the amount of defendant's indebtedness, as required by section 538, Code of Civil Procedure, because of the inclusion in the affidavit of the words, "in addition to certain claims for damages for breach of contract hereinafter referred to." It is claimed that this renders the amount of the indebtedness uncertain. The contention is without merit. The affidavit itself shows very clearly that the sum for which the attachment is sought is $375. The intimation that the plaintiff is also claiming additional damages, for which no attachment is asked, is mere surplusage, and in no way throws any doubt upon the amount for which the attachment is requested. See Bank of California v. Boyd, 86 Cal. 386, 388, 25 Pac. 20.

[2-6] The second ground of the motion is that the affidavit discloses no basis for attachment "in that it alleges that $375 is due on an implied contract, while the complaint is based on an express contract and the action is for a reformation of said contract and damages for the breach thereof." A motion to dissolve an attachment cannot be turned into a demurrer to the complaint. Kohler v. Agassiz, 99 Cal. 9, 33 Pac. 741; Hale Bros. v. Milliken, 142 Cal. 134, 75 Pac. 653. The only question is whether the cause of action which is stated or attempted to be stated is one upon which an attachment will issue. Here the complaint sets out a breach of an express contract. One of the items of damage is the $375 paid to the defendant, which is sought to be recovered, by reason of a failure of consideration. A plaintiff who sues for breach of a contract upon which he has advanced money and received nothing in return may recover as damages the money so paid. This sum is certain and liquidated; as to it an attachment will therefore issue. Santa Clara, etc., Fuel Co. v. Tuck, 53 Cal. 304. It is immaterial that plaintiff has also demanded in the complaint other sums, which are not liquidated, and to which she may or may not be entitled. The indebtedness set up in the affidavit need not include all the damages claimed in the com-

plaint. There may be an attachment for a portion only. Waples on Attachment and Garnishment, § 80; Dwyer v. Testard, 65 Tex. 432. The statement in the affidavit that the money is due upon an implied contract when in fact it is due upon an express contract does not make the affidavit defective. It need not appear in the affidavit whether the contract is express or implied (Flagg v. Dare, 107 Cal. 482, 40 Pac. 804), so long as it is a contract for the direct payment of money. If that is stated, any further recital is only surplusage, and may be disregarded. Spear v. King, 6 Smedes & M. (14 Miss.) 276; Cope v. U. M. M. & P. Co., 1 Mont. 53. Since the $375 constituted an attachable claim, and the affidavit itself was not defective, it follows that the motion to dissolve was properly denied.

Order affirmed.

We concur: SLOSS, J.; SHAW, J.

(35 Cal. App. 103)

PETERSON v. TITLE GUARANTY & SURETY CO. (Civ. 2023.)

(District Court of Appeal, First District, California. Oct. 23, 1917. Rehearing Denied by Supreme Court Dec. 20, 1917.)

Limitation of Actions 🔑34(3)—Fraudulent Acknowledgment.

In view of Code Civ. Proc. § 338, subd. 1, requiring an action upon a liability created by statute, other than a penalty or forfeiture, to be brought within three years after its accrual, an action for damages sustained through reliance on a false certificate of acknowledgment of defendant notary was barred in three years from the date of the acknowledgment, regardless of time of discovery of falsity.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by P. E. Peterson, administrator, etc., against the Title Guaranty & Surety Company. From an adverse judgment, defendant appeals. Reversed.

Hartley F. Peart, of San Francisco (Gus L. Baraty, of San Francisco, of counsel), for appellant. N. E. Wretman and C. L. Witten, both of San José, for respondent.

PER CURIAM. In this action the plaintiff sought to recover from the defendant, as surety upon the official bond of a notary public, damages sustained by plaintiff's intestate through his reliance upon a false certificate of acknowledgment issued by said notary. The defendant, both by demurrer to the complaint and by answer, pleaded section 338, subd. 1, of the Code of Civil Procedure, requiring an action upon a liability created by statute, other than a penalty or forfeiture, to be brought within three years of its accrual—it appearing upon the face of the complaint that the present action was commenced some five years after the making and issuing of the false acknowledgment. The trial court took the view that this section and subdivision of the Code was not applicable to an action upon the official bond of a notary, but the Supreme Court in a very recent case (Norton v. Title Guaranty & Surety Co., 168 Pac. 16), following other cases decided in this jurisdiction in which actions upon official bonds were involved, held, in an action brought upon this identical bond, that this provision of the statute of limitations was to be given application in this class of cases.

It follows that the trial court erred in overruling the demurrer of the plaintiff. Upon the authority of Norton v. Title Guaranty & Surety Co., supra, the judgment is reversed.

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35 Cal. App. 101

PEOPLE v. BRENNAN. (Cr. 563.)

(District Court of Appeal, Second District, California. Oct. 23, 1917.)

1. Robbery 🔑24(1) — Evidence — Sufficiency.

Evidence *held* sufficient to show the commission of the crime of robbery, and that the accused was the active participant therein.

2. Criminal Law 🔑959—New Trial—Continuance—Discretion of Court.

The matter of allowing a continuance of proceedings for new trial, for obtaining affidavits as to newly discovered evidence, rests in the discretion of the trial judge.

Appeal from Superior Court, San Bernardino County; H. T. Dewhirst, Judge.

James Brennan was convicted of robbery, and his motion for new trial was denied, and he appeals. Affirmed.

A. S. Maloney, of San Bernardino, for appellant. U. S. Webb, Atty. Gen., and Robert M. Clarke, Deputy Atty. Gen., for the People.

JAMES, J. The appeal in this case was taken from a judgment of imprisonment and an order denying defendant's motion for a new trial.

The appellant was accused by the information of the district attorney of the county of San Bernardino of the crime of robbery, alleged to have been committed on the 26th day of May, 1917. Two points only are made upon this appeal as furnishing reasons why the judgment and order should be reversed. We find no merit in either contention.

[1] 1. It is claimed that the evidence was insufficient to establish the fact that the crime of robbery had been committed as alleged. Our attention is directed to the testimony given by the complaining witness. This witness testified that on the 26th day of May, 1917, he had been drinking at saloons in the town of Needles and was standing in front of one of these saloons when he was accosted by some person who said to him, "A couple of parties want to see you back behind." He had seen this appellant in

company with two other persons during the day, and had several times displayed money in their presence. In response to the request, he went to the rear of the saloon where, he says, this appellant jumped upon his back, grabbed him around the neck and choked him, saying, "Give me what you got; come on and keep still;" that he tried to throw the man off, but was unsuccessful. He testified that he had at the time money in a pocketbook; also a $10 bill and $7 or $8 in silver, also a watch, razor, and pocket knife. When asked what became of that property, he said, "Well, these men I think took it, because when I came to why I didn't have none of it." He further testified that the taking of the property was without his consent, and that he did not give it to the men, but that when he "came to" he found himself lying in the back end of the building. Then, he testified, as he sat up the three men came back and said, "You have got more money, damn you, give it up," and that they kicked him and broke two ribs. Without quoting from the testimony further, it must at once appear that there was ample evidence showing not only that the crime of robbery was committed, but that the appellant here was an active participant therein.

[2] 2. Defendant at the time he presented his motion for a new trial asked for a continuance of one week of that matter in order that he might go from San Bernardino to Needles to obtain affidavits as to alleged newly discovered evidence. The matter of allowing a continuance was one which rested in the discretion of the trial judge, and from an examination of the representations made orally by counsel requesting the continuance, we cannot perceive that this discretion was in any wise abused.

The judgment and order are affirmed.

We concur: CONREY, P. J.; WORKS, Judge pro tem.

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35 Cal. App. 84

SHERWOOD et al. v. AHART. (Civ. 1714.)

(District Court of Appeal, Third District, California. Oct. 22, 1917.)

1. DEDICATION 🔑20(3) — HIGHWAYS—LONG-CONTINUED ADVERSE USE.
Dedication of a road as a highway is implied from its long continuous use with full knowledge of the landowners interested without permission asked or given, and without objection from any one for a period beyond that required by law to bar right of action.

2. DEDICATION 🔑44—FROM USE—HIGHWAYS—EVIDENCE.
Evidence of use of road as highway *held* sufficient to support a finding of dedication to public.

3. HIGHWAYS 🔑155—OBSTRUCTION—ACTION TO ENJOIN—PARTIES.
One suffering special injury in the use of his property from obstruction of a highway may maintain an action to enjoin the public nuisance.

4. EVIDENCE 🔑213(1) — ADMISSIONS — COMPROMISE.
Conduct of plaintiffs in seeking, for purpose of avoiding trouble and litigation, amicably to settle with defendant the difficulty of his obstruction of a highway, and in requesting of him a written grant of right of way, will not be considered an admission that they had no right over the road.

5. HIGHWAYS 🔑160(2) — ACTION FOR OBSTRUCTING—PARTIES.
The wife of one obstructing a highway need not be joined in action to enjoin the obstruction merely because she is a co-owner with him of the adjoining premises.

6. JURY 🔑14(12)—RIGHT TO JURY—INJUNCTION.
Action to enjoin obstruction of highway being one in equity, defendant is not entitled to a jury.

Appeal from Superior Court, El Dorado County; N. D. Arnot, Judge.

Action by Edward G. Sherwood and others against George S. Ahart. From adverse judgment and order, defendant appeals. Affirmed.

Wm. F. Bray, of Placerville, and H. C. Jerrett, for appellant. Abe Darlington, of Placerville, for respondents.

BURNETT, J. The action was to enjoin defendant from interfering with the free use and occupation of a certain highway by plaintiffs, and from interfering with or preventing plaintiffs or either of them from entering upon any portion of said way and repairing the same. The theory upon which the action was tried is that said way constitutes a public highway, and that said plaintiffs were especially damaged by reason of the interference on the part of the defendant with the use and enjoyment of the same on the part of the former. There is, however, no allegation in the complaint that said way constitutes a public highway, it being designated as a "wagon road, commonly known as Brewer's road," and it was alleged:

> "That plaintiffs have traveled said wagon road known as Brewer's road for more than ten years last past, and are the owners and in possession and occupation of a right of way over said northeast quarter of section 35 along and over the course of said Brewer's road, and are entitled to travel and pass over the same at any and all times, and it is necessary for them and each of them to travel the said road in order to reach the said city of Placerville."

It is thus to be seen that plaintiffs presented, by their complaint, the issue as to their ownership merely of a right of way, but, as before stated, the case was tried without objection upon the theory that said wagon road constituted a public highway and had been used as such for many years, and the court so found, as the following finding discloses:

> "That said road known as Brewer's road has been used and traveled by the general public as a public highway continuously since the year 1860."

[1] And it must be said that abundant evidence is found in the record to support said finding. The manner in which it became a public highway was through a dedication by the owner and acceptance by the public. Such dedication is implied from the long and continuous use of the said road with full knowledge of the landowners interested, without asking or receiving any permission, and without objection from any one for a period of time beyond that required by law to bar the right of action. Under the authorities, it must be held that such long-continued use without objection, and with the acquiescence of the owners, raised the implication of dedication for such public purpose. Schwerdtle v. County of Placer, 108 Cal. 589, 41 Pac. 448; Hartley v. Vermillion, 141 Cal. 339, 74 Pac. 987; Leverone v. Weakley, 155 Cal. 395, 101 Pac. 304. We may add that in addition to such use of said road there are other circumstances disclosed by the evidence indicating an intention of the owner to so dedicate said land. One of these circumstances is found in the fact that the road was fenced on both sides throughout its entire length on the land of the defendant, forming a lane through his land. The exact date when the road was thus fenced does not appear. There is, however, direct testimony that it was built by one James Dean, who was then the owner of the land in controversy, now owned by appellant, and it appears from the testimony of other witnesses that said Dean died in the year 1893. The conclusion therefore follows that it has thus been fenced on both sides of the land of defendant since the said year 1893. This fencing of the road would appear to constitute a clear and explicit intention of dedication to the public.

[2] Recurring now to the use of said road as a public highway, the following testimony of certain witnesses for the plaintiffs can leave no room for controversy: E. G. Sherwood testified that he had traveled the road for 16 years, and that it had been "used right along by the general public as a public highway." Mrs. L. Church testified that she had traveled it since 1874. E. E. Twitchell testified that it "has been traveled by the general public as a public highway for the last 35 years." N. Heuer testified that it has been traveled by the general public since 1879. Eugene Phelps knew a portion of the road 29 years ago, and said that it was traveled by the general public. W. S. Dean, a son of J. M. Dean, who patented the land now owned by Ahart, testified that he had known the road as long as he could recollect, and that it had been traveled by all sorts of vehicles, and that "we never attempted to stop anybody; as far as we knew, every one had a right to travel there." Henry Schneider testified:

> "I have known the road called Brewer's road, which passes through the land of Sherwood and Ahart to the Buck's Bar road, for over 54 years. During all that time it has been traveled by the general public as a public highway."

Mrs. Carrie Dean, a witness for the defendant, a former owner of the land now owned by him, testified:

> "We permitted people to pass over that road; we never obstructed anybody's passing. Later on my husband fenced the lane that goes through there now. I never objected to people passing through there; never had any occasion to. I did not have any bother only with cattle; people traveled it as they saw fit."

The defendant himself testified:

> "I never forbid any one going through there. There is very little travel there. Whoever wanted to go through passed along without saying anything."

It must be apparent that the foregoing is amply sufficient to support a finding of a dedication of said way to the public use.

[3] It is equally clear from the evidence, which we need not set out, that the plaintiffs were damaged by the acts of defendant in obstructing said way in a manner different in degree from that of the public generally, and therefore were they authorized to maintain the present action. In the Leverone Case, supra, it is held, the learned Chief Justice rendering the opinion of the court, that:

> "One who suffers special injury in the matter of the comfortable use and enjoyment of his property may maintain an action to enjoin a public nuisance, consisting of the obstruction to a public highway, and recover the damages caused him thereby."

[4] It is true that plaintiffs sought amicably to settle the difficulty with defendant, and that they made a request of him for a written grant of said right of way, but we are satisfied that the lower court was justified in finding that this conduct of plaintiffs was inspired by the desire to avoid trouble and litigation, and was not intended, and should not be construed, as a recognition of any right on the part of defendant to question the use of said road as a public highway, nor should it be construed as an admission on the part of plaintiffs that they had no right over said road.

It follows from the foregoing that the plaintiffs had the right to enter upon said highway and make the necessary repairs. 37 Cyc. 204; Smith v. San Luis Obispo, 95 Cal. 463, 30 Pac. 591.

[5] We can see no merit in the contention that the wife of defendant should have been joined as a party because she is a co-owner of the premises. It does not appear that she interfered at all with the use and occupation of the road, and hence plaintiffs had no cause to complain against her.

[6] Neither was there any error on the part of the court in denying defendant's request for a jury to try the cause. This is not an action at law, but one in equity, and therefore as to this question the rule laid down in Meek v. De Latour, 2 Cal. App. 261, 83 Pac. 300, and Loftus v. Fischer, 113 Cal. 286, 45 Pac. 328, applies.

We find no error in the record, and the judgment and order are therefore affirmed.

We concur: CHIPMAN, P. J.; HART, J.

(35 Cal. App. 36)

LEWIN v. HANFORD et al. (Civ. 2133.)

(District Court of Appeal, First District, California. Oct. 18, 1917.)

1. Corporations ⟹116—Sale of Stock—Executed Contract—Liability.

A contract whereby plaintiff agreed to sell and a corporation agreed to buy certain stock at a named price, payable on a certain date, was an executed contract, and where plaintiff tendered the stock, the corporation became instantly liable for the price, and not merely for the difference between the price and the value.

2. Guaranty ⟹40—Contract—Validity.

Where defendants guaranteed a corporation's executed contract to buy stock from plaintiff at a price named payable on a certain date, on breach by the corporation it became liable for the price named, and the contract of guaranty did not violate Civ. Code, § 2809; limiting liability of guarantor to amount recoverable from principal.

3. Guaranty ⟹78—Defenses—No Damage.

Where defendants guaranteed purchase by corporation of stock from plaintiff, who tendered the stock, it was no defense, in action on the guaranty, that the stock was worth more than the agreed price, so that plaintiff suffered no damage.

4. Guaranty ⟹16(2) — Consideration — Sufficiency.

Where a contract guaranteeing performance of another was made simultaneously therewith, no other consideration need exist, by specific provision of Civ. Code, § 2792.

Appeal from Superior Court, City and County of San Francisco; Bernard J. Flood, Judge.

Action by Leon Lewin against R. G. Hanford and William S. Tevis. Judgment for plaintiff on the pleadings, and defendants appeal on the judgment roll. Affirmed.

R. P. Henshall, of San Francisco, for appellants. Wise & O'Connor, of San Francisco, for respondent.

LENNON, P. J. This is an appeal upon the judgment roll alone from a judgment on the pleadings in favor of plaintiff. Defendant's demurrer to the complaint was overruled, and after he filed an amended answer, plaintiff moved for and obtained judgment on the pleadings.

The two points made upon this appeal are that the complaint does not state a cause of action, and that the amended answer states a defense. Therefore it is contended a motion for judgment on the pleadings could not be granted.

The complaint alleged an agreement between plaintiff and Hanford Investment Company, a corporation, executed on November 12, 1913, by which the plaintiff agreed to sell and the Hanford Investment Company agreed to buy the following personal property, to wit: 30 bonds of the Union Water Company, 30 debentures of the United Properties Company, 180 shares of the preferred and 180 shares of the common stock of the United Properties Company, for the sum of $27,000 payable on the 12th day of November, 1914, with interest thereon from the 12th day of November, 1913.

The complaint further alleged that simultaneously with the execution of said agreement and as a part thereof plaintiff and defendants entered into an agreement in writing (setting it forth in hæc verba) which was to the effect that defendants guaranteed that the Hanford Investment Company would well and truly purchase and take the said personal property on or before November 12, 1914, and that, if the Hanford Investment Company failed to make the payment on or before that date, the defendants jointly and severally promised to pay said amount upon demand, with interest from November 12, 1913, and upon payment the property should become the property of the defendants; that the securities which were the subject-matter of the contract had been tendered to the Hanford Investment Company; that it had refused to accept or pay for them; that demand was made upon defendants to pay, and they had refused. Upon these allegations the complaint prayed judgment in the sum of $27,000, and interest.

[1] Appellants argue that the complaint counts upon the breach of an executory contract to buy personal property; that in such case the damage is the difference between the agreed price and its value; and that, as there is no allegation in the complaint respecting the value of the property, no damage is shown, and therefore the complaint fails to state a cause of action. Appellants' conclusion is correct if the major premise is correct. But we are unable to find any grounds for the contention that the complaint constitutes an action for damages for breach of an executory contract.

[2] The theory of the complaint is sound, and is as follows: That both the principal contract and the contract of guaranty were fully executed; that when delivery of the property which was the subject-matter of the sale was tendered to Hanford Investment Company, title to the same at once became vested in it, and upon its refusal to pay the plaintiff elected to consider the stock as sold (Cuthill v. Peabody, 19 Cal. App. 304, 125 Pac. 926); and that the contingency having arisen upon which the defendants' obligation was based, and demand having been made upon the defendants to pay the sum agreed upon, they were liable for that sum.

The complaint counts upon a contract of guaranty. The defendants themselves admit that they are guarantors. They have promised to pay $27,000, based on a certain contingency, which is admitted to have occurred, and there is nothing in this promise which violates the provisions of section 2809 of the

Civil Code, in which the liability of a guarantor is limited in amount to that which could be recovered from the principal. As the principal contract was executed, Hanford Investment Company, as principal, was liable for its full purchase price of $27,000, and that is the sum which the defendants in their contract of guaranty obligated themselves to pay.

[3] The amended answer does not state a defense. The defendants do not deny the execution of the written instrument, nor do they contend that the statements there contained are untrue or were obtained by fraud or misrepresentation, and the fact alleged in the answer that the value of the securities agreed to be purchased was in excess of the sum of $27,000, and that therefore the plaintiff had suffered no damage is no defense to an action against the defendants on their contract of guaranty, which contract became operative at the time the principal contract became executed.

[4] The claim of appellants that the agreement between respondent and themselves is without consideration is equally untenable. The guaranty was entered into simultaneously with the execution of the original agreement and as a part thereof, and in such case no other consideration need exist. Civ. Code, § 2792.

Judgment affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

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35 Cal. App. 44

MARKS v. REISSINGER. (Civ. 1722.)

(District Court of Appeal, Third District, California. Oct. 20, 1917. Rehearing Denied by Supreme Court Dec. 17, 1917.)

1. APPEAL AND ERROR 🔑1002 — REVIEW — CONCLUSIVENESS OF VERDICT ON CONFLICTING EVIDENCE.

Where, in an action for wrongful death, the evidence was conflicting as to whether defendant without cause or justification struck deceased on the head with a piece of rubber hose, and whether the blows so delivered caused the death of deceased, and there was real and substantial evidence to support a verdict for plaintiff, the verdict could not be disturbed, though the only witness who testified that defendant struck deceased on the head with the hose was plaintiff's brother, and though a number of other alleged eyewitnesses gave testimony which, if accepted and believed, would have completely destroyed the evidentiary force and value of his testimony.

2. ASSAULT AND BATTERY 🔑26 — ACTIONS — BURDEN OF PROOF—SELF-DEFENSE.

Where, in an action for death from an assault, the answer set up as a defense that defendant struck deceased in necessary self-defense, or to protect himself against threatened personal injury on the part of deceased, the burden rested upon him to establish such defense.

3. DEATH 🔑11 — RIGHT OF ACTION FOR DEATH—CREATION OF NEW ACTION.

Under Code Civ. Proc. § 377, giving the heirs or personal representatives of a deceased person a right of action for his death wrongfully produced through the act of another, the right of action is a new action separate and distinct from deceased's right in his lifetime to sue for the injury causing the death, and the heirs or personal representatives do not merely succeed to his right of action.

4. DEATH 🔑21 — RIGHT OF ACTION FOR DEATH—DEFENSES.

An action for death is not barred by deceased's failure in his lifetime to bring an action for the injuries causing the death.

5. DEATH 🔑39 — ACTIONS FOR CAUSING DEATH—LIMITATIONS.

As an action for death is a new action distinct from the right of action which deceased had in his lifetime, the limitation of one year under Code Civ. Proc. § 340, subd. 3, relative to actions for injuries or death, does not run until the death.

6. EVIDENCE 🔑236(1)—DECLARATIONS BY DECEDENT—PRIVITY.

As a right of action for death arose independently of deceased's right of action in his lifetime for the injury inflicted, and could not be destroyed by any compromise or release by deceased, his declarations as to the circumstances of the injury were not admissible to defeat the action under Code Civ. Proc. § 1853, making the declarations of a deceased person against his pecuniary interest, or that of his successor in interest, admissible, as deceased never had any interest in the action for his death or the subject-matter thereof, and his heirs or representatives are not his successors in interest.

7. EVIDENCE 🔑126(2) — RES GESTÆ — STATEMENTS OF INJURED PERSON.

In an action for death due to an assault, a statement of deceased a few days after the assault that defendant did not strike him on the head was not admissible as a part of the res gestæ.

8. EVIDENCE 🔑471(2) — FACTS OR CONCLUSIONS—PARTICIPATION IN QUARREL.

In an action for death due to an assault in the course of a squabble at defendant's brewery and saloon, where defendant testified that when he attempted to stop a fight between third persons, deceased told him to let them have it out, or he would get defendant, and that he would have stopped the fight if it had not been for deceased, this last statement that he would have stopped the fight except for deceased involved, by insinuation, his opinion and conclusion that deceased was taking a hand in the trouble or encouraging it, and was properly excluded.

9. ASSAULT AND BATTERY 🔑31—ACTIONS FOR ASSAULT—EVIDENCE.

Defendant's testimony in answer to a question as to why he kept in his saloon a piece of rubber hose with which he struck deceased, that he was "out there" and had no protection, and thought he had a right to protect his place, was properly stricken out, though it might have been allowed to stand without jeopardizing plaintiff's rights, where it was admitted that the hose was in the saloon, and was used by defendant, and there was no claim that he was anticipating trouble with deceased and his companions, or had it for the purpose of meeting such trouble, as the fact that he kept the hose to protect himself, or was without protection, would not justify him in taking the law into his own hands, or in wrongfully assaulting deceased.

10. EVIDENCE 🔑472(4) — OPINION EVIDENCE —MATTERS FOR DETERMINATION OF JURY.

In an action for death due to an assault with a piece of rubber hose, a question asked defendant as to whether he used any more force than he felt necessary to cause deceased to cease attacking him was objectionable in form; it being for the jury to say whether the force used was greater than was necessary to stop deceased from further prosecuting his attack upon defendant.

11. APPEAL AND ERROR 🔑1058(2)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

The exclusion of such question, if error, was not prejudicial, where the general trend of defendant's testimony was that he acted in self-defense, and used no more force in repelling the attack than was absolutely requisite for his own protection and safety.

12. WITNESSES 🔑240(4) — EXAMINATION — LEADING QUESTIONS.

The exclusion of questions asked defendant as to whether he hit deceased or attempted to strike him until deceased first swung at him, and whether he or deceased made the first hostile demonstration, was technically justified, on the ground that the questions were leading in form, and suggestive of the desired answers.

13. APPEAL AND ERROR 🔑1058(2)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

In an action for death due to an assault, the exclusion of questions asked defendant as to whether he hit deceased, or attempted to strike him before deceased swung at him, and whether he or deceased made the first hostile demonstration, was not error, where, in another part of his examination, he was asked whether he used the hose with which he struck deceased before deceased swung at him, and answered in the negative.

14. WITNESSES 🔑37(4) — KNOWLEDGE OF FACTS—REPUTATION OF PARTY.

In an action for death due to an assault, testimony that the general reputation of deceased for peace and quietude was bad was properly excluded, where the testimony of the witnesses on cross-examination showed that they based their statement as to his general reputation entirely on their own observations of his personal conduct on particular occasions, and not on what the community generally had said of him, as testimony concerning a party's general reputation should not be based upon specific acts within the personal observation of the witness.

15. ASSAULT AND BATTERY 🔑43(4)—ACTIONS —BURDEN OF PROOF—SELF-DEFENSE.

Where, in an action for death due to an assault, defendant contended that he acted in self-defense, an instruction that there was no legal presumption that a bodily injury, if any, was justifiable, and that the justification therefor, if any, must be proved by the one asserting it, was properly given, as it simply meant that when justification was set up as a defense, the burden was on defendant to prove the defense.

16. DEATH 🔑17 — LIABILITY FOR DEATH — CONCURRING CAUSES.

Where, after deceased was assaulted by defendant, he was taken down with pneumonia, if he would not have died but for the development of cerebral meningitis from the injury to his head and brain inflicted by defendant, then such meningitis was at least a concurring cause of his death, and defendant was liable, even though the pneumonia concurred therewith in proximately causing the death.

17. APPEAL AND ERROR 🔑1033(5)—HARMLESS ERROR—ERRORS FAVORABLE TO APPELLANT.

An instruction that if, after the assault and prior to his death, deceased contracted pneumonia, and the cerebral meningitis due to the injury proximately concurred with the pneumonia in causing his death, and if his death would not have occurred at the time it did from the pneumonia alone, then plaintiff was entitled to recover, was not prejudicial to defendant, where there was ample evidence from which the jury could have found that deceased had practically recovered from the pneumonia, and that his death was directly and solely due to cerebral meningitis, caused by the injuries wrongfully inflicted upon him by defendant.

Appeal from Superior Court, Yuba County; Eugene P. McDaniel, Judge.

Action by Eva Marks, administrator of Harry Marks, deceased, against M. Reissinger. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

W. H. Carlin, of Marysville, for appellant. Jeremiah F. Sullivan, Theo. J. Roche, and E. I. Barry, all of San Francisco, and J. E. Ebert, of Marysville, for respondent.

HART, J. The action was brought by plaintiff as administratrix of the estate of her husband, on behalf of herself and her three minor children, to recover damages for the death of her husband alleged to have been caused by blows wrongfully inflicted upon him by defendant. The jury returned a verdict in favor of plaintiff in the sum of $10,000, and judgment was entered accordingly. The appeal is by defendant from said judgment and from an order denying him a new trial.

Briefly, the facts of the case may be stated as follows: Harry Marks, the deceased, was the owner of a number of work horses with which he engaged, in the summer months, in the business of logging in Plumas and Sierra counties, and in the winter months in plowing for different parties in Yuba and Butte counties. In March, 1912, he was engaged in plowing some land about 6½ miles from Marysville, and had spent the night of March 12th with his family in Marysville. On the morning of the 13th of March, George W. Hughes, a brother of Mrs. Marks, who was employed by Harry Marks, drove into Marysville with a four-horse team for the purpose of securing supplies for the men and teams. He was accompanied by a man named Frank Robinson and another named Petrie. Late in the afternoon these three men, accompanied by Marks and a man named Craig, started to drive back to the place where they were working. Some of the party had been drinking during the day, and Hughes testified that Robinson and Craig were "pretty drunk," and that Marks and Petrie were sober. When the party arrived at the saloon and brewery owned and conducted by the defendant, Robinson, desiring another drink, alighted from the wagon and started towards the saloon. He became engaged in a controversy with Herman Fehr, an employé at the brewery, which soon became a scuffle. Marks remarked that he was "going in to get Mr. Robinson," and went to where the two men were. Shortly afterward Hughes followed him, and he testified that Robinson and Fehr were scuffling, and that Marks was standing by looking on. He said that Fehr had Robinson down on the floor, and the latter "hollered 'Enough!' and Mr. Marks stepped over and said, 'Humpy, Frank says he has got enough,' and just then a man hit Harry three times over the head with a billy and kind of staggered him down, and a fellow named 'Red' Quinlan hit Harry, and knocked him clean down, and he got up, and the fight kind of stopped, and the fellow that hit him with the billy run into the building, into the saloon, I judge. * * * Mr. Marks was struck with a billy on the left side of his head." The man who struck the deceased with the "billy," which was shown by the evidence to be a piece of rubber hose, was the defendant.

Dr. J. H. Barr attended deceased from the 14th of March, 1912, until his death, which occurred on the 1st day of May following. He testified that Marks complained of pains on the left side of his head. After his death he performed an autopsy upon the body. He testified:

> "An incision was made, removing the scalp, and on the removal of the scalp on the left side of the head, * * * located about half way between the top of the head and the median line, was a blood extravasation below the periosteum. * * * We found the membrane thickened and congested and adhered to the brain. * * * We found the brain lacerated and infiltrated with pus. * * * I would say trauma was the cause of the conditions I observed and found in the head of Harry Marks on this occasion. By 'trauma' I mean violence. * * * A blow of any kind could inflict that; a fall could also inflict it; but the individual would have to fall with his head downward to inflict it in that place."

Dr. Barr stated that the cause of the death of Marks "was injury to the skull—I will get it properly worded—injury to the head; laceration of the brain on the left side." He said that the injury was to the left of the median line and on the left side of the head. Dr. David Powell, who assisted Dr. Barr in the autopsy, corroborated the latter as to the conditions in the head and brain and the cause of Marks' death.

The first assignment of error is that the evidence is insufficient to sustain the verdict of the jury.

1. While we deem it unnecessary to recite herein in detail the testimony of the various witnesses, we may, nevertheless, properly refer to some of the testimony in a general way for the purpose of showing that there is a sharp conflict in the evidence upon the material points in the case, and that, therefore, the verdict of the jury must stand. In the first place, it may be remarked that it is to be conceded that the testimony of the witnesses for the defendant that were present at the time of the trouble and claimed to have witnessed it tended to show that a general row, started by the man Robinson, above referred to, was in progress in the brewery, and that the deceased was mixed up in it; that the defendant ordered the men to cease making a disturbance in his place; that the defendant procured a piece of hose and again stepped up to the fighting men and ordered them to stop fighting; that the deceased made some remark to the defendant, and also made a demonstration as though he intended to assault him, whereupon the defendant struck the deceased with the said piece of hose several times on the shoulder, not with sufficient force, however, to knock him down or to the floor; that thereafter the deceased went on the outside, picked up a heavy stick, and threatened to "settle" with the defendant; that thereupon one Quinlan, with his fist, struck Marks twice—once in the mouth or side of the neck, and once in the nose. The defendant testified that he had in the saloon a piece of hose about 2½ inches in diameter, which he kept there for the purpose of "protecting himself." He admitted striking the deceased with the hose, but denied that thus he struck him on the head. There was further testimony (given by Dr. Barr) that, after the deceased was injured at the brewery, he was taken down with pneumonia, from which Dr. Barr declared he had entirely recovered; serious symtoms from the effects of the blows upon his head having shortly thereafter manifested themselves. Dr. Kaufman, for the defendant, testified that he was present and witnessed the autoptical examination of the deceased by Drs. Barr and Powell, and declared it to be his opinion that Marks' death was not the result of any injury to his head or brain, but was directly caused by pneumonia.

[1, 2] Thus it will be noted that, as stated, there is a pronounced conflict in the evidence upon the two important questions of fact in the case, viz.: (1) Whether the defendant, without cause or not in necessary self-defense, struck the deceased on the head with the piece of hose; (2) whether the cause of Marks' death was from the effect of the blows so delivered by the defendant. It is true that but one witness (Hughes) testified that the blows delivered by the defendant were upon the head of the deceased when the latter was doing no more than attempting to stop the fight or scuffle going on between Fehr and Robinson, and that, prior to being so struck, the deceased had made no hostile or threatening movement or demonstration toward the defendant. The defendant's witness, Hardy, it might be well to explain in this connection, admitted that he told the attorneys for the defense and Mrs. Marks, the plaintiff, in the office of said attorneys, prior to the trial, that he saw the defendant strike the deceased on the head with the hose; but he further declared that he then made that statement because he had been asked by the plaintiff's attorneys to call at their office, and that he desired to see precisely what they (the attorneys) wanted him for or wanted him to say when giving his testimony. He positively and thus repeatedly declared, though, that said attorneys at no time asked him to testify to anything concerning the case which was not true. But, throwing out of the case any consideration of Hardy's testimony or any suggestion that the jury might have believed that he told the plaintiff's attorneys the truth when he said to them that

the defendant struck the deceased on the head with the hose, and still there stands unimpeached in the record Hughes' testimony which, if believable, is amply sufficient to sustain the verdict. His testimony is not upon its face improbable. The fact that he is a brother of the plaintiff obviously does not make it so. It might have entered into the question of his interest in the case in behalf of the plaintiff, and thus his credibility and the weight of his testimony affected, but this was for the jury to resolve. The latter having evidently, and, indeed, presumptively, believed his testimony as to the circumstances of the assault, as well as the testimony of Drs. Barr and Powell as to the cause of Marks' death, it is manifestly not for a court of review to say, in view of the character of said testimony or the face value thereof, that the conclusion arrived at by the jury was not justified, notwithstanding that the record discloses that a number of other persons, claiming to have witnessed the assault, gave testimony which, if accepted and believed by the jury, would certainly have had the effect of completely destroying its evidentiary force and value. There is, as seen, real and substantial evidence in the record on the material point in the case to support the verdict, and this is all that is required to foreclose interference with the verdict on the ground that it was not justified by the proofs. Driscoll v. Cable Railway Co., 97 Cal. 533, 562, and 567, 32 Pac. 591, 33 Am. St. Rep. 203; Clopton v. Clopton, 162 Cal. 31, 121 Pac. 720; Lummer v. Unruh, 25 Cal. App. 102, 142 Pac. 914; Hecker v. Morley, 170 Cal. 88, 148 Pac. 516; Clark v. Tulare Dredging Co., 14 Cal. App. 414, 429, 112 Pac. 564. It may be added that, since the answer of the defendant set up, as a defense to the action, the fact that the defendant struck the deceased as in necessary self-defense or to protect himself against threatened personal injury on the part of the deceased, the burden rested upon the defendant to establish that defense (Brooks v. Haslam, 65 Cal. 421, 4 Pac. 399; Chapell v. Schmidt, 104 Cal. 511, 38 Pac. 892), and the jury were the exclusive judges of whether this burden was sustained.

The other assignments of error involve the rulings of the court upon the evidence, certain instructions embraced in the court's charge and the ruling disallowing the demurrer on the ground that the action was barred by the terms of subdivision 3 of section 340 of the Code of Civil Procedure. The latter proposition, although the last assignment of error discussed in the briefs, may first be appropriately considered, since it goes to the question whether the plaintiff's action was lost by lapse of time. Moreover, the principle to be considered and applied in the determination of the question whether the action was brought after it was barred under the statute has direct relation to and will govern in the decision of the point, advanced by the defendant, that the court erred in refusing to permit a certain declaration of the deceased as to the assault to go before the jury.

[3] 2. The contention is that the time for the commencement of this action began to run from the time the deceased received the injuries which, it is alleged, caused his death, and that, when this action was instituted, more than one year had elapsed since the injuries were received; section 340, subdivision 3, providing, among other things, that an action for injury to or for the death of one caused by the wrongful act or neglect of another must be brought within one year from the time of such injury or death. The theory involved in the demurrer on the special ground necessarily is that the right of action which the plaintiff is here claiming is precisely the same or identical action which accrued to the deceased by reason of the injury suffered by him from the alleged wrongful act of the defendant. The theory is plainly erroneous. The right of the deceased to maintain, in his lifetime, an action for the damage, if any, sustained by him at the hands of the defendant, and the right of the heirs or personal representatives of the deceased, after the latter's death as the result of such injury, to maintain an action for the death of Marks so caused, are two entirely different rights. Obviously, the right of the deceased to maintain an action for damages for the injuries received necessarily expired with his death. "Actio personalis moritur cum persona." And but for the law giving to the heirs or representatives of the deceased the right to sue for such damages as they may have sustained by reason of the death of Marks through the alleged wrongful act of the defendant, the latter (Marks having died before bringing any action) would be wholly immune from any action or the consequences thereof of a civil nature. Our law (section 377, Code Civ. Proc.), giving the heirs or personal representatives of a deceased person a right of action for his death, wrongfully produced through the act of another, was not known to the common law. It is purely a statutory right—a right with which, very clearly, the person for whose death the action may be maintained could possibly have no concern. It ought not to be necessary to say that the right does not, and in the very nature of things could not, under any possible view, exist during or in the lifetime of the person wrongfully injured, for the very fact of his death from wrongful violence at the hands of another itself or alone creates or establishes the foundation for the exercise of the right to sue for any damages suffered by his heirs, etc., for his death so caused. To hold, as the learned counsel maintains, that the right of action after death is only the succession in the heirs or personal representatives of the right as it existed in and belonged to the deceased before his death

would be to hold that the right of action in the heirs lies solely in the damages suffered by the deceased by reason of the injuries received. This would involve a most unreasonable view of section 377. As stated the damage for which the heirs or personal representatives of a deceased whose death has been caused by the wrongful act of another may maintain the action authorized by said section lies necessarily in the fact of such death. What damage, in law, could a person himself suffer by reason of his own death caused by the tortious act of another? Obviously, no damage whatever. But the language of the section mentioned is itself plain and simple enough to show that the intention of the Legislature, in enacting it, was to give to the surviving heirs of the deceased who may themselves be damaged by his death in a wrongful manner the right to sue for compensation for the damage so sustained. The section reads:

> "When the death of a person, not being a minor, is caused by the wrongful act of another, his heirs or personal representatives may maintain an action for damages against the person causing the death," etc.

[4] Nor does the fact, if it be a fact, that the deceased did not bring an action in his lifetime for the damages occasioned to him by the injuries inflicted upon him bar the right of the heirs or personal representatives of the deceased to exercise and prosecute their right of action under section 377.

The above views accord with the authorities. We quote the following from Tiffany on Death by Wrongful Act, § 23:

> "It is manifest that the act did not repeal, or create an exception to, the rule of 'actio personalis moritur cum persona' by providing for the survival of the action which the party injured might have maintained, for, though the action can be maintained only when the death is caused under such circumstances as would have entitled the party injured to maintain an action, it is not maintainable for the recovery of the damages resulting from the personal injury to him, and hence, by survival, to his estate, but is maintainable only for the recovery of damages for the pecuniary loss resulting from the death to the surviving members of his family. As Coleridge, J., said in one of the first cases that arose under the act: 'This act does not transfer the right of action to his representative, but gives to his representative a totally new right of action, on different principles.' It must be admitted that expressions occur in some of the opinions to the effect that the statute gives a substituted, and not a new, right of action, but, having regard to the provisions of the act in respect to the persons who are entitled to the benefit of the action and the measure of damages, such a position is entirely untenable. Said Lord Blackburn, in Seward v. The Vera Cruz: 'A totally new action is given against the person who would have been responsible to the deceased if the deceased had lived—an action which * * * is new in its species, new in its quality, new in its principle, in every way new, and which can only be brought if there is any person answering the description of the widow, parent, or child, who, under such circumstances, suffers pecuniary loss.'"

The Supreme Court, in Munro v. Dredging & Rec. Co., 84 Cal. 515, 524, 24 Pac. 303, 305 (18 Am. St. Rep. 248), said, referring to what was said in the English case of Blake v. Midland Ry. Co., 18 Q. B. 93:

> "We agree with what is said in the opinion above quoted that the action given by the statute (section 377, supra) is a new action, and not the transfer to the representative of the right of action which the deceased person would have had if he had survived the injury"—citing a number of English and American cases.

See, also, Lange v. Schoettler, 115 Cal, 388, 390, 47 Pac. 139; Burk v. Arcata & Mad River R. R. Co., 125 Cal. 364, 366, 367, 57 Pac. 1065 73 Am. St. Rep. 52; Gregory v. S. P. Co., (C. C.) 157 Fed. 113; Webster v. Norwegian Mining Co., 137 Cal. 399, 70 Pac. 276, 92 Am. St. Rep. 181; Western & A. R. Co. v. Bass, 104 Ga. 390, 30 S. E. 874; Causey v. Seaboard Air Line R. Co., 166 N. C. 5, 81 S. E. 917, L. R. A. 1915E, 1185, Ann. Cas. 1916C, 707.

[5] From the foregoing considerations it follows, of course, that the time for bringing an action of this character begins to run from the time of the death of the injured person, and not, as counsel for the defendant contends, from the time that the injury causing his death was inflicted upon him. The deceased died on the 1st day of May, 1912, and this action was commenced on the 23d day of April, 1913. The action was therefore brought within the statutory time, and the demurrer upon the ground that it was barred by the section named was properly overruled.

[6, 7] 3. As stated, the next assignment of error involves a question closely akin to the proposition above discussed. It came about thus: The witness Mandry, for the defendant, was asked by the latter's counsel about an alleged conversation the witness had with the deceased, a few days after he received the beating by the defendant, to which question an objection was made by the plaintiff and sustained by the court. Thereupon counsel for the defendant stated that he desired to prove by the witness that in the conversation referred to Marks declared that the defendant did not strike him on the head. Objection to the proposed testimony was interposed by the plaintiff on the usual or ordinary grounds, and, furthermore, that it was hearsay, and the objection sustained. We think the ruling was correct.

As above shown, the right of action asserted here by the plaintiff was not a right of action of the deceased. It arose independently of any consideration of the deceased's right to maintain and prosecute an action in his lifetime for any damages he might have suffered because of the injury inflicted upon him by the defendant. The right of his heirs or representatives to maintain this action for his death and to support the same by evidence could not be destroyed by any compromise or agreement of release he might have made with the defendant while his right of action existed. Or, as the Supreme Court has recently said, referring to the action created by section 377—we quote the syllabus:

> "The right of action thereby created is a new right of action with a different measure of dam-

age from that which accrued to the injured person as the result of the defendant's wrongdoing, and a compromise agreement and release of the wrongdoer made by the injured person before his death is not a defense thereto." Earley v. Pac. Elec. Ry. Co. (Sup.) 167 Pac. 513.

By parity of reasoning, the declaration of the deceased after he received the injuries and before his death, that he was not struck and injured by the defendant, cannot be used for the purpose of defeating the heirs or representatives of the deceased in an action which is theirs and never his. The declaration was not admissible under the rule allowing declarations of a deceased person against his pecuniary interest or that of his successor in interest (Code Civ. Proc. § 1853), for, as has been shown, he never had any interest in the present action or the subject-matter thereof, nor are his heirs or representatives, in an action of this character, his successors in interest. Nor was it admissible as part of the res gestæ. The whole theory upon which such declarations are excluded in a case of this character is, as above suggested, that the legal rights of the heirs or representatives of a deceased person seeking to recover for his death resulting from the wrongful act of another, while growing out of the injury causing the death, are independent of that fact and cannot be defeated or affected by anything the deceased can say or do. This proposition is clearly explained in the cases, among which we cite the following: Hedge v. Williams, 131 Cal. 455, 63 Pac. 721, 64 Pac. 106, 82 Am. St. Rep. 366; Pennsylvania Co. v. Long, 94 Ind. 250, 252; City of Bradford v. Downs, 126 Pa. 622, 17 Atl. 884; Louisville, etc., Ry. Co. v. Berry, 2 Ind. App. 427, 28 N. E. 714.

[8] 4. The next assignment involves an attack upon the action of the court in striking out a portion of an answer to a certain question put to the defendant by his counsel. The defendant, after explaining that, when Fehr and Robinson were scuffling on the floor, he attempted to stop the fight, and said to the belligerents that he did not "want any trouble here," was asked by his attorney: "What did Marks do or say then?" to which he replied: "He said, 'You Dutch s——n of a b——h, if you don't let them have it out I will get you,' and I would have stopped it there if it had not been for Marks." The court, on motion, struck out the following portion of the answer: "I would have stopped it there if it had not been for Marks." The ruling is not erroneous. The portion of the answer stricken out involved the mere opinion and conclusion of the witness, and its vice was in its insinuation, without explaining or describing his acts or conduct so that the jury could have determined that question, that Marks was taking a hand in the trouble or encouraging it.

[9] 5. Again, it is said that the court erred to the prejudice of the defendant's rights in the trial by striking out the following explanation by the defendant of his reason for keeping in his saloon the piece of hose with which he struck the deceased: "I am out there, and I have no one's protection whatever, and I thought I had a right to protect my place there." Although we think the ruling was proper, the statement stricken out might have been allowed to stand without jeopardizing the rights of the plaintiff or contributing to the advantage of the defendant. The hose was in his saloon, and he admitted using it on the deceased, and, manifestly, the fact that he kept it there to protect himself or that he was without protection except such as he might himself personally invoke when necessary could have no tendency to excuse his act in striking Marks. There was no claim in this case that he was anticipating trouble with Marks and his companions on the day of the difficulty or at any other time, and that he had procured the piece of hose for the special purpose of meeting such trouble or of assaulting Marks. The statement that he was without protection (presumably police protection) was clearly irrelevant and immaterial. That fact would not, of course, justify him in taking the law into his own hands or in wrongfully assaulting another.

[10, 11] 6. As seen, the defendant testified that he did not use the hose on the deceased until the latter "had swung at him." He was then asked: "And when you did use it, did you use any more force than you felt necessary there to cause him to cease attacking you?" We think the form of the question is objectionable, yet, if he had been asked the question whether or not he believed, from all appearances, that he had used no more force than was necessary to cause the deceased to cease attacking him, the question might have been proper, in which case, after all, it would have been for the jury to say whether the force used by the defendant was greater than was necessary to stop the deceased from further prosecuting his attack upon the former. But, in any event, even if the ruling involved error, we cannot say that it was prejudicial, since the general trend of the defendant's testimony was that he acted in self-defense, and used no more force in repelling the attack of the deceased than was absolutely requisite for his own protection and safety.

[12, 13] 7. The following questions to the defendant by his attorney were objected to as incompetent, irrelevant, immaterial, and leading, and the objection sustained: "Did you hit him or attempt to strike him until he first swung at you?" "Who made the first hostile demonstration there, Marks or you?" To the latter question the additional objection was made that it called for the conclusion of the witness. Undoubtedly the objections that the questions were leading in form and suggestive of the answer desired were well taken, and the exclusion of answers upon that ground, though a highly

technical ground, was legally justified. Even though the court could properly enough have allowed the questions to be answered and should have done so, yet it is to be said that the record shows that the defendant received the benefit of the testimony which they would probably have elicited; for, in another part of his examination, he was asked if he used the hose before Marks "swung at you," and he answered, and the answer was allowed to remain in the record: "No, sir; no, sir." This was the equivalent of saying that the deceased made a hostile or threatening demonstration toward him before he used the hose; and it was, furthermore, the equivalent of saying that he did not "hit him [Marks] or attempt to strike him until he [Marks] first swung" at the defendant. And there can be no doubt that the jury so understood the answer to that question.

[14] 8. Several witnesses were introduced by the defense to testify that the general reputation of the deceased for peace and quiet was bad. While some of these witnesses, after considerable questioning and repeated explicit explanations by the court of what was meant by the term, "general reputation," as it is understood in law, were made to say, on direct examination, that they were acquainted with the general reputation of the deceased for the traits mentioned, and declared it to be bad, on cross-examination it was developed that they had based their statement that his general reputation was bad in the respect mentioned entirely on their own observations of his personal conduct on occasions when the decedent was under the influence of intoxicating liquor and not on what the community generally had said of him. The court, upon motion, struck from the record all such testimony, and technically the court thus made no mistake. It is well understood, of course, that the purpose of testimony of the general reputation of a person in the community in which he resides and is known for certain traits is to prove that his character is good or bad, as the case may be. Proof of character in that manner involves an exception to the rule against hearsay evidence. It is not an uncommon circumstance that such testimony may itself have the effect of turning the scale on a vitally important question of fact involved in the issue to be decided. Hence the rule as to the mode of presenting such testimony or of proving character should, with substantial strictness, be observed, and to this end testimony of specific instances of misconduct, where bad character is sought to be shown, should no more be allowed than testimony of particular instances of commendable conduct, where good character is attempted to be established. In other words, testimony addressed to the question of the general reputation of a person as to certain traits of character should, as the law requires, be based upon and the result of the knowledge of the witness of such general reputation, and not upon specific acts tending to show a good or bad character which have come under the personal observation of the witness.

[15-17] 9. Relative to the complaint that the court erred in some of the instructions embodied in its charge to the jury, counsel for the defendant, in his brief, says:

> "Under this heading [Errors Claimed in Connection with the Giving of Instructions], we will group certain assignments of error which we deem it our duty to present and concerning which we make no waiver, as we believe they should be passed upon by the court, but in the discussion of which we can't indulge the same earnestness of conviction attempted to be asserted in thus far presenting this case."

Thus it plainly appears that counsel himself is not seriously of the opinion that the instructions to which he refers contain erroneous statements of legal principles, or that the principles so stated are not pertinent to the issues as made by the pleadings and developed by the evidence. There are, however, three instructions in the group mentioned in the above-quoted statement. One of these is to the effect "that there is no legal presumption that a bodily injury, if any, is justifiable; and the justification therefor, if any, must be proven by him who asserts it." We think the instruction, as applied to this case, states a legally sound principle. It simply means that, in a case of this character, where justification for the injury inflicted is set up as a defense, the burden is upon the defendant to prove the defense. This is as we understand the law and have elsewhere in this opinion so declared. The learned counsel says that he has no fault to find with the second instruction included within the group, and certainly we have none. It is therefore unnecessary to make further reference to it. The third and last instruction embraced within the group, it is insisted, is not only erroneous, but was prejudicial in its effect upon the defendant's substantial rights. It reads:

> "If you believe from the evidence that on the 13th day of March, 1912, the defendant, M. Reissinger, without cause or provocation, wrongfully and negligently struck Harry Marks on the head with a piece of hose, and if you further believe from the evidence that as the result thereof said Harry Marks suffered from cerebral meningitis, *and if you further believe from the evidence that after said 13th day of March, 1912, and prior to his death said Harry Marks contracted pneumonia, and that said cerebral meningitis proximately concurred with said pneumonia in causing his death, and that said death would not have occurred at said time from pneumonia alone, then I charge you that under such circumstances if such shall have been shown by the evidence the plaintiff in this case is entitled to recover, and your verdict must be in her favor and against the defendant.*"

It is the portion of the instruction in italics to which the defendant objects. We perceive nothing wrong in the instruction. If the deceased would not have died when he did but for the cerebral meningitis caused by the injuries inflicted by the defendant, then certainly the plaintiff would be entitled to recover, notwithstanding that pneumonia might have concurred with such meningitis in proximately causing death. We do not understand the law to be that, to hold a party for his tortious act whereby he produces damage to or the death of another, such act must be the *sole* proximate cause of the injury or the death resulting therefrom. If such a rule were sound, then, where the distinct acts of two different parties had concurred proximately to cause injury to or the death of another, neither would be liable. In this case, as we have seen, the deceased was taken down with pneumonia, a dangerous malady, after he had been injured by the defendant. Now, if the evidence was such as to warrant the conclusion that the deceased would not have died when he did if it had not been for the development of cerebral meningitis from the injury to his head and brain inflicted by the defendant, then it follows that such meningitis was at least a concurring proximate cause of his death, and for this the defendant is liable. The instruction complained of clearly enough states the principle as we understand and have explained it. But, in any view, the instruction could not have prejudiced the defendant, since it assumes that pneumonia was a concurring proximate cause of death, whereas there is ample evidence from which the jury could have found, with seeming justness, that the deceased had practically recovered from pneumonia, and that his death was directly and solely due to cerebral meningitis caused by the injuries wrongfully inflicted upon him by the defendant.

We conclude that we would not be justified from anything presented in the record before us in disturbing the result reached in the court below, and, accordingly, the judgment and the order appealed from are affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

(35 Cal. App. 91)

SILBERSTEIN v. KITRICK et al.

(Civ. 1735.)

(District Court of Appeal, Third District, California. Oct. 23, 1917. Rehearing Denied by Supreme Court Dec. 20, 1917.)

PRINCIPAL AND SURETY 🔑117 — CONTRACTOR'S BOND—RELEASE OF SURETY.

Under Civ. Code, § 2836, providing a surety cannot be held beyond the express terms of his contract; section 2844, declaring him to have all the rights of a guarantor; section 2840, providing that he is exonerated in like manner with a guarantor to the extent that he is prejudiced by any act of the creditor which would naturally prove injurious to the remedies of the surety or inconsistent with his rights, or which lessens his security; and section 2819, providing that a guarantor is exonerated, except so far as he may be indemnified by the principal, if by any act of the creditor, without the consent of the guarantor, the original obligation of the principal is altered in any respect, or the remedies or rights of the creditor against the principal in respect thereto in any way impaired or suspended—a building contractor's surety is discharged by the owner not complying with his duty under Code Civ. Proc. § 1184 (which statute must be read into the contract), when "stop notices" are given, to protect the surety, by withholding payment of unpaid installments; failing in which he was guilty of an act "which would naturally prove injurious to the remedies of the surety or inconsistent with his rights," and this though the persons filing the "stop notices" recovered judgment against the owner.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action by H. Silberstein against R. S. Kitrick and another. From adverse judgment and order, plaintiff appeals. Affirmed.

Charles J. Heggerty, of San Francisco, and W. H. Carlin, of Marysville, for appellant. A. F. Jones and George F. Jones, both of Oroville, for respondents.

CHIPMAN, P. J. The action is to recover from defendants the sum of $10,000 on a bond given by them for that amount as sureties of the Burnight-Kennedy Company, a corporation, which had entered into a contract with plaintiff to erect a building in the city of Chico. The cause was tried by the court without a jury, and defendants had findings and judgment in their favor. Plaintiff appeals from the judgment and from the order denying his motion for a new trial. The contract price for the building was $41,500, to be paid by progressive payments, as follows:

> "First. The sum of two thousand ($2,000) dollars when all excavation is completed and the walls are up ready to receive first or street floor joists.
>
> "Second. The sum of twenty-nine thousand one hundred ($29,100) dollars from time to time as the work progresses, from the date of the first payment until the completion of the building; said sum of $29,100 to be paid in the sums of $2,000 each, when labor and material have been performed and placed in the building, exceeding said several sums by 25 per cent. Each payment shall be a stop or rest, and the next payment of $2,000 to be made when an additional amount of labor and material has been performed and furnished 25 per cent. in excess of the payment to be made. After thirteen payments of $2,000 have been made and upon the final completion and delivery of the building the sum of $31,000 shall be made, and the balance and last payment of the contract price, to wit, the sum of $10,400, shall be made thirty-six (36) days after the completion and delivery of the building."

By appropriate averments in their answer, defendants sought to have corrected an obvious ambiguity or mistake in the latter part of clause "Second," which provided for a completion payment of $31,000, so as to read $3,100, and the court, on sufficient evidence, found that it was the intention of the parties that this payment should be $3,100. Thus construed, payments should have been made as follows:

First payment	$ 2,000
13 $2,000 payments	26,000
Completion payment	3,100
36 days after completion payment	10,400
	$41,500

The first payment of $2,000 was made on May 22, 1909, and at various times each month thereafter 13 payments of $2,000 each were made, the last, or thirteenth, of date January 8, 1910. On January 22, 1910, there was a further payment made of $2,000 which defendants claim was a premature payment and unauthorized. On March 16, 1910, the company quit work and ceased furnishing materials, leaving the building unfinished, and plaintiff took possession and completed the work on April 14, 1910, at a cost to him of $885.31 for labor and material, and on April 15, 1910, he filed notice of completion in the county recorder's office.

As the work progressed, the architect named in the contract issued and delivered to the company certificates upon account of materials used and labor performed, and plaintiff paid to the company on said certificates up to and including the payment of January 22, 1910, the total sum of $30,000. The contract provided, among other things, as pointed out by appellant, that in each case of payment under the contract, a certificate was to be "obtained and signed by the said A. J. Bryan, architect"; that "should any dispute arise respecting the meaning of the drawings or specifications, the same shall be decided by A. J. Bryan, architect, and his decision shall be final, but should any dispute arise respecting the value of the extra work or works omitted" the dispute was to be arbitrated; that "all payments shall be made upon the certificates of the architect, and this contract is completed and the work is finished in accordance with the original plans and such modifications or alterations as may be made therein. The owner is to make payments promptly and upon the certificate of the architect." No other powers of the architect appear at all pertinent to any issue here, so far as we can discover. The bond made reference to the contract, and among the provisions of the bond relating to the obligation of the sureties were the following:

> "Now, therefore, if the said Burnight-Kennedy Company shall pay for all materials and supplies furnished for the performance of the work so contracted to be done and pay for all labor done and to be done of every kind and to complete and finish said building within the time named and according to the plans and specifications, then this obligation shall be void, otherwise the sureties herein will pay the same to the amount specified in said bond. It is further stipulated in a portion of this bond that the said Burnight-Kennedy Company shall complete and turn over to the said H. Silberstein said building free and clear of all claims, liens or demands of any person, contractor, subcontractor, materialmen, laborers, etc., and in the event of the failure to do so, then the sureties on this bond are held as herein specified."

The court found that the payment of $2,000 made January 22, 1910, was a premature payment, "and should not, under the terms of the contract entered into between H. Silberstein, and Burnight-Kennedy Company, have been made until the final completion and delivery of the building to plaintiff and the acceptance of said building by him; that said payment was made without the knowledge or consent of the defendants, R. S. Kitrick and Harry Jacoby, or either of them." The court also found that certain corporations and partnerships served notice under section 1184 of the Code of Civil Procedure, "which notices were in proper form, to withhold the amounts named in said notices from the payments due under said contract, or to thereafter become due to said Burnight-Kennedy Company." These claims aggregated $7,573.70, as follows:

Diamond Match Company, notice served September 15, 1909	$5,617 10
Wygant & Collins, notice served December 26, 1909	1,751 20
Chico Con. Co., notice served January 4, 1910	205 40

The court found that without the knowledge or consent of defendants, plaintiff paid to the company "large sums of money which, under the laws of the state of California, it was his duty to withhold," namely, after September 15, 1909, on which date the Diamond Match Company served its notice, plaintiff paid to the contracting company $14,000, as appears above. After the date of the Wygant & Collins notice, the sum of $4,000 was paid by plaintiff to the company, and a like amount was paid after the notice of the Chico Construction Company was served. The court found:

> "That the plaintiff failed to withhold any sums of money coming due after the services of any of said notices, except the sum of $1,100, the balance of the completion payment, and the sum of $10,400, the 35-day payment, neither of which sums were due under the terms of said contract until the final completion of said building."

As conclusions of law, the court found that "defendants and each of them are discharged from all responsibility and liability as sureties," and that they are entitled to a dismissal of the action, and to recover their costs herein.

Defendants interposed two defenses to the action: First, that the completion payment of $2,000, January 22, 1910, was premature, the building not then having been completed, and, as such payment released defendants from liability on their bond. Second, that the failure of plaintiff to withhold sufficient money to pay the claims above set forth, after receiving notices to withhold under section 1184 of the Code of Civil Procedure, worked defendants' release from liability. The contention of appellant as to the payment of January 22, 1910, is that it was not a premature payment under the construction given the contract by the architect, which was that the contract called for 14 payments of $2,000 each as the work progressed besides the first payment, making 15 payments before coming to the completion payment of $3,100 (or as erroneously stated in the contract, $31,000). In other words, that he was authorized to give certificates for $29,100, plus the first payment of $2,000, making $31,100, and that in giving certificates for $30,000 he was acting in accordance with his construction of the contract.

Witness Burnight one of the company's officers, testified that the last payment to be made upon completion of the building was to be $3,100, to which the 14 $2,000 payments and the $10,400 reserved for 36 days being added would make the contract price of $41,500. Appellant contends that the contract was susceptible of two different constructions by reason of its ambiguity, and that whether or not the architect properly construed the contract, he was made sole arbiter, and having given his certificate, it is conclusive, and respondent cannot now attack it. We do not think that the power given the architect was broad enought to authorize him to misconstrue the contract and conclude the sureties by such misconstruction. The ambiguity, if any, was caused, no doubt, by the mistake in making the final completion payment $31,000 instead of $3,100, but it seems clear enough that but 13 payments of $2,000, in addition to the first payment of $2,000, were to be made which was the extent of the progressive payments authorized by the contract, and that the court was justified in holding the payment of January 22, 1910, to have been prematurely made. We do not think that the payments made upon the architect's certificate were so far conclusive as to have justified plaintiff in entirely disregarding the withhold notices. On the contrary, we think he made such payments at his peril. However this may be, there is no dispute but that payments were made to the contractor, as shown above, after notices had been served on the owner to withhold payment under section 1184 of the Code of Civil Procedure and in plain violation of its provisions. It is true that the lien claimants brought action and recovered judgment against the plaintiff herein (Diamond Match Co. v. Silberstein, 165 Cal. 282, 131 Pac. 874), and as we are told, this judgment has been satisfied. As claimed by appellant, his duty to the creditors was thus fully discharged, but does it follow, as seems to be further claimed, that the sureties were not relieved?

A surety cannot be held beyond the express terms of his contract (Civ. Code, § 2836); he has all the rights of a guarantor (Id. § 2844), and is exonerated in like manner with a guarantor to the extent to which he is prejudiced by any act of the creditor which would naturally prove injurious to the remedies of the surety or inconsistent with his rights, or which lessens his security (Id. § 2840). A guarantor is exonerated, except so far as he may be indemnified by the principal, if by any act of the creditor, without the consent of the guarantor, the original obligation of the principal is altered in any respect, or the remedies or rights of the creditor against the principal in respect thereto, in any way impaired or suspended. Id. § 2819.

County of Glenn v. Jones, 146 Cal. 518, 80 Pac. 695, was an action against the contractor, Jones, and his sureties. Jones had contracted to furnish the necessary materials and erect a high school building for the sum of $5,580, to be paid as follows: $1,860 when Jones shall have delivered all the material for said building on the building site; $1,860 when the roof is on: and the balance, $1,860, on full completion and acceptance of the building. He delivered a portion of the building materials, and upon application and without the sureties' consent was paid by the board of supervisors the first payment of $1,860. He pocketed the money, abandoned the contract, and left the materials unpaid for. The question presented was: Did the premature payment made by plaintiff release the sureties? Of the duty of the creditor, the court said:

> "The contract of suretyship imports entire good faith and confidence between the parties as to the whole transaction. The creditor is bound to observe good faith with the surety. He must withhold nothing, conceal nothing, release nothing, which will possibly benefit the surety. He must not do any act injurious to the surety or inconsistent with his rights. He must not omit to do any act required by the surety which duty enjoins him to do, if such omission injures the surety. The liability of a surety is not to be extended * * * beyond the terms of his contract. To the extent and in the manner, and under the circumstances pointed out in his obligation, he is bound, and no further. He has a right to stand on its very terms."

Speaking of the contract the court said:

> "In this case the sureties agreed and guaranteed that Jones would place all the materials on the building site, on condition that he was to receive no money until he had done so; they did not agree that if paid in advance he would place such materials on the site. By the payment, the hope of reward for further performance was lost, the temptation to act dishonestly was increased."

The sureties were held to have been exonerated.

Keissig v. Allspaugh, 91 Cal. 231, 27 Pac. 655, 13 L. R. A. 418, was also an action against the contractor and a surety on his bond. At the completion of the building there were certain liens upon it notwithstanding which the owner paid the completion payment and the contractor failed to discharge the liens. The owner was compelled to pay these lien claims, and he brought the action to recover from the principal and surety. In holding that the surety was discharged, the court said:

> "The judgment cannot be sustained upon the facts. The appellant, Lundeen, was a surety, and as money sufficient to satisfy all of the liens mentioned in the complaint was, or ought to have been, in the hands of the plaintiff at the time of his settlement with the contractors, he should have so applied it, instead of paying it to the contractors. This balance was to be re-

tained in his hands as an additional security against liens upon the building, and, in equity, he held the same also for the benefit of the sureties. It was a special fund to which they had a right to look for their indemnity, and in view of which it must be supposed that they assumed the obligation of sureties, as the original contract is referred to in the bond as the inducement or consideration for its execution, and the plaintiff was not authorized to surrender it without their knowledge or consent; and having done so, the appellant was discharged. Bragg v. Shain, 49 Cal. 131; Taylor v. Jeter, 23 Mo. 244."

In speaking of the failure of the plaintiff to retain this balance or apply it to the satisfaction of the obligation for which the appellant was surety, the court said:

> "The neglect to resort to a fund already in his hands for his own protection in the very matter for which the defendant was a surety, and which fund was therefore charged with a trust in favor of appellant, and its surrender without his consent, constitutes a defense to this action."

It is true that in this case was involved the final payment of 25 per cent. of the contract price which, by the terms of the contract, was to be reserved. The contract in the present case also reserved a 25 per cent. final payment, and it is silent as to the duty of plaintiff where so-called "stop notices" are filed under section 1184 of the Code of Civil Procedure. But the statute defines the duty of the owner where such notices are given and the owner is charged with knowledge of the statute. It was clearly his duty to protect the sureties by withholding payment of unpaid installments, failing in which he was guilty of an act "which would naturally prove injurious to the remedies of the surety or inconsistent with his rights." For the sureties' protection, the statute must be read into the contract and be deemed to operate as fully as the written provision in the contract respecting the final payment. In the Diamond Match Company Case, supra, the court said of section 1184:

> "It is the clear duty of the owner under service of such a notice to withhold from the moneys due, or from the first moneys that may become due, a sum sufficient to protect him against the demand of the notice. If he does not do this he becomes justly liable under later notices to withhold which may be served upon him."

As to the nature and effect of such a notice, a full discussion will be found in the cases cited in the Diamond Match Company Case. See, also, Sweeney, Executrix, v. Board of Trustees, 165 Pac. 42.

Respondents point out what appears from the record, that had appellant complied with the law as laid down in the Diamond Match Company Case and with the strict terms of his contract, he would have had at the completion of the contract to pay lienholders and materialmen who had given withhold notices the sum of $21,073.70. The total judgment given against him in said case was $19,025.81, leaving in his hands a balance of $2,047.89, out of which there remained only to be paid $885.31, the cost of completing the building. He now seeks to recoup the loss occasioned by his failure to observe his duty towards respondents as sureties. We think they were by his acts entirely exonerated from all liability under their bond.

The judgment and the order are affirmed.

We concur: BURNETT, J.; HART, J.

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35 Cal. App. 27

NAVE v. NAVE. (Civ. 1717.)

(District Court of Appeal, Third District, California. Oct. 17, 1917.)

1. DIVORCE 🔑252—DIVISION OF PROPERTY.

Where the community property of a husband and wife consisted of a homestead valued at about $1,500, but mortgaged for $500, the house, tools, furniture, and one cow, and barely 40 acres were cleared for cultivation, and the wife, who did not enjoy vigorous health, was awarded the custody of one minor child by a decree for divorce on the ground of extreme cruelty, she should have been awarded the entire property, instead of merely one-half, under Civ. Code, § 146, providing that, if the decree be rendered on certain grounds, including extreme cruelty, the community property shall be assigned to the parties in such proportion as the court from the facts and the conditions of the parties may deem just, but that, if the decree be rendered on any other ground, the community property shall be equally divided; this seeming to infer that where the divorce is granted for extreme cruelty more than one-half must be decreed to the innocent spouse.

2. DIVORCE 🔑298(1)—CUSTODY OF CHILDREN —DISCRETION.

Under Civ. Code, § 138, providing that in actions for divorce the court may make such order for the custody of minor children as may seem necessary or proper, where, though the wife was granted a divorce for extreme cruelty, the evidence was conflicting and there was much to show that the husband was not as bad a man as the complaint indicated, it was not an abuse of discretion to award the husband the custody of a boy three years old; the wife being given the custody of a girl one year old, and the decree reserving control over the children.

3. DIVORCE 🔑306—AWARD FOR SUPPORT OF CHILDREN.

Where the homestead set apart to the wife on a divorce for extreme cruelty consisted of 160 acres of which barely 40 were cleared for cultivation and the property was heavily mortgaged, and the wife, who was given the custody of a child one year old, had no separate property of any substantial value, the husband should be required to pay a reasonable amount monthly, at least to aid in supporting, caring for, and educating such child.

Appeal from Superior Court, Modoc County; Clarence A. Raker, Judge.

Suit by Zelma H. Nave against William C. Nave. From a judgment for plaintiff for insufficient relief, she appeals. Reversed in part, with directions, and affirmed in part.

J. T. Sharp, of Alturas, for appellant. Jamison & Wylie, of Alturas, for respondent.

BURNETT, J. Plaintiff was granted a divorce without alimony from defendant on the ground of extreme cruelty. The judgment divides the community property, consisting of a homestead valued at about $1,500, but mortgaged for $500, the house and tools, furniture, and one cow, equally between the parties, and awarded the custody of Samuel Oliver Nave, aged three, to defendant, and Rose May Nave, aged one, to plaintiff. The plaintiff appeals from that part of the judgment refusing alimony and awarding half of the community property and the custody of the boy to defendant.

[1] The law regarding the disposition of community property on divorce is that:

> "If the decree be rendered on the grounds of adultery, or extreme cruelty, the community property shall be assigned to the respective parties in such proportions as the court, from all the facts of the case, and the condition of the parties, may deem just." But "if the decree be rendered on any other ground than that of adultery or extreme cruelty the community property shall be equally divided between the parties." Section 146, Civ. Code.

And in section 148 it is declared that the disposition is subject to revision on appeal in all particulars, "including those which are stated to be in the discretion of the court."

> "Where the divorce is granted on the ground of adultery or extreme cruelty, section 146 of the Civil Code leaves the disposition of the community property, in the first instance, to the discretion of the trial court, with, perhaps, the qualification, inferred from the reading of the entire section, that, as a general rule, more than one-half of such property must be decreed to the innocent spouse in such a case." Gorman v. Gorman, 134 Cal. 378, 66 Pac. 313; Knapp v. Knapp, 23 Cal. App. 10, 136 Pac. 719.

In the Gorman Case seven-twelfths of the property was awarded to the innocent husband. In Knapp v. Knapp, where the wife was awarded considerably more than half the community, the judgment was affirmed. On the other hand, in those cases of extreme cruelty where the trial court had divided the community property equally, the upper court has modified the decree. Thus in Eslinger v. Eslinger, 47 Cal. 62, and Brown v. Brown, 60 Cal. 579, the court changed the decree of the lower court and awarded the innocent party three-fourths of the community. It thus appears that, unless there be some very good reason to the contrary, the general rule is to be followed. It does not appear in the Eslinger or Brown Case that the party to whom the larger share was awarded had to provide for any children; nevertheless, the award was made. But in Strozynski v. Strozynski, 97 Cal. 189, 31 Pac. 1130, where a minor child, aged 15, was awarded to the innocent wife, the decree of the lower court, dividing the community property of the clear value of over $2,000 equally, was modified on appeal and all said property was awarded to her. We think that we have here a case even stronger in its facts than Strozynski v. Strozynski. The homestead here consists of 160 acres, but of these barely 40 were cleared for cultivation. The property is heavily mortgaged. The plaintiff must care for her one year old girl as well as provide for herself. Plaintiff does not appear to enjoy vigorous health. Under these circumstances, we feel constrained to award all the community property to the plaintiff.

[2] With respect to the custody of the children, the Code has not provided us with such explicit rules in regard to discretion as in the case of community property. As a result, the rule in respect to the children has been declared as follows:

> "It is manifest that the Legislature, by the foregoing enactment (Civ. Code, § 138), intended to confide to the trial courts, in the disposition of the minor children of the parties to divorce actions, a very extensive discretion, with a view to the conservation of the highest and best interests of such minors, and the conclusion arrived at by such courts in such cases will not be set aside unless the record discloses a clear abuse of that discretion." Simmons v. Simmons, 22 Cal. App. 448, 134 Pac. 791; Van Horn v. Van Horn, 5 Cal. App. 719, 91 Pac. 260; Dickerson v. Dickerson, 108 Cal. 351, 41 Pac. 475.

And this rule is adhered to, though at the same time it is declared that:

> "Naturally and presumptively the mother is entitled to the custody and care of minor children of tender years." Luck v. Luck, 92 Cal. 653. 28 Pac. 787.

Of course, the predominating factor in these considerations is the welfare and interest of the child. In the present case we cannot say that the interests of Samuel Oliver Nave would be better served by changing the decree of the lower court and awarding him to his mother. Though the trial court found "that defendant had been guilty of extreme cruelty toward plaintiff, as set forth in the complaint of plaintiff filed in this action," there was considerable conflict in the evidence; there being much to show that defendant was not as bad a man as the complaint indicated. In this connection, it is further to be noticed that the trial court has reserved a control over the children; the awards being made "pending the future order of the court." If the occasion should demand it, therefore, the court can speedily transfer the custody of the boy to his mother. Under these circumstances, we cannot say that there has been a clear abuse of discretion by the trial court.

[3] As to the question of alimony, the case is not without difficulty. The plaintiff, having been granted a divorce on the ground of cruelty and accorded the custody of a minor child, would naturally and ordinarily be entitled to some allowance for her support and that of the child. This would, of course, be affected by the consideration of the financial condition of the respective parties and their earning capacity. As to the present case, considering what is revealed by the record concerning each party, we should have no hesitation in saying that the defendant should be required to pay at least a sufficient sum to support the younger child, unless the wife has considerable separate property. However, as to this there is no finding

by the court. Plaintiff alleged in the complaint that she was in indigent circumstances, but this was denied in the answer, and it seems to have been overlooked by the trial judge. The evidence does, however, show that she had a little separate property, apparently of trifling value. As to the homestead herein set apart to her, the situation is similar to that in Strozynski v. Strozynski, wherein it is said:

> "The house and lot constitute but an humble home for the plaintiff and her minor daughter, and it cannot be presumed that the household furniture was more than was necessary for their use. Allowing them all these, they are still left, so far as appears, to earn their support."

Under such circumstances, we think a reasonable amount should be required of defendant monthly, at least to aid the plaintiff in meeting the responsibility cast upon her by the custody, care, and education of the child.

We therefore think that the portion of the judgment awarding plaintiff one-half of the community property should be reversed, with direction to the court below to award to her the whole thereof, that the portion of the judgment decreeing that she is entitled to no alimony be reversed, with direction to the court to retry the issue as to the financial condition of the parties and their earning capacity, and that the judgment in other respects be affirmed, appellant to recover her costs on appeal.

It is so ordered.

We concur: CHIPMAN, P. J.; HART, J.

(35 Cal. App. 33)

SAN BERNARDINO COUNTY v. INDUSTRIAL ACC. COMMISSION OF STATE OF CALIFORNIA et al. (Civ. 2364.)

(District Court of Appeal, Second District, California. Oct. 18, 1917. Rehearing Denied by Supreme Court Dec. 17, 1917.)

1. Master and Servant ⚷373—Workmen's Compensation—"Arising Out of and in Course of Employment."

A road construction foreman, who was struck by a workman whom he discharged for insubordination and refusal to obey instructions, received the injury "arising out of and in the course of his employment," since it occurred while he was engaged in doing work within the scope of his employment, and at a time and place when and where it was his duty to perform it; and it arose out of his employment because it followed as a natural incident of the work occasioned by the nature of the employment and performance of the duty which it imposed upon him as such foreman.

2. Master and Servant ⚷373 — Workmen's Compensation—Character of Employé.

In such case the character of the employé, whether peaceable or quarrelsome, is immaterial.

Application by Homer C. Gragg for workman's compensation, opposed by the County of San Bernardino, employer. To review an award by the Industrial Accident Commission in favor of applicant, the employer brings certiorari. Affirmed.

Leonard, Surr & Hellyer, T. W. Duckworth, and John L. Campbell, all of San Bernardino, for petitioner. Christopher M. Bradley, of San Francisco, and Daley & Byrne, of San Bernardino, for respondents.

SHAW, J. Certiorari to review an order of the Industrial Accident Commission awarding compensation to Homer C. Gragg for an injury sustained while in the employ of petitioner.

The sole contention of petitioner, as presented in its brief, is that "the injury did not arise out of the employment and was not incidental thereto." In our opinion, the facts are identical with those involved in Western Indemnity Co. v. Pillsbury et al., 170 Cal. 686, 151 Pac. 398, wherein a like award was affirmed.

As appears from the record, Gragg was foreman of a gang of some 18 or 20 men employed by the county of San Bernardino, who, under his direction, were engaged in the construction of a concrete road. He was authorized and empowered in his discretion to discharge any of the men from the work for insubordination, neglect, or refusal to perform the same in the manner directed by him. Among the employés at the time in question was one Carl Hansen, engaged in spreading concrete upon the roadway. The foreman called Hansen's attention to the fact that he was not spreading the concrete properly, and, taking the shovel, showed him how he wanted it done. Hansen resented this, saying, "To hell with you; I know how to do this," in response to which Gragg said, "If you feel that way about it, you are fired right now; I will put a man in your place;" and thereupon he called another employé whom he substituted for Hansen. Gragg proceeded with other duties and Hansen, following him, demanded his pay, to which Gragg replied, "I cannot pay you; you will have to go up and see the timekeeper; he makes up the time." Hansen was told where to find the timekeeper, whose location was about a mile distant. Gragg again walked away, followed by Hansen, who came up behind and struck him a blow with his fist, knocking him down, and causing the injury for which he applied for compensation.

[1] The only difference between the case of Western Indemnity Co. v. Pillsbury (known as the Rudder Case) and this is that in the former the foreman was the aggressor, while in the case at bar Hansen was the aggressor, making an unprovoked attack upon Gragg for no cause other than the fact that he had been justly discharged from the work for refusing to perform it in the manner directed. Petitioner claims that in the Rudder Case the question as to whether the

injury arose out of the employment was not presented or considered. In this contention counsel is in error. The court in its opinion said:

> "The main contentions of the petition are that there is no evidence to show * * * that the injuries happened while Rudder was performing a service incidental to and in the course of his employment."

The statute provides for an award of compensation for injuries sustained by employés, "arising out of and in the course of the employment"; and the language of the Supreme Court quoted was used in the sense and meaning of the statute. That the applicant's injury was sustained in the course of his employment conclusively appears from the fact that it occurred while he was engaged in doing work within the scope of his employment, and at a time and place when and where it was his duty to perform it; and it arose out of his employment because it followed as a natural incident of the work occasioned by the nature of the employment and performance of the duty which it imposed upon him as such foreman. McNichol's Case, 215 Mass. 497, 102 N. E. 697, L. R. A. 1916A, 306; Bryant v. Fissell, 84 N. J. Law, 72, 86 Atl. 458.

> "It [the accident] need not have been foreseen or expected, but after the event it must appar to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence." Kimbol v. Industrial Accident Commission, 173 Cal. 351, 160 Pac. 150, L. R. A. 1917B, 595; Reithel's Case, 222 Mass. 163, 109 N. E. 951, L. R. A. 1916A, 304.

The circumstances are such as to leave no doubt that the risk of such unwarranted attack was one connected with the employment and directly traceable to the conditions under which the duty was performed.

[2] The character of the employé, whether peaceable or quarrelsome, is immaterial to the question. A docile mule has been known to kick his attendant, and we assume that, had applicant in the performance of his duties, and while passing a team of mules engaged upon the work, been kicked by one of them, no question would arise as to his right to recover for injury thereby inflicted. In our opinion, there is no distinction between the facts presented in the Rudder Case and those here involved.

The order making the award is affirmed.

We concur: CONREY, P. J.; JAMES, J.

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35 Cal. App. 41

CORDES v. HARDING et al. (Civ. 2086.)

(District Court of Appeal, First District, California. Oct. 19, 1917. Rehearing Denied by Supreme Court Dec. 17, 1917.)

STIPULATIONS ⚷14(12) — CONSTRUCTION—BREACH.

Where two attachment plaintiffs against same defendant made stipulation providing that all recoveries in either of said suits shall be ratably apportioned between said plaintiffs, according to the respective amounts of their claims or according to the respective amounts of the judgments rendered and entered in said suits should judgments be recovered or entered, and one secured judgment and filed transcript so as to become a redemptioner, and the other, having secured judgment, failed to file it, and a third judgment creditor purchased the first judgment, there being no duty on the second judgment creditor to docket his judgment, his failure to do so was not such a breach of the stipulation as to destroy his right to share in the amount paid for the first judgment.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by W. F. Cordes against R. T. Harding and Henry E. Monroe, copartners, doing business as Harding & Monroe. Judgment for plaintiff, and defendants appeal on the judgment roll. Affirmed.

Robert H. Borland, of San Francisco, for appellants. Henry Ach and Joseph Kirk, both of San Francisco, for respondent.

LENNON, P. J. This is an appeal from the judgment on the judgment roll. This case was before this court before on an appeal from the order of the trial court granting defendant's motion for a nonsuit. 27 Cal. App. 474, 150 Pac. 650. The effect of the former decision of this court was to establish the sufficiency of the complaint, and to construe the meaning of the word "avails" to include moneys obtained from the sale of the Lindemann judgment.

Briefly, the facts are these: On the 9th day of May, 1910, defendants Harding & Monroe, through their assignee Lindemann, brought suit against the California Consolidated Mines Company for $10,193.25 for legal services, and procured an attachment upon the company's property. At this time certain creditors of the defendant Mines Company assigned their claims to W. F. Cordes, who brought an action against the Mines Company and caused an attachment to be levied on June 20, 1910, on the same property of the company which had been previously attached in the suit brought by Lindemann. A stipulation was thereupon made, entitled in the court and causes of Lindemann and Cordes against the Mines Company by the attorneys for the respective plaintiffs in each case, providing in part:

> "That all recoveries or avails effected in either of said suits under or by virtue of the attachments which have been issued therein and levied upon the property of the California Consolidated Mines Company, a corporation, in the county of Amador, state of California, shall be ratably apportioned between said plaintiffs, according to the respective amounts of their claims or according to the respective amounts of the judgments rendered and entered in said suits should judgments be recovered or entered."

Lindemann subsequently obtained a judgment for $8,883.10, but did not levy execution. Prior to December 1, 1911, Lindemann recorded a transcript of this judgment in Amador county, in which county the property was situated. On November 23, 1910, plaintiff Cordes in his suit against the Mines Company obtained a judgment for $2,371.16, but no transcript of this judgment was filed until after December 22, 1911. Prior to May 12, 1910, and prior to the attachment of either Lindemann or Cordes, the Chichizola Estate Company recovered a judgment in Amador county against the Mines Company for the sum of $10,000. Under this judgment, on December 10, 1910, the mining properties under attachment were sold on execution to the plaintiff in that action. December 15, 1911, the Chichizola Estate Company sold and assigned this judgment to one Magee. On December 22, 1911, defendants in this action told Magee that they proposed to redeem. After negotiations, Magee bought the Lindemann judgment, paying therefor $7,000. The plaintiff here, claiming that this money received by defendants was avails effected by the Lindemann attachment, brought this action for his proportion thereof, pursuant to the terms of the stipulation. Prior to the expiration of the period of redemption under the Chichizola sale, defendants in this action, for plaintiff Lindemann, who had become a redemptioner by having filed a transcript of her judgment in Amador county, served upon the purchaser at that sale a demand for a statement of the rents and profits under the provisions of section 707, Code of Civil Procedure, thereby obtaining for plaintiff Lindemann an extension of the time to redeem. The sale of the Lindemann judgment to Magee was made before this extension of time had expired.

Appellants contend that the Cordes attachment, owing to the failure of Cordes to file the transcript of his judgment in time to become a redemptioner from the Chichizola execution sale, had become worthless, that Cordes had failed to comply with the implied agreement of the stipulation that he should do everything necessary to keep alive his attachment, and consequently, for this alleged breach on his part, that Lindemann was no longer bound by the stipulation. Looking at the stipulation itself, it is impossible to say that there was any implied agreement that plaintiff should docket his judgment in the county where the property was situated so as to acquire a lien on the property of the judgment debtor in that county. Appellants' argument rests upon the speculative theory that if plaintiff had put himself in the position of a redemptioner qualified to redeem from the Chichizola sale, Magee would have paid him something for his judgment. But upon the other hand, Magee might not have purchased plaintiff's judgment at all. There is no evidence or finding to the effect that he would have done so. It might well have been that plaintiff, by refraining from making his judgment a lien on the property of the judgment debtor, thereby facilitated the sale of the Lindemann judgment; that while Magee was willing to buy the Lindemann judgment, he might have been unwilling to redeem when he found the property more heavily incumbered.

Since there was no duty on the part of plaintiff, express or implied, to docket the judgment, and as the record discloses no request or demand from the respondents that plaintiff advantage their position by docketing that judgment, we cannot say that plaintiff's failure to do so was a breach on his part of the contract.

Judgment affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

35 Cal. App. 89

GLOBE INDEMNITY CO. v. INDUSTRIAL ACC. COMMISSION OF STATE OF CALIFORNIA et al. (Civ. 2281.)

(District Court of Appeal, First District, California. Oct. 22, 1917.)

Master and Servant 🔑417(5)—Workmen's Compensation Act—Writ of Review to Vacate Award.

On petition for writ of review to vacate and annul an award of compensation to an employé of a manufacturing establishment which carried with petitioner a policy of insurance covering its industrial liability, where the record shows that the commission's finding is sustained by the law and evidence adduced at the hearing, the award will be affirmed, and the writ dismissed.

Petition for writ of review by the Globe Indemnity Company against the Industrial Accident Commission of State of California, and others. Writ dismissed.

D. Hadsell, of San Francisco, Joe G. Sweet, of Berkeley, and E. A. Ingalls, of San Francisco, for petitioner. Chris. M. Bradley, of San Francisco, for respondents.

PER CURIAM. Petition for writ of review.

This is a petition for a writ of review for the purpose of having vacated and annulled an award of compensation to an employé of a manufacturing establishment, which carried with the petitioner a policy of insurance covering its industrial liability. It is contended that the evidence does not support the conclusion reached by the Industrial Accident Commission that said employé's disability arises from an accident received during the course of his employment, but arises from a cause entirely independent of such employment. But from a review of the record we think the finding of the commission is well sustained by the law and the evidence adduced at the hearing.

The award is therefore affirmed, and the writ dismissed.

35 Cal. App. 81

BRUSSTER et al. v. INDUSTRIAL ACCIDENT COMMISSION et al. (Civ. 2280.)

(District Court of Appeal, First District, California. Oct. 22, 1917.)

MASTER AND SERVANT 🔑375(1)—WORKMEN'S COMPENSATION ACT—SCOPE OF EMPLOYMENT —NIGHT WATCHMAN.

Assuming that it was within the scope of the night watchman's employment to see that the doors of the premises were properly secured, his resort to a circular saw for the purpose of making a board of suitable length to barricade a door was beyond the scope of his employment, and an award of the Industrial Accident Commission for injuries sustained while using such saw was unwarranted.

Proceedings for compensation before the Industrial Accident Commission. Compensation awarded, and Brusster, Jr., and others petition for writ of review. Award annulled.

Lilienthal, McKinstry & Raymond and Barry Colding, all of San Francisco, for petitioners. Chris. M. Bradley, of San Francisco, for respondents.

PER CURIAM. Petition for writ of review.

The applicant, being a night watchman in the employ of the petitioners, received an injury while using a circular saw on the premises of his employers, the use of said saw being occasioned by the desire of said watchman to procure a board of suitable length to barricade an outer door of the premises which he was employed to watch, the lock on said door being defective. He was awarded compensation by the Industrial Accident Commission, and a writ of review is here sought for the purpose of annulling said award upon the ground that there is no evidence to sustain it.

Assuming that it was within the scope of the applicant's employment to see that the doors of the premises were properly secured by locking, nevertheless we are of the opinion that his resort to the use of a circular saw for the purpose of making a board that would answer the purpose of extending across the door was entirely beyond the scope of his employment, and not in the contemplation of his employers, and was not a resort to reasonable means for the purpose of securing the end intended by him at that time. If we are correct in this conclusion, the award cannot stand; and it is therefore ordered that it be, and it is hereby, annulled.

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35 Cal. App. 83

HERTZ v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO. (Civ. 2283.)

(District Court of Appeal, First District, California. Oct. 22, 1917. Rehearing Denied by Supreme Court Dec. 20, 1917.)

COSTS 🔑119—BONDS—NONRESIDENT—EXTENSION OF TIME.

Under Code Civ. Proc. § 1054, declaring that, when an act to be done relates to the undertakings to be filed, the time allowed may be extended upon good cause shown, the court may extend the time for the filing of a bond for costs which under section 1036 may be required of nonresidents or foreign corporations, and, where the bond is filed within the time extended, the case should not be dismissed.

Petition by Alfred Hertz for writ of mandate to be directed to the Superior Court of the City and County of San Francisco, and the Honorable George A. Sturtevant, Judge thereof. Writ dismissed.

Eric J. Rosenstirn and Brewton A. Hayne, both of San Francisco, for petitioner. Hartley F. Peart and Gus L. Baraty, both of San Francisco, for respondent.

PER CURIAM. Petition for writ of mandate directed to respondent commanding it to dismiss a certain action pending before it because of the alleged failure to file a good and sufficient bond under the provisions of section 1036 of the Code of Civil Procedure.

We are satisfied that the court below was empowered, under the provisions of section 1054 of the Code of Civil Procedure, to extend the time in which the bond in question might be filed; and we think, upon the authority of Sciutti v. Pac. Coal Co., 30 Utah, 462, 85 Pac. 1011, 8 Ann. Cas. 942, and the case of Kissler v. Budge, 24 Idaho, 246, 133 Pac. 125, the court was within the law when it refused to dismiss the cause after a good and sufficient bond had been filed.

For that reason the writ is dismissed.

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35 Cal. App. 807

THANNHAUSER & CO. v. SUPERIOR COURT, CITY AND COUNTY OF SAN FRANCISCO. (Civ. 2289.)

(District Court of Appeal, First District, California. Oct. 22, 1917.)

Petition of Thannhauser & Co. for writ of prohibition directed to Superior Court, City and County of San Francisco. Writ denied.

Chickering & Gregory, of San Francisco, for petitioner. Lent & Humphrey, of San Francisco (Joseph H. Mayer and George D. Perry, both of San Francisco, of counsel), for respondent.

PER CURIAM. It is conceded that the same question is involved in this application as in Hertz v. Superior Court (No. 2283) 169 Pac. 258, decided by this court on October 22, 1917, wherein a writ of mandate was denied.

Upon the authority of that case, the writ in the present case is dismissed.

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35 Cal. App. 99

ALMOND CITY LAND & DEVELOPMENT CO. v. PATTERSON. (Civ. 2242.)

(District Court of Appeal, First District, California. Oct. 23, 1917.)

1. VENDOR AND PURCHASER 🔑314(1) — RIGHTS OF VENDOR—ACTION FOR INSTALLMENT OF PRICE — SUFFICIENCY OF COMPLAINT.

In an action for the recovery of an intermediate installment payment due on a contract for the sale of realty by plaintiff to defendant, the complaint setting forth in full the contract and showing that the sum of $6,000 and interest was due on it prior to the commencement of the action, and that the same was unpaid, was sufficient to constitute a cause of action, though not alleging tender of a deed by plaintiff to defendant.

2. PLEADING 🔑345(1) — JUDGMENT ON PLEADINGS—INSUFFICIENCY OF ANSWER.

Where, after the trial court had properly granted plaintiff's motion to strike out portions of the answer, no sufficient averments remained amounting to a denial of plaintiff's cause of action, or a defense thereto, the court properly granted plaintiff's motion for judgment on the pleadings.

Appeal from Superior Court, Alameda County; Stanley A. Smith, Judge.

Action by the Almond City Land & Development Company against Mary Hughes Patterson. From an order granting plaintiff's motion to strike portions of defendant's answer, and from judgment on the pleadings for plaintiff rendered after its motion to strike out had been granted, and on its motion for such judgment, defendant appeals. Order and judgment affirmed.

J. Monroe Latimer, of San Francisco, for appellant. H. S. Derby, of San Francisco, for respondent.

PER CURIAM. This is an appeal from an order granting the plaintiff's motion to strike out certain portions of the defendant's answer, and also from the judgment on the pleadings rendered and entered after said motion to strike out had been granted and upon plaintiff's motion for such judgment.

[1] The action was for the recovery of an installment payment of $6,000, with interest, alleged to be due upon a certain contract for the sale of real estate by the plaintiff to the defendant. Two points are presented upon the appeal: First, that the complaint did not state facts sufficient to constitute a cause of action. We find no merit in this contention. The complaint sets forth in full the contract upon which the action was predicated, and shows that the sum of $6,000 and interest was due upon that contract prior to the commencement of this action and that the same was unpaid. The appellant contends that the complaint should also have alleged the tender of a deed on the part of the plaintiff to the defendant covering the premises in question, as a prerequisite to the institution of this action; but in view of the fact that this action was brought for the recovery of an intermediate payment due upon said contract, upon which a further and final payment was still to become due before the defendant was entitled to a conveyance of the premises, and that the contract had not been rescinded, but, on the contrary, the plaintiff chose to stand upon its terms, and to bring this action for the recovery of an intermediate payment due and overdue thereon, no averment of tender of a conveyance of the premises to the defendant prior to the commencement of the action, to which she was not as yet entitled, was required.

[2] The second contention of the appellant is that the answer presented sufficient defenses to the action to defeat a motion for judgment on the pleadings; but our examination of the record discloses that after the trial court had granted the plaintiff's motion to strike out portions of said answer—which order, we think, was not erroneous—no sufficient averments remained amounting to a denial of the plaintiff's cause of action or a defense thereto. This being so, the order of the court granting the motion for judgment on the pleading was not erroneous.

The order and judgment are affirmed.

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35 Cal. App. 80

WOLF v. MULCREVY. (Civ. 2287.)

(District Court of Appeal, First District, California. Oct. 22, 1917.)

1. CLERKS OF COURTS 🔑66—CLERK OF SUPERIOR COURT—POWER TO DETERMINE IDENTITY OF PETITIONS FOR PROBATE.

The clerk of the superior court is not invested with power to determine whether or not two petitions for the probate of the estate of a decedent are identically the same.

2. CLERKS OF COURTS 🔑71 — PETITION FOR PROBATE—RIGHT OF PETITIONER—FILING, NUMBERING, AND INDEXING BY CLERK.

The only right which petitioner for probate of the estate of a decedent has is to have his petition filed in the superior court, and, if the clerk fails to file it properly, petitioner has his remedy in the superior court by an application there to have his paper filed, numbered, and indexed by the clerk as it ought to be; so that no injury comes to him because his petition is filed and numbered with a similar pending petition.

3. EVIDENCE 🔑82—SUPERIOR COURT — PRESUMPTION AS TO PROPER ACTION.

The presumption is that the superior court will do what the law demands in relation to compelling its clerk properly to file, number, and index a petition for probate of a decedent's estate.

4. COURTS 🔑207(4)—RIGHT TO WRIT — ADEQUATE REMEDY IN SUPERIOR COURT.

If petitioner in the superior court for probate of the estate of a decedent is entitled to a writ of mandate prayed by him in the appellate court to compel the clerk of the superior court to file, number, and index his petition separately from a similar petition, such remedy may be plainly, speedily, and adequately had in the superior court on proper application and showing made there, so that petitioner is not entitled to writ of mandate from the appellate court.

Application for writ of mandate by Arturo Wolf against Harry I. Mulcrevy. Writ denied.

Dozier & Dozier and Theodore A. Bell, all of San Francisco, for petitioner. Edgar D. Peixotto, Leon Samuels, and J. R. Pringle, all of San Francisco, for respondent.

PER CURIAM. Application for writ of mandate directing the respondent to file, number, and index a petition for the probate of the estate of Tobe Funkenstein, deceased, separately from a similar petition in the matter of the same estate theretofore filed and pending in the superior court of the city and county of San Francisco, of which respondent is clerk.

[1, 2] We are of the opinion that the clerk of the court is not invested with power to determine whether or not these two petitions for the probate of the estate of Funkenstein are identically the same, but, even if he were, we are strongly impressed with the contention made by the respondent that the only right which the petitioner has is to have his petition filed, and if the clerk fails to file it properly, the petitioner then has his remedy in the superior court by an application there to have his paper filed, numbered, and indexed by the clerk as it ought to be.

[3] In short, no injury comes to him because his petition is filed and numbered with a similar pending petition, and the presumption is that the superior court will do what the law demands in the premises. It is conceded that the writ of mandate is issued by this court as a matter of discretion, and not as of right, and in the present case there does not appear to be any injury suffered by the petitioner because of the action of the clerk.

[4] Moreover, we are af the opinion that, if the petitioner is entitled to the remedy prayed for, it may be plainly, speedily, and adequately had in the court below upon proper application and showing made there.

For these reasons, the writ is denied.

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35 Cal. App. 31

CITY OF LOS ANGELES v. STATE INDUSTRIAL ACC. COMMISSION et al.

(Civ. 2365.)

(District Court of Appeal, Second District, California. Oct. 17, 1917.)

MASTER AND SERVANT 🔑375(1)—COMPENSATION FOR INJURIES—PUBLIC OFFICERS—"EMPLOYÉ."

There was no relation of employer and employé existing between a city and a judge of an election board at a municipal election while taking the election returns to the city hall, and the Workmen's Compensation Act (St. 1913, p. 279) did not cover an injury sustained by him, as he was performing a public duty, and the city had no control over his actions, and no right or power to provide means to secure his safety, and, moreover, a contract of employment is deemed an essential element in defining the term "employé."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Employé.]

Proceedings under the Workmen's Compensation Act by Thomas Meehan to obtain compensation for personal injuries, opposed by the City of Los Angeles, alleged employer. Compensation was awarded, and the city petitions for writ of review. Award annulled.

Albert Lee Stephens, City Atty., and W. D. Spalding and Wm. P. Mealey, Deputy City Attys., all of Los Angeles, for petitioner. Christopher M. Bradley, of San Francisco, for respondents.

JAMES, J. Certiorari to review an order of the Industrial Accident Commission allowing compensation to Thomas Meehan, who was a claimant against the city of Los Angeles, alleging that he had been injured while in the employ of that municipality. Meehan acted as judge of an election board at a municipal election held in the city of Los Angeles on the 6th day of June, 1916. After the ballots were counted by the board, Meehan, using his own automobile, took the election returns and was proceeding to the city hall, where he proposed to deliver them to the proper officer. While so engaged his automobile was struck by another motorcar, and by reason of the impact Meehan was thrown from his seat and injured. It was upon this state of facts, related briefly as above, that the commission made its award for compensation.

It is the contention of the city of Los Angeles, appearing here as petitioner: (1) That Meehan was not its employé within the meaning of the Workmen's Compensation, Insurance and Safety Act; (2) that if it is determined that the relation of employer and employé existed at the time of the injury suffered, the employment was both casual, and not in the usual course of the trade and business of the municipality, which latter case is excepted from those in which compensation is provided to be awarded by the act. We agree with the petitioner in its conclusion that the relation of employer and employé did not exist between the claimant and the municipality. Meehan at the time he suffered his injury was performing a public duty which may be imposed upon any citizen—the obligation exists without contract. The provisions of the law are too familiar to require citation here. In determining the nature and extent of the duties of an election officer, the law alone must be looked to. There is no power of direction given to or left in the city regarding the performance of such duties. In other words, the so-called "employer" in such a case has no control over the actions of the election officer. It has no right or power to provide means to secure the safety of the officer which it may require him to take advantage of, and therefore is without the right to safeguard its interests. Had the city, acting in its own interests, proposed to furnish an entirely safe means of transportation to the election officer in order to enable him to transport the election returns from the polling place to the city hall, it was without power to compel him to use such means. The officer had the right to choose the most dangerous and hazardous means affording such transportation, and the city, if it is held that the relation of employer and employé existed, would be without the power to reduce the possibility of damage accruing by reason of a claim for compensation for injuries which might result. There was here no "contract" of employment, which is deemed an essential element in defining the term "employé" under our decisions. Claremont Country Club v. Industrial Accident Commission, 163 Pac. 209; Mono County v. Industrial Accident Commission, 167 Pac. 377. In the latter case it was held that a sheriff of a county injured in the performance of his duties could not recover compensation under the employers' liability act. In the case last cited the decision in Sibley v. State, 89 Conn. 682, 96 Atl. 161, L. R. A. 1916C, 1087, is approved. In that case the court referred to the contention that there was shown a contract between the state and its officer (a sheriff) to pay salary compensation, and that, where such contract existed, the full relation of employer and employé resulted under the Compensation Act there being considered. The court there said:

> "But it is urged in behalf of the claimant that the statute attaching a salary to the office of sheriff raises an obligation or duty on the part of the state to pay it, and that if it refuses to pay the law will give the sheriff an action quasi ex contractu upon the obligation, and that the officer was thus under a quasi contract of service with the state. If for the argument's sake this were to be conceded, it would not advance the claimant's cause. A quasi contract is no contract. * * * The term quasi contract describes a situation where there is an obligation or duty arising by law upon which the same remedy is given as would be given if the obligation or duty arose out of contract. The term itself implies that the obligation or duty is not a contractual one."

Mono County v. Industrial Accident Commission, supra, contains a discussion as to the effect of certain amendments made to the act in 1915 and the prior legislative history, all of which is pertinent to the argument here advanced on behalf of respondents, and is adverse to the contentions here made by the latter.

For the reasons stated, we think that the award cannot be sustained, and it is therefore annulled.

We concur: CONREY, P. J.; SHAW, J.

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35 Cal. App. 104

WESTERN INDEMNITY CO., Inc., et al. v. INDUSTRIAL ACC. COMMISSION OF STATE OF CALIFORNIA.

(Civ. 2375.)

(District Court of Appeal, Second District, California. Oct. 23, 1917.)

1. Master and Servant 🔑398—Workmen's Compensation Act—Attorney in Fact—Application—Unauthenticated Letter.

An authenticated letter written by the Austrian father of a son killed in service in America, to a third person not a relative, as attorney in fact, purporting to authorize the third person to apply under the Workmen's Compensation Act for adjustment of claim, constituted no legal authority for the third person's action in filing application.

2. Master and Servant 🔑405(5) — Workmen's Compensation Act—Finding That Deceased Contributed to Father's Support—Evidence.

Under Workmen's Compensation Act (St. 1913, p. 313, as amended by St. 1915, p. 1102, § 28), § 77, subd. "a," providing that hearsay or testimony not competent to be admitted in a trial court may be received by the Industrial Accident Commission, its effect being restricted to statements written or oral of a person who is dead, or who cannot be found, which relate directly to the injury in question, there is no warrant for a finding that deceased contributed to his father's support by sending money to him in Austria, the sole basis of which is testimony by deceased's depositary that deceased had requested an advancement of money, saying it was intended for such purpose.

3. Master and Servant 🔑398—Workmen's Compensation Act—Jurisdiction of Industrial Accident Commission—Application.

Under Workmen's Compensation Act, § 22, providing that jurisdiction of the Industrial Accident Commission is obtained upon filing of an application in writing by a party interested, stating the nature of the controversy, or concerning any liability arising out of or incident thereto, where no application was at any time made by one unrelated to deceased servant for reimbursement for funeral expenses paid by him in the burial of deceased, the commission had no jurisdiction to make an allowance therefor on the ground that it appeared that such third person, a stranger to the record, had made such disbursements.

Proceedings by William Pavlovic for compensation under the Workmen's Compensation Act for the death of his son, Nick Pavlovic, opposed by John B. Glick, employer, and the Western Indemnity Company, Incorporated, insurer. Compensation was awarded by the Industrial Accident Commission, and to review its order the insurer and employer bring certiorari. Order annulled.

See, also, 163 Pac. 60.

Duke Stone, of Los Angeles, for petitioners. Christopher M. Bradley, of San Francisco, for respondent.

SHAW, J. Certiorari to review an order of the Industrial Accident Commission whereby an award of compensation was made to William Pavlovic as a dependent of his son Nick Pavlovic, who died from injuries sustained by an accident while in the employ of John R. Glick who held an insurance policy issued by the Western Indemnity Company covering such liability.

[1] It appears from the record that William Pavlovic has at all times lived in Austria; that the accident wherein his son, who was a common laborer, sustained the injuries as a result of which he died on September 5, 1915, occurred on September 2, 1915. The application for adjustment of the claim was filed on August 17, 1916, by Stephen Pavlovic, as attorney in fact of William Pavlovic to whom he bore no relation. Authority for such action had and taken by Stephen Pav-

lovic was an unauthenticated letter received by him from William Pavlovic, which letter was not written or signed by the latter, but for him by another. In our opinion, this unauthenticated letter written by the father, purporting to authorize Stephen Pavlovic to act in the matter, constituted no legal authority for the action taken by Stephen Pavlovic in filing the application. After the filing of the same and the partial hearing of the matter, Stephen Pavlovic received and presented what purported to be a power of attorney, signed by William Pavlovic, authorizing him to initiate the proceeding. Waiving the question as to whether or not such purported power of attorney would cure the irregularity, there is nothing in the record indicating that such document was acknowledged or its execution proved in a manner which could be deemed a sufficient authentication thereof.

[2] While petitioners insist that no party in interest filed the application, as required by section 22 of the Workmen's Compensation Act, their chief contention is that there was no legal evidence of any kind or nature showing that William Pavlovic was a dependent of his son Nick Pavlovic at the time of his death. The evidence shows that deceased was 22 years old; that he had been in this country about four years; that for the purpose of providing means to procure his transportation from Austria to the United States, his father advanced him the sum of $130, and which he repaid. There is an entire absence of legal evidence tending to show that during said four years of his life spent in the United States he contributed anything whatsoever to the support of his father, William Pavlovic, or sent him any money other than the $130 in repayment of the loan made. The order made is based solely upon hearsay testimony of Stephen Pavlovic, who filed the application, which is to the effect that deceased deposited his money with him, which in fact is untrue, since it was deposited with his wife, and that he from time to time, at the request of deceased, advanced money to him upon the statement of deceased that he wanted to send money home, and he supposed he did so. But other than what was told him, he knew nothing about it. While section 77, subdivision "a", of the act provides that "hearsay or testimony not competent to be admitted in a trial in court" may be received, its purpose and effect are restricted to "statements, written or oral, of a person who is dead, or who cannot after diligent search be found," and which "relate directly to the injury in question." There is nothing in this provision which by any interpretation could warrant a finding that deceased contributed to his father's support by sending him money, the sole basis of which is testimony to the effect that deceased had requested from his depositary an advancement of money, saying that it was intended for such purpose. Conceding the relation of father and son, and that the former was in indigent circumstances, nevertheless there is no evidence whatsoever which tends in the remotest degree to show any recognition of his needs on the part of the son, or that he ever contributed anything whatever to his support.

[3] By its order the commission made an allowance of $100 to Stephen Pavlovic for funeral expenses paid by him in the burial of deceased. Section 22 of the act provides that jurisdiction of the commission is obtained upon the filing therewith of an application in writing by a party interested, stating the nature of the controversy, or concerning any liability arising out of or incident thereto. No application was at any time made by Stephen Pavlovic for reimbursement for such expenditure, and in the absence thereof the commission had no jurisdiction to make an allowance to him upon the sole ground that in the course of the proceedings it appeared that he, a stranger to the record, had made such disbursement.

The order is annulled.

We concur: CONREY, P. J.; JAMES, J.

35 Cal. App. 88

GORTER v. INDUSTRIAL ACC. COMMISSION et al. (Civ. 2226.)

(District Court of Appeal, First District, California. Oct. 22, 1917.)

Petition by one Gorter for a writ of review, directed against the Industrial Accident Commission and others, to review an award made by the commission. Writ dismissed, and award affirmed.

H. Clyde Harms and Randolph V. Whiting, both of San Francisco, for petitioner. Chris. M. Bradley, of San Francisco, for respondents.

PER CURIAM. Petition for writ of review. It is contended by petitioner that the applicant in whose favor an award was made by the Industrial Accident Commission was not in his employ, but was working independently, although under an arrangement with petitioner by which the latter furnished him with the necessary tools and appliances for performing his work and received 40 per cent. of the amounts earned by the applicant. The respondent Industrial Accident Commission concluded from the evidence on the whole that the relation of employer and employé existed, and thereupon made its award. We are satisfied that the evidence sustains this conclusion, and for that reason the writ is dismissed, and the award affirmed.

(176 Cal. 706)

PERRY et al. v. INDUSTRIAL ACC. COMMISSION et al. (S. F. 8459.)

(Supreme Court of California. Dec. 14, 1917. Rehearing Denied Jan. 10, 1918.)

1. MASTER AND SERVANT 🔑405(5) — WORKMEN'S COMPENSATION PROCEEDINGS — EVIDENCE—DEPENDENCY.

In a workmen's compensation proceeding, where it appeared that the employé's wife was living separate from him, and had neither received nor sought any support from him for years, and was suing him for a divorce without claiming alimony, a finding of the Industrial Accident Commission that she was not in fact dependent on him was supported by the evidence.

2. MASTER AND SERVANT 🔑388—WORKMEN'S COMPENSATION PROCEEDING—RIGHT TO COMPENSATION.

Workmen's Compensation Act (St. 1913, p. 279) § 19, as amended by St. 1915, p. 1087, § 7, provides that a wife shall be conclusively presumed wholly dependent upon a husband with whom she was living at the time of his death or who was legally liable at such time for her support; that a child under 18 shall be conclusively presumed dependent upon the parent; that, if there is more than one person wholly dependent upon a deceased employé, the death benefit shall be divided equally among them, unless otherwise ordered by the commission; and that death benefits shall be paid to such one or more of the dependents as may be determined by the commission, and the commission may apportion such benefits among the dependents in such manner as may be in proportion to their respective needs and just and equitable. *Held* that, assuming that a wife living apart from the employé was conclusively presumed dependent upon him for support, still, where there were children also dependent on him, the commission had power to award the compensation in proportion to their respective needs and in such manner as might be just and equitable, even to the total exclusion of the wife.

3. MASTER AND SERVANT 🔑417(7)—WORKMEN'S COMPENSATION PROCEEDING—REVIEW —QUESTIONS OF FACT.

The question of what disposition of compensation for the death of an employé is in proportion to the respective needs of the dependents and just and equitable is one of fact, the determination of which is committed to the Industrial Accident Commission, and in its determination the commission is necessarily vested with a large discretion, and no court should interfere with such determination unless it clearly appears that the conclusion of the commission is without substantial support in the record.

4. MASTER AND SERVANT 🔑388—WORKMEN'S COMPENSATION PROCEEDING — RIGHT TO COMPENSATION.

Where the wife of a deceased employé was living apart from him, and had not received or sought support from him for years, and was suing him for divorce without asking for alimony, the Industrial Accident Commission's conclusion that it would be just and equitable and in proportion to the respective needs of the dependents to award the whole compensation for the employé's death to his two minor children, one of whom was between two and three years of age, and the other less than a year old, was warranted.

In Bank. Proceedings under the Workmen's Compensation Act to obtain compensation for the death of Clarence H. Perry. Compensation was awarded to certain other parties to the exclusion of Gertrude E. Perry, and she and the Hartford Accident & Indemnity Company, insurer, apply for a writ of review. Affirmed.

Hadsell, Sweet & Ingalls and F. Harrison Smitton, all of San Francisco, for petitioners. Christopher M. Bradley, of San Francisco, for respondents.

ANGELLOTTI, C. J. One Clarence H. Perry was killed on November 10, 1916, under such circumstances as to entitle his dependents to a death benefit from his employer under the terms of the Workmen's Compensation, Insurance, and Safety Act. Petitioner Hartford Accident & Indemnity Company was the insurance carrier of the employer. The amount of death benefit was fixed by the commission at $3,050. No question is raised as to the correctness of the award, in so far as the amount is concerned. By its decision the commission awarded all of the same to the two minor children of deceased to the exclusion of petitioner Gertrude E. Perry, who was his wife, and it is claimed the award was in excess of the powers of the commission, and that the wife should be awarded a portion of the death benefit.

The commission, while finding that Gertrude E, Perry was the lawful wife of the deceased, further found that in November, 1913, he "separated from" her, and thereafter did not contribute to her support, that she had instituted proceedings for divorce, with the result that in October, 1916, an interlocutory decree in divorce was granted her, without any award of alimony, and "that it is in accordance with the respective needs of the dependents of said deceased employé, and is just and equitable, that the entire death benefit be apportioned and paid to the" two minor children.

The material facts, as shown by the record, may be briefly stated. Deceased had been married to Gertrude E. Perry some three years, when, in November, 1913, he left her. There is no issue of said marriage. He never thereafter contributed to her support, and she has ever since been entirely dependent on her parents for support. On December 4, 1913, deceased commenced to live with another woman as his wife, and so continued to the time of his death. The two minor children, both girls, are the issue of this union, one being between two and three years of age, and the other less than a year. Deceased supported this woman and his two children to the time of his death, and they were wholly dependent on him for support. He left a policy of insurance in the sum of $1,000 payable to the mother of the children, and apparently nothing else. In the year 1916 the wife commenced her action for a divorce on the ground of desertion, not asking for any alimony. She testified that her reason for not seeking alimony was that she thought he was unable to pay any, and that "it would be embarrassing to his family" for her to ask for it. She obtained an interlocutory decree in October, 1916, a few weeks before her husband's death. She was at first disposed to relinquish in favor of these children all claim to any part of the award that might be made by the commission on account of the death of her husband, and signed a written waiver and relinquishment in their favor. Acting on such waiver, the commission in the first instance awarded the whole sum to the minors. She subsequently changed her mind in this regard, and, a rehearing having been granted by the commission, she pressed her claim for a portion of the death benefit before that body, with the result already stated. Her claim being disallowed, she seeks relief here. The insurance carrier joins with her, but in no way disputes its liability for the amount of the award.

[1] No question is raised as to the two minor children being conclusively presumed to be wholly dependent for support upon the deceased employé by virtue of the provisions of section 19a(3) of the act, as apparently they were also wholly dependent in fact. The surviving wife claims that the same conclusive presumption obtains as to her by virtue of section 19a(1), which declares such presumption in favor of "a wife upon a husband with whom she was living at the time of his death, *or for whose support such husband was legally liable at the time of his death*" (her claim being based upon the portion we have italicized), and she also claims that the evidence shows that she was so wholly dependent in fact. As to the latter claim the commission found against her, and in view of the showing that she had received nothing from him in years, apparently had not sought and was not relying upon receiving anything from him, and was pressing her claim for a divorce from him without any provision for support, it cannot be held that this finding was without sufficient support in the evidence. Solely for the purposes of this decision we shall assume that she comes within the provisions of section 19a (1), hereinbefore quoted, and that by virtue of this law she must be conclusively presumed to have been wholly dependent for support upon deceased at the time of his death. If we so assume, the result is that we have three persons who must be held to have been wholly dependent upon him for support, the surviving wife and the two minor children.

[2-4] The act provides in section 19d(2):

> "If there is more than one such person wholly dependent for support upon a deceased employee, the death benefit shall be divided equally among them, *unless otherwise ordered by the commission*." (The italics are ours.)

The same provision, viz. "unless otherwise ordered by the commission," is to be found in other sections relative to the distribution of the death benefit. By section 19e it is provided as follows:

> "The death benefits shall be paid to such one or more of the dependents of the deceased, or to a trustee * * * for the benefit of the person or persons entitled, as may be determined by the commission, and the commission may, anything in this act contained to the contrary notwithstanding, apportion such benefits among the dependents in proportion to their respective needs and as may be just and equitable, and may order payment to a dependent subsequent in right, or not otherwise entitled, upon good cause being shown therefor."

This provision amply authorizes the commission to award the death benefit among the dependents in such manner as may be in proportion to their respective needs, and just and equitable, even to the total exclusion of one or more of them. It was upon this provision that the action of the commission was based in the case at bar, as is shown by the finding already set forth. The question what disposition in any particular case is in proportion to the respective needs of the dependents and just and equitable is, of course, one of fact, the determination of which is committed to the commission, and in its determination the commission is necessarily invested with a large discretion. Certainly no court should interfere with the determination of the commission in such a matter unless it is clearly made to appear that the conclusion is without substantial support in the record. In the case at bar we are of the opinion that, in view of the facts shown by the record, it cannot fairly be held that there is not sufficient support for the conclusion of the commission.

Our view on this point renders unnecessary discussion on any other point.

The award of the commission is affirmed.

We concur: SHAW, J.; SLOSS, J.; MELVIN, J.; HENSHAW, J.

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176 Cal. 584

TERRY v. SOUTHERN PAC. CO.

(L. A. 3954.)

(Supreme Court of California. Nov. 30, 1917.)

COURTS ⚿397 — ERROR TO STATE COURT — RIGHT TO ALLOW.

Where a cause was appealed to the Supreme Court, which transferred it to a District Court of Appeal, and, after hearing, the Supreme Court refused to vacate the decision of the District Court of Appeal and hear the case, the District Court of Appeal was the highest court in which a final judgment could be rendered, within the United States statutes, and it, and not the Supreme Court, has authority to allow a writ of error from the United States Supreme Court.

In Chambers of the Chief Justice.

Action by J. M. Terry against the Southern Pacific Company, a corporation. Judgment for plaintiff, and defendant appealed. Judgment affirmed by the District Court of Appeal. Application by the defendant for a writ of error from the United States Supreme Court to this court. Application denied.

See, also, 169 Pac. 86.

E. B. Drake, of Los Angeles, for plaintiff. Henry T. Gage and William I. Gilbert, both of Los Angeles, for defendant.

ANGELLOTTI, C. J. This is an application by the Southern Pacific Company, a corporation, for allowance of a writ of error from the United States Supreme Court to this court.

The appeal originally taken to this court was by express authorization of the provisions of the Constitution of this state transferred to the District Court of Appeal of the Second Appellate District, and has ever since remained within the jurisdiction of that court. Decision thereon was rendered by that court, affirming the judgment of the trial court, on July 18, 1917, and that decision has become final. Subsequently thereto, in accord with certain provisions of our Constitution, this court was asked to vacate the decision of the District Court of Appeal and order the cause transferred to this court for hearing and determination, and this application was denied; the court refusing to again assume jurisdiction of the cause.

In view of certain decisions of the United States Supreme Court, I am of the opinion that, under the circumstances, within the meaning of the provisions of the United States statutes governing the question, the District Court of Appeal of the Second Appellate District must be held to be the highest court in which a final judgment could be rendered in this cause (see Western Union Tel. Co. v. Crovo, 220 U. S. 364, 366, 31 Sup. Ct. 399, 55 L. Ed. 498; Norfolk Turnpike Co. v. Virginia, 225 U. S. 269, 32 Sup. Ct. 828, 56 L. Ed. 1082; Mulcrevy v. City and County of San Francisco, 231 U. S. 669, 34 Sup. Ct. 260, 58 L. Ed. 425; Second National Bank, etc., v. First National Bank, etc., 242 U. S. 600, 37 Sup. 236, 61 L. Ed. 518), that a writ of error would therefore lie to that court only, and that I have no authority to allow the writ.

The application for a writ of error is denied.

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34 Cal. App. 773

CONNELY v. SUPERIOR COURT OF LOS ANGELES COUNTY et al. (L. A. 5471.)

(Supreme Court of California. Dec. 6, 1917.)

JUSTICES OF THE PEACE 🔑43(3)—JURISDICTION — ACTIONS FOR POSSESSION OF PROPERTY.

Under Const. art. 6, § 11, providing inferior courts shall not trench upon courts of record, and Code Civ. Proc. § 112, subd. 3, providing that justice's courts have jurisdiction in actions to recover the possession of personal property, if its value does not exceed $300, such court has jurisdiction where the property is valued at $290 and damages for unlawful detention are $100.

In Bank. Certiorari by Sallie Connely to review an order made in the Superior Court of the County of Los Angeles, State of California, by John M. Yorke, Judge thereof, dismissing an action appealed from justice's court. Order annulled by the District Court of Appeal of the Second Appellate District. Rehearing denied.

The following is the opinion of James, J., in the District Court of Appeal, concurred in by Conrey, P. J., and Shaw, J.:

Petitioner in this proceeding sought a writ of certiorari to review an order made in the superior court, which order purported to accomplish the dismissal of an action theretofore brought into the superior court by appeal from the justice's court. The writ was issued and return duly made. It appears that the petitioner commenced her action in the justice's court in September, 1916. The action was one of claim and delivery, and it was alleged that the value of the property was $290 and that the plaintiff had been damaged by the unlawful detention thereof in the sum of $100. The relief demanded was for the possession of the property, or, in case possession could not be had, then for its value in the sum stated, together with the amount of damages alleged. Answer was filed and the case duly set for trial in the justice's court and notice given to the defendants. Defendants failed to appear at the trial, and after hearing evidence the justice entered judgment in accordance with the prayer of the complaint. Defendants thereupon appealed the case to the superior court, where, after certain proceedings, the court made the following order: "In this cause heretofore submitted on April 3, 1917, it is ordered that the action be and the same is hereby dismissed for want of jurisdiction." It is this order that petitioner seeks to have annulled.

The main question presented is as to whether the justice's court had jurisdiction of an action for the recovery of personal property of the alleged value of $290 where the additional sum of $100 damages was claimed. The civil jurisdiction of the justice's court, as defined in section 112, Code of Civil Procedure, includes: "3. In actions to recover the possession of personal property, if the value of such property does not amount to three hundred dollars." Counsel for respondent argues that, as section 11, article 6, of the Constitution of this state provides that the powers of inferior courts "shall not in any case trench upon the jurisdiction of the several courts of record," section 112 of the Code of Civil Procedure, defining the jurisdiction of the justice's court, must be held to include only actions in which the total demand does not amount to $300. But we may inquire: If the justice's court did not have jurisdiction of this action, what court did? The constitutional provision defining the jurisdiction of superior courts (section 5, art. 6) gives jurisdiction to such courts where personal property is in litigation, where "the value of the property in controversy amounts to three hundred dollars." In an action of claim and delivery the recovery of the property itself is the main demand—damages are incidental. In the case of Astell v. Phillippi, 55 Cal. 265, our Supreme Court said: "It would seem, in like manner, that, when the standard of jurisdiction is 'the value of the property,' the recovery of which is the main object of the proceeding, the incidental damages for the detention are not limited." Respondent argues that this decision was rendered under a different state of the law; that the Constitution of 1849 was then in force, which did not contain provisions simiıar to that in section 11, article 6, referred to above.

As a matter of fact, the Constitution of 1849 did contain, in the amendments ratified in 1862, the same provision in almost the identical terms. The case of Astell v. Phillippi is in point. But, even though it did appear that the demand was for an amount in excess of the jurisdiction of the justice's court, still, where the appeal was regularly taken and the case was brought into the superior court, the latter court had jurisdiction to determine the appeal on its merits. De Jarnett v. Marquez, 132 Cal. 702, 64 Pac. 1090, cited in Riverside Heights Water Co. v. Riverside Trust Co. et al., 148 Cal. 457, 83 Pac. 1003. We do not mean to decide that a party properly objecting to the jurisdiction of a justice's court may not have that objection reviewed and passed upon on appeal; but the record here discloses no objection as having been made in either court. Apparently, judging from the face of the return, the action of the court was taken of its own motion. However, for the reasons stated, we are satisfied that the justice's court had jurisdiction of the action, in that the value of the property involved did not amount to $300.

The order of the superior court is annulled; petitioner to have her costs.

George P. Cook, of Los Angeles, for petitioner. Hugh E. Macbeth, of Los Angeles, for respondents.

PER CURIAM. The petition for a hearing in this court, after decision by the District Court of Appeal of the Second Appellate District, is denied. As we read the opinion of the District Court of Appeal, the conclusion of the court is based wholly upon the proposition that the justice's court had jurisdiction of the action, in that the value of the property involved did not amount to $300, and we are entirely in accord with what is said by the District Court of Appeal on this question.

In denying the hearing, we are not to be understood as expressing any opinion upon the other question discussed in the opinion.

(176 Cal. 600)

RICHMOND v. JULIAN CONSOL. MINING CO. (L. A. 4067.)

(Supreme Court of California. Dec. 5, 1917.)

1. Appeal and Error ⟹616(2)—Record on Appeal—Authentication.

Where the record is prepared under the alternative method provided by Code Civ. Proc. §§ 953a–953c, all that may be authenticated by the clerk is the judgment roll, together with notice of appeal, and in the absence of a certificate of the trial judge copies of certain notices of motion to dismiss for want of diligence in prosecution and affidavits and orders with reference thereto cannot be considered.

2. Appeal and Error ⟹907(1)—Regularity of Proceedings in Lower Court—Presumption.

Code Civ. Proc. § 583, requiring dismissal of action where no trial is had within five years after filing of answer, excepts from its provisions cases in which the parties have extended the time by written stipulation. *Held* that, although the trial took place more than five years after filing of answer, it would be presumed on appeal that there was a stipulation justifying trial court in proceeding where there was nothing in the record to indicate that a stipulation extending time was or was not filed; every presumption being in favor of the regularity of the proceedings in the court below.

Department 1. Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Action by G. B. Richmond against the Julian Consolidated Mining Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Sidney J. Parsons, of Los Angeles, for appellant. W. W. Butler, of Los Angeles, for respondent.

SLOSS, J. The plaintiff recovered judgment against the defendant on two promissory notes made by defendant to plaintiff's assignor. The defendant appeals from the judgment.

The record on appeal was prepared under the alternative method. Code Civ. Proc. §§ 953a–953c. It is certified by the clerk alone.

[1] The appellant's first contention is that the action should have been dismissed, on its motion, for want of diligence in prosecution. The transcript contains copies of certain notices of motion, affidavits, and orders bearing on this matter. But it is settled by our decisions that, where a record is made up under the alternative method, all that may be authenticated by the clerk is the judgment roll, together with the notice of appeal. In the absence of a certificate of the trial judge, other papers are not a part of the record on appeal, and they cannot be considered. Totten v. Barlow, 165 Cal. 378, 132 Pac. 749; Bush v. Allen, 172 Cal. 102, 155 Pac. 456.

[2] From recitals in the findings and the judgment, it appears that the trial took place something more than five years after the filing of defendant's answer. The appellant claims that this lapse of time made it mandatory on the court to dismiss the action on its own motion. The last clause of section 583 of the Code of Civil Procedure, on which this claim is founded, excepts from its operation those cases in which the parties have extended the time by written stipulation. Error must be affirmatively shown; it is not presumed. On the contrary, every presumption is in favor of the regularity of the proceedings of the court below. There being nothing in the record to indicate that a stipulation extending time was, or was not, made, we must assume, in support of the action of the court in entering judgment, that it had before it such a stipulation as would justify it in proceeding.

Apart from this, it is not suggested that any error appears on the face of the judgment roll.

The judgment is affirmed.

We concur: SHAW, J.; LAWLOR, J.

(176 Cal. 699)

PEOPLE v. WONG HING. (Cr. 2102.)

(Supreme Court of California. Dec. 13, 1917. Rehearing Denied Jan. 10, 1918.)

1. Homicide ⇨250 — Murder — Evidence — Sufficiency.

Evidence *held* to sustain conviction of murder.

2. Criminal Law ⇨703 — Trial — Conduct of Attorneys.

In prosecution of a Chinese for murder, after statement in opening argument that the state expected to show that a highbinders' war or Chinese tong was begun on the day of the murder, in the absence of showing of bad faith or that the statement was made without intention of trying to support it, there was no misconduct by failure to produce such evidence.

3. Criminal Law ⇨1170½(5) — Appeal — Harmless Error—Cross-Examination.

In prosecution of a Chinese for murder, though it was improper to ask accused how long he had belonged to a tong or society of highbinders when on objection he was then asked how long he had belonged to the tong, the error was harmless, especially where no request was made that the jury be admonished to disregard the question.

4. Homicide ⇨174(6)—Evidence—Admissibility.

In prosecution of a Chinese for murder, it was not error to admit evidence as to the meaning of Chinese characters appearing on a badge found in his possession when arrested.

5. Criminal Law ⇨651(1)—Viewing Premises—Discretion of Court.

Under Pen. Code, § 1119, providing that when in the opinion of the court it is proper the jury may view the premises, the matter of viewing the premises is entirely within the discretion of the court.

6. Homicide ⇨305 — Instructions — Accessories.

Where the evidence justified conviction on theory either that defendant shot deceased or was present, aiding, and abetting in the shooting, it was proper to instruct that in either case he was guilty as a principal, since Pen. Code, § 1127, makes it the duty of the court to charge the jury as to all matters of law necessary for their information.

7. Criminal Law ⇨800(2)—Instructions—Commonplace Words.

In prosecution for murder, where the court instructed on accessories, it was not error to fail to define the term "aiding and abetting," which are commonplace words, especially in the absence of a request for such definition.

In Bank. Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Wong Hing was convicted of murder, and, from such judgment and order denying motion for new trial, he appeals. Affirmed.

Wm. Hoff Cook, R. Porter Ashe, Albert Waldstein, and T. M. O'Connor, all of San Francisco (Harold C. Faulkner, of San Francisco, of counsel), for appellant. U. S. Webb, John H. Riordan, C. M. Fickert, Fred L. Berry, and Jas. F. Brennan, all of San Francisco, for the People.

VICTOR E. SHAW, Judge Pro Tem. The grand jury of the city and county of San Francisco returned an indictment charging defendant with the crime of murdering a fellow countryman known as Nung Yu. Upon trial he was convicted of murder in the first degree, followed by judgment of the court sentencing him to execution as provided by law. From this judgment and an order of court denying his motion for a new trial defendant appeals.

The alleged errors upon which he bases his claim for a reversal are: First, insufficiency of the evidence to justify the verdict; second, misconduct of the district attorney; third, rulings of the court in admitting and rejecting testimony; and, fourth, erroneous instructions given the jury.

[1] As to the first assignment of error, it appears that at the time of the killing, about 1:30 p. m. on March 5, 1917, the deceased, Nung Yu, was engaged in conducting an undertaking business in San Francisco, at 750 Pacific street, adjoining which on the west was a vacant lot, through which deceased had access from the front entrance of his storeroom to a house in the rear thereof occupied by him and his family as a residence. Thomas J. Wright, a witness called on behalf of the prosecution, in substance testified: That shortly before the commission of the crime he was with Nung Yu, in the latter's store, when defendant, accompanied by another Chinaman, leaving a third outside, entered and, in English, asked who was the proprietor of the place, to which deceased replied, "I am the proprietor." That "Yu seemed to be getting a little nervous." That about the same time some shooting occurred on Stockton street, when Yu ran out of his place, going through the vacant lot towards his residence. "He walked back through the vacant lot. It is something over 120 feet or more, and as he turned to walk through the vacant lot he started back, and at that time they commenced opening fire." That he saw defendant shoot deceased about four times in the back. That deceased fell and, raising his hand up, said: "I don't belong to any society." That after the shooting defendant ran through the vacant lot, throwing the gun down, and went out through that lot over to Broadway, where he was captured by an officer and brought back. In reply to the question, "How many men were shooting at the deceased in that vacant lot?" witness said:

> "I only saw that man doing the shooting. There were three men, three Chinamen, but two was around him. But I seen that young man who pumped him in the back four times. He was the one that asked was he the proprietor; he was the one that made the finishing touch."

Both upon his direct and cross examination the witness admitted that, due to the occurrence, he was somewhat excited, but is positive that defendant was the Chinaman who came into Yu's store and inquired for the proprietor, and that some ten minutes later he saw the same man, with another Chinaman, both of whom were engaged in the shooting of Yu. On cross-examination the witness said:

> "It is a pretty hard matter for me to say that he is the one that made the fatal blow, but I say he was engaged in the shooting."

Other testimony of this witness is to the effect that, after deceased was down, defendant stood within eight or ten feet of him and fired four or five shots into his body.

The wife of deceased also witnessed the shooting and testified: That the defendant fired one shot when her husband, who was in the vacant lot, fell down and, partially rising, said: "I belong to no tong. My name is Nung Yu." That defendant fired more shots and then ran past her doorway. That as to the identity of defendant, she was positive that he was the man who did the shooting.

Another eyewitness, Louis Bergamaschi, testified: That while in his saloon, some 200 feet distant but in plain view of the place where the shooting occurred, he heard some shots and, looking out through the rear window, saw deceased lying on the ground, surrounded by three Chinamen, two of whom started to run away and the other, said by the witness to be defendant, fired three shots at deceased, threw the gun away, and then ran through an alley past his saloon to Broadway street, upon which the saloon fronted. That witness ran to the front door of his saloon and saw the three Chinamen separate, the defendant crossing Broadway, where Officer Collins, whose attention was attracted by the witness blowing a police whistle, arrested him. In response to the question, "Was it this Chinaman" (defendant)? the witness said:

> "Yes, it was this fellow. I didn't know him before, but I see him when he was coming, and I paid attention right where he was going, and Mr. Collins he brought him back. * * * I didn't lose him with my eyes; I saw him all the time."

Further testifying, the witness said:

> "I could not prove that he is the man that done the shooting, but he was one of the men in the bunch. * * * I know he is one of the men of the three, but I dont know if he was the man that was shooting."

Upon arresting defendant, Officer Collins, taking him by the arm, conducted him to where Nung Yu was lying, when defendant said, "I didn't do it." In applying the handcuffs, witness noticed a powder mark on defendant's right hand, and asked defendant, "How did you get this?" to which defendant replied: "You done; you done it." Again defendant said: "You did it; you did it." The bullets which caused the death of deceased were of 32-caliber size, and a 32-caliber pistol containing six shells, five of which were empty, and its condition evidencing its recent discharge, was, a few minutes after the tragedy, found some 25 feet from where Yu fell when he was shot. Afterwards Officer Richards went to the room occupied by defendant and discovered a box of 32-caliber cartridges, such as were used in said gun, from which six shells were missing. This room was occupied, besides defendant, by two other Chinamen, one of whom testified that the cartridges and a 32-caliber pistol had been left with him by a cousin who had gone to China, and he had removed six cartridges from the box to load the pistol. Defendant explained his presence in the vicinity upon the theory that he was hunting a carpenter shop located near there, the name and address of the proprietor of which he had in his possession when arrested. The testimony of the eyewitnesses, differing somewhat as to minor details, which under the circumstances was most natural, together with incriminating circumstances, the explanation of which failed to satisfy the jury, clearly justified the conclusion that, if the defendant did not fire the shots himself, he, nevertheless, was a party to the commission of the crime and aided and abetted therein. Indeed, upon the evidence it is difficult to see how the jury could have arrived at any verdict other than the one rendered.

[2] An assignment of misconduct of the district attorney is predicated upon the fact that in his opening statement to the jury he said:

> "We expect to show that on the afternoon of the 5th day of March, 1917, about 1:20, a so-called highbinders' war or Chinese tong was begun in this city."

There is evidence, though slight, from which an inference might be drawn that the killing of Yu was the result of a tong feud. Conceding, however, that no evidence was offered in support of the statement so made to the jury, there is nothing in the record tending to show that it was made in bad faith or without intention of trying to support it by evidence. In the absence of such showing, it cannot be said the district attorney was guilty of misconduct because he failed to produce such evidence. People v. Gleason, 127 Cal. 323, 59 Pac. 592; People v. Searcey, 121 Cal. 1, 53 Pac. 359, 41 L. R. A. 157.

[3] It appearing from defendant's testimony that he was a member of the Bing Kong Tong, he was, on cross-examination, asked, "Now, how long have you belonged to this Bing Kong Tong or society of highbinders, as it is commonly known?" to which defendant interposed an objection upon the ground that it was incompetent, irrelevent, and immaterial. Without waiting for a ruling of the court thereon, the attorney for the prosecution, impliedly conceding the impropriety thereof, recast the question and asked, "How long have you belonged to that Tong?" No evidence had been offered that the Bing Kong Tong, of which defendant was a member, was a society of highbinders; and hence the question containing the implication was highly improper and should not

have been put to the witness. Nevertheless, we are unable to perceive, under the circumstances, how defendant could in any event have been prejudiced thereby. Moreover, no request was made by defendant's attorney that the trial court admonish the jury to disregard the question, in the absence of which, where such admonition may cure the error, it has been held this court will not consider the same. People v. Metzler, 21 Cal. App. 80, 130 Pac. 1192; People v. Shears, 133 Cal. 154, 65 Pac. 295; People v. Bradbury, 151 Cal. 675, 91 Pac. 497.

[4] Neither was it prejudicial error to receive evidence as to the meaning of Chinese characters appearing on a badge found in defendant's possession when arrested. As translated these characters were, "Congratulations on the dedication," and then in English, "B. K. T. of San Francisco, California," followed in Chinese by, "San Francisco Bing Kong Tong Representative, Wong Yak Shu." Defendant's possession of the badge with these characters is accounted for in the fact, as shown by him, that he had, as a delegate from the San Francisco society, recently represented it at a meeting of the Seattle branch in the dedication of a new building.

While the shots fatal to defendant were fired from a 32-caliber revolver, it appears also that a 38-caliber revolver, found at the place where the shooting occurred, was used by one of the persons engaged in attacking Yu, one shot from which took effect in his thigh, and concerning which witness Davis stated it contained five empty shells and one loaded. The revolver, however, as appears from the record, was not offered in evidence, but, at the request of the prosecution, merely marked as an exhibit. Hence there is no ground for appellant's contention that the court erred in admitting this revolver in evidence, since it was not so admitted.

[5] Error is also predicated upon a ruling of the court refusing to make an order granting defendant's request that the jury be permitted to view the premises where the offense was committed. Section 1119 of the Penal Code provides:

> "When, in the opinion of the court, it is proper that the jury should view the place in which the offense is charged to have been committed, or in which any other material fact occurred, it may order the jury to be conducted in a body * * * to the place. * * * "

Under this provision the making of such order is a matter committed solely to the discretion of the court, and it is difficult to conceive of a case in which the facts would justify a reversal for an abuse of such discretion. People v. Maupins, 30 Cal. App. 393, 158 Pac. 502; People v. Howard, 28 Cal. App. 180, 151 Pac. 754. In People v. Fitzpatrick, 80 Cal. 538, 22 Pac. 215, it is said:

> "Sending a jury out to view premises, even when clearly within section 1119 of the Penal Code, is a hazardous proceeding, and frequently leads to difficulties; and it would be well for trial courts not to make use of the power therein given except in cases which seem to imperatively call for it."

In the case at bar a plat, correctly delineating the premises and objects surrounding the scene where the offense was committed, was used by the witnesses in giving their testimony, and there is nothing in the record which in the slightest degree discloses any abuse of discretion on the part of the court in making the order complained of.

[6, 7] Appellant challenged the giving to the jury of an instruction as follows:

> "It is the law, gentlemen, that all persons concerned in the commission of a crime, whether they directly commit the act constituting the offense or aid and abet in its commission, or, not being present, have advised and encouraged its commission, are principals in any crime so committed. So that in the case before you, if you are satisfied beyond all reasonable doubt that the defendant here directly committed the crime charged, or aided and abetted in its commission, or, not being present, advised and encouraged its commission, you will be justified in finding him guilty as a principal."

The attack thereon made is that appellant, conceding the correctness of the instruction as an abstract proposition of law, insists it is inapplicable to the facts established and theory upon which the case was tried. By the provisions of section 1127, Penal Code, it is made the duty of the court to charge the jury as to all matters of law necessary for their information. Reference to the résumé of the evidence hereinbefore made discloses two theories either of which, if found correct, justified the verdict rendered. That deceased was attacked by three men, one of whom was defendant, clearly appears, and, according to the positive testimony of the wife of deceased, he fired the fatal shots. But concede that her testimony, notwithstanding its support, was deemed insufficient proof of the fact, other testimony that of Wright and Bergamaschi, if believed, together with incriminating circumstances established, constituted proof inconsistent with any theory other than that he was there present aiding and abetting in the commission of the crime. The character of the evidence and reasonable inferences to be drawn therefrom were such that the jury in arriving at its verdict might have adopted either of the two theories: (1) That defendant fired the fatal shots; or (2) that, while not guilty of so doing, he was present aiding and abetting in the acts which deprived Nung Yu of his life. Hence in charging the jury it was proper for the court to instruct it as to both theories. The term "aiding and abetting" are commonplace words, the meaning of which the jurors must be deemed to have understood; hence, and especially in the absence of a request therefor, the court was not called upon of its own motion to define them.

A careful examination of the entire transcript convinces us that defendant had a fair and impartial trial, free from any prejudicial error disclosed by the record.

The judgment and order appealed from are affirmed.

We concur: ANGELLOTTI, C. J.; MELVIN, J.; SHAW, J.; SLOSS, J.; HENSHAW, J.

176 Cal. 714

DARGIE v. PATTERSON (CONNERS et al., Interveners). (S. F. 7387.)

(Supreme Court of California. Dec. 14, 1917. Rehearing Denied Jan. 10, 1918.)

HUSBAND AND WIFE ⚷267(1)—COMMUNITY PROPERTY—GIFT BY HUSBAND—AVOIDANCE.

Civ. Code, § 172, as amended by St. 1891, p. 425, declaring the husband has the management and control of the community property, with the like absolute power of disposition (other than testamentary) as he has of his separate estate, by adding: Provided, however, that he cannot make a gift of such community property or convey it without a valuable consideration, unless the wife, in writing, consents thereto—does not make such a conveyance void as to any one; nor voidable by husband, his executors or personal representatives; but does make it voidable by the wife, after the husband's death, to the extent, and only to the extent, of the half interest therein, which would pass to her as the survivor of the community; and such right of avoidance she has, without regard to the amount or condition of the estate remaining in the husband's hands at his death.

In Bank. Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Action by Erminia Peralta Dargie against Etta I. Patterson; John F. Conners and J. Clem Arnold, executors of William Edward Dargie, deceased, intervening. From the judgment, defendant appeals. Reversed, with directions.

Morrison, Dunne & Brobeck and McClanahan & Derby, all of San Francisco, for appellant. A. A. Moore and Stanley Moore, both of San Francisco, for respondent Dargie. Fitzgerald, Abbott & Beardsley and Eugene E. Trefethen, all of Oakland (Edgar D. Peixotto, of San Francisco, of counsel), for respondents Conners and Arnold.

SLOSS, J. On October 20, 1910, William E. Dargie signed a deed purporting to convey to the defendant Etta I. Patterson, a parcel of land in the city of Oakland. Dargie died on February 10, 1911. By the present action his widow attacks the validity of said deed upon the ground, principally, that the land described in it was community property of herself and William E. Dargie; that the conveyance was without consideration, and that she had not consented to it. The complaint also contains an allegation that the instrument was never delivered. The answer of the defendant put in issue many of the allegations of the complaint. Before the case came on for trial, two of the three executors of the will of William E. Dargie intervened, and joined with the plaintiff in assailing the conveyance.

When the case came on for trial the parties entered into a stipulation disposing of many of the issues raised by the pleadings. It was admitted, for the purposes of the trial, that William E. Dargie and the plaintiff were husband and wife from December 15, 1881, until the death of Dargie; that all of the estate left by Dargie, as well as the property covered by the deed in controversy, was community property; that there was no consideration for said deed, and that the same was executed without the knowledge of the plaintiff, and without her consent, oral or written. Findings were made in accord with the stipulation. Evidence was offered on the issue of delivery, and the court found that the instrument was delivered to the defendant on October 20, 1910. Finding these facts, with some others which, so far as necessary, will be referred to later, the court concluded that the deed under which defendant claims the property is wholly void; that defendant has no right, title, or interest in or to said real property, and that the whole thereof is community property of William E. Dargie and the plaintiff, and forms a part of the estate of said William E. Dargie, deceased. From the judgment entered pursuant to these conclusions, the defendant appeals.

The questions presented for decision turn upon the effect of the amendment of 1891 (Stats. 1891, p. 425) to section 172 of the Civil Code. That section as originally enacted provided:

> "The husband has the management and control of the community property, with the like absolute power of disposition, other than testamentary, as he has of his separate estate."

By the amendment referred to these words were added:

> "Provided, however, that he cannot make a gift of such community property, or convey the same without a valuable consideration, unless the wife, in writing, consent thereto."

The proviso was first brought to the attention of this court in Spreckels v. Spreckels, 116 Cal. 339, 48 Pac. 228, 36 L. R. A. 497, 58 Am. St. Rep. 170. The decision in that case went off on the ground that the amendment could not operate upon property acquired and owned before the enactment of the proviso. Neither in that case, nor in any other decided up to the time when the first briefs on the present appeal were filed, was there a ruling by this court touching the effect of the amendment on conveyances of community property acquired after the proviso became law. We have, however, during the pendency of this appeal, had occasion to consider this very subject. Our recent decision in a second case entitled Spreckels v. Spreckels, 172 Cal. 775, 158 Pac. 537, has removed from the field of controversy some of the questions which counsel in the present appeal have elaborately argued in their briefs. We there said, among other things (175 Cal. page 782, 158 Pac. 539):

> "The proviso of 1891 does not render a gift of community property by the husband without the consent of the wife void as to him, nor confer upon him, in his lifetime, or upon his personal representatives after his death, any right or power to revoke the gift or recover the property. There is nothing in the language to express the idea that the title does not, as before, remain wholly in him. The provision is merely for a limitation upon his power to dispose of it. He is bound by his own gift as fully as if it was of his separate estate."

Nothing need be added to these expressions to demonstrate that the executors of the husband's will had no standing to join in the widow's attack upon the conveyance. Their intervention was based upon the theory that, under the amendment to section 172, the conveyance was absolutely void, and that the husband's representatives retained the same interest in the property that they would have had if the conveyance had not been made. So, too, the decision disposes of the contention, pressed by the widow as well, that the deed is an absolute nullity, and does not affect the ownership of the property in any degree. The gift, it is declared in the case just cited, is not void, but "only voidable by the wife at her option." The court goes on to amplify and explain this statement by means of the following quotation from the decision in Wildes v. Vanvoorhis, 15 Gray (81 Mass.) 139, 143:

> "In many cases where a transaction is declared void in terms by a rule of the common law, or even expressly by statute, where the obvious interest of the rule is to secure and protect the rights of another party, the construction of law is, that it is voidable so far that it shall not operate to defeat or impair those rights. Such deed is not a dead letter; but can be avoided by such persons only, and at such time, and in such manner, as may be necessary to secure those rights. In other respects it has its natural effect."

What, then, is the conclusion to be drawn? May the wife avoid the deed in its entirety, or only so far as necessary to protect her rights? While this question was not directly answered in Spreckels v. Spreckels, or in the later case of Winchester v. Winchester, 165 Pac. 965, the only logical conclusion is that the wife's right to assail the conveyance where, as here, the action is brought after the husband's death, is limited to an undivided half of the property. During his lifetime the husband, notwithstanding the statutory limitation upon his power of disposition, is the owner of the community property. The proviso attached to section 172 does not impair his right to dispose of the property, so far as concerns his own interest, and that of those claiming under him. If he had made no conveyance, the widow would, upon his death, have been entitled to one-half of the property in question, as of all other community property. The other half would have passed to his heirs or devisees, and the widow, as such, would have had no interest in it. His heirs or devisees are bound, as he himself was bound, by the conveyance made. Why, then, should the widow's claim extend to any more than the one-half which would pass to her as survivor of the community? The privilege of avoiding the gift is conferred upon her as a means of protecting her interest in the community property. We see no reason why, in assailing the gift, she should enjoy greater rights than she would have had if the gift had never been made. Furthermore, if the deed should be set aside in its entirety, and the property restored to the community, the one-half not passing to the widow would be distributed as a part of the husband's estate. His representatives and successors would therefore be in the very position which they would occupy if they were entitled, in their own right, to disaffirm the conveyance—a thing which, as we have seen, they cannot do. It is not necessary to the widow's protection that she attack the transfer, except as to one-half, and she should not be allowed to attack it for the benefit of others who are bound by it.

It is argued, on behalf of the plaintiff, that the wife need not await the dissolution of the marriage by death to attack such a conveyance; that she may, during the lifetime of her husband, bring an action to protect her interest in the community property. This question was mentioned, but not decided, in the later Spreckels Case, supra. There is no occasion to decide it here. If such action may be brought by the wife during the husband's lifetime, the relief could go only so far as to bind the property to such extent as may be necessary to protect the ultimate interest of the wife, in case the marriage should be dissolved by divorce or the death of the husband. It cannot be held that she would by proceeding during the existence of the marriage, be entitled to set aside the conveyance in its entirety. Such holding would be in direct conflict with the now established rule that the conveyance is binding upon the husband. It follows that the judgment declaring the conveyance void, and decreeing that the grantee has no interest in the property, cannot stand.

Certain facts, in addition to those already stated, were stipulated by the parties, and found by the court, and the appellant's claims, based upon these further facts, call for notice. It was agreed and found that the value of the estate of W. E. Dargie subject to distribution exceeds $500,000; that the value of the land involved in this action does not exceed $100,000. All of this was community property. It appearing, therefore, that the amount of the estate which passed into the hands of the executors was sufficient to satisfy the claim of the widow to one-half of all the community property, including the lot conveyed without her consent, she must, it is argued, seek satisfaction of her demand for one-half of the community estate out of the property retained by the testator until his death, instead of proceeding against his grantee. We may assume, for the purposes of this discussion, that the record shows that the debts of the estate and the expenses of administration are not sufficient to reduce the balance in the hands of the executors beyond the amount necessary to meet such claim of the widow.

The appellant's position is based upon the suggestion made by Chief Justice Beatty in his concurring opinion in the first Spreckels Case. The late Chief Justice thus expressed his view (116 Cal. page 350, 48 Pac. 232):

> "Upon the dissolution of the community by the death of the husband, or by divorce, I think that in estimating her share of the community property she would be entitled to have any property given away by the husband subsequent to the act of 1891 reckoned as a part of the community assets, and that she would be entitled to reclaim from the donee enough to make up her half of the whole, if less than one-half remained undisposed of. In all ordinary cases this would be the proper and sufficient remedy for any infringement of her rights. * * * If the wife survives her husband, she will get her full share of the community property out of that which remains. If the husband survives the wife, he will get everything that he has not voluntarily parted with."

No other member of the court joined in these declarations; a majority of the justices concurring in an opinion which held merely that the amendment of 1891 had no application to the property involved. The opinion of the Chief Justice does not, therefore, constitute authority which is in any sense binding. In the light of the further discussion of the subject in the second Spreckels Case, we are not disposed to adopt the suggested rule. The widow, upon showing the existence of the facts bringing a conveyance within the terms of the proviso of section 172, is entitled, so far as her rights are concerned, to treat that conveyance as a nullity. She has the right to avoid the conveyance so far as is necessary for the protection of her interest in the property conveyed. As to her, the case must be regarded as if there had been no conveyance, and the property had, accordingly, remained a portion of the community estate, of which the husband had died seized. Upon his death, she succeeded to one-half of such community estate as heir of the husband. Est. of Burdick, 112 Cal. 387, 44 Pac. 734; Sharp v. Loupe, 120 Cal. 89, 52 Pac. 134, 586; Cunha v. Hughes, 122 Cal. 111, 54 Pac. 535, 68 Am. St. Rep. 27; Est. of Moffitt, 153 Cal. 359, 95 Pac. 653, 1025, 25 L. R. A. (N. S.) 207. Her right to succeed as such heir goes to every part and parcel of the community estate. Immediately upon his death she became the owner of an undivided one-half interest in every item of property owned by him, including the parcel of land which he had conveyed, but which, as against her objection, must be treated as still a part of the community property. Since, however, the conveyance made by him is binding upon those who claim under his will, and she cannot pursue her rights through the medium of any action instituted by the executors, she must have the right to proceed directly against the grantee claiming to hold the land in opposition to her right. If then, she, upon the death of the husband, is the legal owner of one-half of the land, on what ground can it be said that she should be divested of this legal ownership, and be required to resort to a proceeding against the other heirs of the husband for reimbursement to the extent of the value of the property of which she is thus deprived? Ordinarily the owner of an interest in specific real or personal property cannot be compelled against his will to surrender title to the specific property, and take in exchange therefor other property of like value, or the money equivalent of such value. The only reason for requiring the widow to seek recourse out of the other property of the estate is that thereby the gift in its entirety will be enforced against the grantor and his devisees, as to all of whom it was valid. But we are not, in this proceeding, passing upon the relative equities of the devisees and the grantee named in the deed. If any such equity exists in favor of a grantee who has given no valuable consideration for the conveyance, the widow is in no way affected thereby. Taking, as a volunteer, a conveyance declared by the law to be voidable at the option of the nonconsenting wife, the grantee knowingly runs the risk that the wife may elect to avoid the transfer. Such rights as may exist in favor of the grantee against those claiming under the husband's will cannot be worked out through the wife, but should be sought in an action brought directly against the parties concerned.

We conclude therefore that, upon the death of a husband who has attempted to convey community property contrary to the provisions of section 172, his nonconsenting wife may recover an undivided one-half of such property in an action brought against the grantee, and this without regard to the amount or condition of the estate remaining in his hands at the time of his death. Such is the case disclosed by the findings of fact, none of which are assailed on this appeal. There is no occasion to order any further trial.

The judgment is reversed, with directions to the trial court to enter judgment that the plaintiff is the owner of an undivided one-half interest in the property in question, and that the defendant is the owner of the other undivided one-half thereof. The rents, issues, and profits which have accrued during the pendency of the litigation should, by the terms of the judgment, be divided in accordance with this conclusion.

We concur: ANGELLOTTI, C. J.; SHAW, J.; MELVIN, J.; HENSHAW, J.

176 Cal. 742

FAIRCHILD v. WESTERN SECURITIES CORP. et al. (Sac. 2462.)

(Supreme Court of California. Dec. 14, 1917. Rehearing Denied Jan. 10, 1918.)

1. APPEAL AND ERROR ⚷843(4)—HARMLESS ERROR—STRIKING OUT PLEADING.

Where, had the motion to strike been denied, the complaint would nevertheless have been obnoxious to the general demurrer interposed, it is unnecessary to consider the alleged error in granting the motion.

2. CORPORATIONS ⚷121(4)—SALE OF STOCK—RESCISSION — CONDITION PRECEDENT—RESTORATION.

A complaint for rescission of a sale of shares of stock and recovery of the purchase price on the ground of false and fraudulent representations, alleging that plaintiff comes now and tenders return of the stock and consents to the cancellation of all agreements and obligations created or intended to be created thereunder, was demurrable, in the absence of any averment showing the stock to be worthless or that the sellers were able to, or had upon tender thereof before suit refused to, return the purchase price received by them, in view of Civ. Code, § 1691, subd. 2, providing that when not effected by consent the party seeking rescission must restore to the other party everything of value he has received from him under the contract or must offer to restore the same upon condition that each party shall do likewise unless the latter is unable or positively refuses to do so.

Department 2. Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Action by Lizzie M. Fairchild against the Western Securities Corporation and others. Judgment dismissing action, and plaintiff appeals. Affirmed.

L. T. Hatfield, of Sacramento, for appellant. Dunn & Brand and W. E. Kleinsorge, all of Sacramento, and C. A. Tuttle, of Eureka, for respondents.

VICTOR E. SHAW, Judge pro tem. In this action plaintiff sought a rescission of sale of 250 shares of its capital stock made to her by the California Guaranty Life & Accident Insurance Company and the recovery of $500 paid as consideration for the purchase thereof. As appears from the bill of exceptions, motions made by defendants California Guaranty Life & Accident Insurance Company and J. W. Carmichael for an order of court striking out certain portions of the first amended complaint and substantially all of a supplemental complaint filed by leave of court were granted. Thereafter plaintiff filed an engrossed copy of the first amended complaint omitting therefrom the portions so stricken out by order of court to which said defendants interposed a demurrer upon both general and special grounds. The court by an order in general terms sustained the demurrer as to each defendant, and plaintiff was granted 20 days in which to amend her complaint. At the expiration of the time so granted, plaintiff having failed to exercise her right to file an amended complaint, a judgment dismissing the action as to said defendants California Guaranty Life & Accident Insurance Company and D. W. Carmichael was entered, from which plaintiff prosecutes this appeal.

[1] As we view the case, it is unnecessary to consider the alleged error predicated upon the ruling of the court in granting the motion to strike. This for the reason that, had the motions been denied, the complaint would nevertheless be obnoxious to the general demurrer interposed.

[2] The ground of rescission was on account of the alleged false and fraudulent representations as to material facts made by defendants to plaintiff by reason whereof she was induced to pay them $500 in consideration of which they sold and delivered to her a certificate for 250 shares of the capital stock of the California Guaranty Life & Accident Insurance Company, which shares of stock at the time of filing the complaint she retained in her possession. Not only is there a failure on the part of plaintiff to aver that the stock so held by her was of no value; but on the contrary the allegations of the complaint, indicating as they do that the stock had a substantial value, are wholly inconsistent therewith. Subdivision 2, § 1691, of the Civil Code, provides that when not effected by consent the parties seeking a rescission "must restore to the other party everything of value which he has received from him under the contract; or must offer to restore the same, upon condition that each party shall do likewise, unless the latter is unable or positively refuses to do so." In the absence of any averment showing the stock to be worthless or that defendants were able to or had upon tender thereof refused to return the $500 so received by them as the purchase price therefor, and there are none, an allegation showing compliance with this provision of the statute was an essential prerequisite to a statement of a cause of action for rescission against defendants or either of them.

The complaint contains a statement that:

> "Plaintiff comes now and tenders return of the certificates for 250 shares of the stock issued to her * * * and consents to the cancellation of all agreements and obligations created or intended to be created hereunder."

Counsel for appellant insists that this allegation is a sufficient showing of compliance with the statute in support of which he cites authorities from this and other jurisdictions involving cases where the plaintiff holding promissory notes of the defendant sought rescission without offering to return the same. Such cases, as pointed out in Kelley v. Owens, 120 Cal. 502, 47 Pac. 369, 52 Pac. 797, Cowen v. Bloomberg, 66 N. J. Law, 386, 49 Atl. 451, and Coghill v. Boring, 15 Cal. 218, are inapplicable to cases of this character. In this case the stock was of substantial value, and, in the absence of anything pleaded excusing plaintiff from so doing, it was her duty, upon declaring that it was not her property to restore or offer to restore it to defendants upon condition that they repay to her the $500 so paid therefor, thus prior to bringing suit affording them an opportunity to join in the act of rescission. That under the circumstances shown to exist she was not entitled to a decree declaring the sale rescinded is supported by Gifford v. Carvill, 29 Cal. 589; Herman v. Haffenegger, 54 Cal. 161; Collins v. Townsend, 58 Cal. 608; Kelley v. Owens, supra; Buena Vista, etc., v. Tuohy, 107 Cal. 243, 40 Pac. 386; Loaiza v. Superior Court, 85 Cal. 31, 24 Pac. 707, 9 L. R. A. 376, 20 Am. St. Rep. 197; Hammond v. Wallace, 85 Cal. 531, 24 Pac. 837, 20 Am. St. Rep. 239; Burton v. Stewart, 3 Wend. (N. Y.) 239, 20 Am. Dec. 692—in some of which cases the facts were almost identical with those here involved.

The judgment is affirmed.

We concur: MELVIN, J.; HENSHAW, J.

176 Cal. 632

In re ALLEN'S ESTATE.

PEARSON v. ELLIOTT.

(S. F. 8313.)

(Supreme Court of California. Dec. 7, 1917.)

1. WILLS 🔑427—PROBATE—RES ADJUDICATA —CONTEST OF WILL.

A party interested in a will who had legal notice of contest of the will on the ground of unsoundness of mind is bound by a decree admitting the will to probate, and cannot later contest the will on that ground.

2. WILLS 🔑423 — PROBATE — BINDING ON WHOM—NOTICE.

The probate of a will is a proceeding in rem, binding on all persons interested in the will who, being constructively notified to appear at the probate, might have come in, and who, had they come in, would have been heard for or against the will.

3. APPEAL AND ERROR 🔑151(6)—WHO MAY APPEAL—"PARTY AGGRIEVED."

One interested in a will, although not appearing in a contest of the will, is a "party aggrieved," under Code Civ. Proc. § 938, relating to appeals, and could appeal from a decree admitting the will to probate.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Aggrieved Party.]

Department 2. Appeal from Superior Court, Alameda County; Wm. S. Wells, Judge.

In the matter of the estate of Andrew Allen, deceased. A will was offered for probate by John Elliott, and Hannah A. Pearson contests. From a decree dismissing the contest, the contestant appeals. Affirmed.

Peter J. Crosby, of Oakland (Stanley R. Sterne, of counsel), for appellant. McNair & Stoker, of San Francisco, for respondent.

HENSHAW, J. Andrew Allen died testate, leaving surviving him two adult daughters. In March, 1916, his will was offered for probate. Thereafter one of these daughters, Jane A. Allen, filed her grounds of contest, and the proponent of the will made answer thereto. Amongst these grounds of contest was the asserted unsoundness of mind of the testator. In due course the hearing of this contest was had before a jury, and the verdict of the jury was in favor of the validity of the will, and, of course, against the asserted unsoundness of the testator's mind in its execution. This was on the 13th day of February, 1917, and the court thereupon continued the petition for probate for further proceedings to the 16th day of February, 1917. On the 15th day of February, 1917, the other daughter, Hannah A. Pearson, appellant herein, filed her ground of contest and served copies thereof upon the proponent of the will and upon her sister. The ground of contest was the same ground of unsoundness of mind upon which the determination of the jury had just been received. This second contest was met by the proponent of the will with a motion to dismiss, supported by affidavit. The hearing of all these matters was duly continued until the 5th day of March, 1917, when the court granted the motion to dismiss. The contest was dismissed, the will was admitted to probate, and Hannah A. Pearson appeals.

Appellant based the contention of her right to be heard on her contest principally upon the Estate of Mollenkopf, 164 Cal. 576, 129 Pac. 997, but to this the conclusive answer is that the court in that case was not called upon to consider, and therefore did not consider, the peculiar features presented by the case at bar. We are not here concerned, as was the court in the Mollenkopf Case, with the question merely as to the time when a contest could be filed, nor with the limitation put by the law upon that time. We are here concerned with the effect of the determination of the previous contest upon the right of this appellant to contest at all, and as is answered the question, Was this appellant in law a party to and bound by the result of the previous contest? so will be answered the question as to whether or not the court erred in dismissing her contest.

It is made to appear that this contestant was a witness at the trial and gave testimony bearing upon the very matter of the asserted unsoundness of her deceased father's mind. But we need attach and do attach no legal weight to this fact.

[1] The essential fact is that by the provisions of our law she was a party interested in the estate, had legal notice of the contest, became in point of law an actor in it, and is bound by the result. The legal notice of the offer of the will to probate ran to all those interested in the estate, of which this appellant was unquestionably one. Code Civ. Proc. §§ 1303, 1304; Gridley v. Boggs, 62 Cal. 190;

Curtis v. Underwood, 101 Cal. 661, 36 Pac. 110.

[2] The probate of a will is a proceeding in rem, binding on all persons interested in the will who, being constructively notified to appear at the probate, might have come in, and who, had they come in, would have been heard for or against the will. Black, Judgments, § 638; Est. of Baker, 170 Cal. 578, 150 Pac. 989.

[3] The issue of soundness or unsoundness of mind which had been resolved by the jury in favor of the validity of the will was thus as binding upon this appellant as though she herself had been the actual contestant. She was a party aggrieved under section 938, Code of Civil Procedure. She had the unquestioned right, as such heir at law and party aggrieved, to have appealed from the decree admitting the will to probate. Estate of Crooks, 125 Cal. 459, 58 Pac. 89; Estate of McDermott, 127 Cal. 450, 59 Pac. 783; Estate of Colton, 164 Cal. 5, 127 Pac. 643. Her remedy therefore was by such an appeal, and not by an attempt in the form of a new contest to retry an issue which had been decided adversely to her. The court in probate therefore did not err in dismissing her contest, and the decree so doing is affirmed.

We concur: MELVIN, J.; LORIGAN, J.

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176 Cal. 634

In re MOREHOUSE et al. (S. F. 8323.)

(Supreme Court of California. Dec. 7, 1917.)

1. JUDGMENT 🔑153(2) — SETTING ASIDE — TIME—MOTION—STATUTES.

Under Code Civ. Proc. § 473, providing for setting aside judgments within six months of rendition, not only a notice of motion, but the motion itself, must be made within six months.

2. JUDGMENT 🔑141 — SETTING ASIDE VOID JUDGMENTS—MOTION—DIRECT ACTION.

In order to set aside an order of court after six months on motion, the order must show on its face that the court had no jurisdiction to enter it, otherwise a direct action is necessary for relief.

3. GUARDIAN AND WARD 🔑13(3)—INFANTS—APPOINTMENT—WHO ENTITLED TO NOTICE—RIGHTS OF MOTHER.

Where after a separation the husband went to his wife's town and took their children into his own custody, and notified her of his act, notice to such wife was not necessary in a proceeding to have the husband appointed guardian, the relatives in the town of the residence of the husband having notice.

Department 2. Appeal from the Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

In the matter of the guardianship of the persons and estates of Frank Beverly Morehouse and Marion M. Morehouse, minors. Frank B. Morehouse was appointed guardian. Merle M. Morehouse moved to set aside the appointment. From an order vacating the appointment, the guardian appeals. Reversed.

H. I. Stafford and W. F. Stafford, both of San Francisco, for appellant. Arthur H. Barendt, of San Francisco, for respondent.

HENSHAW, J. The facts on this appeal are not in dispute. On January 3, 1916, the appellant Frank B. Morehouse and the respondent Merle M. Morehouse, his wife, separated. There were two minor children of the marriage. The mother took the two small children from the family home in San Francisco and went to Alameda county, where she still resides. The father remained at the family home in San Francisco. On June 18, 1916, the father went to Alameda and brought the children back to San Francisco, writing to his wife that he had done so and inviting her to return to the family home. She neither answered nor returned. On August 3, 1916, he filed a petition in the superior court of the city and county of San Francisco for the appointment of himself as guardian of the children. The only relatives of the children residing in San Francisco at the time were Mrs. Stewart, an aunt, and Frank B. Morehouse, a grandfather. They both requested the appointment of appellant in writing, and both had notice of the application.

[1] On August 3, 1916, an order was made appointing appellant guardian of the persons and estates of the minors. On February 1, 1917, the mother gave notice that she would move to set aside this appointment on February 9, 1917, which last date is more than six months after the order appointing appellant guardian was made and given. The motion was made on February 9, 1917, and was based on the ground of fraud and lack of jurisdiction. The charges of fraud were voluntarily withdrawn and the court found that no fraud had been practiced or attempted, but the court made its order vacating the appointment on the ground that "the same was inadvertently made, in that the court had no jurisdiction to do so." As a motion for relief, predicated upon the provisions of section 473, Code of Civil Procedure, the motion having been made more than six months after the date of the judgment, the court should have refused to entertain it. People v. Ah Sam, 41 Cal. 645; Spencer v. Branham, 109 Cal. 337, 41 Pac. 1095; Estate of Eikerenkotter, 126 Cal. 54, 58 Pac. 370. It is not sufficient that notice shall be given within the six months that a motion will be made after the six months. The motion itself must be made and the action of the court requested on it within the six months.

[2, 3] It follows, therefore, that the order of the court vacating the appointment can be upheld only if the decree making the appointment is void on its face. It is contended that it is so void for lack of notice. It has been said that all of the relatives in the city and county of San Francisco appeared and re-

quested the appointment of the appellant in writing, and the order appointing the guardian recites this and the additional fact that they had notice. In Whyler v. Van Tiger, 14 Pac. 846, a guardian, as here, had been appointed without any notice. It was so found, and an attack was made upon the acts of the guardian so appointed as being without authority. This court declared that: "We think that Mrs. Whyler was a guardian when she executed the lease to the defendant." The only jurisdictional notice required is one to be given to the person having the custody of the minor. In re Lunberg, 143 Cal. 402, 77 Pac. 156; Estate of Eikerenkotter, supra; section 1747, Code Civ. Proc.

This disposes of the ground upon which, manifestly, the court acted in setting aside the decree. Respondent, however, further argues that the order of appointment is void on its face as not being in accordance with, and supported by, the allegations of the petition, and also that the court was without jurisdiction to deprive the mother of her maternal rights under the facts pleaded and found. Without regard to the merits of the contentions thus advanced, it must suffice to say that they are not such as to establish a lack of jurisdiction to make the decree complained of, nor yet sufficient to establish that the decree so made is void on its face. For any such relief the respondent must proceed by direct action, and not by motion such as the one here under consideration.

The order appealed from is therefore reversed.

We concur: MELVIN, J.; LORIGAN, J.

(176 Cal. 659)

O'DEA v. COOK et al. (S. F. 8194.)

(Supreme Court of California. Dec. 12, 1917.)

1. Municipal Corporations 🔑187—Police Pensions—Nature of—"Gratuity."

In view of Const. art. 4, § 31, prohibiting gratuities to individuals, etc., pensions for the families of policemen provided by San Francisco Charter, c. 10, § 8, cannot be deemed gratuities, but must be deemed a part of the contemplated compensation for the services rendered by policemen, the pension statute being in force when the services were rendered; for a pension is a gratuity only where it is granted for services previously rendered, which at the time they were rendered gave rise to no legal obligation.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Gratuity.]

2. Municipal Corporations 🔑176(3)—Police Pensions—Statutes—Repeal.

Where pensions are predicated merely upon death occurring during the period of service, and death only fixes the right to a pension, a repeal of the pension statute before death destroys the pension right.

3. Pensions 🔑1—Construction of Statutes—Liberal Construction.

Pension statutes serving a beneficial purpose are to be liberally construed.

4. Statutes 🔑263—Construction—Prospective Effect.

Statutes shall be given a prospective effect and not a retrospective effect, unless the latter effect is made compulsory by the language of the act.

5. Municipal Corporations 🔑187—Police Pensions—Statutes—Construction.

San Francisco Charter, c. 10, art. 8, declared at the time a policeman received injuries which finally caused his death that commissioners, out of the police and pension fund, should provide for the family of any officer who was an employé of the department who may have been killed while in the performance of his duty. Thereafter, but before the death of the policeman, the provision was amended so as to declare that commissioners shall, out of the police relief and pension fund, provide for the family of any officer, member, or employé of the department who may be killed or injured in the performance of his duty, and who shall have died within one year from the date of such injury. *Held*, that as statutes should, if possible, be given a prospective effect, and as pension acts are to be liberally construed, the widow of a policeman is entitled to a pension under the old act, her rights, which came into being on the occurrence of the injury, not being affected by the change in the statute.

In Bank. Appeal from Superior Court, City and County of San Francisco; Bernard J. Flood, Judge.

Petition by Mary O'Dea for a writ of mandate against Jesse B. Cook and others, as the Board of Trustees of the Police and Pension Fund, and Kate Conway, Secretary of the Board. From a judgment for petitioner, respondents appeal. Affirmed.

Percy V. Long, George Lull, and Maurice T. Dooling, Jr., all of San Francisco, for appellants. Andrew F. Burke, of San Francisco, for respondent.

HENSHAW, J. Edward O'Dea was a member of the police department of the city and county of San Francisco when, in December, 1912, in the performance of his duties, he received injuries which directly and approximately caused his death on March 8, 1915, two years and three months thereafter. The foregoing statement, so far as this appeal is concerned, stands as an admitted fact. After his death his widow made application to the trustees of the police relief and pension fund of the city and county of San Francisco, seeking the pension which she asserted was due her under the law. Upon the trustees' refusal to recognize the validity of her demand she brought her action in mandate in the superior court, setting forth the foregoing facts. The board of trustees filed a general demurrer to her complaint, which was overruled. They declined to answer further, and judgment in mandate was given in favor of the widow. From this judgment the board of trustees has appealed.

[1] At the time O'Dea sustained the injuries which resulted in his death the law (found in the charter of San Francisco, art. 8, c. 10) declared that the commissioners, out of the police relief and pension fund, shall provide for the family of any officer, member, or employé of the department who

may be killed while in the performance of his duty, as follows:

> "First. Should the decedent be married, his widow shall, so long as she may remain unmarried, be paid a monthly pension equal to one-half of the salary attached to the rank held by the decedent at the time of his death. * * *"

Subsequent to the time when O'Dea sustained his injuries and while he was suffering therefrom, this provision of the charter was amended to read as follows:

> "Sec. 4. The commissioners shall, out of the police relief and pension fund, provide as follows for the family of any officer, member or employé of the department who may be killed or injured, while in the performance of his duty, and who shall have died within one year from the date of such injury. * * *"

The refusal of the board to recognize the widow's claim was based upon its view that at the time of O'Dea's death, when the widow for the first time became entitled to a pension on account of death, the controlling law under which it could be granted was that found in the amendment of 1913, and as O'Dea admittedly had not died within one year from the date of his injury the widow's claim was not allowable. Upon this appeal this is the proposition argued, and in the argument it is pointed out that the amendment was made to relieve from the uncertainty as to the length of time which must elapse between injury and death, which uncertainty was noted in Edwards v. Sweigert, 15 Cal. App. 503, 115 Pac. 256. Further, appellant insists that the respondent had acquired no vested rights to a pension which the amendment could not take away, and that whatever rights she did possess were, in fact, taken away by the amendment and by virtue of the fact that her husband did not die within one year after sustaining his injuries.

A pension such as this law contemplates is not a gratuity or a gift. If it were, all of the provisions pertaining to it would be void, under the Constitution of the state. Art. 4, § 31; Taylor v. Mott, 123 Cal. 497, 56 Pac. 256. A pension is a gratuity only where it is granted for services previously rendered, and which at the time they were rendered gave rise to no legal obligation. United States v. Teller, 107 U. S. 64, 2 Sup. Ct. 39, 27 L. Ed. 352; Mahon v. Board of Education, 171 N. Y. 263, 63 N. E. 1107, 89 Am. St. Rep. 810; State, etc., v. Love, 89 Neb. 149, 131 N. W. 196, 34 L. R. A. (N. S.) 607, Ann. Cas. 1912C, 542. But where, as here, services are rendered under such a pension statute, the pension provisions become a part of the contemplated compensation for those services, and so in a sense a part of the contract of employment itself. Hammitt v. Gaynor (Sup.) 144 N. Y. Supp. 123; State, etc., v. Love, supra; People, etc., v. Abbott, 274 Ill. 380, 113 N. E. 696.

[2] Cases are abundant, many of them are cited by appellants, where pensions are predicated merely upon the death occurring during the period of service. As death, and death only, by the terms of these statutes fixes the right to a pension, a repeal before death operates to destroy the pension right. Such are the cases of Pennie v. Reis, 80 Cal. 266, 22 Pac. 176; Cohrn v. Henderson, 19 Cal. App. 89, 124 Pac. 1037.

[3] It is a firmly established principle of judicial construction that pension statutes serving a beneficial purpose are to be liberally construed. Walton v. Cotton, 9 How. (60 U. S.) 355, 15 L. Ed. 658; Hanscom v. Malden, etc., Gas Light Co., 220 Mass. 1, 107 N. E. 426, Ann. Cas. 1917A, 145.

[4] A fundamental and universal rule in the construction of statutes is that they shall be given prospective effect and not retrospective effect, unless such latter effect is made compulsory by the language of the act itself. Vanderbilt v. All Persons, 163 Cal. 507, 126 Pac. 158.

[5] Nothing in this act forces the conclusion that it was designed to apply to past injuries which thereafter might result in death. Its reasonable construction, under the rules of interpretation above given, is that it was designed to apply to cases arising in the future, and to set a time limit as to them alone. It therefore does not dispose of the matter to say merely that the respondent had no vested right in the pension until the death. True, she had no such vested right. True, she could secure no widow's pension at all, unless the death occurred under the circumstances contemplated by the statute, but from the very moment that her husband sustained his fatal injuries in the performance of his duty she had a right, springing from the fact of the infliction of the fatal injury, to the pension if and when death ensued, and that right, since we are not compelled to give the amendment a retrospective effect, was a right existing and continuing to exist under the unamended law. In its essence the principle is the same as that which governs the legal right of action for death. It is the injury which creates the right, though the right of action itself does not arise until death follows the injury.

> "While the action lies to recover damages for death, death does not constitute the tort. The fact of death is not the tort, but its consequence. Negligence, unlawful violence of a wrongful act is the tort, although death must result from injury caused by such negligence, violence, or act before the statutory cause of action accrues." Van Doren v. Pennsylvania R. Co., 93 Fed. 260, 35 C. C. A. 282.

Analogous in principle is the case of Baur v. Court of Common Pleas, 88 N. J. Law, 128, 95 Atl. 627. An employé had sustained injuries. He filed his petition for compensation more than two years after the occurrence of the accident. At the time of the accident there was no limitation prescribed by law concerning the time when application for compensation should be made, but before he filed his application, by amendment, the statute fixed a time limit of one year after the occurrence. It was argued that his application was filed too late and was barred by the very terms of the statute. There the court refused to give the act a retrospective effect and, holding to the "well recognized and established rule that a statute shall have a prospective effect only," decreed that the amended statute of limitation applied only to cases arising thereafter.

For these reasons the judgment appealed from is affirmed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; SHAW, J.; MELVIN, J.

176 Cal. 677

ZIRBES et al. v. MOUNSEY et ux.

(L. A. 4121.)

(Supreme Court of California. Dec. 13, 1917. Rehearing Denied Jan. 10, 1918.)

1. Bills and Notes ⟹505—Evidence—Admissibility.

In action on note for broker's commission wherein defendants set up fraud in that plaintiffs, in arranging exchange of lands, agreed to take one-half of commission from each party, and accepted $1,000 from others, but represented that such others paid $2,500 and so secured the note in suit, it was error to exclude the agreement by which plaintiffs accepted $1,000 from one side.

2. Bills and Notes ⟹520—Fraud—Evidence—Sufficiency.

Where parties stipulated that an absent witness would testify to fraud inducing the note in suit, without objection to its competency, and no other evidence as to fraud was admitted, finding that there was no fraud was without support.

Department 2. Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by Joseph Zirbes and H. W. Hedgcock, copartners doing business as Zirbes & Hedgcock, against G. A. Mounsey and wife. Judgment for plaintiffs, and order denying new trial, and defendants appeal. Reversed.

Lynn Helm, E. S. Williams, and W. T. McNeely, all of Los Angeles, for appellants. Clyde E. Cate, of Los Angeles, for respondents.

VICTOR E. SHAW, Judge pro tem. Action to recover upon a promissory note executed by defendants. Judgment went for plaintiffs from which, and an order denying their motion for a new trial, defendants appeal.

Plaintiffs as real estate brokers and acting as the agents of both parties, negotiated an exchange of property valued at $100,000 owned by defendants for property of like value owned by J. C. Wilson. The note involved, for the sum of $2,500, was given by defendants for commissions claimed to be due from defendants to plaintiffs for the services so rendered.

In their answer the defendants admitted the making of the note, but alleged its execution was procured by fraud and deceit of plaintiffs, in that before and at the time of the making of the exchange it was agreed that defendants should pay as commission a sum equal to that paid by said Wilson as his share thereof, which amount was by plaintiffs represented to defendants as being $2,500, whereas, in truth and in fact, the amount of the commission exacted from Wilson, and which he agreed to pay plaintiffs, was the sum of $1,000; that defendants believing said representations to be true, and in reliance thereon, were thus deceived and thereby induced to execute the note in the sum of $2,500.

The alleged errors complained of are due to rulings of the court in excluding evidence offered in support of the allegations of fraud. At the trial the parties stipulated that Mary Lucena Mounsey, then absent, should be deemed as testifying to the truth of the allegations of fraud contained in the answer. Her codefendant was called as a witness for defendants and in substance testified that in view of the fact that the properties of the parties to the exchange were of like value, namely, $100,000, it was agreed that they should pay exactly the same commission, and that one of the plaintiffs, Mr. Zirbes, represented to the defendants that Mr. Wilson was to pay 2½ per cent. of said valuation of his property. Thereupon the witness was asked whether or not he relied upon such statements, to which the court sustained plaintiffs' objection that it was irrelevant and immaterial. A proposal for the exchange executed two days before the making of the note, and containing a provision that defendants should pay a commission of $2,500, on which was indorsed an acceptance thereof purporting to be signed by Wilson and wife whereby they agreed to pay a commission of $3,500, was on the cross-examination of the witness received in evidence.

[1] Thereupon Wilson was called as a witness, and produced an agreement made with plaintiffs fixing the commission which he was required to pay plaintiffs at $1,000, which document the court refused to admit in evidence, or permit the witness to state the amount of the commission exacted by plaintiffs from him in negotiating said exchange of properties, and likewise refused to permit testimony offered to the effect that defendants' assent to the amount of $2,500 commission specified in the agreement was procured by like false representations as those which induced them to execute the note. That such action constituted prejudicial error, to our minds, admits of no doubt. It is apparent from the record that the learned trial judge in making the rulings complained of accepted the view of counsel for respondents here urged, that such evidence was inadmissible for the reason that it was sought thereby to vary the terms of a written instrument by parol testimony, whereas, in fact, its purpose was to establish that such instrument

was procured by fraud as alleged in the answer.

[2] Moreover, it having been, without objection to its competency, stipulated that Mrs. Mounsey might be deemed as testifying to the truth of the allegations of fraud as to which there was no contradictory evidence offered by plaintiffs, the adverse finding thereon made by the court is without support.

The judgment and order are reversed.

We concur: MELVIN, J.; HENSHAW, J.

176 Cal. 637

FULLER v. FULLER. (L. A. 4093.)

(Supreme Court of California. Dec. 11, 1917.)

1. EJECTMENT 🔑65 — PLEADING — SUFFICIENCY.

Complaint alleging that plaintiff was lawfully in possession of, and had title to, as a homestead entryman under the laws of the United States, the property in controversy, that plaintiff has been and now is entitled to the possession of said land, and has held and now holds title thereto as such homestead entryman, and that, while plaintiff was in possession of and entitled to the possession of and had title to said land, as such homestead entryman, the defendant wrongfully entered into possession of a portion of the land and ousted plaintiff therefrom, and now wrongfully withholds possession thereof, is sufficient.

2. PLEADING 🔑8(11) — FACTS OR CONCLUSIONS.

Such allegations are of ultimate facts, and not of conclusions of law.

3. COURTS 🔑489(5) — JURISDICTION — STATE COURTS—HOMESTEAD ENTRIES.

State courts have jurisdiction to determine conflicting claims to the possession of land after a homestead entry has been made.

Department 1. Appeal from Superior Court, San Diego County; W. A. Sloane, Judge.

Action by Charles H. Fuller against Preston B. Fuller. Judgment for plaintiff, and defendant appeals on the judgment roll. Affirmed.

H. N. Dyke, of Imperial, for appellant. E. L. Hotchkiss, of San Diego, for respondent.

SLOSS, J. Judgment went for plaintiff in this action to recover possession of a tract of land in San Diego county. The defendant appeals on the judgment roll.

The complaint alleged that on February 13, 1912, plaintiff was lawfully in possession of, and had title to, as a homestead entryman under the laws of the United States, the property in controversy; that ever since said date plaintiff has been, and now is entitled to the possession of said land, and has held, and now holds, title thereto as such homestead entryman; that on or about December 4, 1913, while plaintiff was in possession of and entitled to the possession of, and had title to, said land, as such homestead entryman, the defendant wrongfully entered into possession of a portion of the land and ousted plaintiff therefrom, and now wrongfully withholds possession thereof.

The defendant demurred on the grounds that the complaint did not state facts sufficient to constitute a cause of action, and that the court had no jurisdiction of the subject-matter. It is urged that error was committed in overruling the demurrer.

[1, 2] In support of the first, or general, ground, it is argued that there is no proper averment of facts showing the nature and extent of the title claimed by plaintiff. We see no force in the objection. It has been held in this state that it is sufficient, in an action of this character, to allege that plaintiff was in possession of the land when he was ousted by defendant. Hutchinson v. Perley, 4 Cal. 33, 60 Am. Dec. 578. But if it be necessary that he allege his ownership, he complies with the requirement when he pleads that he has title as entryman under the homestead laws of the United States. The fee being in the United States, the only interest which the plaintiff could have was his possession and the right of purchase vested in him as entryman. Malony v. Adsit, 175 U. S. 281, 20 Sup. Ct. 115, 44 L. Ed. 163. This interest the complaint described in terms which amounted to an allegation of ultimate fact, rather than, as appellant claims, a conclusion of law. See Malony v. Adsit, supra.

[3] The point that the state courts are without jurisdiction to determine conflicting claims to the possession of land after a homestead entry has been made is without merit. Gauthier v. Morrison, 232 U. S. 452, 461, 34 Sup. Ct. 384, 58 L. Ed. 680; Whittaker v. Pendola, 78 Cal. 296, 20 Pac. 680; Thompson v. Basler, 148 Cal. 646, 84 Pac. 161, 113 Am. St. Rep. 321; 32 Cyc. 833.

Appellant makes no other contention that is worthy of notice.

The judgment is affirmed.

We concur: SHAW, J.; LAWLOR, J.

176 Cal. 649

BENSON v. BENSON. (S. F. 7581.)

(Supreme Court of California. Dec. 12, 1917.)

1. MARRIAGE 🔑65 — ANNULMENT — SETTING ASIDE DEFAULTS.

The same liberality in setting aside defaults in actions for divorce is present, if not with more force, when the action is for annulment of marriage.

2. MARRIAGE 🔑65—ANNULMENT—DEFAULT—AFFIDAVIT TO VACATE.

On application within one year to set aside a default judgment of annulment of marriage, an affidavit of merits is not required, and therefore inartificiality in an affidavit of merits is immaterial.

3. APPEARANCE 🔑3 — ANNULMENT OF MARRIAGE—DEFAULT.

A request by attorneys, in an action to annul a marriage, to allow defendant an extension of time in which to plead, which for all appears was not authorized, was not equivalent to an "appearance" within Code Civ. Proc. § 1014.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Appearance.]

Department 2. Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by John Benson against Ruth Benson to annul a marriage. Judgment for plaintiff. From an order vacating and setting aside the judgment, plaintiff appeals. Affirmed.

S. T. Hogevoll, of San Francisco (Marcel E. Cerf, of San Francisco, of counsel), for appellant. Walter J. Thompson, of San Francisco, for respondent.

HENSHAW, J. Plaintiff sued defendant for an annulment of marriage which he alleged the two entered into in the state of California on the 10th day of February, 1911. He averred that the defendant was at the time of the marriage a mulatto and by reason of that fact incompetent to enter into the marriage relation with the plaintiff, who is a white person. Substituted service of summons upon defendant was made by publication. On the last day fixed by law for defendant's appearance certain attorneys appeared and secured on her behalf a ten days' extension of time in which to plead. No other or further appearance was made. Defendant's default was entered, evidence was taken, and a judgment and decree annulling the marriage entered. Within one year thereafter the defendant moved to vacate and set aside the judgment upon the ground, amongst others, of her mistake, surprise, and excusable neglect. Defendant filed an affidavit in support of her motion in which she set forth that she married plaintiff in February, 1911; that some time thereafter plaintiff took her to Washington, D. C., where her relatives resided; that about the middle of April, 1912, plaintiff told her that he was obliged to return to California but would send for her within two months; that he abandoned and did not thereafter communicate with her; and she alleges that his purpose in taking her to Washington, D. C., was to abandon her and to leave her in destitution as he did, so that she would not be able to return to California and contest the action for annulment of their marriage. She declares that "the facts stated and contained therein (in his complaint) are absolutely false and untrue and were known by plaintiff, at the time said complaint was sworn to, to be false and untrue"; that she was never served with summons or complaint but that she received in Washington what purported to be a summons and complaint and "took the same to a man who represented himself to be a lawyer, in Washington, D. C., paying him a retaining fee in said action, and instructing him to prepare and file for her a contest to the same, * * * and he thereupon promised that he would do so; that defendant is ignorant of law and proceedings in court, and has never been in court in her life or had any kind of litigation whatsoever, and she fully relied upon her said attorney in Washington, D. C."; that on or about the 1st of March, 1915, she communicated with Walter J. Thompson of San Francisco, an attorney at law, requesting him to investigate the condition of said action, and then for the first time was advised that the judgment of annulment had been entered.

A counter affidavit was filed by plaintiff. In this, as in his complaint, he set forth the marriage as having taken place on the 10th day of February, 1911, and that it was only in the month of April, 1912, that he discovered that his wife was a mulatto; that for the purpose of deceiving him she had represented herself to be of white blood and "had painted herself in such a manner that the said plaintiff, who had known her a short time, could not tell that she was a mulatto."

Upon the application of the defendant thus made within the year, the court set aside the judgment and opened the default, and from its order so doing plaintiff has appealed. Upon appeal it is urged that the court abused its discretion, in that it was made to appear that the defendant had actual notice of the pendency of the action; that the failure of the attorney whom she asserts she employed in Washington, D. C., so to defend her, is not explained; that respondent failed to state any facts in her affidavit of merits showing a defense to the action; that the appearance of the attorneys asking for an extension of time was the equivalent of a submission to the jurisdiction of the court; and, finally, that while liberality is by this court countenanced in divorce actions, this is not an action for divorce but an action for annulment.

[1-3] To all of these contentions answer may briefly be made. The underlying principle dictating liberality in setting aside defaults in actions for divorce is present in the same, if not with more force, when the action is one for annulment. It is not necessary to do more than refer, amongst the many, the cases of Wadsworth v. Wadsworth, 81 Cal. 182, 22 Pac. 648, 15 Am. St. Rep. 38, and Rehfuss v. Rehfuss, 169 Cal. 86, 145 Pac. 1020. It is not even required that such an application, if made within the year, should be supported by an affidavit of merits. McBlain v. McBlain, 77 Cal. 507, 20 Pac. 61; Mulkey v. Mulkey, 100 Cal. 91, 34 Pac. 621. This being so, the inartificiality of defendant's affidavit of merits is immaterial to the consideration; the objections here made being to the language of that affidavit above quoted. The request of the attorneys to the court in San Francisco to allow defendant an extension of time in which to plead, which for all that appears was not authorized, was not the equivalent of an "appear-

ance." Code Civ. Proc. § 1014; Vrooman v. Li Po Tai, 113 Cal. 302, 45 Pac. 470.

The order appealed from is therefore affirmed.

We concur: MELVIN, J.; LORIGAN, J.

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176 Cal. 685

HOROWITZ v. SPEESE. (L. A. 4081.)

(Supreme Court of California. Dec. 13, 1917.)

JUDGMENT ⚷744 — RES JUDICATA — RIGHTS UNDER LEASE.

In a lessee's action for damage for breach of the lease by refusing to give him possession of the property and leasing it to another, judgment, in a former suit between the same parties, where it was adjudged that defendant landlord was entitled to possession of the premises under the lease involved, was conclusive, and a final determination of the lessee's rights under the lease, not having been set aside and not having been appealed from, so that the judgment roll was admissible in evidence.

Department 2. Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by Ab. Horowitz against J. H. Speese. There was judgment for plaintiff, and, from an order denying his motion for new trial, he appeals. Affirmed.

M. O. Graves, of Los Angeles, for appellant. G. F. McCulloch, of Los Angeles, for respondent.

VICTOR E. SHAW, Judge Pro Tem. By the terms of a lease in the usual form defendant demised and let to plaintiff a certain building for the term of five years from September 1, 1912, at a monthly rental of $250, payable in advance, and containing a clause to the effect that in case of default in the making of such payments, or in complying with any of the covenants therein contained, the lessor might re-enter and remove all persons therefrom. The action is by the lessee to recover damage for the breach of the lease, plaintiff claiming that defendant refused to give him possession of the property and leased it to another. A jury trial was had resulting in a verdict of one dollar in favor of plaintiff for which judgment was entered. The appeal is from an order of the court denying plaintiff's motion for a new trial.

Appellant's chief claim for a reversal, and conceded to be the only error necessary to consider if said contention be not sustained, is that the court erred in admitting in evidence the judgment roll in a former suit between the same parties wherein it was by the superior court on January 14, 1913, adjudged that defendant was entitled to possession of said leased premises, and, in connection therewith, instructed the jury that plaintiff's right to the possession of the premises terminated on October 23, 1912, and that plaintiff's damage must be deemed limited to such as he sustained between said date and September 1st preceding. Reference to the judgment roll so received in evidence discloses that the subject of said action was plaintiff's asserted right to possession of the premises in question under and by virtue of the lease here involved from which he alleged he had been ousted October 23, 1912. It was adjudged therein that defendant, and not plaintiff, was entitled to possession. This judgment, not set aside and from which no appeal was taken, upon well-settled principles of law, must be deemed a final determination of plaintiff's rights under the lease.

The theory upon which the court submitted to the jury the question of damages sustained by plaintiff for the period extending from September 1st, the date when under the terms of the lease he was to have possession, and October 23d, is that he did not have possession during all of said period, and if, notwithstanding evidence tending to show that he had refused to comply with the covenant as to payment of rent, the jury found that he was entitled to possession, it might fix the damage sustained by reason of such fact. In other words, the right of plaintiff during such time was not involved in the former litigation.

The order is affirmed.

We concur: MELVIN, J.; HENSHAW, J.

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176 Cal. 619

In re HILL'S ESTATE. In re HILL et al.

HILL et al. v. RANSDELL. (L. A. 8274.)

(Supreme Court of California. Dec. 7, 1917.)

WILLS ⚷665—CONSTRUCTION—"CONTEST"—"ATTEMPT TO CONTEST."

One who applied in Michigan for letters of administration on the ground that deceased died intestate, but stated that there were instruments on file in the probate court of Oakland county, Cal., alleged to be a will, and later objected to jurisdiction of the California court, but alleged such opposition was not a contest or an attempt to contest, but that the will should be probated in Michigan, did not forfeit her rights under the will, which provided that the rights of any one contesting or attempting to contest should be forfeited, because such actions did not show any "contest" or attempt to contest.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Contest.]

Department 2. Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

In the matter of the estate of Joshua Hill, deceased. Petition by Ellen P. Hill, J. Price Hill, and Hunt C. Hill, and Hunt C. Hill, trustee, for the forfeiture of the interests of Abbie R. Ransdell under the will of deceased and for partial distribution. From a decree denying the forfeiture, petitioners appeal. Affirmed.

Ira S. Lillick and Hill & Sealby, all of San Francisco, for appellants. Lloyd S. Ackerman, of San Francisco, and Samuel J. Patterson, for respondent.

HENSHAW, J. In his will the deceased, Joshua Hill, declared as follows:

> "In the event that my said wife or any of my said children, shall contest or attempt to contest the allowance of this instrument as and for my last will and testament, for any reason or upon any grounds whatever, then such portions of my estate, or other benefits as have heretofore been directed to be paid to the person so contesting shall be by such person or persons forfeited, etc."

The testator died in the city and county of San Francisco leaving surviving him a widow and five children. The eldest of these children, Abbie H. Ransdell, respondent herein, filed a petition for letters of administration upon the estate of her father in the probate court of Oakland county, state of Michigan, in which she alleged that "said deceased died on the 29th day of September, 1915, leaving no last will and testament as I am informed and believe," and she also declared:

> "It is alleged that there are instruments on file in the probate court of Oakland county and in the state of California, purporting to be the last wills and testaments of said deceased."

Thereafter the will of the deceased was offered for probate in the superior court of the city and county of San Francisco. At that time there was pending in the probate court of Oakland county, Mich., a petition for the probate of decedent's will filed by Frank L. Perry, one of the trustees named therein. Respondent, having been advised by her attorneys that there could not be two forums in separate states each possessing original jurisdiction over the will of deceased, filed her opposition to the probate of the will in San Francisco. In this the respondent declared:

> "This opposition is not a contest nor an attempt to contest the allowance or admission to probate of the will of Joshua Hill as the last will and testament of said decedent, and that this showing is made solely for the purpose of objecting to the jurisdiction of the court to grant the probate of the will of said decedent as filed."

The ground of opposition was that above indicated, that original jurisdiction to admit the will to probate was in the courts of the state of Michigan. Upon petition for partial distribution, it was urged that respondent by her action and conduct as above set forth had forfeited all her rights under the will. The court held to the contrary and this appeal followed.

We need not here be at pains to elaborate upon the meaning which shall be given to the language employed by the testator, "contest or attempt to contest." This has been done sufficiently in the cases of In re Garcelon's Estate, 104 Cal. 570, 38 Pac. 414, 32 L. R. A. 595, 43 Am. St. Ry. 134, and Estate of Hite, 155 Cal. 436, 101 Pac. 443, 21 L. R. A. (N. S.) 953, 17 Ann. Cas. 993. Neither separately nor cumulatively can it be said that the acts of this respondent measure up either to a contest or to an attempt to contest the allowance of the will. True, in her petition before the Michigan courts she expressed her belief that her father had died intestate, but at the same time she advised the court that instruments were in existence which were asserted to be wills of deceased. It cannot be said that here was even an attempt to contest the validity of any of these purported wills which at that time had not been offered for probate, and the fairness of the respondent is evidenced by the information which she conveys to the court of the existence of these written instruments. Even less weight attaches to her action in filing an opposition in the courts of California. In no sense does it amount to an attempt to contest the allowance of an instrument for an interested party to say that the court of original jurisdiction for the reception in probate of this will is a court other than the one to which it had been presented.

The order and decree appealed from are therefore affirmed.

We concur: **MELVIN, J.; LORIGAN, J.**

176 Cal. 597

BESSOLO v. CITY OF LOS ANGELES.

(L. A. 4117.)

(Supreme Court of California. Dec. 5, 1917.)

1. TAXATION 🔑87, 355 — REDUCTION OF DEBTS—PROPERTY IN LITIGATION—"SOLVENT CREDIT."

Where sum awarded plaintiff in condemnation proceedings was in the hands of the county treasurer on the first Monday of March, it was assessable against the treasurer in view of Pol. Code, § 3647, providing that money and property in litigation in possession of a county treasurer must be assessed to such treasurer, etc., and plaintiff was not entitled to reduction from such sum of unsecured debts owing by him and assessed to bona fide residents of the state as provided by sections 3628, 3629, subd. 6, 3650, subd. 15; such sum not being a "solvent credit" within the last-mentioned sections.

[Ed. Note.—For other definitions, see Words and Phrases, Solvent Credits.]

2. TAXATION 🔑597—ASSESSMENTS—APPEAL —PRESUMPTION.

On appeal from order sustaining city's demurrer to plaintiff's complaint for recovery of taxes paid by county treasurer on money awarded plaintiff in condemnation proceedings, and paid by city to county treasurer, it will be presumed, in the absence of allegation to the contrary, that the assessment was made to the county treasurer, as required by Pol. Code, § 3647.

3. TAXATION 🔑333 — REDUCTION OF DEBTS FROM CREDITS—CONDITION PRECEDENT.

Conceding that the money awarded plaintiff in condemnation proceedings by defendant city, on deposit with the county treasurer, constituted a "solvent credit," from which debts owed by plaintiff could be deducted by the assessor, plaintiff was not entitled to a deduction unless the amount of such debts were shown by a sworn statement, as required by Pol. Code, § 3629, subd. 6.

Department 1. Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by Angelo Bessolo against the City of Los Angeles. Judgment for defendant, and plaintiff appeals. Affirmed.

Courtney Lacey, of Los Angeles, for appellant. Albert Lee Stephens, City Atty., and Charles S. Burnell, Asst. City Atty., both of Los Angeles, for respondent.

SLOSS, J. A demurrer to plaintiff's complaint was sustained, with leave to amend. No amendment having been made within the time allowed, judgment was given in favor of the defendant. The plaintiff appeals.

The complaint alleges that in October, 1911, the defendant, the city of Los Angeles, commenced an action against the plaintiff and others to condemn certain lands for public uses. In that action a parcel of land belonging to the plaintiff, Bessolo, was condemned upon payment of $11,310. The sum so awarded to plaintiff was paid by the city to the county treasurer, and it was in the treasurer's hands on the first Monday of March, 1913. After receiving from the county treasurer a statement of moneys in his hands, belonging to individuals, the city assessor of the defendant city assessed said sum belonging to plaintiff for Los Angeles city taxes for the year 1913–14, and collected a tax of $174.26 thereon. This tax was paid by the county treasurer out of plaintiff's moneys, without plaintiff's knowledge or consent. On the first Monday in March, 1913, the solvent credits owned by plaintiff, including the $11,310 so awarded to him, aggregated $11,863 and no more. The unsecured debts then owing by him, and assessed to bona fide residents of the state, aggregated $15,050, a sum exceeding the solvent credits owned by him. On the first Monday in March, 1913, plaintiff did not own any solvent credits subject to assessment, and said sum of $11,310 was exempt from taxation and was erroneously assessed. On April 16, 1913, plaintiff presented to the city a claim which set forth the foregoing facts regarding the assessment and collection of taxes, and asked a return of $174.26. Such return was refused, and the complaint, accordingly, prays judgment for the amount of the tax thus collected.

[1] The demurrer was based on want of facts, lack of jurisdiction of the subject, and various provisions of the statutes of limitations. Regardless of other points made, we think the demurrer was properly sustained on the first of these grounds. The fund in the hands of the treasurer was not such a "solvent credit" as, in the purview of our tax laws, is subject to the deduction of debts owed by the plaintiff. It was covered by the terms of section 3647 of the Political Code, which provides that:

> "Money and property in litigation in possession of a county treasurer, of a court, county clerk, or receiver, must be assessed to such treasurer, clerk, or receiver, and the taxes be paid thereon under the direction of the court."

The right to tax money or other property under this section "does not depend upon the ownership of the money or property, nor the final result of the litigation." Los Angeles v. L. A. City Water Co., 137 Cal. 699, 70 Pac. 770. Such money or property is to be assessed to the officer in whose hands it is, and an assessment to the real or ultimate owner is not authorized. City of San Luis Obispo v. Pettit, 87 Cal. 499, 25 Pac. 694.

[2] There being no allegation to the contrary, we must assume that the assessment in this case was made, as it properly should have been, to the treasurer. Statutory provisions for the deduction of debts from solvent credits (Pol. Code, §§ 3628, 3629, subd. 6, 3650, subd. 15) clearly contemplate the deduction of such debts only as are owed by the person to whom the solvent credits are assessed—not a deduction of debts owed by one person from money, property, or credits assessed to another.

[3] But if it be conceded that the moneys on deposit constituted a "solvent credit," from which debts owed by plaintiff could be deducted, he was still not entitled to the deduction unless the amount of such debts were shown by the sworn statement which, on demand of the assessor, the taxpayer was required to make. Pol. Code, § 3629, subd. 6. The complaint does not allege that the assessor failed to exact a statement from plaintiff, or that plaintiff made a statement of any kind, to say nothing of one showing the debts owed by him. See Henne v. County of Los Angeles, 129 Cal. 297, 61 Pac. 1081; Brenner v. Los Angeles, 160 Cal. 72, 75, 116 Pac. 397. The complaint does not therefore exhibit the facts necessary to support plaintiff's claim of a right to have the deduction made.

The judgment is affirmed.

We concur: SHAW, J.; LAWLOR, J.

176 Cal. 621

E. AIGELTINGER, Inc., v. BURKE et al.
(S. F. 7590.)

(Supreme Court of California. Dec. 7, 1917. Rehearing Denied Jan. 3, 1918.)

1. CORPORATIONS ⚷397—AUTHORITY OF CORPORATE AGENT—PROOF.

The authority of a corporate agent need not be shown by a resolution or other express declaration of the directors, but, like other facts, may be proved by circumstantial evidence.

2. CORPORATIONS ⚷406(4) — CORPORATE AGENT—AUTHORITY.

Where one has actual charge and management of the general business of a corporation with the knowledge of the members or directors, it is sufficient evidence of authority, and the company will be bound by his contracts on its behalf within the apparent scope of the business intrusted to him.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

3. CORPORATIONS 🔑425(4)—EMPLOYMENT BY CORPORATE AGENT.

A corporation which suffers appearances to exist, and its officers and agents to act so as to give one employed by them reason to believe that he is employed by the company, becomes liable to such person as his employer to pay for services rendered.

4. CORPORATIONS 🔑426(10)—AGENCY—RATIFICATION — ACCEPTANCE OF BENEFITS OF CONTRACT.

A corporation cannot knowingly accept the benefits of a contract made in its behalf, or in which it is interested, and refuse to be bound by its terms and conditions, as it ratifies the agreement by the acceptance of benefits, and is bound thereby.

5. MECHANICS' LIENS 🔑208 — CONTRACT OF MATERIALMAN AND SUBCONTRACTOR—SCOPE OF CLAUSE.

The clause of an agreement by a materialman and a subcontractor purporting to release the original contractor to erect a building and the owner "from any and all liens for labor and materials furnished by them" referred to and included materials and labor previously furnished for the performance of the subcontract, where, according to the terms of the agreement, the original contractor was to pay for all materials and labor subsequently furnished and done to complete the subcontract.

6. MECHANICS' LIENS 🔑281(1) — REPRESENTATION BY MATERIALMAN TO CONTRACTOR —SUFFICIENCY OF EVIDENCE.

In an action to foreclose a lien for materials furnished by plaintiff materialman, a corporation, to a subcontractor, evidence *held* to support the finding that the individual who was the moving spirit in plaintiff company represented by conduct and conversation to the original contractor for the work that he had personally furnished the materials to the subcontractor.

7. MECHANICS' LIENS 🔑105—JOINT INTEREST IN SUBCONTRACT.

Where an individual was personally interested as a partner in the contract whereby a corporation undertook to plaster a building under construction, he and the company were jointly interested in such subcontract for plastering.

8. MECHANICS' LIENS 🔑281(1)—MATERIALMAN'S INTEREST IN SUBCONTRACT—SUFFICIENCY OF EVIDENCE.

In an action to foreclose a lien for value of materials furnished by plaintiff corporation to a subcontractor to plaster a building under erection, evidence *held* to sustain the finding that plaintiff was interested in the subcontract for plastering; the individual who was its moving spirit having obtained the interest acting in its behalf.

Department 1. Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by E. Aigeltinger, Incorporated, against G. W. Burke and the Lindgren Company. From a judgment for the Lindgren Company, plaintiff appeals. Judgment affirmed.

Wal J. Tuska, of San Francisco, for appellant. Francis V. Keesling and C. A. S. Frost, both of San Francisco, for respondent.

SHAW, J. This is an action to foreclose a lien for the value of materials alleged to have been furnished by the plaintiff to G. W. Burke Company, a corporation, subcontractor under a corporation known as Lindgren Company, who was the original contractor for the erection of a building for the Olympic Club in San Francisco. The materials were furnished for use, and were used, in said building, and in the completion of the subcontract of said G. W. Burke Company. Issues were formed, a trial was had, and findings and judgment were given in favor of the defendant Lindgren Company. The plaintiff appeals from the judgment.

The only controversy upon this appeal is upon the question whether or not, by reason of a certain agreement executed by E. Aigeltinger, G. W. Burke Company, and Lindgren Company, on October 13, 1911, and the circumstances under which said agreement was made and carried out, the Aigeltinger Company is estopped from claiming a lien on the property. It is admitted that the notice of lien was duly filed within the time allowed by law, and that the amount claimed therein was justly due from G. W. Burke Company to the Aigeltinger Company for materials furnished by the latter to the former, as subcontractor, for use in said building.

The subcontract of the Burke Company with the Lindgren Company, under which the materials were furnished, was executed on February 14, 1911. Work was performed thereunder and a large part thereof was completed prior to October 13, 1911. At that time the Burke Company and Aigeltinger applied to Lindgren Company for assistance in carrying out the subcontract, and in consequence of said application the contract of October 13, 1911, was executed. The findings of the court relating to the subject of the estoppel and the effect of the last-mentioned contract were somewhat elaborate and need to be stated in detail.

Aigeltinger was at all times the president of the Aigeltinger Company, and exercised entire control of its business and affairs. The company adopted and used the name of E. Aigeltinger as its corporate name. It permitted him to mingle his own funds and the corporate funds, and otherwise to commingle his personal identity and affairs with the corporate business. The Lindgren Company had no knowledge, prior to the filing of the plaintiff's claim of lien herein, that E. Aigeltinger was a corporation, or that there was a corporation by the name of "E. Aigeltinger, Incorporated," but, on the contrary knew one E. Aigeltinger as a person and as a friend of W. G. Burke, president of the Burke Company, and as bondsman of the said company on said subcontract, and as a person financially interested as a partner with said Burke Company in said subcontract, but had no knowledge or information that the materials for which plaintiff's lien is claimed were furnished or sold by E. Aigeltinger, Incorporated, as a corporation, or as distinct from E. Aigeltinger as a person. The plaintiff during all this time made no effort to distinguish its identity in the minds of Lindgren Company's officers and agents from that of E. Aigeltinger personally. With the knowledge and acquiescence of the plaintiff corporation, E. Aigeltinger became financially interested in said subcontract at the time it was made, and with the consent of the plaintiff he mingled the moneys of the corporation with his own in paying for labor performed on said subcontract, all of which money was kept in a bank account in the name of said plaintiff corporation. Having no money with which to pay for the labor and material necessary to complete the performance of the subcontract, Aigeltinger and Burke applied to the Lindgren Company for financial assistance to enable them to complete the same. The Lindgren Company agreed to this proposal, and thereupon the agreement of October 13, 1911, was executed. As its effect is the main question in controversy, it is necessary to set it out in full. It is as follows:

"This memorandum of agreement, made this the 13th day of October, 1911, by and between the G. W. Burke Company, a partnership, and E. Aigeltinger, all of the city and county of San Francisco, Cal., parties of the first part, and Lindgren Company, a corporation organized under the laws of the state of California, the party of the second part, witnesseth: That whereas, the party of the second part is the general contractor for the erection of the Olympic Club Building, now being built on the corner of Post and Mason Streets, in San Francisco, Cal., and the parties of the first part are jointly interested in a contract made by the G. W. Burke Company for the plastering work on said building, that the parties hereto agree each with the other as follows: The party of the second part agrees that it will pay for all the labor and materials necessary for the completion of the said plastering contract from and after this date that may be furnished and provided by the parties of the first part, including the labor furnished during the week ending on Saturday the 14th inst., and that it will reimburse itself for all moneys so paid out for labor and materials out of the money due and to become due to the parties of the first part on said plastering contract, and out of any balance that may remain after all bills as above mentioned have been paid, to pay, first, to G. W. Burke Co., a sum equaling $8 per day for the time actually spent on the plastering work by G. W. Burke, and, second, to pay any balance that may then remain in equal portions to the G. W. Burke Company and E. Aigeltinger.

"The parties of the first part agree that they will complete the plastering contract above referred to, and that upon the completion and acceptance of the work done under such contract they will release the party of the second part and the owner of the building, the Olympic Club, from any and all liens or claims for labor and materials furnished by them, and further agree that they will pay to the party of the second part interest at the rate of 8 per cent. per annum for all moneys advanced by it to pay for labor and materials for and during the time it shall be advanced before the money so advanced shall have been returned to said party of the second part from the payments due to said parties of the second part on account of said contract.

"In witness whereof the parties hereto have affixed their signatures this the 13th day of October, 1911. G. W. Burke Co., by G. W. Burke, Pres. E. Aigeltinger. Lindgren Company, by A. F. Lindgren, Vice President."

The Burke Company was not a partnership, as recited in said agreement, but was a corporation. The recital in the agreement that the Burke Company and Aigeltinger were jointly interested in the contract of the Burke Company for the plastering work on the Olympic Club building referred to the subcontract involved herein. Aigeltinger failed to inform Lindgren Company of the claim of E. Aigeltinger, Incorporated, against the Burke Company for materials furnished for use in the building, or of the existence of the plaintiff as a corporation distinct and separate from himself. But with intent to mislead Lindgren Company, and while exercising control of the business and affairs of the plaintiff corporation, E. Aigeltinger, represented to Lindgren Company that said account against the Burke Company for said materials was held and owned and that said materials were sold to said Burke Company by E. Aigeltinger personally, and that, if any rights to lien therefor should arise, they would belong to said E. Aigeltinger personally. The Lindgren Company believed said representations to be true, and in reliance thereon entered into the said agreement of October 13, 1911, and thereafter fully performed its part thereof. It would not have entered into the said agreement, or made further payments to the Burke Company under the said plastering contract, if it had known that the plaintiff, as distinct from Aigeltinger personally, was the real owner of the demand against the Burke Company for said materials. The plaintiff was jointly interested in the plastering contract with said Aigeltinger and said Burke Company, and, with full knowledge of all the facts concerning the agreement of October 13, 1911, accepted the full benefit of said agreement and of the performance thereof by Lindgren Company. The court also found that at the time of making said agreement of October 13, 1911, it was understood and agreed by and between the persons who accepted the same on behalf of the respective parties that all liens or claims for labor or material used, and to be used, in the performance of the said subcontract, would be released so far as the Olympic Club and Lindgren Company were concerned. This we take to have been intended as a statement of the true meaning and legal effect of the written agreement, and not as a statement of an oral agreement separate from the writing.

The answer sets up the defense based upon the agreement of October 13, 1911, in two counts. The first count alleged that the plaintiff corporation, by E. Aigeltinger, its agent, executed said agreement as one of the parties of the first part. The second count alleged the facts in accordance with the findings above set forth, with the additional allegation that all the acts and statements of E. Aigeltinger in regard to the matter were performed and made by him "as agent of and for the benefit of plaintiff," and that plaintiff knew of and authorized the same. The court made no explicit finding upon this additional allegation, nor upon the aforesaid allegation of the first count.

[1-3] It would have made the case clearer if the court had found as a fact that in all his proceedings as heretofore related Aigeltinger was acting as agent for the plaintiff and in its behalf, and that he was thereunto duly authorized by the plaintiff. The authority of a corporate agent need not be shown by a resolution or other express declaration of the directors. Like other facts, it may be proven by circumstantial evidence.

> "Where one has the actual charge and management of the general business of a corporation, with the knowledge of the members, or the directors, this is sufficient evidence of authority, and the company will be bound by his contracts, made on their behalf, within the apparent scope of the business intrusted to him. * * * A corporation which suffers appearances to exist, and its officers and agents to so act, as to give one employed by such officers and agents reason to believe that he is employed by the company, becomes liable to such person as his [its] employé to pay for the services rendered." Crowley v. Genesee M. Co., 55 Cal. 276; Goodwin v. Union Screw Co., 34 N. H. 378; Bates v. Coronado Beach Co., 109 Cal. 162, 41 Pac. 855; Phillips v. Sanger L. Co., 130 Cal. 434, 62 Pac. 749; Curtin v. Salmon, etc., Co., 141 Cal. 311, 74 Pac. 851, 99 Am. St. Rep. 75.

[4] There was ample evidence of the character indicated in the above quotation to prove the facts alleged in the answer as above stated. But the same results follow from the allegation and finding that the plaintiff, with full knowledge of all the facts concerning the agreement of October 13, 1911, accepted the full benefits thereof and of the performance thereof by Lindgren Company. In compliance with that agreement, Lindgren Company paid the money due for the labor and materials required to continue the work of the subcontract after October 13, 1911, until the same was fully completed. The plaintiff was interested in said subcontract, and these payments were a benefit to it. One cannot knowingly accept the benefits of a contract made in its behalf, or in which it is interested, and refuse to be bound by its terms and conditions. The plaintiff, therefore, in effect, ratified the agreement of October 13, 1911, and is bound thereby. Bates v. Coronado Beach Co., supra; Phillips v. Sanger L. Co., supra; Curtin v. Salmon, etc., Co., supra.

[5] Plaintiff earnestly insists that the clause of the agreement by Aigeltinger and the Burke Company purporting to release Lindgren Company and the Olympic Club "from any and all liens for labor and material furnished by them," meaning Aigeltinger and the Burke Company, refers to labor and materials thereafter to be furnished by them in completing the subcontract, and does not include any lien for the materials previously furnished to the Burke Company by the Aigeltinger Company. We think it is manifest that it refers to and includes the materials and labor previously furnished for the performance of the subcontract. According to the terms of the agreement, Lindgren Company was to pay for all materials and labor subsequently done and furnished to complete the subcontract. It was to be repaid by Burke out of moneys to become due on the subcontract. This implies, of course, that the Burke Company was to be fully paid for the labor thereon. The materials would be paid for by Lindgren Company, and no other person would have a lien therefor. Neither Aigeltinger nor the Burke Company could have any claim or lien on account thereof. The reference in the agreement must have been to a lien which had a possibility of existence, and the lien for the bill of the Aigeltinger Company for materials previously furnished to the Burke Company was the only one that could answer that description.

[6] It is claimed that the representations of Aigeltinger found to have been made, as above stated, were not proven by any evidence. There was no express statement by him to Lindgren Company that he had personally furnished the materials to Burke Company, or that he, personally, was the owner of the demand and of the right to a lien therefor. But his entire course of conduct and conversation in the affair, from beginning to end, amounted to a representation to that effect, and was such that the Lindgren Company might with good reason have believed that to be the fact. It is also implied by the terms of the agreement itself. The finding is therefore not without substantial support in the evidence.

[7, 8] It is also claimed that the contract for plastering work on the building, referred to in the agreement of October, 1911, as the contract in which Aigeltinger and the Burke Company were jointly interested, is not the subcontract under which the Aigeltinger Company supplied the materials to the Burke Company. There is no merit in this claim. The contract of the Burke Company was the only contract for the plastering of the building. The court found that Aigeltinger was personally interested as a partner therein with the Burke Company. This being the case, it would be true, as the recital states, that the two were jointly interested therein. The fact was that Aigeltinger had made an agreement with Burke Company whereby, in consideration of Aigeltinger's assistance in the performance of the contract, financial and otherwise, he was to have a part of the profits thereof, and it was shown by abundant evidence that in making this agreement and obtaining this interest Aigeltinger was acting in behalf of the plaintiff corporation,

and that the interest which he thereby acquired in the subcontract was in equity the property of the plaintiff corporation. The court found that the plaintiff was interested in said subcontract, and this finding is sustained by the evidence. From all these circumstances it is manifest that the reference could have been to no other contract than the subcontract of Burke Company for the lathing and plastering of the building.

We are of the opinion that the estoppel against the plaintiff was established by the facts found, and that the findings are sustained by the evidence. Appellant's counsel presents a number of minor points as to the relevancy and competency of certain evidence. All of these points are either covered by what we have said or they are too trifling to deserve notice.

The judgment is affirmed.

We concur: SLOSS, J.; LAWLOR, J.

176 Cal. 694

WARE v. QUIGLEY et al. (Sac. 2446.)

(Supreme Court of California. Dec. 13, 1917.)

1. TRUSTS ⚷25(1)—CREATION—INSTRUMENTS—SUFFICIENCY—"EXPRESS TRUST."

A writing between plaintiff and defendant, on one hand, and a third person, on the other hand, by which the third person agreed to assist in securing options on property, and plaintiff and defendant agreed to pay him certain amounts therefor, did not constitute an "express trust" within the meaning of Civ. Code, § 852, stating requisites of a trust in real property; no contractual relation being thereby created between plaintiff and defendant.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Express Trust.]

2. TRUSTS ⚷63¾—CREATION—INSTRUMENTS — SUFFICIENCY — "TRANSFER" — "RESULTING TRUST."

Nor did such instrument, coupled with payment of money by plaintiff and taking of title by defendant, create a "resulting trust" within Civ. Code, § 853, providing that when a transfer of real property is made to one person, and the consideration therefor is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made, since the options so secured and taken in defendant's name were not a "transfer" of property within the definition of Civ. Code, § 1039, but were mere rights of election.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Resulting Trust; Transfer.]

Department 2. Appeal from Superior Court, Sutter County; K. S. Mahon, Judge.

Action by J. H. Ware against T. L. Quigley and others. From a judgment of dismissal, plaintiff appeals. Affirmed.

W. H. Carlin, of Marysville, for appellant.
Butler & Swisler, of Sacramento, for respondents.

VICTOR E. SHAW, Judge pro tem. This is an appeal by plaintiff from a judgment of dismissal entered upon the sustaining of demurrers to the amended complaint without leave to amend.

The complaint alleges: That defendants Evans, Gregory, and James were the owners of certain described lands located in what is known as Butte Basin in Sutter county; that on February 2, 1913, there was executed by and between plaintiff and defendant Quigley an agreement as follows, to wit:

"Sacramento, Cal., Feb. 8, 1913.

"This agreement made this 8th day of Feb. 1913 between T. L. Quigley and J. H. Ware of Seattle, Wash., parties of the first part and Morris Brooke of the second part:

"In consideration of the help and assistance which the party of the second part is to give to the party of the first part in tying up or securing prices or options on certain properties in the Sacramento Valley more particularly known as the Butte Basin of said valley, parties of the first part agree to pay the party of the second part a commission on all properties handled in said district of one third of a regular commission based on an understanding that a regular commission is five per cent.

"The party of the second part agrees to help parties of the first part in any way he can and shall be willing and ready to give said parties at any and all times such assistance as he or his office can give.

"He further agrees that he or his office shall not operate in the above described district excepting to give assistance to the parties of the first part.

T. L. Quigley.
"J. H. Ware.
"Morris Brooke."

That "in accordance with said agreement and the whole thereof" plaintiff and Quigley procured from defendants Evans, Gregory, and James a 90-day option taken in their joint names to purchase the land described in the complaint. That before the expiration of the option, "and in full accordance with the terms of the foregoing agreement, said option was renewed for a period of six months * * * by virtue of an agreement and understanding by and between plaintiff and defendant T. L. Quigley" for an additional period of six months "taken in the name of defendant T. L. Quigley but for the benefit of himself and plaintiff in accordance with the provisions of the foregoing agreement," which option as renewed provided that the same should be extended for a period of six months upon the payment of $1,500 to the owners of said land, which sum, pursuant to an agreement between the plaintiff and Quigley, the latter paid, upon an agreement that he should have recourse alone to the profits of any sale of said lands for repayment of the amount so advanced, with legal interest thereon. That prior to the expiration of the extended option so obtained by Quigley, and in consideration of the $1,500 paid therefor, plaintiff, who was not familiar with its terms or the expiration thereof, notified Quigley that the option should be exercised by a purchase of the property unless an extension of the option should be obtained and that he was ready and willing to contribute his part necessary to consummate such purchase or obtain such extension, and also demanded full information as to the terms and conditions thereof, to which Quigley made no response. That about January 3, 1914, Quigley obtained either an extension of the option or a new option expiring in January, 1915, for the purchase of the property with the purpose and intent to appropriate to himself the profits derived therefrom. That plaintiff in carrying out the terms of said contract contributed both time and money in assisting in procuring the original option and permitted the renewal thereof in the name of Quigley upon his promise that he would hold the same as trustee in accordance with the terms of said agreement. That unless restrained from so doing Quigley will exercise the said option and cause transfers of the property to be made by the owners of the land to purchasers obtained by him, at a profit of many thousands of dollars which he will appropriate to his own use in a manner so that plaintiff will be unable to reach or obtain any part thereof. The prayer of the complaint is for a decree that plaintiff is the owner of a one-half interest in and to any contracts or options which Quigley may have for the purchase of said property and that he be enjoined from exercising the same other than in conjunction with plaintiff and that defendants Evans, Gregory, and James be enjoined from making any deeds or transfers of the property under any contract or option with Quigley other than acting in conjunction with plaintiff.

To this complaint the defendants Evans, Gregory, and James interposed a general demurrer, and the defendant Quigley interposed a demurrer upon both general and special grounds both of which, as stated, were sustained without leave to amend.

[1] Appellant insists that the facts pleaded created a trust in Quigley for the benefit of plaintiff. This contention is based upon the theory, first, that the written agreement made by himself and Quigley with Brooke, constituted an express trust created by written instrument within the meaning of section 852 of the Civil Code, and, second, that "a trust is presumed to result in favor" of plaintiff by reason of the fact that he contributed several hundred dollars in labor and money in procuring the option. Neither position is tenable. Reference to the document upon which appellant based his first contention shows it to be a contract, not between plaintiff and Quigley, but by both of them as one of the parties thereto with Morris Brooke, the subject of which was not a trust, nor, indeed, any contractual relation whatsoever between plaintiff and Quigley, but certain services to be rendered by Brooke for which plaintiff and Quigley agreed to pay him a commission. It is not possible to construe this document as creating an "express trust" by an instrument in writing as provided by section 852.

[2] Neither does the complaint contain facts showing the creation of a "resulting trust" as defined in section 853 of the Civil Code. This section provides that when a transfer of real property is made to one person, and the consideration therefor is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made. The authorities, Faylor v. Faylor, 136 Cal. 92, 68 Pac. 482, and Moultrie v. Wright, 154 Cal. 520, 98 Pac. 257, cited by appellant in support of his contention, all involve facts where the title to the property was conveyed to one person, the consideration for which was paid by another, thus bringing the cases directly within the purview of said section. By section 1039 of the Civil Code a "transfer" is defined as "an act of the parties or of the law by which the title to property is conveyed from one living person to another." An option is not a transfer of property. No title is conveyed thereby. It is a mere right of election acquired by one under a contract to accept or reject a present offer within the time therein fixed. Am. & Eng. Ency. of Law, p. 924. Not only was there no transfer of title to the real property made by the owners thereof to Quigley, but, as appears from the allegations of the complaint, plaintiff neither paid, nor agreed to pay, any part of the $1,500 which Quigley paid for the option. Under the agreement he was to look for reimbursement to the profits derived from a sale of the property. Hence it seems clear that no trust was created under the provisions of said section 853 of the Civil Code.

Not only is the complaint for the reasons given obnoxious to the general demurrer interposed, but it is apparent from the views expressed that the allegations of the complaint based upon the instrument are wholly inconsistent with the terms thereof which does not purport to have been made by and between plaintiff and Quigley as to any subject of contract between them. As stated in the special demurrer of Quigley, it is impossible to say what is meant by the allegations that the options were procured and the renewals made in full accordance with the terms of the agreement and the renewal thereof obtained in Quigley's name with the consent of plaintiff "in accordance with the provisions of the foregoing agreement," nor what is meant by the allegation that plaintiff in carrying out the terms of said agreement contributed several hundred dollars in labor and money.

The demurrers were properly sustained, and the judgment is affirmed.

We concur: MELVIN, J.; HENSHAW, J.

176 Cal. 680

SCOTT v. HOLLYWOOD PARK CO. et al. (L. A. 4166.)

(Supreme Court of California. Dec. 13, 1917.)

1. Appeal and Error ⟹934(1) — Presumptions—Regularity of Judgment.

All presumptions indulged in are in favor of the regularity of the judgment and proceedings upon which it is based, and it devolves upon an appellant to affirmatively show the existence of the error upon which he asks for a reversal.

2. Appeal and Error ⟹758(3) — Brief — Sufficiency.

Where a party presented typewritten transcript on appeal under Code Civ. Proc. § 953c, requiring necessary portions of record to be in the record, but he made no attack on the findings or their sufficiency, and pointed out no error of law, and failed to indicate the relief sought by the action, or the nature of the judgment, there was nothing for review.

3. Appeal and Error ⟹757(1) — Briefs — Statement of Case.

When Code Civ. Proc. §§ 953a, 953b, 953c, as to bringing up necessary parts of record, are not complied with on appeal under such sections, no duty devolves on the court on appeal to search for the error through the typewritten transcript.

Department 2. Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by J. George Scott, suing for himself and others, against the Hollywood Park Company and others. From the judgment rendered, plaintiff appeals. Affirmed.

Robt. L. Hubbard, of Los Angeles, for appellant. Charles S. Burnell and Haas & Dunnigan, all of Los Angeles, for respondents.

VICTOR E. SHAW, Judge pro tem. In support of his appeal herein, appellant, in lieu of a bill of exceptions and printed record, presents a typewritten transcript, in accordance with the provisions of sections 953a, 953b, and 953c of the Code of Civil Procedure. While section 953c declares the transcript of such record need not be printed, it, in express terms, provides that:

> "In filing briefs on said appeal the parties must, however, print in their briefs, or in a supplement appended thereto, such portions of the record as they desire to call to the attention of the court."

[1, 2] In his brief counsel for appellant states that:

> "While there were many and grievous errors committed by the court in the trial of this cause, the one and vital error, and the one relied upon, consisted in rendering judgment in favor of the defendants and against plaintiff, and denying plaintiff the relief to which he is entitled."

As appears from appellant's brief, no attack is made upon the findings, the sufficiency of which to support the judgment is likewise unquestioned, and our attention is directed to no error of law occurring at the trial. Neither in his brief nor in any supplement thereto is there anything to indicate what relief was sought by the action, nor is there anything printed in the brief indicating the nature of the judgment which appellant says was erroneously rendered. All presumptions indulged in are in favor of the regularity of the judgment and proceedings upon which it is based; hence it devolves upon an appellant to affirmatively show the existence of the error upon which he asks for a reversal. Upon the showing made, how can this court say the judgment thus attacked is erroneous? Assuming that appellant's real contention is that the evidence is insufficient to sustain the findings, the answer is that the findings so attacked are not printed in the brief, without which, and the evidence upon which they are based, this court cannot say they are unsustained. The brief does not purport to contain all or other than a meager part of the evidence upon which the trial court made its findings.

[3] The direction contained in the statute is clear that, where the record is brought up under the provisions of sections 953a, 953b, and 953c of the Code of Civil Procedure, the appellant shall print enough of such record to show the alleged error of which he complains, and also illustrate the points made in the argument. When not thus exhibited, no duty devolves upon the court to examine a voluminous typewritten transcript of the stenographic report in search of error upon which to base a reversal.

The requirement of the statute in this regard has been repeatedly pointed out. Estate of McPhee, 156 Cal. 335, 104 Pac. 455, Ann. Cas. 1913E, 899; Marcucci v. Vowinckel, 164 Cal. 693, 130 Pac. 430; McKinnell v. Hansen, 167 Pac. 887; Miller v. Oliver et al., 163 Pac. 357.

The judgment is affirmed.

We concur: MELVIN, J.; HENSHAW, J.

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176 Cal. 691

FROST v. ALWARD et al. (Sac. 2768.)

(Supreme Court of California. Dec. 13, 1917. Rehearing Denied Jan. 10, 1918.)

Contracts ⟹164—Frauds, Statute of ⟹118(1)—Separate Instruments.

Two instruments simultaneously executed, by one of which defendants agreed to pay plaintiff a certain rate for hauling parcel post for a stated period, and by the other plaintiff agreed that after a year, if defendant then used auto trucks for hauling, all contracts between them were canceled, constituted one contract in view of Civ. Code, § 1642, requiring such instruments to be construed together, and section 1647, requiring reference to circumstances and subject-matter, and, so construed, there was no want of mutuality nor contravention of the statute of frauds.

In Bank. Appeal from Superior Court, Shasta County; James G. Estep, Judge.

Action by A. G. Frost against Leslie T. Alward and another. Judgment of nonsuit, and plaintiff appeals. Reversed.

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

McCoy & Gans, of Red Bluff, for appellant. Carr & Kennedy, of Redding, for respondents.

VICTOR E. SHAW, Judge pro tem. In this action plaintiff sought recovery of damages for the breach of an alleged written contract. At the conclusion of plaintiff's evidence the court made an order granting defendants' motion for a nonsuit upon the ground "that no contractual relation had been established between plaintiff and defendants in the action." In accordance with such order judgment was entered, from which plaintiff appeals.

It appears that at the times in question defendants were contractors engaged in the carrying of United States mail and parcel post from Redding to other points in California; that on August 14, 1915, two documents set forth in the complaint, designated therein as Exhibit A and Exhibit B as constituting the alleged contract between the parties, were executed in form and terms as follows:

Exhibit A.

> "Redding, Cal., August 14, 1915.
>
> "We, the undersigned, agree to pay A. G. Frost for the hauling of parcel post from Redding to Weaverville the following rates: $1.40 per hundred pounds from December 1, 1915, to April 15, 1916; from April 15, 1916, to December 1, 1916, $1.00 per hundred pounds—the same each consecutive year as long as our contract with government holds, and the rates to intermediate points the same as per contract price from the government, save and except that portion that we might haul on our daily stage and not to exceed 750 pounds per day in excess of our 600 pounds load required by the government; said hauling to be done as required by the government. Said A. G. Frost is to receive and deliver parcel post in good order as received to the different points mentioned.
>
> "Leslie T. Alward.
> "C. F. Brouillard."

Exhibit B.

> "Redding, Cal., August 14, 1915.
>
> "I, the undersigned, A. G. Frost, hereby agrees after one year from Sept. 1, 1915, should Alward & Brouillard put on automobile trucks for the transportation of parcel post to consider all contracts canceled then held by the undersigned. A. G. Frost."

By answer defendants admit that on the date named they made, executed, and delivered to plaintiff the writing designated Exhibit A, and that at the same time plaintiff executed and delivered to them the instrument designated Exhibit B, which without denial is alleged in the complaint to have been executed and delivered to defendants by plaintiff as a part of the agreement made between the parties.

As appears from the evidence, plaintiff entered upon and continued in the performance of the duty of transporting parcel post for defendants until about May 1, 1916, when the latter committed the alleged breach of contract for which the action was instituted.

The sole question presented is whether the instruments hereinbefore set out constitute a contract between plaintiff and defendants. Both by the evidence and admissions in the pleadings they are shown to have been executed at the same time between the same parties and relate to the same subject-matter; hence, as provided in section 1642 of the Civil Code, are to be considered together as constituting one transaction, in effect as though the terms were embodied in one document. Flinn & Treacy v. Mowry, 131 Cal. 481, 63 Pac. 724, 1006; Ingoldsby v. Juan, 12 Cal. 564, 577; Makepeace v. Harvard College, 10 Pick. (Mass.) 298. Assuming the identical language set forth in the two documents to have been incorporated in one instrument signed by all the parties, it would clearly appear therefrom that for the period extending from December 1, 1915, to the termination of Alward and Brouillard's contract with the government, subject to their right to terminate the contract with plaintiff after December 1, 1916, by putting on auto trucks for the transportation of parcel post, they agreed to pay him, the plaintiff, the prices therein specified for hauling parcel post between designated points, and plaintiff agreed to perform the services in the manner required by the government and deliver the parcel post in as good order as it was delivered to him. Reference to the circumstances under which the contract was made and the subject to which it relates as provided by section 1647 of the Civil Code clearly warrants such interpretation. Thus construed, the contract is not in contravention of the statute of frauds, nor is there want of mutuality in its terms.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; MELVIN, J.; HENSHAW, J.; SHAW, J.

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176 Cal. 682

CITY SECURITIES CO. v. HARVEY et al.

(L. A. 4102.)

(Supreme Court of California. Dec. 13, 1917. Rehearing Denied Jan. 10, 1918.)

1. MUNICIPAL CORPORATIONS 🔑469(4)—IMPROVEMENTS—ASSESSMENTS—FRONTAGE.

In proceeding under St. 1909, p. 167, for work and construction of sidewalks and curbing, section 6 of which provides that the expense shall be assessed upon the lots and lands fronting thereon on the same side of the street where said sidewalks shall be constructed, each lot or portion of lot being separately assessed in proportion to the frontage at a rate per front foot sufficient to cover the total expense of the work, it was improper to apportion and assess the cost of a sidewalk in proportion to the square feet of sidewalk in front of each lot.

2. MUNICIPAL CORPORATIONS 🔑490 — IMPROVEMENTS—ILLEGAL ASSESSMENT—RELIEF.

In proceeding under St. 1909, p. 167, for work and construction of sidewalks and curbing, where assessment was illegal on its face, the property owner need not, as provided by section 10 of the act, appeal to the city council, but, the assessment being void, was no lien on the property, and the owner could rely on the invalidity in an action to enforce the assessment.

3. Evidence ⚷333(4)—Illegal Assessment—Evidence—Admissibility.

In proceeding under St. 1909, p. 167, for work and construction of sidewalks and curbing, where assessment was illegal on its face, the assessment roll was not admissible in evidence.

Department 2. Appeal from Superior Court, Los Angeles County; Eugene P. McDaniel, Judge.

Action by the City Securities Company against Harriet Harvey and others. From decree for plaintiff and order denying motion for new trial, defendant Harvey appeals. Reversed.

Hiatt & Selby, William M. Hiatt, Edward M. Selby, and Howard R. Hinshaw, all of Los Angeles, for appellant. A. J. Sherer and Arthur G. Baker, both of Los Angeles, for respondent.

VICTOR E. SHAW, Judge pro tem. Action to foreclose a lien based upon an assessment against a lot and parcel of land owned by defendant Harvey for the cost of constructing a sidewalk on Eleventh street, upon which said property fronted in the city of Los Angeles. A decree was entered as prayed for in favor of plaintiff, from which, and an order denying her motion for a new trial, defendant Harvey appeals.

The proceedings which created the alleged lien purport to have been had and taken by the city council of Los Angeles under and pursuant to the provisions of an act of the Legislature entitled "An act to provide for work upon and construction of sidewalks and curbing within municipalities" (Stats. 1909, p. 167), and provided for the construction of cement sidewalks varying in width on portions of both sides of Eleventh street, between Main and Figuroa streets.

At the trial the court, over defendants' objection, admitted in evidence the warrant, assessment, and diagram made by the superintendent of streets, together with the certificate of the city engineer as to the completion of the work, which under section 11 of the act, when accompanied by an affidavit of demand and nonpayment, are made prima facie evidence of the regularity and correctness of the assessment and the prior proceedings upon which said assessment, warrant, and diagram are based, and like evidence of plaintiff's right to recover in the action. Thereupon, plaintiff having rested, the defendant moved for a nonsuit upon the ground, among others, that the documents offered and received in evidence were on their face illegal and void, and as made, without authority of law, for the reason that as appeared therefrom, the assessment included the work done on both sides of the street and against each lot, not in proportion to the frontage which it bore to that of all the lots in the same side of the street along which the entire sidewalk was constructed, but in proportion to the number of square feet of sidewalk constructed in front thereof as compared with the number of square feet in the whole area of sidewalk constructed, which motion the court denied.

[1] The chief question involved and the only one necessary to decide is the validity of the assessment made in apportioning the cost of constructing the sidewalk on the northeasterly side of Eleventh street on which defendant's property abutted and in front of whose lot the sidewalk as authorized in the proceeding was of a width of 9½ feet, while the specified width of other portions thereof on the same side of said street and in front of other lots was 7½ feet. Section 6 of the act provides that:

> The "expense incurred for the construction of any sidewalk authorized by this act * * * shall be assessed upon the lots and lands fronting thereon on the same side of the street where said sidewalks shall be constructed, each lot, or portion of lot being separately assessed in proportion to the frontage at a rate per front foot sufficient to cover the total expense of the work. * * *"

Concededly the assessment was not so made. As shown on the face thereof, the entire cost of the work on both sides of the street, together with the incidental expense thereof, was apportioned to and assessed against the lots fronting on each side thereof in such proportion as the number of square feet of sidewalk in front of each lot bore to the entire area of sidewalk constructed, so that the assessment against lots of the same frontage was greater or less in amount, depending upon the width of the sidewalk upon which they fronted.

[2, 3] It is suggested that, conceding the assessment was not made as provided by law, nevertheless the remedy of defendant, if aggrieved or objecting to the correctness or legality of the assessment, was an appeal to the city council, provision for which is made section 10 of the act, which declares the decision of such body to be final and conclusive as to all matters therein made the subject of appeal. Since unauthorized by any law of this state, the assessment is void on its face, constitutes no lien on defendant's property, and hence she is not an aggrieved party within the meaning of the provision. As stated in Ryan v. Altschul, 103 Cal. 177, 37 Pac. 340:

> "If, however, the assessment is void upon its face, it does not constitute an apparent lien upon the property, and as its invalidity is always apparent, the owner is not 'aggrieved,' and is not required to seek its correction by an appeal, but may defend, upon this inherent invalidity whenever an attempt is made to enforce it, or any right is asserted by virtue of its existence."

Where the assessment itself discloses that it is made in a manner not authorized by statute, it is void on its face. An owner of property thus assessed is not required to appeal to the city council for the correction of the assessment, but may as a defense in an action to enforce the same rely upon its inherent invalidity. Pacific Pav. Co. v. Verso, 12 Cal. App. 362, 107 Pac. 590. The court erred in admitting the assessment roll in evidence, and likewise erred in denying defendant's motion for a nonsuit.

Our conclusion renders it unnecessary to consider other grounds urged for a reversal.

The judgment and order are reversed.

We concur: MELVIN, J.; HENSHAW, J.

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176 Cal. 722

BLACK v. KNIGHT et ux. (S. F. 7212.)

(Supreme Court of California. Dec. 14, 1917. Rehearing Denied Jan. 10, 1918.)

LANDLORD AND TENANT 🔑318(3)—WRONGFUL DISPOSSESSION—DAMAGES—"EVICTION."

The prosecution to judgment of an action of unlawful detainer by a landlord, without malice, does not constitute an eviction which would entitle the tenant, on reversal, to damages, where no writ to dispossess was issued, tenant having moved by reason of the judgment.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Eviction.]

In Bank. Appeal from Superior Court, City and County of San Francisco; Jas. M. Troutt, Judge.

Action by Henry Black against Robert S. Knight and Henrietta C. Knight, his wife. Judgment for plaintiff, and Henrietta C. Knight appeals. Reversed.

Samuel Knight, of San Francisco, and Carl H. Abbott, of Oakland, for appellant. Arthur H. Barendt, of San Francisco, for respondent.

ANGELLOTTI, C. J. This is an action for damages for the alleged unlawful eviction of plaintiff by his landlord from premises held and occupied by him as a tenant under a lease. Judgment was given for the sum of $10,449, and the appeal is from such judgment and from an order denying a motion for a new trial. All but $586 of the amount awarded was on account of the value of the unexpired term of the lease (fixed at $11,544), such $586 being for expense and damage incurred in defending the unlawful detainer action.

The only alleged eviction found was the prosecution by the landlord to judgment in the superior court of an unlawful detainer proceeding on account of the alleged violation by the tenant of a covenant of the lease, the judgment entered therein declaring the lease canceled and forfeited, and adjudging that the tenant "restore" and the landlord "have" possession of the demised premises, and that the landlord recover from the tenant $2,250 damages, $200 attorney fees, and $30 costs. The tenant appealed from the judgment, staying by bond the enforcement of the judgment pending appeal in so far as the money recovery was concerned, but not seeking any stay as to the portion of the judgment relative to possession of the demised premises. In the complaint it was alleged that by the judgment the tenant was required to "and did surrender possession of said premises" to the landlord. By the answer, it was denied that "the tenant was obliged to surrender" possession of the premises, "or that, he was deprived of the possession thereof by either of defendants." It was further alleged that without asking for any stay, "and before the issuance of any writ of execution or assistance whatever," the tenant "abandoned the possession of the said premises." The trial court found simply that the tenant, "in compliance with said judgment, was required to and did surrender possession of said demised premises" to the landlord. This finding is assailed as being without sufficient support in the evidence. There was no evidence whatever as to the circumstances attending the change of possession; nothing tending to show that the tenant, without the issuance of any writ and without any demand by the landlord, did not abandon possession to the landlord upon the entry of the judgment. For all the purposes of this appeal it must be assumed that he did actually abandon the premises without being compelled to do so under any process issued and served under the judgment in the unlawful detainer proceeding. On appeal, the judgment in the unlawful detainer action was reversed, and the cause remanded for a new trial. The landlord then tendered possession of the premises to the tenant for the unexpired portion of the term, but the tender was not accepted. The unlawful detainer action was then dismissed by the landlord. In view of the record it must also be assumed for all the purposes of this appeal that the unlawful detainer action was commenced and prosecuted to the end in good faith and without malice. The judgment herein was for the amount found to be the full value of the unexpired term at the time the tenant surrendered possession, plus the amount of the expenses of the tenant in defending his possession, less certain counterclaims aggregating $1,891.

The theory upon which this judgment is sought to be sustained is that the prosecution by the landlord of the unlawful detainer action to a judgment in his favor, which judgment, by its terms, required the tenant to deliver possession to the landlord, entitled the tenant to treat the conduct of the landlord as a breach of the covenant of quiet enjoyment and an unlawful eviction, with the result that not only could he regard the lease upon voluntary surrender of possession as at an end and himself exempt from liability for further rent, etc., thereunder, but, also, treating the lease as still in force, recover as damages the value of the unexpired term thereunder, in the event that he succeeded on his appeal from the judgment.

Consideration of the authorities satisfies us that such a theory finds no substantial support therein. It may be assumed purely for the purposes of this decision that if the tenant is actually ousted from possession under process issued upon such a judgment, he may treat such ouster as a breach of the implied covenant for quiet enjoyment, and recover his damages in the event of a reversal of the judgment. Certain states have statutes providing for the recovery of such damages, among which is New York, where the statute provides substantially that if the final order in such a summary proceeding is reversed upon appeal, the person dispossessed may maintain an action to recover the damage sustained by the dispossession. Even under such a statute it has been held that actual dispossession of the tenant by the landlord is essential to a right of recovery, and that, where the tenant removes from the premises without the taking of any steps on the part of the landlord to enforce the judgment, he cannot maintain the action. See Halperin v. Henry, 144 App. Div. 658, 129 N. Y. Supp. 599; Coe v. Haines, 44 N. J. Law, 134. There is no such statute in this state. It seems to us that wherever the tenant's claim is based solely on an alleged deprival of actual possession, and is for the consequent damages, no other rule can logically or reasonably be applied.

It is elementary that the covenant for quiet enjoyment goes only to the possession, and that to constitute a violation thereof, as said in Levitsky v. Canning, 33 Cal. 299, "there must be some act of molestation, affecting, to his prejudice, the possession of the covenantee." It is true that a complete physical ouster of the tenant is not always essential to an eviction, and it has often been declared that any wrongful act of the landlord which directly results in depriving the tenant of the full beneficial enjoyment of the premises is an eviction. In Levitsky v. Canning, supra, where the tenant was never actually ousted from or abandoned the premises, the slandering of the tenant's possession, the giving out and pretending publicly that the tenant had no right to possession, and the bringing of two actions at law to recover possession from the tenant and his subtenants, under the pretense that the lease had expired (one of which actions was dismissed by the landlord, and the other of which resulted in judgment for the tenant), with the result that the subtenants quit the premises by reason of their doubts caused thereby as to the lawfulness of the tenant's possession, leaving them vacant, and he was unable to let to other parties, were held to disturb and interrupt the possession of the tenant to his injury, in violation of the covenant for quiet enjoyment, to the same extent as if he had taken plaintiff's tenants by the shoulders and forcibly ejected them. But that there must be an actual deprivation of the beneficial enjoyment of the premises to constitute an eviction was emphatically stated, and the case is not authority for the proposition that the mere institution and prosecution, by the landlord, even to judgment, of an unlawful detainer action, in good faith and without malice, can be held to constitute an invasion of the beneficial enjoyment of the premises guaranteed the tenant by his covenant for quiet enjoyment. This was clearly and distinctly shown in the later case of Agar v. Winslow, 123 Cal. 587, 56 Pac. 422, 69 Am. St. Rep. 84, in which there was involved the question whether the previous institution of an action in ejectment by the landlord constituted an eviction of the tenant. As substantially stated in that case, the essential thing in Levitsky v. Canning, supra, was "that the acts complained of as amounting to an eviction had the effect to make the tenants of the lessee quit the premises, leaving them vacant." In the case at bar, if the tenant had been actually ousted from possession by the landlord, under process issued upon the unlawful detainer judgment, it might well be argued that Levitsky v. Canning, supra, required a conclusion, contrary to very respectable authority, that there had been a wrongful deprival of possession by the landlord, constituting a breach of the covenant for quiet enjoyment. But, as we have seen, that element must be held to be lacking here.

So long, certainly, as there is no disturbance of the tenant's beneficial enjoyment of the premises caused thereby, the right of a landlord, acting in perfect good faith and without malice, to prosecute an action in the courts for the purpose of obtaining a determination of the question whether the tenant has not forfeited his term because of violation of some covenant of the lease, without making himself amenable to the tenant in damage, cannot well be disputed. Indeed, there is much authority which goes further in favor of the landlord's rights in this respect. It is substantially said in 2 Tiffany, Landlord and Tenant, § 289, that the general rule is that in order to make one liable for the institution of a civil suit it must have been with malice and without probable cause, and that, under this rule, a landlord would not be liable to his tenant for damage to the latter arising from his wrongful institution of a summary proceeding to recover possession, unless it was instituted maliciously and without probable cause. See, also, Porter v. Johnson, 96 Ga. 145, 23 S. E. 123; Hegan-Mantel Co. v. Cook's Adm'r et al., 57 S. W. [Ky.] 929. It has been declared that an entry by the landlord by virtue of summary process under the landlord and tenant act for nonpayment of rent is not an eviction (24 Cyc. 1132, note); and also, substantially, that the right to damage in such cases exists only where the dispossession proceedings have been instituted maliciously and without probable cause; or where the process has been used excessively or for a purpose which it was not intended by law to effect as in cases of abuse of process; or when expressly provided by statute. See 24 Cyc. 1462. But certainly there can be no eviction or liability in damage on the part of the landlord, in such a case, so long as there is no disturbance of the tenant's beneficial enjoyment of the premises. The mere pendency of the suit constitutes no such disturbance. The claim of learned counsel for plaintiff is based principally upon the fact that here a judgment was obtained in the superior court which, by its terms, required restoration of the premises to the landlord. It seems to us that this fact does not assist, and that the utmost that may reasonably be claimed by the tenant under these circumstances is that the landlord may not enforce his judgment by actually ousting the tenant from possession under the judgment, without making himself liable for the damage resulting from this deprival of possession, in the event of a reversal of the judgment. Until the landlord does so enforce the judgment, he does not actually disturb the possession and beneficial enjoyment, and the case in this respect is just as it was before entry of judgment. The landlord is not compelled to carry the judgment into execution simply because it has been given and entered. He may well decide to withhold execution until the final determination of his action—until it has been finally determined that the tenant has forfeited his term, and that he may treat the term as forfeited and safely enforce his judgment. The tenant has no right to assume from the mere entry of judgment that the landlord intends to do otherwise. Authorities are, of course, ample to the effect that the tenant may accept not only the prosecution to judgment of such an action, but also the mere institution thereof, as such an election on the part of the landlord to terminate the lease that he will be justified in treating the lease as ended, and may yield possession of the premises and be free from further liability under the terms of the lease. Such is the meaning of the declaration in section 675 of Underhill on Landlord and Tenant, relied on by plaintiff, where Jennings v. Bond, 14 Ind. App. 282, 42 N. E. 957, is cited, the same being an action for rent after a suit in ejectment maintained by him and after a subsequent offered surrender of the premises by the tenant. This, however, is an entirely different proposition from the one involved in this case. Here the tenant so yielding possession without being required to do so is insisting that the act of the landlord in prosecuting his action to judgment shall be treated as an eviction, and the landlord held liable to him for any loss suffered from his failure to enjoy the remainder of the term. To our minds neither reason nor authority warrants the holding that such position is correct, where the tenant actually abandons the possession without being compelled to do so under any process issued and served under the judgment in the unlawful detainer proceeding, and the proceeding was brought and maintained in good faith and without malice. As we read 1 Taylor on Landlord and Tenant, § 311, and 2 Tiffany on Landlord and Tenant, §§ 184, 185, we find nothing contrary to this view.

Decisions to the effect that the establishment of a title paramount to that of the landlord by decree of a court of competent jurisdiction warrants the tenant in yielding possession to the true owner, without waiting to be dispossessed under a writ of possession, and in treating the judgment as an eviction by title paramount are, of course, not in point. In Mack v. Patchin, 29 How. Prac. (N. Y.) 20, Id., 42 N. Y. 167, 1 Am. Rep. 506, a case strongly relied on by plaintiff, the tenant was compelled to yield possession by virtue of a writ of assistance issued in foreclosure of mortgage proceedings, the mortgage being prior in right to his interest as lessee. The writ had been issued and placed in the hands of the sheriff, who "by virtue of it demanded the possession of" the tenant. It appeared further that the landlord had expedited, if he did not instigate, the foreclosure of the mortgage, and was a joint purchaser on the mortgage sale, and a joint petitioner, with the other purchaser, for the writ of assistance. In short, he had apparently actually connived, for his own benefit, in having the tenant dispossessed by paramount title.

We are not interested here in determining just what acts of a landlord interfering with the beneficial enjoyment by the tenant of the premises, short of actual physical ouster, will warrant the latter in abandoning possession and treating the conduct of the landlord as an unlawful eviction, with the right to the damage consequent upon being deprived of the remainder of his term. It is sufficient for the purposes of this case to hold, as we do, that the mere prosecution to judgment by the landlord of an unlawful detainer action, in good faith and without malice, for the purpose of obtaining a judicial determination of the question whether he is entitled to possession by reason of some default on the part of the tenant, and possession in the event that the determination is in his favor, is not such an act.

From what we have said it necessarily follows that, upon the record before us, the recovery against appellant cannot be sustained in whole or in part. It appears unnecessary to consider other points made by her for a reversal.

The judgment and order denying a new trial are reversed.

We concur: SHAW, J.; MELVIN, J.; SLOSS, J.; LAWLOR, J.; HENSHAW, J.; VICTOR E. SHAW, Judge pro tem.

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176 Cal. 645

FERRI et al. v. CITY OF LONG BEACH et al. (L. A. 4087.)

(Supreme Court of California. Dec. 11, 1917.)

1. MUNICIPAL CORPORATIONS ⟹294(3) — STREET OPENING—NOTICE—REQUISITES.

In proceeding for street opening under St. 1903, p. 376, section 3 of which, as amended by St. 1913, p. 430, § 2, requires notice of date of passage of ordinance for the improvement, the notice is prerequisite to confer jurisdiction, and must state the date of the ordinance, and a statement of the number is not sufficient, in spite of St. 1903, p. 386, § 37, requiring liberal construction.

2. MUNICIPAL CORPORATIONS ⟹294(3) — STREET OPENING—NOTICE—REQUISITES.

In proceeding for street opening under St. 1903, p. 375, § 3, as amended St. 1913, p. 430, § 2, a notice of passage of ordinance for the improvement, defective in failing to set out date thereof, was not cured by reference to the ordinance "for further particulars."

Department 1. Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Injunction by Elizabeth Ferri and others against the City of Long Beach and others. Judgment for defendants, and plaintiffs appeal. Reversed with directions.

Phil M. Swaffield and Roland G. Swaffield, both of Long Beach, for appellants. Geo. F. Kapp, of Long Beach, for respondents.

SLOSS, J. The plaintiffs, owners of property in the city of Long Beach, brought this action against the city of Long Beach, and the members of its board of public works, to enjoin the enforcement of a street assessment by the sale of the plaintiffs' property, and to have the assessment declared void.

The proceedings which are attacked were had under the "street-opening act of 1903," as amended. Stats. 1903, p. 376; Stats. 1909, p. 1035; Stats. 1911, pp. 855, 894; Stats. 1913, p. 429. The city authorities undertook to order the widening of a street in Long Beach, and to assess the cost of the improvement upon a certain district, which included the lands of the plaintiffs. Section 1 of the act gives to the city council power to order such work to be done. Section 2 provides that before ordering any improvement to be made, the city council shall pass an ordinance declaring its intention so to do. Section 3 provides for the publication and posting of notice of the passage of said ordinance. Such notice is to be posted at certain points, and "shall state the fact and date of the passage of said ordinance and briefly describe the improvement proposed, and refer to said ordinance of intention for a description of the assessment district and for further particulars." Under section 4, persons interested are authorized to file written protest within 30 days after the first publication of the notice; a time for hearing such protests is to be fixed, and the board is to pass upon the same. At the expiration of the time within which protests may be filed, or after the denial of protests which have been filed, the city council acquires jurisdiction to order the improvement.

From the findings of fact it appears that the ordinance declaring the intention of the council to order the improvement was passed on the 29th day of December, 1911. (It was passed on its first and second readings on the 22d day of December, 1911, but was not finally passed until December 29th, which must, of course, be taken as the date of its passage, within the meaning of the act.) The posted notice, in addition to stating that the ordinance of intention was passed on the 22d day of December, 1911, briefly described the improvement, and referred to said ordinance for further particulars. Notwithstanding the discrepancy between the actual date of the passage of the ordinance and the date recited in the notice, the court found that the proceedings had been conducted in substantial compliance with the law, and that the assessments levied were legal. Judgment was entered accordingly in favor of the defendants, and from this judgment the plaintiffs appeal.

[1, 2] We think the conclusion of the trial court cannot be sustained. Unquestionably the giving of the notice required by the act is one of the steps necessary to confer upon the council jurisdiction to order the work done.

> "Proceedings for street assessments, being in invitum, must, in order to charge the property of the owner, be based upon a compliance with the provisions of the statute authorizing the assessment, in so far, at least, as those provisions have to do with the giving of notice or other steps precedent to the jurisdiction of the board to order the work done." Haughawout v. Percival, 161 Cal. 491, 493, 119 Pac. 649, Ann. Cas. 1913D, 115; Himmelmann v. Cahn, 49 Cal. 285; Brooks v. Satterlee, 49 Cal. 289; Dehail v. Morford, 95 Cal. 457, 30 Pac. 593.

Where the statute prescribes a certain kind of notice, a court is not justified in saying that some other kind of notice would be equally effective. Section 3 of the act provides that the notice shall state the fact and date of the passage of the ordinance. Confessedly, the notice in this case did not state the date of the passage of the ordinance, but stated, as such date, a day seven days prior to its actual passage. It is true that the act contains a provision (section 37) that its provisions shall be liberally construed. But no liberality of construction would justify a holding that a notice which fails to state the true date of the passage of an ordinance does state its date. Nor can we, as suggested by the respondents, hold that there was a substantial compliance with the statute because, as it is claimed, the notice gave the number of the ordinance. The argument is that any one who desired to inspect the ordinance could find it as readily from a reference to its number as from one to its date. This may be so, but it does not appear to have been the view of the Legislature, which saw fit to require a statement of the date. In Haughawout v. Percival, supra, relied on by the respondents, the notice was, as we held, substantially that required by the statute, not a notice different from, although perhaps just as good as, the notice called for by the act. For us to hold that a statement of the number of an ordinance is equivalent, or substantially equivalent, to a statement of its date would be to make a statute, rather than to interpret one. It may be remarked, incidentally, that the record does not show that the posted notice contained a statement of the number of the ordinance.

It need hardly be said that the defective notice is not cured by the fact that it refers to the ordinance itself for further particulars. The statute requires such reference in addition to the statement of the date. Upon the facts found, the conclusion of law should have been that the assessments complained of were void, and that their collection should be enjoined.

The judgment is reversed, with directions to the court below to enter judgment upon the findings in favor of the plaintiffs, as prayed in their complaint.

We concur: SHAW, J.; LAWLOR, J.

176 Cal. 652

FEREM et al. v. OLSON & MAHONY.

(S. F. 7709.)

(Supreme Court of California. Dec. 12, 1917.)

1. SHIPPING 🔑21—PARTNERS—RIGHTS.
Part owners of a vessel are cotenants and partners in the use of the vessel, but not partners in the ownership thereof, and the partnership necessarily terminates when the vessel is lost or sold.

2. SHIPPING 🔑21 — PARTNERSHIP — LOSS OF VESSEL—RIGHT TO ACCOUNTING.
Where a partnership in the use of a vessel was dissolved by the sale of the vessel under libel, one part owner had the right prima facie to an accounting.

3. SHIPPING 🔑21—LIBELS—GENERAL AVERAGE LOSS ADJUSTMENTS—CONCLUSIVENESS.
Where a vessel owned by a partnership was libeled, although the managing owner had power to make a general average loss adjustment, such adjustment was not conclusive and did not debar equity from calling for completion and settlement within the court.

4. SHIPPING 🔑21—LIBELS—GENERAL AVERAGE LOSS ADJUSTMENTS—CONCLUSIVENESS.
Under Civ. Code, §§ 2152–2154, as to adjustments of average loss where the managing owner after libel of the ship failed to make a general average loss adjustment, he could not urge that the minority owners prematurely sought aid of equity because he delayed in making such adjustment.

5. SHIPPING 🔑21—LIBEL—RIGHTS OF PARTNERS.
After a vessel is libeled, the managing owner is without authority to bind minority owners for subsequent costs, disbursements, and expenses.

6. ACCOUNT STATED 🔑2—PARTNERS.
Where the managing owner of a vessel rendered accounts to minority owners and they took no action thereon, the accounts did not become stated, since between partners an accounting cannot be stated at law.

7. SHIPPING 🔑21—ADJUSTMENTS—COMPENSATION OF ADJUSTER.
An adjuster, who adjusted the insurance on the freight earnings which was in its nature a partnership asset, was properly allowed a compensation against both the managing and the minority owners.

Department 2. Appeal from Superior Court, City and County of San Francisco; Marcel E. Cerf and E. P. Shortall, Judges.

Action by Lina Ferem and others against Olson & Mahony. From the judgment rendered, plaintiffs appeal. Reversed and remanded.

C. H. Sooy and F. R. Wall, both of San Francisco, for appellants. Henry A. Jacobs, of San Francisco, for respondent.

HENSHAW, J. This is an action in equity by the minority owners of the American schooner Wm. F. Garms against defendant corporation, the majority owner and the managing owner, for an accounting touching their respective partnership interests in the use and operation of the vessel. It had made two voyages. Its third projected voyage was from Puget Sound to Santa Rosalia, Mexico. When a few days out from its domestic port it encountered heavy weather, was disabled, and was towed back to a Puget Sound port by the Puget Sound Tugboat Company. Shortly thereafter this last company libeled the vessel and her cargo for salvage, and by a second libel for towage. From neither of these libels was she released. Default was entered in the libel for towage, and the vessel was sold for $5,800; the money being paid over to the United States marshal. At this sale the defendant, managing owner, bought the vessel. None of the minority owners appeared in either of the cases, nor has any of them since reacquired any ownership in the vessel thus sold. In addition to the $5,800 arising from the sale of the vessel, $3,000 was paid into court by the owners of the cargo in the libel against the vessel and its cargo for salvage. Payments were made out of this $8,800 amounting to $4,376.48. The balance was sent to San Francisco and delivered to W. T. Cleverdon, named by respondent as adjuster; $1,700 of this balance having been paid to the cargo owners. The $3,000 paid for salvage was received by the Puget Sound Tugboat Company in full satisfaction for salving both the vessel and her cargo. The admiralty court made no determination of the amount that the cargo should pay to discharge the lien against it for salvage, nor the amount that the vessel should pay to discharge the lien against it. There has thus been no determination of the amount in value of the lien against the vessel for salvage or of the amount in value of the lien against the cargo. The adjuster, Mr. Cleverdon, testified:

> "I presume the average adjuster is going to adjust the salvage and ascertain the proportion of it that the cargo will have to pay and the proportion that the vessel will have to pay. I certainly presume that I am going to do that."

The $1,700 paid over to the cargo owners was not authorized by the plaintiffs or any of them. Defendant, the managing owner, employed Mr. Cleverdon to estimate the general average loss and to make due and proportionate adjustment of it. This general average loss and adjustment had not been made at the time of the sale of the vessel and has not yet been made. Many items of expense involving charges against these plaintiffs' interests in the vessel and in its use remain to be settled. On June 3, 1915, according to the defendant, the general average statement was being prepared. When this cause came on for trial in December, 1914, it had not been prepared. In the matter of voyages numbered 1 and 2 above adverted to, which voyages had been completed, the defendant charged sums for managing the business of the voyages. Without further elaboration, the foregoing, for the purposes of the consideration to be had, presents with sufficient accuracy the situation when plaintiffs brought to trial their equitable action for an accounting of all these matters. The learned judge, in his opinion, declared the indubitable proposition that the managing owner has power to adjust general averages, but further laid down the proposition that:

> "The co-owners are bound by the adjustment. They are bound by all of its elements, even the alleged erroneous inclusion of the claim for salvage."

Further, that the minority owners must await the general average adjustment, and with further discussion as to certain items of insurance and items of the charges of the managing owner for compensation in managing the voyages, the court concluded "that there are not now in the hands of the managing owner any funds respecting which the plaintiffs are entitled to an accounting," and it gave judgment for defendant for costs.

[1] The status of these parties litigant is, of course, well settled. They were cotenants in the ship. They were partners in the use of the vessel. As part owners they were tenants in common and not partners. Freeman, Cotenancy, § 379; The New Orleans, 106 U. S. 13, 1 Sup. Ct. 90, 27 L. Ed. 96. Their partnership extended only to the use of the vessel and not to its ownership. Hendy v. March, 75 Cal. 569, 17 Pac. 702; Civ. Code, § 2396. The proposition that upon the dissolution of a partnership an accounting may be had in equity at the instance of any surviving partner or of the representatives of a deceased partner is so fundamental as to require no citation of authority. The proposition is argued by respondent that this partnership still continues, undissolved. Indeed, respondent must maintain this position to uphold the judgment of the court. But from the nature of the thing itself this cannot be. Such a limited partnership, going only to the employment of the vessel itself, of necessity must terminate when the vessel is lost or sold, and so all of the adjudications hold. Abbott's Merchant Ships (14th Ed.) 145; Am. & Eng. Ency. of Law (2d Ed.) pp. 880 and 881; Watson, Law of Partnership, pp. 139, 142; Mumford v. Nicoll, 20 Johns. (N. Y.) 635. For many purposes the employment of the vessel upon each voyage is regarded as a special partnership which ends on the termination of the voyage. It is not necessary to enter with elaboration upon this. Suffice it to cite Smith v. Butler, 164 Mass. 37, 41 N. E. 60, and McLauthlin v. Smith, 166 Mass. 131, 44 N. E. 125. It is immaterial to the present consideration how this partnership may be regarded, since plaintiffs are seeking no legal relief, but equitable relief growing out of all the transactions of the partnership.

[2] The partnership thus unquestionably having been dissolved, the right to an accounting is established prima facie by this fact alone. 30 Cyc. 712.

[3] Seemingly the learned trial judge entertained the view that as it was within the power of the managing owner to make the general average loss adjustment, and as the minority owners in this partnership would be bound by that adjustment, and as that adjustment had not in fact been made, these minority owners and partners had prematurely sought the assistance of equity. If such in truth was his position, he was in error. No such finality attaches to such general average loss adjustments, and the fact that it has not been completed by the managing owner does not debar equity from calling for its completion and settlement under its own eye, and not only the right but the duty of equity to do this precise thing became fixed upon the dissolution of the partnership by the sale of the vessel. Says Story, speaking of general average adjustments:

> "A court of equity having the authority to bring all of the parties before it and to refer the whole matter to a master to take an account and to adjust the whole apportionment at once, affords a safe, convenient, and expeditious remedy." 1 Eq. Jur. (13th Ed.) 491.

If an adjustment be made without the aid of a court of equity, it is not conclusive. "The adjustment is not conclusive. The facts are open to inquiry." The Santa Anna (D. C.) 49 Fed. 878; The Alpin (D. C.) 23 Fed. 819; The Niagara, 21 How. 9, 16 L. Ed. 41. In The Star of Hope, 9 Wall. 203, 19 L. Ed. 638, the court made the average adjustment, and on appeal the court's right and power to do this was upheld; the Supreme Court of the United States pointing out merely the law to be applied in making an average adjustment. See, also, Minor v. Commercial Union Ins. Co. (D. C.) 58 Fed. 801.

[4] In brief, sections 2152 to 2154 of our Civil Code provide how the average loss is to be adjusted. The managing owner has the power to make or cause this adjustment to be made. If the adjustment so made be conformable to the law, it is valid. Otherwise it may be questioned. If at the time that the aid of a court of equity is sought this adjustment has been made, then equity will take up the matter upon the basis of the adjustment so made. If it has not been made then, as has been shown, it is quite within the power and province of equity to order the adjustment to be made and to subject it to equitable review. But it does not lie in the mouth of the managing owner after the termination of the partnership to urge that the minority partners have prematurely sought the aid of equity because he has delayed making such adjustment. Backus v. Coyne, 35 Mich. 5.

[5] Of course, it is well settled that after the vessel was libeled the managing owner was without authority to bind these plaintiffs for subsequent costs, disbursements, and expenses. If they were properly incurred, of course, these plaintiffs must bear their proportion thereof. Otherwise the managing owner was but a volunteer. Reed v. Bachelder, 34 Me. 205; The Augustine Kobbe (D. C.) 37 Fed. 702; The Esteban de Antunano (C. C.) 31 Fed. 924; Williams v. Suffolk Ins. Co., Fed. Cas. No. 17,739; The Joseph Farwell (D. C.) 31 Fed. 844; Civ. Code, § 2155.

[6] Our law denies a partner the right to compensation for services rendered by him to the partnership (Civ. Code, § 2413), and declares that "a managing owner is presumed to have no right to compensation for his own services." Civ. Code, § 2072. The trial court allowed the items of compensation to defendant for voyages 1 and 2. It very properly refused to do so upon evidence of custom to this effect, but concluded that the charge made by the managing owner for these services and presented to these plaintiffs in accounts rendered, in view of the nonaction of these plaintiffs, bound them as by an account stated. But an inspection of these accounts and of the testimony supporting them shows that they were not and were not meant to be final, but by their very terms were subject to later modification and adjustment. Moreover, the principle governing the determination as to whether or not an account has been stated is necessarily different when the controversy is between partners from what it is when the parties to it stand at arm's length. And this is very well pointed out in Hinton v. Law, 10 Mo. 701, where it is said:

> "No principle is better settled than that between partners no account can be taken at law. The rule has its origin in this principle that, before an action can be brought for any particular item, the partnership accounts must be taken, with a view to ascertain whether that item has been affected in any, and in what, degree, by the intermediate gains or losses of the partnership business."

That the action or nonaction of plaintiffs in the matter of these accounts did not bind them as to an account stated is in full accord with our authorities. Ross v. Cornell, 45 Cal. 136; Fisher v. Sweet, 67 Cal. 228, 7 Pac. 657; Dukes v. Kellogg, 127 Cal. 563, 60 Pac. 44.

[7] The last item allowed by the court, whose allowance is criticized by these appellants, is a payment to Adjuster Cleverdon of $405 as compensation for his services in adjusting the insurance on the freight earnings. For several reasons, however, this item was properly allowed. Mr. Cleverdon was employed for this purpose by the managing owner in the interest of all of the partners before the sale or even the libel of the vessel. The insurance fund was in its nature a partnership asset, and, even if it be said that the respondent was without authority to procure the insurance in the first instance, yet, when the fund was collected and these plaintiffs accepted their portions of it without protest, they should not in equity be heard to complain.

It is finally urged by respondent that the trial court did not refuse to state the account between these parties and wind up the affairs of the partnership, but, to the contrary, that the court did in terms take and make an accounting, and declared that the defendant had accounted to each and all of the owners of the schooner for all moneys received, both as managing owner and as partner.

But it is apparent, from what has been said and from the quotations from the court's decision, that after passing upon a few questioned items it in effect refused to enter upon a general accounting and settlement of the partnership affairs, upon the ground that the plaintiffs were not entitled thereto.

For which reasons the judgment appealed from is reversed, and the cause remanded for such further proceedings as may be meet in equity.

We concur: MELVIN, J.; LORIGAN, J.

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176 Cal. 629

FAIRCHILD et al. v. OAKLAND & B. S. RY. CO. (S. F. 7596.)

(Supreme Court of California. Dec. 7, 1917.)

1. EMINENT DOMAIN 🔑271—STREETS—RIGHT OF ABUTTING OWNERS—STREET RAILROADS—SPECIAL DAMAGES.

A property owner of a corner lot where a street railway track is laid close to the curb along the line of his property is entitled to damages under Const. art. 1, § 14, granting a recovery for the damage as well as the taking of property for public use; the rule being that one suffering any special or peculiar damage apart from the general inconvenience which may have been worked to all property owners is entitled to damages.

2. EMINENT DOMAIN 🔑293(4) — ISSUES — PLEADING.

Where an abutting lot owner is shown to be entitled to damages from a street railway, it is immaterial, as far as the company is concerned, that plaintiffs, who really own the lot, have not shown the kind of ownership pleaded in their complaint.

3. EMINENT DOMAIN 🔑298 — STREET RAILWAY COMPANY — SPECIAL DAMAGES — ELEMENTS.

In an action by a corner lot owner for special damages on account of a street railway track constructed close to the curb along the line of the lot, it was improper, where there was no improper construction or maintenance, to admit evidence of the jar occasioned by passing street cars, such being an inconvenience sustained in common with all others, and is not an element of damages.

Department 2. Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by Theodore Fairchild and Lilly Fairchild against the Oakland & Bay Shore Railway Company, a corporation. Judgment for plaintiffs, and defendant appeals. Affirmed.

Corbet & Selby, of San Francisco, and Snook & Church, of Oakland, for appellant. Reed, Black, Nusbaumer & Bingaman, of Oakland, Cal., for respondents.

HENSHAW, J. Plaintiffs, as tenants in common of a corner lot in the city of Oakland, brought this action against defendant to recover damages occasioned to their property by the construction and maintenance of an electric street railroad, the tracks of which were laid close to the curbing along the line of their property. They recovered judgment, and defendant appeals from that judgment, and from the order of the court denying its motion for a new trial.

[1] The first contention is that the proper operation of such an electric street railroad is not an additional burden or servitude upon the street so that an abutting property owner, not owning the fee of the street, is entitled to damages. Herein appellant relies upon Montgomery v. Santa Ana R. R. Co., 104 Cal. 186, 37 Pac. 786, 25 L. R. A. 654, 43 Am. St. Rep. 89. This case, however, is not in conflict with the later case of Smith v. Southern Pacific R. R. Co., 146 Cal. 164, 79 Pac. 868, 106 Am. St. Rep. 17, where such a right of action is recognized as a right belonging to the property owner along a street so used, if he suffers any special or peculiar damage apart from the general inconvenience which may have been worked to all property owners. This is precisely one of those rights of action for the damaging of property which, if it did not exist before, came into existence by virtue of our constitutional amendment granting a recovery for the damage as well as for the taking of property for public use. Const. Cal. § 14, art. 1.

[2] The second proposition advanced by appellant is that the ownership of the lot is not established, or at least is not established as pleaded in the complaint. With this, however, appellant has no real concern. It is sufficiently shown that all of the ownership in the lot is vested in the plaintiffs. The satisfaction of the judgment relieves the appellant from any possibility of future litigation over the damage so occasioned, and this is sufficient.

The evidence was sufficient to sustain the award of judgment which the court actually gave—$600. It would be unprofitable to set forth that evidence in detail.

[3] Mrs. Fairchild was permitted, over objection of appellant, to answer the following question:

> "When one of these freight trains is passing the house, what is the effect on the house itself? A. It jars it."

Unquestionably the discomfort or inconvenience which a property owner sustains in common with all others in the legitimate and proper exercise of a street or steam railway is not an element of damage. Eachus v. Los Angeles Ry. Co., 103 Cal. 617, 37 Pac. 750, 42 Am. St. Rep. 149. Under certain circumstances, as tending to show an improper construction and maintenance, this question and answer might be permissible. Upon the other hand, if it went only to a common detriment or lessening of enjoyment or comfort, not growing out of faulty or improper construction and maintenance, it would not be an element of damage. We need not stay to analyze what it was or might have been in this case for the action was heard by the court without a jury, and it will be presumed that the court gave to this evidence the weight to which it was entitled and no more.

The judgment and order appealed from are therefore affirmed.

We concur: MELVIN, J.; LORIGAN, J.

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176 Cal. 639

COLLINS v. MARSH et al. (L. A. 4082.)

(Supreme Court of California. Dec. 11, 1917.)

1. MUNICIPAL CORPORATIONS 🔑706(8) — STREETS—STANDING VEHICLES.

Under a municipal ordinance requiring standing vehicles to be not more than two feet distant from the curb, except in emergency, where plaintiff, driving up to the curb, had a space of only 22 feet in which to stand his vehicle, owing to other standing vehicles, and intended to alight and move the wheels of the buggy over to the curb, there was such an emergency that, in an action for injuries when his buggy was struck by defendant's automobile, it was proper to refuse instruction that he was guilty of negligence if any wheel on the curb side was more than two feet from the curb.

2. APPEAL AND ERROR 🔑1050(1)—HARMLESS ERROR—EVIDENCE—INTENT OF WITNESS.

While admission of plaintiff's testimony that he intended so to move the buggy was error, it was not ground for reversal, where the only way to get the buggy to the curb was the way he intended to use, and the emergency still existed when the accident occurred.

3. MUNICIPAL CORPORATIONS ⊂⊃706(5) — STREETS — DRIVING AUTOMOBILES — NEGLIGENCE—EVIDENCE.

Evidence *held* sufficient to establish negligence of defendant in driving automobile against rear wheel of plaintiff's buggy.

4. MUNICIPAL CORPORATIONS ⊂⊃706(8) — USE OF STREETS—LAST CLEAR CHANCE DOCTRINE.

It was error in submitting the last clear chance doctrine in an action for injuries to plaintiff when his buggy was struck by defendant's automobile to predicate defendant's negligence on whether he should have known, in the exercise of ordinary care, of plaintiff's situation.

5. APPEAL AND ERROR ⊂⊃1064(1)—HARMLESS ERROR—INSTRUCTIONS.

But such instruction was not harmful where there was no dispute as to the position of plaintiff's buggy, and defendant testified that he saw it when he was still 40 or 50 feet away.

6. TRIAL ⊂⊃260(8)—INSTRUCTIONS—REQUESTS COVERED.

Requested instruction in an action for injuries when plaintiff's buggy was struck by defendant's automobile, that the jury could consider whether the street was in a secluded district or in a business district, was sufficiently covered by instruction that in passing on issue of negligence the jury must consider all the facts and circumstances.

Department 1. Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by Michael T. Collins against Robert Marsh and others. From a judgment for plaintiff and order denying new trial, L. J. Marsh appeals. Affirmed.

O'Melveny, Stevens & Milliken, Walter K. Tuller, and Alex Macdonald, all of Los Angeles, for appellant. J. W. Carrigan and Zenus F. Barnum, both of Los Angeles, for respondent.

SLOSS, J. In this action, brought against several defendants to recover damages for personal injuries, the jury returned a verdict in favor of the plaintiff against L. J. Marsh alone for $5,000. L. J. Marsh appeals from the ensuing judgment, and from an order denying his motion for a new trial.

The accident occurred on Hill street in the city of Los Angeles. Plaintiff, who was driving a horse attached to a buggy, had turned into Hill street from Seventh street, and was driving northerly on the easterly or right-hand side of Hill street toward Sixth street. He had occasion to go to a telephone office in the block between Seventh and Sixth streets. The entire curb line along the east side of this block was occupied by automobiles and other vehicles, with the exception of a space of some 22 feet, about the middle of the block. At this point the plaintiff undertook to drive in. The space was not sufficient to enable him to get his horse and buggy close up to the curb. He was compelled to drive in at an angle, and brought his horse to a stop, as he testified, with the horse's head over the curb, the right front wheel of the buggy about a foot and a half from the curb, and the rear wheel about four feet out. Before he could alight, his buggy was struck by an automobile driven by the appellant. Plaintiff was thrown to the pavement, receiving the injuries of which he complains.

The appellant's contention was that the collision was due to the act of plaintiff's horse in stepping back, and thus throwing the rear end of the buggy into the line of the automobile's progress. Without this backing, it was claimed, the automobile would have passed plaintiff's buggy in safety; the appellant's own testimony being that his front wheels had already passed, and that the right rear wheel of the automobile collided with the left rear wheel of the buggy. The answer, in addition to denying negligence on the part of the defendants, set up that plaintiff was guilty of contributory negligence.

There was offered in evidence a traffic ordinance of the city of Los Angeles, which contained this section:

> "Sec. 15. It shall be unlawful for the driver of any vehicle to stop the same, or to cause the same to be stopped, in or upon any street unless the side of such vehicle nearest the curb is not more than two feet distant from such curb; provided, however, that the provisions of this section shall not apply in case of emergency, or when such stop is made for the purpose of allowing another vehicle or a street car or interurban car or a pedestrian to pass in front of such vehicle so stopped, or when in compliance with an order or signal of a police officer."

[1] The defendant requested an instruction to the effect that this provision required that both wheels of a four-wheeled vehicle stopped upon a public street should be not more than two feet from the curb, and that:

> "If plaintiff upon the occasion in question stopped the buggy in question while the same was in such position that the rear right wheel thereof was more than two feet from the nearest street curb, then he was guilty of negligence as a matter of law. * * *"

The court did not err in refusing to give this instruction. It may be conceded that the appellant rightly construes the ordinance to mean that both the front and the rear wheel of a vehicle stopped on the street must be within two feet of the curb. The proviso appended to the section excludes from its operation, among other things, cases of "emergency." In view of the purposes for which the ordinance was adopted, the word "emergency" should not, in the connection in which it is here used, be given too narrow an interpretation. The plaintiff had a right to stop his vehicle on any block in which he had occasion to alight, and section 15 was surely not intended to make it impossible to exercise that right. "Emergency" is defined in Webster's Dictionary as "an unforeseen occurrence or combination of circumstances which calls for immediate action or remedy; pressing necessity; exigency." If the curb space was so occupied that plaintiff could not, in stopping, bring both right wheels close to the curb, it would be no stretch of reason to say that he was confronted by an "emergency," within the meaning of the ordinance. At any rate, the jury might well have found the existence of conditions which excepted the case from the operation of section 15, and the instruction proposed was erroneous in requiring a finding that plaintiff's act was a violation of the ordinance, and hence negligence, without regard to the existence or nonexistence of an "emergency."

[2] The plaintiff was allowed to testify, over objection, that when he stopped his buggy he intended to bring both right wheels close to the curb by pulling the rear end of the buggy in after alighting. The objection should have been sustained. If the plaintiff had been guilty of negligence in bringing his horse and buggy to a stop as he did, the character of his act could not have been affected by his undisclosed intention to thereafter move the rear wheels. But it was shown without objection, if, indeed, it was not apparent from the circumstances themselves, that the method which the plaintiff said he intended to follow was the only possible one for accomplishing the purpose of getting both right wheels close to the curb. Until he had time to do this, the emergency excusing compliance with the ordinance, if such there was, continued. With this evidence before the jury, the mere additional testimony of plaintiff's intent was not, we think, of such serious consequence as to have affected the result or to justify a reversal.

[3] There is no merit in appellant's claim that there was not sufficient evidence to show negligence on his part. It is true that he testified that a backing motion of the horse had brought the wheel of the buggy into the line of the automobile's motion. But the plaintiff's testimony was that the movement of the horse, which he described as a "settling motion," pushed the buggy back not more than three or four inches. The buggy stood on a slant, and the movement sidewise would therefore have been less than this distance. If the jury took this testimony as true, as, of course, it had the right to do, it was for it to say whether or not the defendant had been negligent in leaving so little clearance space as to strike the buggy when it had made the slight movement described by the plaintiff. There was an express instruction to the effect that the plaintiff could not recover if the accident was due to the sudden and unexpected backing of the buggy against or in the way of the automobile, and the jury, by its verdict, impliedly found that this was not the cause of the collision. The defendant testified that he left a clearance space of a foot and a half between the two vehicles. But the jury was not bound to accept this estimate in the face of testimony of facts indicating the contrary.

[4] The court gave an instruction designed to state the doctrine of the "last clear chance." In this instruction it stated that if the appellant saw, *"or, in the exercise of ordinary care should have seen,* the situation in which plaintiff was," and could then have avoided the collision by the exercise of ordinary care, and failed to take such care, he would be liable, notwithstanding the fact that plaintiff might have negligently placed himself in the dangerous position. The court should not have included the phrase which we have italicized. It is well settled in this state that the "last clear chance" rule does not apply where the defendant was not, but should have been, aware of the plaintiff's danger. "Under this rule, a defendant is not liable because he ought to have known." Herbert v. S. P. Co., 121 Cal. 227, 53 Pac. 651; Wahlgren v. Market Street Ry. Co., 132 Cal. 656, 62 Pac. 308, 64 Pac. 993; Harrington v. Los Angeles Ry. Co., 140 Cal. 523, 74 Pac. 15, 63 L. R. A. 238, 98 Am. St. Rep. 85; Bennichsen v. Market Street Ry. Co., 149 Cal. 18, 84 Pac. 420; Thompson v. Los Angeles, etc., Ry. Co., 165 Cal. 748, 134 Pac. 709.

[5] But, under the facts of this case, we think the instruction was not harmful. There was no dispute regarding the position of plaintiff's buggy when it was first brought to a stop. Nor was it denied that the appellant saw the buggy in ample time to enable him to avoid striking it. His own testimony was that he noticed it when he was still 40 or 50 feet away. Whether it was then in a position of danger, or whether the accident was brought about through the subsequent backward motion of the horse, is another question, upon which, as we have seen, the jury found in favor of the plaintiff. Upon the record as it stands it must therefore be taken as established that the appellant saw the buggy while he was 40 or 50 feet from it; that so seeing it he drove on until he struck it, and that his so striking it was not due to any intervening motion of the horse. The error in the instruction was therefore not one which would justify a reversal.

The appellant complains of the court's refusal to instruct the jury that the mere fact of the occurrence of the accident did not raise any presumption of negligence on the part of the defendant. But it appears that in an instruction numbered 18 the court gave a charge which was substantially the same as the one requested.

[6] The court refused to give a requested instruction on the subject of negligence. Included in it was a statement that the jury might consider, among other things, whether the street in question was in a secluded district where there was little traffic, or in a business district where there was much. Admittedly, the place in question was a business district. We think the court covered the subject sufficiently in instructing the jury, as it did more than once, that, in passing on the issue of negligence, it must take into consideration all the facts and circumstances surrounding the particular transaction.

Instruction No. 5, given at the request of plaintiff, also dealt with the question of negligence. Without quoting the instruction, we may say that it is, perhaps, open to criticism as somewhat confused in phraseology. But negligence was so fully and clearly defined to the jury in other instructions that no serious weight can be given to this minor defect.

No other points are made.

The judgment and the order appealed from are affirmed.

We concur: SHAW, J.; LAWLOR, J.

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176 Cal. 663

In re FELTON'S ESTATE. (S. F. 8242.)

(Supreme Court of California. Dec. 12, 1917. Supplementary Opinion, Dec. 22, 1917. Rehearing Denied Jan. 10, 1918.)

1. Appeal and Error 🔑717—Scope of Review.

While opinions of trial judges are welcome on appeal, they are not part of the findings, and the court can consider only whether the findings have sufficient legal support in the evidence.

2. Taxation 🔑895(2)—Inheritance Tax—Appraisal—Evidence—Sufficiency.

An appraisal of property for an inheritance tax based on a schedule of property filed by the heirs, though some testimony indicated that it was of greater value, was proper.

3. Taxation 🔑895(5) — Inheritance Tax —Appraisal of Corporation Stock — Method.

Where decedent owned shares of a close family corporation stock of which had never been on the market and never sold privately, the only way to establish their market value was to ascertain the value of the property which they represented and assign to each share its proportionate worth.

4. Taxation 🔑895(5) — Inheritance Tax —Appraisal of Corporation Stock — Method.

In appraising stock for an inheritance tax, the mere fact that the stock passing was a minority interest did not decrease its value where it passed to one who thereby became the holder of a majority interest.

5. Taxation 🔑881—Transfers of Stock—"Valuable Consideration"—"Adequate Consideration."

Where the transferee of 728 shares of stock agreed to pay the transferor the dividends on 262 shares belonging to the transferee as well as on 728 shares transferred there was a valuable, but not an adequate, consideration.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Valuable Consideration; Second Series, Adequate Consideration.]

6. Taxation 🔑881 — Inheritance Tax — Gifts of Stock.

Where the transferee of corporation stock testified that his father transferred it to him as a gift, and that he paid merely a nominal consideration, the stock was subject to inheritance tax.

7. Taxation 🔑861 — Inheritance Tax — Statutes Applicable.

Where deceased had made an irrevocable transfer of corporation stock, the transferee agreeing to pay him the dividends until his death, the rate of inheritance tax assessable at the time of the transfer, and not at the time of the death of the transferee, was the rate to be followed.

Supplementary Opinion.

8. Taxation 🔑861—Inheritance Taxes—How Computed.

Where decedent had made a gift of stock, reserving dividends thereon, and on his death the inheritance tax on moneys passing to his son was assessed under Statutes of 1913, p. 1066, and paid, and proceeding was brought to assess such tax on the stock which was subject to Statutes of 1905, p. 341, it must be computed as on a separate entity, without consideration of the money transfer.

Department 2. Appeal from Superior Court, San Mateo County; Geo. H. Buck, Judge.

Proceedings in the estate of Charles N. Felton, deceased, wherein Charles N. Felton, Jr., appeals from a judgment confirming the report of the inheritance tax appraiser, supported by John S. Chambers, Controller of the State. Reversed.

Pillsbury, Madison & Sutro, of San Francisco, for appellant. Robert A. Waring, of Sacramento, and John C. Altman, of San Francisco, for respondent.

MELVIN, J. Charles N. Felton, Jr., appeals from a part of a judgment and decree confirming the report of the inheritance tax appraiser whereby the sum of $35,352.82 was declared to be the amount of inheritance tax due upon 728 shares of the capital stock of the Felton Company (a corporation) standing in the name of appellant, but held to be assessable for inheritance tax as a part of the estate of Charles N. Felton, deceased, because of its transfer to appellant during the life of Charles N. Felton as a gift intended to take effect in possession and enjoyment after the donor's death.

The Felton Company was a family corporation having a capital of $200,000, divided into 2,000 shares of the par value of $100 each. It was incorporated under the laws of this state in 1905. Upon the organization of the corporation Charles N. Felton, Sr., took one-half of the capital stock, and assigned to each of his two children (the appellant being one of them) one-fourth thereof. There was evidence tending to show that this division of the stock did not accurately represent the relative contributions of the stockholders to the assets of the corporation, but each of the three members of the family had furnished about one-third of the property. However, the children were entirely satisfied with the father's dominance in the corporation, and during his lifetime he received all of the dividends on one-half of the stock. On April 21, 1911, a certificate was issued signed by Charles N. Felton as president and P. H. McGrath as secretary of the corporation to the effect that Charles N. Felton, Jr., was entitled to 990 shares of the stock. It was in evidence that this certificate was promptly delivered to Charles N. Felton, Jr. Charles N. Felton, Sr., died on September 13, 1914.

A tabulated statement indicating appellant's estimate of the amounts of assets which had been contributed respectively by the father and the two children upon the formation of the corporation was submitted to the inheritance tax appraiser, and, using that statement, he found that upon the bases of their respective contributions the father was equitably entitled to 728 shares and the children to 636 shares each. Therefore, instead of assessing all of the stock which he regarded as a gift to be possessed and enjoyed after the father's death, he assessed only that part which he regarded as equitably the portion of Charles N. Felton, Sr., in the original allotment of stock.

Appellant contends: First, that if the stock were liable for inheritance tax, the amount assessed was excessive and based upon a wrong theory of the law; and, second, that no inheritance taxes could be lawfully charged against it.

The list of properties of the corporation furnished by Mr. Charles N. Felton, Jr., and Mr. McGrath showed, in addition to the estimated values of the assets contributed at the time of the organization of the company, the values placed by those gentlemen upon the possessions of the Felton Company on December 31, 1914, more than three months after Senator Felton's death. Appellant insists that the court erred: First, in accepting these arbitrary sums given by him and by Mr. McGrath (being merely their estimates of the value of the various items of property) as the sole bases of the worth of the assets; and, secondly, in fixing the "market value" of the shares of stock (which is the statutory measure for taxing purposes) by dividing the aggregate value of the entire assets of the Felton Company by the number of shares of stock issued. In support of this contention he calls our attention to the following language contained in the opinion of the learned judge of the superior court who tried the case:

> "The question as to the overvaluation of this stock by the inheritance tax appraiser is presented with counsel's usual force. This is a peculiar case, and presents some peculiar features. While it is true that through their attorney these two heirs have raised this question of the value placed upon this stock by the inheritance tax appraiser, yet these two heirs —the only parties interested in the valuation— have not given any testimony questioning the value placed upon these shares of stock by the inheritance tax appraiser, notwithstanding the fact that both of them were witnesses to the matter. While it is true outside parties having but little idea and only a general knowledge of the value of the property represented by these shares of stock were placed upon the stand in behalf of the two heirs, yet the heirs remained silent. A list of the cost and value of these properties represented by these shares of stock was handed to the inheritance tax appraiser by Mr. Felton, Jr., the manager of this estate.
>
> "I assume that the inheritance tax appraiser performed his duty and found that this list thus presented represented the market value of this stock, and the evidence upon this point seems to confirm the view taken by the inheritance tax appraiser upon this matter."

[1] We cannot accept appellant's view that the court acted solely upon his and Mr. McGrath's estimates of value. Indeed, the last sentence quoted above seems to contradict that assumption. But, even if the written opinion did show, as appellant insists that it does, a sole reliance upon that schedule, nevertheless we would be bound to examine the record to ascertain whether or not there could be found therein testimony of expert witnesses tending to support the findings. Opinions of judges of trial courts are always welcomed by this court because, as a rule, they aid the justices in discovering the processes by which the judgments have been reached. But such opinions are not part of the findings. We may only consider whether the findings have sufficient legal support in the evidence. Goldner v. Spencer, 163 Cal. 317, 125 Pac. 347.

[2] Surely the schedule prepared under appellant's own direction had some evidentiary force as an admission of the value of the property at a time near the date of Senator Felton's death. But, aside from this, there was expert testimony regarding the market value of the various items of property. Some of the estimates given by the experts exceeded, and some corresponded with, the values as given by appellant and Mr. McGrath. We find, therefore, that the court's conclusion regarding the correctness of the appraiser's finding of value of the assets is supported by substantial evidence.

[3] Respondent does not question the rule that the market value of stock at the date of the death of the appellant's father is the proper basis for the fixing of the tax, nor that generally such market value is quite distinct from the ratio between the number of shares assessed and the value of the corporation's property. The term "market value" has been fully defined by this court. Sacramento Southern Railroad Co. v. Heilbron, 156 Cal. 408, 104 Pac. 979; Estate of Ross, 171 Cal. 64, 151 Pac. 1138; Bullard v. Stone, 67 Cal. 477, 8 Pac. 17. Respondent also admits that the same rule for determining market values as that employed in other cases is applicable, generally speaking, to those in which the amounts of inheritance taxes are involved. Estate of Ross, 171 Cal. 64, 151 Pac. 1138. But the Felton Company is a close family corporation. Its shares of stock have never been upon the market, and they have never been sold privately. According to the views of respondent, the only way to establish the market value of such shares of stock is to ascertain the value of the property which they represent, assigning to each share its proportionate worth. This is the method of determining market value which has been adopted in New York and approved by the courts. In re Jones, 172 N. Y. 575, 65 N. E. 570, 60 L. R. A. 476; In re Crawford, 85 Misc. Rep. 283, 147 N. Y. Supp. 234; In

re Valentine (Sur.) 147 N. Y. Supp. 231. We are in accord with respondent's theory that under the circumstances of this case the method of reaching the value of the shares of stock which was adopted was the proper one.

[4] There is no force in appellant's contention that the stock is of less value because we are here concerned with a minority interest. Appellant owns a majority of the stock; the other shares belonging to his sister. While the particular stock subject to the tax is less than half of the issue, appellant, as its possessor, is not under the disadvantages that sometimes confront holders of minority interests.

[5, 6] Appellant says that there was a "valuable and adequate consideration" for the transfer to him of the shares of stock; that the obligation on his part to pay to his father the dividends upon the 262 shares which were equitably his would have been consideration for the transfer of the 728 shares. Granting that this might be a valuable consideration, it would not be an adequate consideration. Estate of Reynolds, 169 Cal. 600, 147 Pac. 268. But the complete answer to appellant's contention is that he testified to the fact that the stock was received as a gift from his father, and that merely a nominal consideration was paid. But it is argued that the appraiser failed to make a finding that there was an absence of valuable and adequate consideration. Upon this failure appellant predicates an assertion that serious error was committed, citing McDougald v. Boyd, 172 Cal. 753, 159 Pac. 168. Conceding the duty of the appraiser to make such finding, it is true that the court, trying the matter de novo upon the transcript of testimony taken before the appraisers (which was introduced upon stipulation of counsel) and upon other testimony, made a formal finding "that said transfer was made without valuable or adequate consideration."

[7] The most important question relates to the rate of taxation applicable to the transfer of stock from Senator Felton to his son. It is here contended, under the authority of Hunt v. Wicht, 162 Pac. 639, L. R. A. 1917C, 961, that the rates applicable to the transfer in question should be those in force at the date of the transfer, and not those in effect at the time of Senator Felton's death. But it is suggested that the question here presented is somewhat different from that which was raised and answered in Hunt v. Wicht. It was held by this court in that case that, where a gift of property is irrevocably made with the reservation of a life estate in the donor, there being no inheritance tax upon such a gift at the time of the transfer, the property so vested may not be reached by a statute subsequently passed, imposing a tax upon such transfers. Our attention is called to the fact that there was a statute imposing an inheritance tax upon such a gift as this when it was made, and that the subsequent statute, which was retroactive by its terms, merely increased the rates. But we can see no escape from the conclusion, under the reasoning of the case of Hunt v. Wicht, supra, that an effective gift such as this may not be subject to taxation under the schedule provided by a statute subsequently passed. It was error, therefore, to assess the amount of the inheritance tax according to the statute of 1913 instead of that of 1905, in force at the time when the stock was transferred.

That the donor of the stock retained the enjoyment of the income from the transferred property during his life was a fact proven to the satisfaction of the court by ample testimony. It was plain that neither he nor his son intended that the gift should take effect in enjoyment during the former's life, and this conclusion is supported even if we ignore an indorsement in writing on the certificate which seemed to reserve the dividends to C. N. Felton during his life. This purported assignment was followed by the word "approved" and the signatures of both of the Feltons. Appellant insists that these signatures were not put upon the certificate at the time the writing was made nor for the purpose of indicating assent to the purported reservation, but we need not consider this question, because, even accepting the views of appellant regarding the indorsement, there was ample support for the finding that the gift was made with intent that enjoyment should be postponed until after the death of the donor, that it was made without valuable and adequate consideration, and that the stock was given in contemplation of the death of appellant's father. These conclusions are supported by the evidence under the principles declared in such cases as Estate of Reynolds, 169 Cal. 600, 147 Pac. 268, and Abstract & Title Guaranty Co. v. State of California, 173 Cal. 691, 161 Pac. 264.

No other alleged errors require discussion or analysis.

That part of the judgment from which an appeal is taken is reversed.

We concur: HENSHAW, J.; LORIGAN, J.

Supplementary Opinion.

MELVIN, J. [8] Since the filing of the opinion in this case doubt has been expressed by counsel regarding the proper method of computing the inheritance tax under the act of 1905. Counsel for the respondent insists that appellant is bound to pay a tax computed upon the amount of the gift of stock plus the money left to Mr. Charles N. Felton, Jr., by his father. But this method would be improper. A tax has been levied under the act of 1913 upon the money received by way of inheritance, and no appeal has been taken from that part of the judgment approving said tax, and, moreover, it has been paid. Upon the appeal that part of the judgment which declared the gift of stock subject to the collateral inheritance tax has been upheld, except that we have decided that the said gift is properly taxable under the act of 1905. It follows that in computing the amount of tax on said stock the other parts of the inheritance of Mr. Felton which have been taxed may not be considered, but the gift must be treated as a separate entity.

We concur: LORIGAN, J.; HENSHAW, J.

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34 Cal. App. 768

CALIFORNIA SAVINGS & COMMERCIAL BANK v. CANNE. (Civ. 1878.)

(District Court of Appeal, Second District, California. Oct. 9, 1917. Rehearing Denied by Supreme Court Dec. 6, 1917.)

1. APPEAL AND ERROR 🔑757(1)—BRIEFS—JUDGMENT ROLL—MATTERS RECEIVABLE.

Where the judgment roll is not printed in the brief, relevancy of testimony offered, refused, or received, or the matter of the correctness of instructions, cannot be received on appeal under the alternative method.

2. APPEAL AND ERROR 🔑757(1)—BRIEFS—ALTERNATIVE METHOD.

Although the alternative method of appeal permits parties to file typewritten transcripts in lieu of printed judgment rolls and bills of exception, such permission casts no burden upon the appellate courts to examine the typewritten documents in deciding the appeal, and enough should, under Code Civ. Proc. § 953c, be printed in the brief to illustrate the points.

3. APPEAL AND ERROR 🔑757(2)—BRIEFS—ISSUES.

In order to show issues involved on appeal by the alternative method, it is ordinarily required that the complaint and answer at least be printed in the brief in full.

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by the California Savings & Commercial Bank, substituted for the Traders' Bank of Los Angeles, against J. C. D. Canne, executor, etc., substituted for H. D. Canne. Judgment for plaintiff, and defendant appeals. Affirmed. Rehearing denied in Supreme Court, 169 Pac. 395.

Tanner, Odell, Odell & Taft, of Los Angeles, for appellant. A. W. Ashburn, of Los Angeles, for respondent.

PER CURIAM. [1] In this case we cannot find sufficient in the printed extracts from the record, as contained in appellant's brief, to warrant our ordering other than an affirmance of the judgment. The judgment roll is not printed in the brief, which leaves us without information presented in the way required by the law, as to the issues. Without this information, we cannot determine questions of the relevancy of the testimony offered, refused, or received, or the matter of the correctness of instructions given or withheld from the jury.

[2] While the alternative method of appeal permits parties to file typewritten transcripts in lieu of printed judgment rolls and bills of exception, such permission casts no burden upon the appellate courts to examine the typewritten documents in deciding the appeal. The statute expressly provides in such cases that:

> "In filing briefs on said appeal the parties must, however, print in their briefs, or in a supplement appended thereto, such portions of the record as they desire to call to the attention of the court." Code Civ. Proc. § 953c.

Both the Supreme Court and this court have repeatedly pointed to the provision of the statute in this regard. Marcucci v. Vowinckel, 164 Cal. 693, 130 Pac. 430; Wills v. Woolner, 21 Cal. App. 528, 132 Pac. 283; Miller v. Oliver et al., 163 Pac. 357; Pasadena Realty Co. v. Clune, 166 Pac. 1025; McKinnell v. Hansen et al., 167 Pac. 887. When it is required that the parties shall print in their briefs such portions of the record as they desire to call to the attention of the appellate court, the law means that they shall print enough of such record to illustrate their points.

[3] In order to show the issues involved, it would ordinarily be required that the complaint and answer at least be set out in full. The better practice would require the printing of the entire judgment roll, and including the notice of appeal. Where it is claimed that the evidence is insufficient to support the issues, or irrelevant to the issues, the printing of the complaint and answer cannot be dispensed with.

The judgment is affirmed.

CALIFORNIA SAVINGS & COMMERCIAL BANK v. CANNE. (L. A. 5465.)

(Supreme Court of California. Dec. 6, 1917.)

1. APPEAL AND ERROR 🔑757(1)—BRIEFS—ALTERNATIVE METHOD.

In an appeal under the alternative method, only such part of the record as is necessary to illustrate the points so that they can be determined need be printed in the brief.

2. APPEAL AND ERROR 🔑757(1)—BRIEFS—EVIDENCE QUESTIONS.

It depends on the circumstances whether or not the entire complaint and answer should be printed in the brief, where it is claimed that the evidence is insufficient to support the finding or is irrelevant to the issues; such not being necessary as to matters not disputed by the opposing party.

In Bank. Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by the California Savings & Commercial Bank against J. C. D. Canne, executor of the estate of H. D. Canne, deceased. Judgment for plaintiff, and defendant appealed. Affirmed by the District Court of Appeals of the Second Appellate District (169 Pac. 395), and the defendant petitions for a rehearing. Petition denied.

Tanner, Odell, Odell & Taft, of Los Angeles, for appellant. A. W. Ashburn, of Los Angeles, for respondent.

PER CURIAM. The petition for a hearing in this court after decision by the District Court of Appeal of the Second Appellate District is denied. In denying this petition we deem it proper to say:

This is a case in which, under our Constitution, the appeal was properly taken to the District Court of Appeal, and the application for a hearing in this court is to be determined in accord with the rule declared in such cases as Burke v. Maze, 10 Cal. App. 211, 101 Pac. 438, 440, and Rauer's Law, etc., Co. v. Berthiaume, 21 Cal. App. 675, 132 Pac. 596, 833. We read the District Court of Appeal opinion as being simply to the effect that in this particular case there was not enough of the record printed in the appellant's brief to enable the court to determine what the issues in the case were, and that without such information they were unable to determine the questions raised as to the relevancy of testimony, and as to the propriety of instructions given or refused.

[1, 2] The law requires, as said by the court, that enough must be printed to illustrate the points made and to enable the court to determine those points. Just exactly what must be printed in any particular case in order to comply with this requirement necessarily depends upon the circumstances of the case, and we cannot give our assent to the proposition at the end of the opinion to the effect that in every case in which it is claimed that the evidence is insufficient to support the finding, or is irrelevant to the issues, "the printing of the complaint and answer cannot be dispensed with." In some cases this may be true, and we must assume, in view of what is said in the District Court of Appeal opinion, that this is such a case. In many cases the only point urged in support of the appeal involves but a single allegation of the complaint or answer, and the printing of anything more than a statement of the substance of the other allegations thereof could give no assistance to the court. In many cases respondent does not dispute the statement of the appellant as to the facts involved in the points urged. The judgment roll is frequently of extraordinary length, sometimes extending to hundreds of pages, and to print it all, where the points involve only a small portion thereof, would benefit no one. It is impossible to lay down any rule for the government of attorneys in deciding what to print in their briefs where the record is prepared under section 953a. If it is understood that enough should be printed to illustrate the points presented, the good sense of attorneys should be sufficient to inform them of the subject.

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35 Cal. App. 39

EASTERLY v. PRAUL, Constable.

(Civ. 2287.)

(District Court of Appeal, Second District, California. Oct. 18, 1917.)

1. APPEAL AND ERROR 🔑757(1)—BRIEFS—RECORD.

On appeal by alternative method under Code Civ. Proc. § 953c, requiring parties to print in their briefs such parts of record as they desire to call to court's attention, where no part of judgment roll is printed in appellant's brief, the judgment should be affirmed.

2. ATTACHMENT 🔑296—THIRD PARTY CLAIM—REQUISITES AND SUFFICIENCY.

In view of Code Civ. Proc. §§ 549, 689, requiring third party claims in attachment and execution to be verified by such party or his agent, a demand by the claimant's brother-in-law as her agent, not verified, was insufficient, though an acknowledgment was made before a notary as to truth of facts stated therein.

3. APPEAL AND ERROR 🔑994(3)—REVIEW—FINDINGS—PRESUMPTIONS.

In view of the provision of Code Civ. Proc. § 1963, subd. 11, that property found in one's possession is presumed to be his, where attached property was found in the debtor's possession, and there was testimony in support of a third party claim, the credibility of the witnesses was for the trial judge.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by N. D. Easterly against C. S. Praul, Constable of Otay Township. Judgment for defendant, and plaintiff appeals. Affirmed.

Duke Stone, of Los Angeles, and Albert J. Lee, of San Diego, for appellant. Walter W. Praul, of San Diego, for respondent.

JAMES, J. [1] By the opening brief in this case we are told that the appeal taken by the plaintiff is from a judgment adjudging that the plaintiff was not the owner of certain horses alleged to have been held under attachment process by the defendant constable in a suit of one Hull v. A. F. Narver. The appeal is taken by the alternative method, which requires the parties to print in their briefs such portions of the record as they may desire to call to the attention of the court. Section 953c, Code Civ. Proc. No part of the judgment roll is printed in the brief of appellant, and we are left without record information as to what the cause of action was or the issues made between the parties. For that reason alone the judgment should be affirmed. Marcucci v. Vowinckel, 164 Cal. 693, 130 Pac. 430; Wills v. Woolner, 21 Cal. App. 528, 132 Pac. 283; Miller v. Oliver et al., 163 Pac. 357; Pasadena Realty Co. v. Clune, 166 Pac. 1025; McKinnell v. Hansen et al., 167 Pac. 887; Lillard v. Abbot Hardware Co., 168 Pac. 707; California Savings & Commercial Bank v. Canne, 169 Pac. 395.

[2] The main point upon which appellant appears to rely is that the evidence was insufficient to support the findings of the court determining that plaintiff, a third party

claimant of the property held under attachment, was not the owner of the horses. The testimony given at the trial is set forth in the briefs. It appears from that testimony that A. F. Narver was at all times in possession of the horses which were attached and which were intermingled with other horses used by him, and which latter he admitted that he owned. When the attachment was made, Narver as agent for the plaintiff, who was his wife's sister, made a written claim or demand on behalf of the plaintiff for the release of the horses. This demand was not verified by the plaintiff as the law requires (Code Civ. Proc. §§ 549, 689), but an acknowledgment was made before a notary as to the truth of the facts stated in the demand. We think the third party claim was not in sufficient form to charge the defendant with liability. Furthermore, in view of the law that an appellate court has no function to review evidence where two different conclusions may properly be drawn therefrom, it must be held that there was some evidence sustaining the findings of the trial court.

[3] The property was found in the possession of Narver, and the presumption attending that possession was that he owned it. Section 1963, subd. 11, Code Civ. Proc. The persons concerned in the alleged ownership were all members of the family of Narver, it being claimed that his mother was the first owner, and that before she died she, by bill of sale and sufficient consideration, transferred her ownership to the sister of Narver's wife. The latter would not testify that she had ever seen the animals, and the testimony of Narver's wife and wife's sister appears as to many of its features to have been affected by uncertainty and hesitatingly given. In view of the presumption imposed by the Code provision, that Narver was the owner of the property found in his possession, it was for the trial judge to determine the credibility of the witnesses appearing before him in support of the third party claim. Section 1847, Code Civ. Proc. Upon the several grounds stated, it is very clear that this judgment should not be disturbed.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

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35 Cal. App. 128

JONES v. AMERICAN POTASH CO. (Civ. 1910.)

(District Court of Appeal, Second District, California. Oct. 25, 1917.)

APPEAL AND ERROR ⟹757(3)—BRIEFS—EVIDENCE POINTS.

Whether the evidence supports the verdict, or evidence was improperly admitted or refused, cannot be considered on appeal by the alternative method, if such evidence is not printed in the brief.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by E. H. Jones against the American Potash Company, a corporation. Judgment for plaintiff, and defendant appeals. Affirmed.

Robert L. Hubbard, of Los Angeles, for appellant. Horace S. Wilson, of Los Angeles, for respondent.

PER CURIAM. This appeal is taken under the alternative method from a judgment entered against defendant. A number of points appear to be made in the brief of appellant, all of which refer to the evidence presented to the trial court. It is urged, among other things, that the findings and judgment are not supported by the evidence; that the court erred in excluding certain evidence, etc. No part of the record is printed in the brief of appellant, except three paragraphs from the findings of the court. Appellant has utterly failed to print in his brief any other matters to which he desires to call the attention of the court. Necessarily, in order to properly consider the points made as to the insufficiency of the evidence and as to the alleged errors of the court in excluding offered testimony, we should have before us the testimony received and offered. The result is that the only order that can properly be made by this court is one in affirmance of the judgment for want of any showing why the same should be reversed. Marcucci v. Vowinckel, 164 Cal. 693, 130 Pac. 430; Wills v. Woolner, 21 Cal. App. 528, 132 Pac. 283; Miller v. Oliver et al., 163 Pac. 357; Pasadena Realty Co. v. Clune, 166 Pac. 1025; McKinnell v. Hansen et al., 167 Pac. 887; California Sav. & Commercial Bank v. Canne, 169 Pac. 395.

The judgment is affirmed.

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35 Cal. App. 230

STEWART v. ANDREWS. (Civ. 1925.)

(District Court of Appeal, Second District, California. Nov. 7, 1917.)

APPEAL AND ERROR ⟹757(1)—BRIEF—MATTERS REVIEWABLE.

On appeal by the alternative method, where the brief contains no part of the record, or the evidence to which attention is called, as specifically required by Code Civ. Proc. § 953c, the decision of the lower court must be affirmed.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by Gertie Stewart against Willedd Andrews. Judgment for plaintiff, and defendant appeals. Affirmed.

Willedd Andrews, of Los Angeles, in pro. per. C. W. Hatton, of Los Angeles, and James W. Barnes, of Compton, for respondent.

PER CURIAM. This is said to be an appeal from an order granting plaintiff's motion to set aside the judgment and granting permission to plaintiff to file an amended complaint. There is no record other than a typewritten transcript, which we may assume was prepared in accordance with section 953a of the Code of Civil Procedure. Appellant has not complied with section 953c of the Code of Civil Procedure, which provides that upon such a record the parties must "print in their briefs, or in a supplement appended thereto, such portions of the record as they desire to call to the attention of the court." The brief for appellant is absolutely deficient in that it contains none of the evidence and contains no part of the record. On the authority of Jones v. American Potash Co., 169 Pac. 397, decided October 25, 1917, and cases there cited, the order is affirmed.

35 Cal. App. 148

JAMES et al. v. SUPERIOR COURT OF CALIFORNIA IN AND FOR BUTTE COUNTY et al. (Civ. 1736.)

(District Court of Appeal, Third District, California. Oct. 26, 1917.)

CERTIORARI 🔑31—ORDER DISSOLVING PRELIMINARY INJUNCTION—REVIEW.

Where petitioner brought action to enjoin the sale of capital stock to enforce payment of an assessment, petitioners' voluntary payment of the assessment fully settled and adjusted the matter in litigation, so that whether an order dissolving the preliminary injunction was void was immaterial and abstract, and afforded no ground for relief, so that certiorari to annul the dissolution order will be discharged.

Certiorari by Henry T. James and others against the Superior Court of the State of California in and for the County of Butte, and Henry C. Gesford, its presiding judge, to annul an order of such Superior Court discharging a preliminary injunction in a case by petitioners against certain defendants. Writ discharged.

Frank D. McClure, of Minneapolis, Minn., and Franklin P. Bull, of San Francisco, for petitioners. Frank Freeman, of Willows, for respondents.

BURNETT, J. The application is to annul an order made by said superior court on July 27, 1915, dissolving a preliminary injunction directed to be issued on March 30, 1915, after notice and full hearing in the case of Henry T. James et al. v. P. B. Steifer Mining Company (a corporation) et al., pending in said court at the time said orders were made. No appeal was taken from the order granting the injunction. The contention of petitioner is:

"(1) That the superior court has no jurisdiction to change, modify, dissolve, or otherwise interfere with the temporary injunction granted upon hearing, after an order to show cause, and in full force and effect.

"(2) That any attempt to dissolve the temporary injunction, after its issuance, upon hearing, and order to show cause, would require a review of the motion for the injunction, and that the superior court has no jurisdiction to review such a motion. * * *

"(4) That the statute regulating proceedings on motion for temporary injunction is very general in its terms, covers the entire subject-matter, and prohibits the change, modification, or dissolution of a temporary injunction, except in cases of mandatory injunction by appeal, and in cases of unlawful diversion of water. * * *

"(6) That a writ of certiorari is the proper remedy, because the superior court exceeded its jurisdiction in dissolving the temporary injunction, and plaintiff has no other means of redress."

The foregoing propositions are apparently supported by the decision of the Supreme Court in the carefully and thoroughly considered case of United Railroads of San Francisco v. Superior Court, 170 Cal. 755, 151 Pac. 129, Ann. Cas. 1916E, 199; but respondents in their brief point out that in February, March, October, and November, 1915, petitioners herein paid severally the full amount of the assessment on their respective shares of capital stock, and the company issued to them receipts therefor, and said assessments have been marked paid on the books of said company. Since the said temporary injunction was issued solely for the purpose of preventing the sale of said capital stock to enforce the payment of said assessment, and the payment has been voluntarily made, the continuance in force of said writ would seem to be a matter of no practical importance. It is not to be presumed, of course, that the directors of the corporation will attempt to make a sale to accomplish a purpose that has already been accomplished by the voluntary act of petitioners. It can be said that the subject-matter of the litigation, as far as this proceeding is concerned, has been fully settled and adjusted. In other words, the actual controversy between the parties has ceased to exist as a live question. It is therefore no longer of any legal consequence whether petitioners are right in their contention that the order attemping to dissolve the injunction is entirely void. By the payment of said assessment they have made it virtually an abstract proposition of law, upon which no rights herein depend, and wherein really no relief can be afforded. Franklin v. Peers, 95 Va. 602, 29 S. E. 321; Morton v. Superior Court, 65 Cal. 496, 4 Pac. 489; People v. Burns, 78 Cal. 645, 21 Pac. 540; Estate of Baby, 87 Cal. 200, 25 Pac. 405, 22 Am. St. Rep. 239.

It may be said that petitioners make no reply to this contention of respondents, and we must conclude that they have no reply to make.

The writ is discharged.

We concur: CHIPMAN, P. J.; HART, J.

35 Cal. App. 123

PEOPLE v. ROGERS. (Cr. 555.)

(District Court of Appeal, Second District, California. Oct. 25, 1917.)

1. FALSE PRETENSES 🔑49(1) — ACTIONS — EVIDENCE—SUFFICIENCY.

In a prosecution for obtaining money by false pretenses that defendant was the owner of the furniture and a lease of a rooming house, evidence *held* sufficient to sustain a conviction.

2. FALSE PRETENSES 🔑47 — PROSECUTION — EVIDENCE—ADMISSIBILITY.

Defendant, representing that he was negotiating sales of rooming houses, induced complainant to make a deposit with him to secure a rooming house. Thereafter defendant represented that he could not obtain the rooming house in question, and offered to sell complainant another rooming house, falsely representing that he owned the lease and the furniture thereof. *Held*, that evidence as to the first transaction was admissible.

3. FALSE PRETENSES 🔑32 — INFORMATION — SUFFICIENCY.

Where the information charged that defendant as the result of false representations and pretenses secured the sum of $600, it will be inferred that the money referred to was lawful money or current coin of the United States, and such information is sufficient.

4. FALSE PRETENSES 🔑30 — INFORMATION — SUFFICIENCY.

Where an information alleging that defendant obtained a sum of money by means of false and fraudulent representations that he was the owner of furniture and a lease of a rooming house, after generally alleging the falsity and fraudulent nature of defendant's representations, and that he knew them to be false and fraudulent, alleged the falsity of his representations that he was the owner of the apartments, etc., the information is sufficient; the general allegations not being limited by the particular allegation that defendant was not the owner of the apartment, etc., even though that allegation be taken to refer to the ownership of the realty, and not the lease and furniture which were the subjects of the misrepresentations.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Robert R. Rogers was convicted of obtaining money by false and fraudulent pretenses, and he appeals. Affirmed.

C. A. Bridges, J. B. Tatlow and Jesse R. Shafer, all of Los Angeles, for appellant. U. S. Webb, Atty. Gen., and Robert M. Clarke, Deputy Atty. Gen., for the People.

JAMES, J. Appellant was convicted of the crime of obtaining money by false and fraudulent representations and pretenses. He appeals from the judgment entered after his conviction by a verdict of the jury. The evidence presented in the trial court and brought here under the alternative method of appeal tells a convincing story of the consummation of a bare-faced scheme by which a working girl was defrauded of her savings to the amount of $600. The complainant testified that she, together with a girl friend, desired to purchase the lease and furniture of some lodging house which they might thereafter conduct. Through a friend they were introduced to this appellant, who appeared to be in the business of negotiating such deals; that appellant took them to a hotel which he said he could secure for them, and requested them to make a deposit so that he might bind the bargain. Thereupon he was given by the complainant a check for the sum of $25. Several days elapsed, at which time he reported to complainant that the negotiations were not entirely closed, and finally he reported that he was unable to make the deal for the house which he had exhibited, and told the complainant that he had another house which he wanted her to look at. This witness testified:

> "He told us that he had bought that place, he got that place, and he wanted us to go over and look at it; that he fell through with the other deal, and he was going to give us that place instead of the Argus Hotel. * * * We went to see the place, and it met with our approval. * * * He said the rent was $226, but he would get it for us for $150. He told us to move over there that night and take possession; that he would come over next morning and fix things."

The complainant and her friend did move into the lodging house, and attempted to take possession at least, but they were ousted therefrom a few days later by the landlord. It appeared in testimony that the appellant neither acquired the ownership of the lease on the premises, nor the ownership of the furniture and furnishings. It further appeared that there were arrearages of rental due from the then tenant of the property to an amount in excess of $400, which the landlord was insisting should be paid before he would consent to a transfer of the lease being made. The return of the money was demanded by the complainant, but the appellant did not return the same, and his arrest followed. It sufficiently appeared by every fair inference to be made from the oral testimony given that complainant relied upon representations as to the ownership of the lodging house so made to her by appellant. It should be further stated that the total amount of $600 was paid over to appellant with intent that the money should be used in the purchase of the hotel first shown to the complainant. However, it also appeared that upon appellant's reporting that he could not consummate the deal for the first house, he continued to hold the money, and it was later agreed that the amount should be applied on the purchase of the second house which appellant claimed he owned. The agreement regarding the purchase of the second house was reduced to writing and signed, which contained the recital made on behalf of Rogers that be sold and transferred all of the household furniture and furnishings at the premises in question, "together with a lease" of the same. The fact that the money was first deposited with appellant with the understanding that he was to purchase the house first exhibited to complainant does not in any wise weaken the position of the prosecution which asserts that the money was in fact paid over on account of the representations made as to the ownership by appellant of the second house. The first deal having fallen through, the money of complainant in the hands of appellant was money which appellant had no ownership of, but he held the same as the agent or trustee for the complainant. When upon his representations she decided to make the purchase of the second lease and furniture, the money would be considered as being then delivered to the appellant for the last-named purpose simultaneously with the execution of the written contract covering the alleged deal.

[1] The point made that the evidence is insufficient to sustain the verdict to us appears not to be well taken. The information charged that the appellant represented and pretended that:

> He "was then and there the owner of the furniture and lease of the Tradewind Apartments, in the city of Los Angeles; * * * that the same was then and there free and clear of all incumbrances, and then and there offered to sell the same to the said Ella Kunkel for the sum of $2,500, $600 in cash and $1,100 to be paid at the rate of $50 per month, according to the provisions of a certain contract. * * *"

It is thoroughly illustrated by the evidence that defendant intended, when he stated that he was the owner of the apartments (it was so understood by the complainant), to convey the information that he was the owner of the leasehold interest, together with the furnishings. As before stated, the evidence showed that he had never acquired the lease nor the right of possession thereunder from the landlord or owner, and consequently never delivered anything of value to complainant. As a matter of fact, the furniture was also incumbered by a mortgage. The evidence was amply sufficient to sustain the verdict.

[2] Objection was made in the trial court, and it is also urged here, to the introduction of the testimony showing statements made with reference to the hotel which appellant first proposed to sell to complainant. It will be remembered that the money of the complainant was placed in the hands of appellant for the purpose, first, of consummating the deal which he pretended could be made for the house first exhibited, and the whole transaction, including the negotiation and making of the agreement for the apartments, was so connected that such evidence was properly admitted as showing the whole circumstances of the transaction. The jury could not well have been given a clear understanding of the matter without being furnished evidence of all such details.

[3] The information charged that as a result of the making of the false pretenses appellant secured from complainant "the sum of $600." Appellant complains that this recitation in the information did not contain a description of anything of value; that is, that there should have been coupled with it some statement that the money was lawful money or current coin of the United States. We think that the allegation in this particular is sufficient. It will be assumed as necessary inference that the money so described was money of the United States and not money of a foreign country. While not precisely in point as to the facts, the decision in the case of People v. Green, 15 Cal. 512, is authority for this holding. See, also, the case of People v. Poggi, 19 Cal. 600.

[4] Another complaint made by appellant is that the information failed to charge a public offense in that it was not set forth therein that the particular representations and pretenses alleged to have been made were untrue. The information, after setting out specifically the representations made and to which we have hereinbefore referred, contained a general allegation that:

> "In truth and in fact each and all of the said pretenses and representations so made as aforesaid by the said R. R. Rogers to the said Ella Kunkel were then and there in all respects utterly false, fraudulent, and untrue, and were well known by the said R. R. Rogers to be false, fraudulent, and untrue."

There was a further statement in the information that the said Rogers was not then and there the owner of the apartments, and that the same were not then and there free of incumbrance. Counsel argue from this that such statement is a statement affecting the ownership of the apartments as distinguished from the lease and furniture. The information first charged that the representations were that appellant was the owner of the furniture and lease. We do not concede that this latter statement in any wise limited the effect of the general allegation that each and all of the pretenses and representations "so made as aforesaid" were untrue, but were we to concede logic to such construction, it still appears that the appellant represented that he was the owner of the leasehold interest, which was an interest in the realty and which representation would be negatived by the allegation that he was not in fact the owner of the apartments, if the latter allegation is deemed to refer alone to the realty. However, the general allegation was present asserting that all of the representations made were untrue, and this we think sufficient. We find nothing in the case of People v. Terrill, 127 Cal. 99, 59 Pac. 836, to change our view upon this matter, and cite in support of our holding People v. Hamberg, 84 Cal. 468, 24 Pac. 298, and the argument of the decision in People v. Bryant, 119 Cal. 595, 51 Pac. 960. All of the acts of the defendant, as illustrated by the evidence in this case, show beyond any question a deliberate intent to secure money of the complainant fraudulently and without returning any thing of value therefor. The swindle as planned and carried out was without shadow of excuse or palliating circumstance.

No other points are presented or relied upon which we think are entitled to any consideration here.

The judgment is affirmed.

We concur: CONREY, P. J.; WORKS, Judge pro tem.

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35 Cal. App. 168

LA HABRA OIL CO. v. FRANCIS.

(Civ. 2150.)

(District Court of Appeal, Second District, California. Oct. 29, 1917.)

1. Corporations 🔑243(3) — Liability of Trustee Stockholder for Assessments.

A trustee, holding corporate stock as trustee for others, although the names of the persons for whom he holds are known to the corporation, is personally liable for assessments levied by the corporation for the purpose of paying corporate debts, notwithstanding Civ. Code, § 313, as to voting stock held by trustee, or section 322, under which creditors of a corporation may not enforce stockholders' liability against pledgees or trustees, for the latter section does not, as between the corporation and its legal stockholders, purport to limit the right to enforce assessments, whether in the nature of calls upon the unpaid subscription contract or strictly as assessments under the statute for the purpose of securing money with which to pay corporate debts.

2. Stipulations 🔑14(1) — Construction — By-Laws of Corporation — Notice of Meeting.

Failure to comply with a corporate by-law requiring "not less than one day's notice" of special directors' meetings was not shown by stipulation that notice was mailed at Pasadena, addressed to a director in Los Angeles, "at least one day before" the meeting, for, even if mailing on the day preceding the meeting would not be sufficient, yet under the stipulation the notice might have been mailed several days before.

3. Corporations 🔑201—Actions—Burden of Proof.

One attacking the validity of a resolution of corporate directors as having been adopted at a special meeting of which insufficient notice was given has the burden of showing affirmatively insufficiency of such notice.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by La Habra Oil Company against Ira J Francis. From judgment for plaintiff, defendant appeals. Affirmed.

Oscar C. Mueller and Alfred Wright, both of Los Angeles (Wm. W. Lovett, Jr., of Los Angeles, of counsel), for appellant. Heney & Carr and William F. Adams, all of Los Angeles, for respondent.

JAMES, J. This was an action to enforce payment of an assessment levied by the plaintiff corporation. The appeal is taken from a judgment rendered in accordance with the prayer of the complaint.

[1] The appellant held the stock upon which the assessment was levied, as trustee for other persons. In the stipulation of facts upon which the case was decided there appears this recitation:

> "That at the time of the issuance of said certificate No. 133, and the delivery thereof to the defendant, plaintiff knew that the defendant held the stock represented by said certificate as trustee for other persons, a list of whose names was given to plaintiff at the time of the issuance of said certificate."

The main contention upon which we are asked to reverse this judgment is that, as the assessment levied upon the stock held by defendant was an assessment to pay debts of the corporation, no personal liability therefor existed as against this defendant, but that the right to enforce payment of the assessment, other than by sale of the stock, rested in the corporation only as against the persons for whom defendant was acting as trustee. In other words, that a trustee stockholder, where he has disclosed to a corporation the names of persons whom he represents, is not liable personally to the corporation on account of assessments.

We do not believe that either the statute law or the decisions support this contention. It is true that by our Code the creditors of a corporation may not proceed to enforce the stockholders' liability against pledgees or trustees. It is expressly provided in such cases that the equitable owner, and not the trustee, is liable. Civ. Code, § 322. Section 313 of the same Code provides that, whenever a pledgor or beneficial owner fails to represent stock at a stockholders' meeting, the trustee may vote it. Our Supreme Court has declared that a trustee must be deemed the legal owner of the stock, and "as against the corporation and all the world, except his cestui que trust, no inquiry may be had touching his actions in the premises." Market St. Ry. Co. v. Hellman, 109 Cal. 571, 42 Pac. 225. At common law a trustee of stock sustained full liability, even though he was recorded on the books as not being the actual owner of the same, and such is the uniform rule except where modified by statute. Cook on Corporations (6th Ed.) vol. 1, § 244 et seq. We have cited the chief modifications of that rule as expressed in our statute, which do not go to the extent of relieving a trustee stockholder from liability to the corporation. The District Court of Appeal for the First District decided in the case of Union Savings Bank v. Willard, 4 Cal. App. 690, 88 Pac. 1098, that a person holding stock as trustee was liable for calls upon the subscription contract made as assessments. That case we think is directly in point here.

Counsel for appellant insist that because the stock was not fully paid there, and because the assessment was virtually upon the subscription contract, the case should be distinguished from this, which was for the collection of money for the purpose of paying debts of the corporation generally. This argument is pressed because of provisions of section 322 of the Civil Code, cited above. We think that the provisions of that section only relieve the trustee stockholder where creditors seek to enforce the statutory liability in payment of their debts. As between the corporation and its legal stockholders, this section does not purport to limit the right to enforce assessments, and whether those assessments be in the nature of calls upon the unpaid subscription contract, or strictly as assessments under the statute for the purpose of securing money with which to pay corporate debts, we think immaterial.

[2, 3] One point further is made by the appellant. It is insisted that insufficient notice was given of the special meeting of the directors at which the resolution levying the assessment was adopted. In the stipulation of facts it appears that the by-laws of the corporation provided that special meetings of the directors might be called "by the president or vice president, by giving not less than one day's notice." It appeared further in the stipulation that four of the five directors were actually present and acted. The stipulation showed that the secretary had mailed notices, with postage prepaid, to each of the five directors "at least one day before the time set for the meeting; the notice to L. Teatsworth was deposited in the United States post office at Pasadena, Cal., addressed to him at his residence in Los Angeles, Cal." It is claimed that these facts show that insufficient notice was given to Teatsworth, the absent director, for the alleged reason that it appears that the notice to Teatsworth was deposited in the mails the day before the date of the meeting. Conceding that the mailing of the notice on the day preceding the meeting would not be sufficient, where the mailing was made in Pasadena and the director lived in Los Angeles, nevertheless no showing is made that this notice was mailed precisely on the day preceding; it may have been mailed several days before. The burden is upon the appellant to affirmatively show that insufficient notice was given. Stockton C. H. & A. Works v. Houser, 109 Cal. 1, 41 Pac. 809; Balfour-Guthrie Co. v. Woodworth, 124 Cal. 169, 56 Pac. 891; Sferlazzo v. Oliphant, 24 Cal. App. 81, 140 Pac. 289. The stipulation of facts here shows that four of the directors assembled at the time stated for the special meeting and that the resolution levying the assessment was thereat duly adopted.

The judgment is affirmed.

We concur: CONREY, P. J.; WORKS, Judge pro tem.

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35 Cal. App. 218

PEOPLE v. AH WING. (Cr. 390.)

(District Court of Appeal, Third District, California. Nov. 6, 1917.)

1. Witnesses 🔑240(2) — Leading Questions.

The court may in its discretion allow leading questions to be addressed to a witness, but the privilege should not be arbitrarily granted to one side and denied to the other.

2. Criminal Law 🔑438—Evidence—Photographs.

In a prosecution for murder, the admission of photographs of the place of the killing was not improper, though they showed sticks of wood laid in the street to indicate witness' idea of positions of deceased and defendant, where they were only used as an illustration.

3. Homicide 🔑166(1), 174(1) — Evidence — Motive.

In a prosecution for murder, evidence that after the homicide defendant went toward the tong headquarters was admissible as bearing on his effort to conceal himself and as indicating the tong's connection with the killing, and so furnishing a motive for the crime.

4. Criminal Law 🔑656(9) — Trial—Remarks of Court.

In a trial for murder, where the district attorney cross-examined a witness by asking an impeaching question, the court's remark that it could not see any conflict in the testimony as read and the testimony of the witness was not improper as an invasion of the province of the jury.

5. Witnesses 🔑287(1)—Redirect Examination—Explanation.

Where an officer testified that on the night of the shooting he saw one B. near the scene of the murder, and his attention was called to his testimony at the preliminary examination that he did not see B. at that time, his explanation on redirect that he meant by his former testimony that he did not talk with B. until the next day was proper; such right being recognized by Code Civ. Proc. § 2052.

6. Criminal Law 🔑706—Conduct of District Attorney—Examination of Witness.

In a trial for murder, where the district attorney apparently believed that an important witness for defendant was not telling the truth, he had a right to use every legal means within his power to vindicate such belief, and though his examination was unduly prolonged and unnecessarily persistent, and included some improper questions, the court could not say that it was prejudicial, as tending to discredit the Chinese witnesses.

7. Criminal Law 🔑1170½(5) — Appeal — Harmless Error.

Where matters as to which an important witness for defendant was interrogated and which might not have been within the proper range of cross-examination were clearly established by other witnesses, the cross-examination furnished no just ground for complaint.

8. Criminal Law 🔑1170(1) — Meaning of Expression—Harmless Error.

In a trial for murder, where defendant's counsel sought to show by the interpreter that in using the expression "angry" the witness had used a Chinese word indicating an appearance of the face, the court's exclusion of the explanation was harmless, where it clearly appeared that the expression had such meaning.

9. Criminal Law 🔑706—Conduct of District Attorney—Questions.

In a trial for murder, the court could not say that the district attorney was guilty of improper conduct in asking a Chinese witness whether a tong had threatened a tong war if defendant was convicted and whether the witness was testifying as he was because he knew of such threatened war, as the court must assume that the district attorney acted in good faith, believing that he had the legal right to ask such questions, though objection thereto was sustained.

10. Criminal Law 🔑448(3)—Evidence—Belief.

Where one element in the theory of self-defense was that defendant believed his life was in danger, it was proper for him to testify whether he believed he was in danger of death or great bodily harm, though the jury would not be compelled to accept his statement.

11. Criminal Law ⚷1170(2) — Appeal — Harmless Error.

In such case error in excluding such statement was cured where the question was fully covered by other questions and answers.

12. Criminal Law ⚷706—Conduct of District Attorney—Age of Defendant.

In a trial for murder, where defendant, a Chinese person, testified in chief that he was 18 years old, the district attorney, apparently believing that he was perhaps 28 years old, was not guilty of improper conduct in seeking to compel such admission from defendant or in asking him in reference to his identification papers.

13. Witnesses ⚷248(2) — Striking Unresponsive Answer.

In a trial for murder, where defendant was asked whether the first time he shot deceased he intended to kill him, answer, "I was protecting my own life; I was afraid," did not give a direct answer, and the court was not in error in striking it out as unresponsive.

14. Criminal Law ⚷655(1) — Prejudice of Court—Sentence.

In a trial for murder, the fact that the court imposed a sentence of life imprisonment did not show prejudice, as it would be assumed that the court believed such sentence was deserved, and any subsequent prejudice would not have affected the fairness of the trial.

15. Criminal Law ⚷1186(4) — Appeal — Harmless Error.

Where the defendant's story of the conduct of deceased seemed highly improbable, and where, even if true, it appeared substantially without conflict that defendant was not justified in firing successive shots, and where his guilt was made quite clear from the other testimony, any errors in the rulings upon testimony, in view of Const. art. 6, § 4½, were no grounds for reversal.

Appeal from Superior Court, San Joaquin County; John Hancock, Judge.

Ah Wing was convicted of murder, and from the judgment and from an order denying his motion for a new trial, he appeals. Judgment and order affirmed.

A. H. Ashley, Gordon A. Stewart, and Hugh J. Tye, all of Stockton, for appellant. U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

BURNETT, J. Appellant was charged, with one Henry Lee, with the crime of murder, and on a separate trial was convicted of murder of the second degree and sentenced to life imprisonment. His associate was convicted of murder of the first degree, and his conviction recently affirmed by this court. People v. Henry Lee, 168 Pac. 694. It is sufficient to refer to said decision for a general statement of the case, and it may be further said that therein were considered some of the important points urged herein for a reversal. However, it is proper to state that, speaking generally, the record here presents the defendant in a somewhat less odious light than Henry Lee was exhibited in the other record, though by this it is not meant to say that the evidence is insufficient to warrant the verdict. Indeed, there could be found ample justification for a conviction of the higher offense, but there seems herein more plausibility in the contention that the defendant acted in self-defense than in the other case, and more reason in his claim that certain alleged errors resulted to his prejudice. As to these, however, it is manifest that many of the rulings complained of cannot be successfully assailed, and some of them are so inconsequential as to merit no specific attention. The others that we deem worthy of notice, we proceed briefly to consider.

[1] The rule is too well settled to be now questioned that the court may in its discretion allow leading questions to be addressed to a witness. It is true that the privilege should not be arbitrarily granted to one side and denied to the other. And it seems that the prosecution herein was somewhat more favored in that respect than the defendant, but we cannot say that any prejudice resulted therefrom.

[2] As to the photographic exhibits, what was said in the Lee Case will apply here, and we need add nothing further.

[3] The testimony as to the flight of his codefendant raises a more serious question in this case than in the other. If it appeared without substantial conflict that appellant fled, the cases in that respect would be similar, but Wing denied that he fled; his statement being that after the shooting he walked toward the headquarters of the Suey Sing tong. Thus, under the authorities cited, there is some force in the claim that the ruling was prejudicially erroneous.

We can see nothing improper in the action of the court in permitting the district attorney to show that the defendant after the homicide went toward said headquarters. Certainly the inquiry related to a circumstance in the case that might be legitimately construed as an effort to conceal himself, or as indicating the connection of said tong with the killing, and thus furnish a motive for the crime. At any rate, the fact was fully covered by the testimony of the defendant himself, and there seems to be no doubt that he did actually go in that direction, and while apparently not very important, the circumstance furnished some ground, however slight, for the support of respondent's contention as to the tong's connection with the crime.

[4] On cross-examination the attention of police officer Ingalls was called to a purported statement made by him at the preliminary examination as to the point at which he first saw deceased and the defendants at the time of the shooting. An objection was made by the district attorney on the ground that there was no contradiction therein, and the court said:

"The court cannot see any conflict in the testimony as read to him and the testimony as now given by the witness."

This is claimed to have been an invasion of the province of the jury. But we think the question amounted to an impeaching question, and the district attorney had the right to make such objection. The court was therefore called upon to determine whether there appeared to be any conflict. In sustaining the objection it was necessarily determined that there was no conflict, and the court added nothing to the force or effect of the ruling by making said statement. An examination of the record convinces us that the ruling was correct, and therefore we think there is nothing in the circumstance warranting criticism.

[5] Officer Fredericks testified that on the night of the shooting he saw near the scene of the homicide one Barthold, and then his attention was called to his testimony at the preliminary examination that he did not see said Barthold at that time, and that he first saw him the next day. On redirect examination he was permitted to explain that he meant by his former testimony that he did not talk with Barthold until the next day. This was entirely proper. It would be a very harsh and unjust rule that closed the mouth of a witness to any explanation of apparently conflicting and irreconcilable statements. It is always permissible to make an explanation, but the force or effect of it is, of course, for the jury. Section 2052 of the Code of Civil Procedure recognizes the right of the witness to explain, which right no appellate court, we think, would deny.

We find nothing seriously objectionable in the method pursued by the district attorney in the examination of the witness Barthold, although in that connection bitter criticism against that officer is directed by appellant. Some of the questions were somewhat suggestive, but we cannot say that the purpose was otherwise than to elicit the truth, or that such result was not accomplished.

[6, 7] One Mah Guey was an important witness for the defendant, and complaint is made of his cross-examination, appellant going so far as to state that it constitutes "simply a long prejudicial argument to the jury tending to throw distrust upon Mah Guey, and thereby cast doubt upon all of the Chinese witnesses." We do not so regard it. In the light of calm reflection, doubtless some reason is disclosed for criticism of the cross-examination, but we do not think that thereby any serious error was committed. No doubt, the district attorney believed that the witness was not telling the truth, and he had the right to use every legal means within his power to vindicate his belief. The examination seems to have been unduly prolonged and the district attorney unnecessarily persistent as to unimportant circumstances, and some of the questions should not have been propounded at all, but we cannot say that by anything said or done while the witness was on the stand appellant's cause was illegally impaired. Indeed, as far as concerns the witness himself, he seems to have emerged from the avalanche of questions with his credit unimpaired and his original story remaining unshaken for what it was worth. As to some matters, covering which he was interrogated and which may not have been within the proper range of cross-examination, we may say further that they were established by other witnesses beyond question, and hence they furnish no just ground for complaint.

[8] While one Hong Jo was on the stand appellant's counsel sought to show by the interpreter that in using an expression "angry" the witness had used a Chinese word indicating an appearance of the face. The court would not permit it, but, whether the court was right or wrong, it is entirely apparent from the testimony of the witness that such was his meaning; in other words, it clearly appears that he referred to the appearance of the face.

[9] We cannot say that the district attorney was guilty of improper conduct in asking Lee Wah the following questions:

"Isn't it a fact that the Suey Sings have threatened there will be a tong war here if the defendant is convicted?" and "Isn't it a fact that you are testifying in this case the way you have because you know that the Suey Sings have threatened a tong war in case the defendant is convicted?"

We cannot assume that the district attorney did not believe such fact existed or that the witness had knowledge of it, or that the knowledge of such threat affected his testimony. We must assume, on the contrary, that the district attorney acted in good faith, believing that he had the legal right to ask the questions, although it seems the court sustained an objection to them.

[10, 11] It is claimed that appellant was not allowed to testify as to the condition of his own mind at the time of the shooting. One important element in his theory of self-defense was that he believed his life was in danger, and his mental condition in that respect was, of course, a matter peculiarly within his own knowledge. While the jury would not be compelled to accept his statement, it would seem entirely proper for him to testify whether he actually did believe that he was in danger of death or great bodily harm. People v. Overacker, 15 Cal. App. 620, 115 Pac. 756; Barnhart v. Fulkerth, 93 Cal. 497, 29 Pac. 50; Kyle v. Craig, 125 Cal. 107, 57 Pac. 791. The particular question to which appellant refers is as follows:

"Did you at the time believe, or not believe, that it was either your life or his life?"

But it is apparent that the question was fully covered by other questions and answers, as the following from the record will show:

"Why did you shoot Lee Yow Juck? A. He threatened to kill me in the tan game. Had it not been that Mah Guey took the pistol from him, he would have killed me in the tan game, and then he threatened to go and get another pistol and kill me, so I was afraid of him. * * * Q. Now why did you continue shooting as Lee Yow Juck went across the street? A. His hand was still in his pocket, and I was afraid he might kill me."

He could have added nothing to the force of the foregoing by stating that he believed it was either his "life" or the "life" of the deceased. There was a similar situation in the Overacker Case wherein it was held that the error was cured.

[12] Appellant is very much dissatisfied with his cross-examination. One circumstance that he especially emphasizes relates to his age. He had testified in chief that he was 18 years old. Naturally this was important, as the average juror would be inclined to treat a minor more leniently than an adult charged with the same crime. The district attorney apparently believed that the defendant was much older than that, even 28 years old, and he sought earnestly to compel such admission on the part of appellant. We cannot see that he overstepped the bounds of legal propriety in the matter. We think it not censurable that he asked appellant in reference to his identification papers. The production of them manifestly might have been of great significance in the solution of this question. It does, however, appear, we think, that some improper questions were asked by the district attorney, but nothing of a prejudicial character.

[13] Appellant with some warmth complains because the court, on motion of the district attorney, struck out as not responsive the answer to the following question: "The first time you shot him, did you intend to kill him?" The answer was, "I was protecting my own life; I was afraid." It is apparent that it was not a direct answer to the question. In fact, the answer assigned a reason for what he did rather than the purpose he had in view. The question was not objected to, and indeed it was proper, and the court was not in error in insisting upon an answer to it. It may be further said that, as far as the reason thereby given is concerned, appellant gave it without objection in answer to other questions. Of course, if the witness had answered the question, he would have been permitted to explain it. Indeed, the court so advised him. He chose, however, to say that he could not answer in that way.

[14] Appellant contends that the court was prejudiced against him as evidenced by the sentence of life imprisonment meted out to him. We must assume that the court believed he deserved this sentence, and that it was not the result of prejudice. At any rate, it would be no evidence of the existence of any prejudice prior to the conviction of the defendant, and a subsequently acquired prejudice could not have affected the fairness of the trial. In fact, there seems to be no ground for the contention that the court was animated by any other desire than to do exact justice as between the people and the defendant, and since the penalty imposed was within that provided for the crime of murder in the second degree, there is nothing in said circumstance demanding further notice.

[15] Finally, taking a general view of the case, we may conclude in a few words. Some errors were probably committed during the trial, principally in the ruling upon testimony, but there was no invasion of the fundamental rights of the defendant. In our opinion he was justly convicted. To one at all familiar with the Chinese character and the method of Chinese murderers, the story of the conduct of the deceased as told by appellant would seem highly improbable. But, granting it credit, then it appears substantially without conflict that appellant was not justified in what he did. The evidence of his guilt is quite clear from the testimony of white witnesses. And, conceding that there was evidence of justification for the first shot fired by appellant, it appears from his own statements that he followed and shot the deceased when by no fair understanding of the situation or twist of construction of the law could it be said that he had reason to believe that his life was in danger, or that he acted in self-defense.

If section 4½, art. 6, of the Constitution is not to be invoked here, then we should not seek to follow it in any case.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

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35 Cal. App. 162

BURRELL v. SOUTHERN CALIFORNIA CANNING CO. (Civ. 2144.)

(District Court of Appeal, First District, California. Oct. 27, 1917.)

1. Sales ⚿178(4)—Acceptance—Waiver of Defects.

Where the purchaser of "cookers" used them throughout the entire season without any statement as to nonacceptance, an attempted rejection was ineffectual.

2. Corporations ⚿300—Assignments—Validity.

Where it was the business custom of the president of plaintiff's assignor to make assignments of its claims, an assignment of a claim to plaintiff for collection was valid, although there had been no meeting of the board of directors authorizing the assignment by the president.

3. Trial ⚿191(3)—Instructions Assuming Facts.

Where, after assignment to plaintiff was admitted in evidence, defendant introduced no evidence with reference thereto, whether there had been a valid assignment was for the court, and it was not error, in instructing, to refer to the seller as "plaintiff's assignor" in such a way as to assume that the assignment had been made to plaintiff.

⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

4. SALES 🔑358(1)—ACTION FOR PRICE—EVIDENCE.

The question as to the expense of sending fruit to cold storage, while the fruit-canning machinery bought of plaintiff's assignor was out of order, was properly excluded, where the expense was not incurred, and was not claimed by defendant as an element of damages.

5. SALES 🔑418(19)—SPECULATIVE DAMAGES.

In an action for the price of machinery, the purchaser could not claim damages sustained by reason of the nonuser of the capacity of its plant as a whole during the canning season, due to defects in the machinery; such damages being speculative, and not contemplated by the parties as a result of a breach.

6. TRIAL 🔑198—INSTRUCTIONS—PROVINCE OF COURT—MEANING OF TECHNICAL TERMS.

The court properly instructed as to the meaning of "perfectly constructed mechanically"; the words having a legal technical meaning.

7. PLEADING 🔑406(6) — DEFECTS — TRIAL OF MATTERS NOT IN ISSUE—ESTOPPEL.

Although rescission was not properly pleaded, where the case was tried upon that theory, defendant is estopped to object that no issue of rescission was raised.

8. SALES 🔑364(5)—RESCISSION—CONDITION PRECEDENT—COMPENSATION.

The buyer's use of the machinery throughout the entire canning season, during which time no rescission was made, and the attempted rejection three months thereafter, when it notified the seller to remove the machinery, justified an instruction that, to effect rescission, the return or tender of the property should be accompanied by an offer of compensation for the immediate use of the property.

9. APPEAL AND ERROR 🔑1002—FEES BASED ON CONFLICTING EVIDENCE—REVIEW.

A jury finding, based on conflicting evidence, will not be disturbed on appeal.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by F. L. Burrell against the Southern California Canning Company. From an adverse judgment, and from an order denying motion for new trial, defendant appeals. Affirmed.

Byron Waters and Henry Goodcell, both of San Bernardino, for appellant. F. J. Hambly, of San Jose, for respondent.

KERRIGAN, J. Plaintiff, as assignee of a certain corporation known as the Anderson-Barngrover Manufacturing Company, brought this action against defendant to recover the price of certain machinery and mechanical appliances used in the canning of fruits, which were alleged to have been sold by the Anderson company to defendant. Three counts or causes of action are set forth in the complaint. The defendant admits the ordering and receipt of the goods, but by answer and counterclaim raises certain issues as to the performance of the contract, and claims damages for alleged breach of warranty in connection therewith in a sum greatly in excess of the amount sued for.

The trial was had by jury, which rendered both a general and a special verdict. The special verdict found in favor of plaintiff for the sum of $5,824.42 based upon the first count, the further sum of $4,427 under the second, and the sum of $708.39 upon the third count. It also found in favor of the defendant in the sum of $2,500 as damages for breach of warranty as to articles embraced in the second count, and this sum was deducted from the amount awarded plaintiff under the special verdict, and a general verdict was rendered in favor of plaintiff for the sum of $8,459.81. Defendant moved the court to vacate the verdict and grant a new trial, and urged as reasons therefor the insufficiency of the evidence to justify it, that it was against law, and upon the further ground of errors in law occurring at the trial, consisting of certain rulings as to the admission of evidence and in the giving of certain instructions to the jury. The motion was denied, and this appeal is from the judgment and such order.

The main argument of appellant is based upon the claim that the evidence is insufficient to support that part of the verdict based upon the second count of plaintiff's complaint. Under this count plaintiff sought to recover the price of certain articles, called "cookers," which were used in the canning of fruits. By its answer defendant admitted the contract for the purchase and sale of these articles, but alleged that they were manufactured for a specific purpose and under a specific warranty, and that they were not fit for the purpose as warranted, and further that they were never accepted, and it is upon such question of acceptance that the evidence is claimed to be insufficient. The trial was a protracted one, lasting many days, and numerous witnesses were called on behalf of both plaintiff and defendant, and much evidence was adduced upon this subject, and, as is usual in such cases, there was a substantial conflict upon this question. There is, however, abundant evidence to show that the cooking machines furnished were in accordance with the contract, and were accepted, and we fail to see how the jury could have arrived at a different conclusion.

[1] The articles were delivered by the plaintiff's assignor in the early part of the canning season, were used by the defendant, and no attempt was made to reject them until long after the canning season was over, and when payment was demanded for them, at which time defendant not only refused to pay for the cookers, but also refused payment for the other machinery here sued for. While the evidence shows that there was a period of trouble, due in part to defendant's misuse of the machines, they were operated throughout the entire canning season by defendant in its business, and no notice or statement of nonacceptance was ever made during such period, and not until the appliances had fulfilled their purpose for that year. The attempted rejection at that time was ineffectual. Jackson v. Porter Land Co., 151 Cal.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

32, 90 Pac. 122. Besides this, the preponderance of evidence shows that there was no tentative or experimental use of the articles, but rather a complete acceptance of them.

[2] The alleged errors of the trial court as to the admission of evidence and the giving of instructions are numerous. The first point urged in this behalf is the action of the court in overruling defendant's objection to the admission in evidence of the instrument of assignment. This evidence was properly received. The assignment was signed by the president of the Anderson company for and in its name and bore the corporate seal; and while the president testified that there had been no meeting of the board of directors authorizing him to execute the instrument or to affix the seal, full proof was made that it was the business custom of plaintiff's assignor to execute assignments as here, and further that such claim had been assigned to plaintiff for collection and not otherwise. No contrary showing was made by defendant to overcome this evidence, and the admission of the assignment was proper. Leitch v. Marx, 21 Cal. App. 208, 131 Pac. 328.

[3] In this connection the further claim, that the court erred when instructing the jury by referring to the Anderson company as "plaintiff's assignor" in such a way as to assume that the assignment had been made, is equally without merit. The assignment having been properly admitted in evidence, and the defendant not having introduced any evidence subsequently on the point, no conflict existed, and the matter became a question of law, with which the jury was not concerned.

[4] Counsel for appellant also assigns as error the ruling of the court, made on its own motion, that the question as to the expense of sending fruit to cold storage, for the purpose of preserving it while the machines were out of order, was immaterial. This expense was never incurred, and was not claimed by defendant in its answer or counterclaim as an element of damage, and was properly excluded.

[5] So, also, the claim of error on the part of the court in sustaining plaintiff's objection as to the damage sustained by defendant, by reason of the nonuser of any portion of the capacity of its plant as a whole during the season, is without merit. The testimony was offered to sustain a claim for damages as set forth in the answer and cross-complaint, based upon delays and lack of capacity, due to the defects in the machinery, especially the cookers, by reason of which it is alleged that the entire plant of defendant was in a measure rendered useless during the whole season, and to that extent the defendant was deprived of the use and benefit of its investment. This amount of damage was arrived at by alleging that the investment exceeded $100,000, and that the rental value was $10,000, and that by reason of these facts the defendant was deprived of the use and benefit of its investment to the extent of two-thirds thereof, and to its disadvantage in the sum of $6,666.66. The ruling of the court was proper. Aside from the fact that the question called for the conclusion of the witness, such damages were remote and speculative, and were such as were not anticipated or contemplated by the parties when making the contract as the probable result of its breach. Hunt Bros. v. San Lorenzo, etc., Co., 150 Cal. 51, 55, 87 Pac. 1093, 7 L. R. A. (N. S.) 913.

[6] Nor is there any merit in the objection to the action of the court in instructing the jury as to the meaning of the term "perfectly constructed mechanically." In this behalf it is claimed that the question as to what was meant by these words was not a question of law but rather a question of fact for the jury; and it is argued that the meaning of this term could be explained by evidence, but not by any dictum or direction of the court. It is not only the proper function, but the duty, of a court to instruct a jury as to the use of words having a legal technical meaning. Here all the court did was to define the term, and it left it to the jury to decide whether the machines were so constructed. In so doing it committed no error.

[7] Equally untenable is the contention that the court committed error in instructing the jury in what cases a party to a contract may rescind. It is admitted that the court followed the Code provision, and that the instruction as given is a correct statement of the law; but it is claimed that the giving of the instruction was calculated to mislead the jury to the prejudice of appellant, for the reason that there was no issue of rescission in the case. While a rescission was not perfectly pleaded, the case was tried upon this theory. Defendant is therefore estopped to object that no such issue was raised.

[8] In this connection counsel also complains of an instruction wherein the court told the jury that, to effect a rescission, the return or tender of the property "should be accompanied by an offer of compensation for the intermediate use of the property." Defendant used the machinery throughout the entire canning season, during which time no rescission was made; and defendant's attempted rejection three months thereafter, when it notified plaintiff's assignor to remove the machinery, justified the court in instructing the jury as it did. Furthermore, the court in other instructions to the jury fully and correctly covered this subject.

Other instructions are excepted to and criticized as being contradictory. It is admitted that these intructions, taken by themselves, state a true rule; but it is claimed that the giving of them caused prejudice to the defendant. We have examined the instructions in the light of this objection, and are of the opinion that as a whole they state the law fully and fairly, and that the giving of them in no manner caused prejudice.

[9] Finally, complaint is made that the amount of damages allowed to defendant for breach of warranty is less than the evidence shows them to be; but the evidence upon this subject was conflicting, for which reason we are unable to disturb the finding made thereon.

The judgment and order are affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

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35 Cal. App. 177

WOOLLEY v. BATCHELDER et al.

(Civ. 2083.)

(District Court of Appeal, First District, California. Oct. 30, 1917.)

1. Brokers ⇨84(1) — Commissions — Right to.

For a broker to recover commissions for services rendered in connection with the sale of land, it must appear that he was duly authorized by an instrument in writing to act as the agent of the owners of the property in negotiating or accomplishing a sale of the property, and that he had either accomplished such sale under the agency, or had procured a purchaser ready, able, and willing to buy on the terms authorized.

2. Brokers ⇨49(2) — Commissions — Right to.

The holder of the legal title to a mining claim in which two others had interests, through the aid of plaintiff, who was not acting under any written authority, entered into a written contract with one W., which gave W. the right to enter on the property, and do development work upon rendering a monthly account to the holder of the legal title, through plaintiff as her agent, and paying 20 per cent. of the amount of the clean-ups resulting from operation of the mine. W. was given an option to purchase the mine for the price of $40,000, which was to be paid by the aggregation of the percentages of the clean-ups paid to the holder of the legal title. The option agreement contained a clause providing that plaintiff might represent the holder of the legal title. After the death of the holder of the legal title, the others interested in the mining claim by action established their right to share in the claim and ratified the agreement giving W. an option to purchase. For over three years W. made no payments under the option, whereupon all parties interested in the claim conveyed their shares to him. *Held*, that plaintiff was not entitled to commissions as a broker on the theory that the parties interested in the claim accepted his services in effecting a sale, and then to defraud him dealt directly with the purchaser, for W. made no payments for a long period, and no sale resulted as a result of the option contract entered into through plaintiff's services.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by H. M. Woolley against Nancy E. Batchelder and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Fabius T. Finch, of San Francisco, for appellant. J. A. Elston, of Berkeley, and G. Clark, of San Francisco, for respondents.

RICHARDS, J. This is an appeal from a judgment in favor of the defendants in an action brought to recover a real estate agent's commission.

The facts of the case are in the main undisputed, and are these: The property involved in the transaction out of which the plaintiff claims his right to a commission to have arisen is a mining property known as the Rising Hope mine. Many years ago the mine was located by three persons named McCrellish, Hamilton, and Batchelder, the title to the property being taken in the name of McCrellish alone, and upon his death it was distributed to his widow, Mary P. McCrellish, and stood in her name until her death in the years 1911. It is conceded, however, that Hamilton and Batchelder, the associates of McCrellish, had at all times each a one-fifth interest in the mine, which in course of time descended to Mrs. Batchelder and Mrs. Hamilton, the defendants herein. McCrellish in his lifetime owned, and his widow succeeded to, a three-fifths interest in the mine. Efforts were made from time to time to sell the mine, but without success, until finally in the year 1910, Mrs. McCrellish, through the aid and services of the plaintiff in this action—who, however, was not acting under any written authority at the time—succeeded in making a contract with one Schuyler N. Warren, by the terms of which the latter was given the right to enter upon the property and do certain development work thereon, rendering a monthly account to Mrs. McCrellish, through the plaintiff as her agent, of his labor and expenditures upon the premises, and paying into the Bank of California 20 per cent. of the gross amount of the clean-ups resulting from his operation of the mine. Warren was also by this agreement given an option to purchase the mine for the price of $40,000, which was to be paid by the aggregation of these sums accruing to Mrs. McCrellish from the clean-ups of the mine. The agreement contained a clause providing that:

> "H. M. Woolley may represent the party of the first part [Mrs. McCrellish] and J. R. Partridge and G. W. Englehardt may represent the party of the second part [Warren] in all the above-mentioned matters."

It was also provided that a deed conveying the entire property should be placed in escrow with the Bank of California to be delivered to Warren when the sum of $40,000, the purchase price of the mine, was paid in the manner specified in the agreement. This deed was so deposited, and with it Mrs. McCrellish also deposited two written orders directing the bank to pay the plaintiff herein 10 per cent. of all moneys paid in by Warren, and also to pay Mr. Partridge 10 per cent. of such moneys. Mrs. McCrellish died in February, 1911, and not long after her death Mrs. Hamilton and Mrs. Batchelder brought an action against the executor of her estate to have it determined that they were each the owner of a one-fifth interest in the mine. Judgment was rendered in their favor in the action in July, 1911, and about the time of its entry the plaintiffs in that action made an agreement with the executor of Mrs. McCrellish's estate by which they ratified expressly the Warren agreement. It does not appear, however, that either Mrs. Hamilton or Mrs. Batchelder at the time of ratifying the Warren agreement were aware of the existence of the orders in favor of Woolley and Partridge deposited with the escrow deed, or that they became aware of the same until the present action was begun. In the month of November, 1911, after the rights and interests of Mrs. Hamilton and Mrs. Batchelder had been established in the aforesaid action, they each executed and caused to be deposited in escrow with the Bank of California their respective deeds to Warren each to an undivided one-fifth interest in the mine, for a consideration to each of the sum of $8,000, to be paid by Warren in the manner specified in the original agreement with him made by Mrs. McCrellish and which they had theretofore ratified. During the period of 3½ years from and after the date of the original Warren agreement no clean-ups occurred at the mine as the result of the latter's operation of it under said agreement, and consequently no money whatever was ever paid into the bank under or by virtue of said agreement or of anything done thereunder. In the month of November, 1913, Mrs. Hamilton and Mrs. Batchelder sold and transferred their interests in the mine to Warren for a cash payment and price of $3,000 each. Subsequently the heirs and legatees of Mrs. McCrellish, of whom the plaintiff in this action was one, sold and conveyed their three-fifths interest in the mine to Warren for the sum of $9,000. Thereafter the plaintiff commenced this action to recover a real estate agent's commission from Mrs. Hamilton and Mrs. Batchelder, his contention being that under and by virtue of the original Warren agreement subsequently ratified by them he had been constituted the agent in writing of the owners of the mine in so far as any sale of it to Warren was concerned, and that the said defendants having thereafter and throughout the life of said agreement dealt with Warren directly, and sold their interests in the mine to him, they were bound to pay to the plaintiff a commission on their said sale.

Upon the trial of the case the court found against the plaintiff upon this contention, and rendered judgment in the defendant's favor, from which judgment the plaintiff prosecutes this appeal.

[1, 2] We are of the opinion that the trial court was not in error in its findings and judgment in this case. In order to a recovery against these defendants it was incumbent upon the plaintiff to prove that he was duly authorized by an instrument in writing to act as the agent of the owners of the property in negotiating or accomplishing the sale of the property to some one, and that he had either accomplished such sale under such agency, or had procured a purchaser therefor who was ready, willing, and able to purchase the same according to the terms of his agency. But in this respect an inspection of the original agreement with Warren upon which the plaintiff relies for proof of his agency shows that he had no authority in writing during any part of the negotiations with Warren until they had been consummated in the agreement in writing with Warren, and that the clause in the agreement designating the plaintiff as the agent of Mrs. McCrellish had reference not to what had already been done in the way of finding and producing Warren as a prospective purchaser of the property, but to what Warren was thereafter to do in connection with his operation of the mine and with the possible exercise of his option to purchase the same. The plaintiff could have earned or been awarded no commissions from Mrs. McCrellish or any one else upon the strength of that agreement until Warren had exercised such option and had consummated the purchase of the mine in accordance with the terms of his agreement. It is conceded that Warren never did this, and that he never in fact did anything in the way of exercising his said option or of making any of the deposits in the Bank of California, through the accumulation of which the purchase price of the mine, the sum of $40,000, was to be paid. The agreement with Warren was in no sense a binding contract on his part to purchase the property or to do any of the acts of development and operation through the means of which its purchase might eventually be accomplished by him. It was at best a mere option which was never exercised; and it nowhere appears that Warren was ever at any time ready or willing or able to purchase the property for the sum of $40,000 or for anything approaching said sum. This being so, we think it is clear that the defendants in this action were in no wise bound to pay the plaintiff a commission on account of any services rendered by him under the terms of the McCrellish agreement, or of the defendants' ratification of the same, and that after the lapse of three years' time following the execution of said agreement, during which nothing had been done in the way of carrying into effect its terms, the defendants were at liberty to deal with Warren independently and to enter into a cash sale of their interests in the mine to him, and that their transaction in so doing has no relation to the original agreement, and cannot be construed as in any way carrying into effect its terms so as to entitle the plaintiff to claim that they were dealing with a purchaser produced by him. The record contains no evidence

that the plaintiff had anything to do with the transaction between these defendants and Warren directly by which he became the purchaser of their two-fifths interest in the property for a cash price less than one-half of the amount stipulated as its purchase price in Warren's original option.

The cases cited by counsel for the appellant, to the effect that an owner of property after having duly authorized a broker to find a purchaser for the same cannot deal with such purchaser directly, and thus defraud the broker out of his commissions, have no application to the facts of the case at bar. Whatever may have been the scope or binding effect of the original appointment of the plaintiff as the agent of Mrs. McCrellish, and of the defendants' ratification of that agreement, we are satisfied that it cannot be extended to cover the later and independent transaction between Warren and these defendants directly with which the plaintiff had no connection and in which he is not shown to have taken any part.

It follows that the judgment of the trial court should be affirmed, and it is so ordered.

We concur: LENNON, P. J.; KERRIGAN, J.

(35 Cal. App. 175)

PEOPLE v. COLLINS. (Cr. 561.)

(District Court of Appeal, Second District, California. Oct. 30, 1917. Rehearing Denied by Supreme Court Dec. 27, 1917.)

1. LEWDNESS 🔑10—EVIDENCE—SUFFICIENCY.
Evidence in a prosecution under Pen. Code, § 269a, for cohabitation and adultery *held* sufficient to sustain a conviction.

2. CRIMINAL LAW 🔑406(2)—EVIDENCE—ADMISSIONS.
In such prosecution a certified copy of the certificate of the death of the woman's child, signed by the defendant, admitting her residence and his to be the same, and that he was the father of the child, filed as required by the Vital Statistics Act (St. 1915, p. 575) §§ 4, 7, and 21, was admissible as a fact tending to prove that at the time of signing the certificate he was living with the woman as her husband, and not as her boarder, as she claimed.

3. CRIMINAL LAW 🔑1086(14)—APPEAL—FAILURE TO INSTRUCT.
Defendant in a criminal case, even if entitled to an instruction that certain impeaching testimony had been admitted only for purposes of impeachment, could not complain of its absence where the record failed to show that he asked the court to give any instructions.

Appeal from Superior Court, San Diego County; Franklin J. Cole, Judge.

Truman D. Collins was convicted of the statutory offense of cohabitation and adultery, and from the judgment and from an order denying the motion for a new trial, he appeals. Judgment and order affirmed.

Edward T. Lannon, of San Diego, for appellant. U. S. Webb, Atty. Gen., and Robert M. Clarke, Deputy Atty. Gen., for the People.

CONREY, P. J. The defendant was convicted upon an information charging him with the crime of cohabitation and adultery as defined by section 269a of the Penal Code. He appeals from the judgment and from an order denying his motion for a new trial.

[1] The evidence is sufficient to establish the fact that the offense was committed within one year prior to the 4th day of June, 1917, when the amended information was filed. It was shown by the testimony of witnesses that the defendant and his paramour together occupied a house in San Diego for a year or more, beginning in May, 1916, and that the defendant, in conversation with persons residing in the neighborhood, referred to the woman as his wife. These facts are not contradicted by any evidence in the record, except that defendant and the woman testified that he was there only as a boarder.

[2] The woman had with her at that house a baby, which died on July 3, 1916, it being then of the age of nine months. The court did not err in admitting in evidence a certified copy of the certificate of death of that child. It was admissible as an official document showing that the defendant, over his own signature, admitted at that date that his place of residence and the place of residence of the child's mother were the same, and that he was the father of the child. The vital statistics act (Stats. 1915, p. 575), in section 4 thereof, provides for a local registrar authorized to receive certificates of death and issue burial permits. Section 7 provides that a certificate of death shall state certain facts, one of which is the name of the father of the deceased, and that those personal and statistical particulars shall be authenticated by the signature of the informant, who may be any competent person acquainted with the facts. Section 21 provides for the issuance of a certified copy of the record of any death registered under the provisions of the act, and that such copy, when properly certified by the state or local registrar, "shall be prima facie evidence in all courts and places of the facts therein stated." While the fact that this defendant was the father of that child (it having been both conceived and born prior to June 4, 1916) would not of itself establish that he was living in a state of cohabitation and adultery with the child's mother on and after June 4, 1916, it was nevertheless a fact tending to prove that at the time of signing the certificate the defendant was living with the child's mother as her husband, and not merely as a boarder.

[3] Appellant claims that the court erred in failing to instruct the jury that certain impeaching testimony had been admitted only for purposes of impeachment. Assuming that the defendant was entitled to such an instruction, he cannot complain of its ab-

sence, since the record fails to show that he asked the court to give any instructions. Assuming also that there were some errors in the rulings of the court upon the admission of evidence, they are of comparatively small importance in view of the fact that the guilt of the defendant was fully established by competent evidence.

The judgment and order are affirmed.

We concur: JAMES, J.; WORKS, Judge pro tem.

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35 Cal. App. 112

DINI v. BYRNES et al. (Civ. 2248.)

(District Court of Appeal, First District, California. Oct. 24, 1917.)

INTOXICATING LIQUORS ⟹327(2)—SALE IN NO-LICENSE TERRITORY.

The prohibitory provision of Wyllie Local Option Law (St. 1911, p. 599) § 13, and section 16, providing that it shall not be unlawful to serve alcoholic liquors by any person at his own home to members of his own family or to his guests, as an act of hospitality, when nothing of value is received in return therefor, and the home is not a place of public resort, do not permit a person conducting the business of selling alcoholic liquor in license territory, there receiving an order for liquor from a person residing in no-license territory, to deliver such liquor to the purchaser at his place of residence, even for the purpose of being served by the purchaser in his own home; for the language of the paragraph refers not to the ultimate purpose of the original sale of the liquor, but to its ultimate distribution.

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by Silvio Dini and another against R. R. Byrnes and others. From judgment for defendants, plaintiffs appeal. Affirmed.

C. H. McConaughy, of Ft. Bragg, and Preston & Preston, of Ukiah, for appellants. Hale McCowen, Jr., of Ukiah, for respondents.

PER CURIAM. The question presented upon this appeal is whether a person conducting the business of selling alcoholic liquor in license territory, who there receives an order for liquor from a person residing in no-license territory, may lawfully deliver such liquor to said purchaser at his place of residence?

Section 13 of the so-called Wyllie Local Option Law (Stats. 1911, p. 599) forbids such a sale unless it comes within the exceptions contained in section 16 of the same act. That section reads:

> "Nothing in this act shall be interpreted as rendering it unlawful to keep alcoholic liquors for distribution, or to sell or distribute such liquors, in no-license territory in the manner and for the purposes in this section provided."

Then follow seven paragraphs, each relating to a particular manner of or purpose in distributing alcoholic liquor; and of these it is admitted that none but the first and seventh can have any bearing upon the question involved as it relates to this case.

The first of such paragraphs reads:

> "The serving of such liquors by any person at his own home to members of his [own] family or to his guests, as an act of hospitality, when no money or thing of value is received in return therefor, and when said home is not a place of public resort."

The seventh of such paragraphs is as follows:

> "The keeping of alcoholic liquors on the premises where manufactured, receiving orders at such premises for such liquors, and the shipping of the same from such premises; provided, said liquors are not distributed or delivered in no-license territory within the county in which such premises are located, in quantities of less than two gallons, and are not delivered to any person or place in such territory within said county except as follows: * * * (d) To any person at his or her permanent residence. * * *"

The attempted delivery of liquor in the present case was not made by its manufacturer, nor does it appear from the complaint to have been in a quantity of not less than two gallons; so it is apparent that this exception provided by the statute does not cover the case at bar.

This conclusion leaves for consideration the effect of the first paragraph. If the language of that provision is to be construed as meaning that alcoholic liquor may be sold and distributed in no-license territory for the purpose of being served by a resident thereof to his guests in his own home, then the question at issue in this case must be decided in the affirmative. Such a construction, however, would to a great extent nullify the purpose of the enactment, and, we think, should not be indulged if the language can be otherwise reasonably construed. We think it must be obvious that the language of this paragraph refers not to the purpose of the original sale of the liquor, but to the manner of its ultimate distribution; the language of section 16 above quoted being "Sell or distribute such liquors in no-license territory in the manner and for the purposes in this section provided."

This seems to be the view adopted by the court (Third appellate district) in Golden & Co. v. Justices' Court, 23 Cal. App. 778, 140 Pac. 49, where the construction given here is very vigorously upheld. Upon the authority of that case the judgment herein is affirmed.

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35 Cal. App. 182

MARTY v. SOMERS. (Civ. 2257.)

(District Court of Appeal, First District, California. Oct. 30, 1917. Rehearing Denied Nov. 28, 1917. Denied by Supreme Court Dec. 27, 1917.)

LIMITATION OF ACTIONS ⟹31 — NATURE — TORT OR CONTRACT—UNSUCCESSFUL OPERATION.

A complaint alleging that defendant physician was employed by plaintiff to cure him of a certain malady, that defendant advised an operation, that the operation was performed, but left plaintiff in a worse condition, that plaintiff has suffered and still suffers great pain, and has become weakened in body, and his physical health and constitution have been greatly impaired, and that by reason of the premises plaintiff has suffered damages in the sum of $10,000, did not state a cause of action for breach of contract to effect a cure, but an action sounding in tort for damages for defendant's act or neglect, governed by Code Civ. Proc. § 340, subd. 3, requiring such actions to be brought within one year.

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Paul Marty against Howard Somers. Judgment for defendant, and plaintiff appeals. Affirmed.

Devoto, Richardson & Devoto, of San Francisco, for appellant. Wm. P. Hubbard, of San Francisco, for respondent.

PER CURIAM. Defendant, being a physician and surgeon, was employed by plaintiff "to cure him of bladder trouble," which the complaint alleges he undertook to do. Thereafter defendant advised plaintiff that an operation was necessary in the treatment of the malady, and agreed with the plaintiff to perform the same for the sum of $250. Said operation was performed, and, according to the complaint, "was unsuccessful, and said defendant did not cure said plaintiff of his malady; that said operation left plaintiff in a worse condition; that plaintiff's urinary organs have become paralyzed, and plaintiff has completely lost the use thereof; that plaintiff has suffered and still suffers great pain, and has become weakened in body, and his physical health and constitution have been greatly impaired; that by reason of the premises plaintiff has suffered damages in the sum of $10,000." The complaint prays judgment for said sum. The action was commenced more than one year after the performance of said operation and treatment, and the defendant demurred to the complaint, and pleaded subdivision 3 of section 340 of the Code of Civil Procedure in bar of the action. This demurrer was sustained, and judgment entered for defendant for his costs, from which plaintiff prosecutes this appeal.

In support of the appeal it is urged quite earnestly that the action is one for breach of contract to effect a cure; but it appears quite plain to us, from a consideration of the allegations of the complaint above recited, that the action sounds in tort, and is for the recovery of damages for the defendant's wrongful act or neglect, thus bringing it within the operation of the section of the Code referred to. We think this case is disposed of by what is said in Basler v. Sacramento, etc., Co., 166 Cal. 33, 134 Pac. 993, where Mr. Justice Melvin, after discussing numerous authorities, concludes the court's opinion as follows:

"We see no escape from the reasoning of the foregoing authorities. The demurrer was properly sustained, for the reason that the cause of action was pleaded as one arising ex delicto; but, even if we should regard it as arising upon contract, nevertheless the damages sought are directly referable to the personal injuries suffered by Mrs. Basler, and consequently the time for the commencement of the action is limited by the terms of subdivision 3 of section 340 of the Code of Civil Procedure."

See, also, Harding v. Liberty Hospital Corp., 171 Pac. 98.

The judgment is affirmed.

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35 Cal. App. 111

MAYER v. GOLDMAN. (Civ. 2245.)

(District Court of Appeal, First District, California. Oct. 24, 1917.)

APPEAL AND ERROR 🔑977(1) — NEW TRIAL 🔑6—DISCRETION OF TRIAL COURT—MOTION.
An order granting plaintiff a new trial rests largely in the trial court's discretion, and will not be reversed where based upon sharply conflicting evidence.

Appeal from Superior Court, City and County of San Francisco; W. M. Conley, Judge.

Action by Samuel A. Mayer against Isaac Goldman. From an order granting plaintiff a new trial, defendant appeals. Affirmed.

M. H. Wascerwitz, of San Francisco, for appellant. Henry G. W. Dinkelspiel, of San Francisco, for respondent.

PER CURIAM. In this action, after judgment for defendant for his costs, the trial court granted plaintiff's motion for a new trial which was based upon the grounds, among others, that the evidence was insufficient to justify certain findings, and that the court failed to find upon material issues. Defendant appeals.

As has been so often stated by appellate courts, the granting of a motion for a new trial or its refusal is largely a matter of discretion in the trial court, and where, as here, the evidence is sharply conflicting, the court may well, upon consideration of a motion for a new trial, take a different view of its effect than upon its first presentation, and arrive at the conclusion that its findings as made are insufficiently supported by it. With the discretion of the court thus exercised this court will not interfere.

The order is affirmed.

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35 Cal. App. 145

In re LEFAVOR.

LEFAVOR v. LUDOLPH.

(Civ. 2377.)

(District Court of Appeal, Second District, California. Oct. 26, 1917.)

1. NEWSPAPERS 🔑3(3)—GENERAL CIRCULATION.
A "newspaper of general circulation," as contemplated in Pol. Code, § 4460, providing that such paper must be one "established, published and printed" for one year in a certain

place, need not be actually printed at the place of circulation, at least not uninterruptedly.

2. NEWSPAPERS ⚷3(1)—GENERAL CIRCULATION.

Under Pol. Code, § 4460, providing that a paper, to become a "newspaper of general circulation," must be published for a year, the changing of the name of a paper during such year from "the Watts Advertiser" to "the Advertiser" did not change its character or destroy its identity.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

In the matter of the application by W. L. Lefavor to secure a judgment declaring a newspaper published in the city of Watts to be a newspaper of general circulation, contested by P. H. Ludolph. From a judgment denying his prayer, the applicant appeals. Reversed, with directions to enter judgment for petitioner.

Neighbours, Hoag & Burke, of Los Angeles, for appellant. A. R. Holston and S. C. Schaefer, both of Los Angeles, and Peebles Shoaff, of Watts, for respondent.

JAMES, J. Appellant herein petitioned the superior court for the purpose of securing a judgment declaring a newspaper published in the city of Watts to be a newspaper of general circulation, as defined in section 4460 of the Political Code. We quote the section:

> "A newspaper of general circulation is a newspaper published for the dissemination of local or telegraphic news and intelligence of a general character, having a bona fide subscription list of paying subscribers, and which shall have been established, printed and published at regular intervals, in the state, county, city, city and county, or town, where such publication, notice by publication, or official advertising is given or made, for at least one year preceding the date of such publication, notice or advertisement. A newspaper devoted to the interests, or published for the entertainment or instruction of a particular class, profession, trade, calling, race, or denomination, or for any number of such classes, professions, trades, callings, races or denominations when the avowed purpose is to entertain or instruct such classes, is not a newspaper of general circulation."

Section 4462 of the same Code contains provisions authorizing this proceeding to be brought. The trial judge determined the facts to be that the newspaper had been published weekly in the city of Watts for the required time, and that it was a newspaper containing general news intelligence as required by the act. A finding followed which recited that the newspaper had been "published and printed" at all such times, "except that for seven issues—being the issues from October 27 to December 8, 1916, inclusive—said newspaper was printed at the city of Redondo Beach, Cal., and that said newspaper and its proprietor had no press and no newspaper plant at the city of Watts, Cal., during the time said newspaper was so printed at said Redondo Beach, and that the then owner of the paper never thereafter printed said newspaper at said Watts, Cal.; that a new management began after the said seventh issue, to wit, December 8, 1916, printing said newspaper in the office of the Observer, on the press of the Observer, at Watts, Cal." Upon these findings judgment was ordered and entered denying the prayer of the petitioner.

[1] From these findings, made by the trial judge, it is very apparent that the only ground upon which the denial of the petition was made was because seven issues of the newspaper were not actually "printed" in the city of Watts. The newspaper was circulated there and was a paper local to that community. We think to construe the statute in such a close and literal sense is to narrow its meaning more than was intended by the Legislature. The object to be accomplished was to define newspapers in which public notices might be made and which would fairly express such notices to the particular community intended to be reached. If the trial judge is correct in his conclusion, then in any case where perhaps a very large newspaper, having all the characteristics of a public journal for the dissemination of general news, through accident or otherwise, is obliged to have its printing done outside of the city or county, as the case may be, even for one issue, its character as a newspaper of general circulation, within the meaning of the Code, would be destroyed. Neither could such a journal establish its character in that respect without proving continuous printing of the same without interruption for the period of at least a year within the prescribed limits. The case of Bayer et al. v. Hoboken, 44 N. J. Law, 131, is directly in point. There a statute required the printing of a notice in a newspaper "printed and published" within the limits of a municipality. The newspaper in which the publication was made was printed altogether on presses in the city of New York, but was distributed in Hoboken. The court held that such a newspaper was "printed and published" as required by the statute. See, also, Ricketts v. Village of Hyde Park, 85 Ill. 110; Brown's Estate v. West Seattle, 43 Wash. 26, 85 Pac. 854; all of which cases are cited in Stanwood v. Carson, 169 Cal. 640, 147 Pac. 562.

[2] It did appear, and was found to be a fact by the court, that during the year in question the name of the newspaper was changed from "the Watts Advertiser" to "the Advertiser." The mere dropping of a part of the wording in the name did not change the character of the newspaper, nor destroy its identity. We think that, on the findings of fact as made by the trial judge, the prayer of the petition should have been granted.

The judgment is reversed, with direction to the trial court to enter judgment in favor of petitioner.

We concur: CONREY, P. J.; WORKS, Judge pro tem.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

35 Cal. App. 107

HATHAWAY v. COLEMAN et al. (Civ. 2145.)

(District Court of Appeal, First District, California. Oct. 23, 1917.)

1. LIVERY STABLE AND GARAGE KEEPERS 🔑 11—DIRECTIONS TO DRIVER.

Where plaintiff who engaged a taxicab and directed the driver to take her to a hospital, and in response to the driver's question as to the location of the hospital informed him that it was out H. street on B. avenue, and the driver proceeded out that street, going up two steep hills, such statement was not a direction that the driver should pursue that route on the return journey; the statement as to the location of the hospital being for information of the driver.

2. NEW TRIAL 🔑6 — DISCRETION OF TRIAL COURT—PROPRIETY OF OVERRULING.

In such case, where the taxicab skidded on the return journey, which was made down the two steep hills which had been ascended on the outgoing trip, the setting aside of a verdict for defendant and the granting of a new trial cannot, it appearing that the day was rainy, be deemed an abuse of discretion, reviewable on appeal for the trial court might have deemed that while it was not negligence to go up the hills, it was negligence to go down the same.

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Martha R. Hathaway against Robert L. Coleman and Max Mamlock, copartners doing business under the name of the Alco Taxicab Company. From an order granting plaintiff a new trial after verdict in their favor, defendants appeal. Affirmed.

Edwin H. Williams, of San Francisco, for appellants. Edward C. Harrison and Maurice E. Harrison, both of San Francisco, for respondent.

PER CURIAM. The plaintiff brought an action against the defendants for damages for personal injuries suffered while she was riding in a taxicab operated by an agent of the defendant. The case was tried before a jury, and it resulted in a verdict for the defendant; but upon a motion for a new trial, made upon all of the statutory grounds, the court made a general order granting a new trial, and the appeal is taken from that order.

The accident out of which the case arose occurred in the following manner: The plaintiff, who desired to go to a certain hospital known as St. Joseph's Hospital, from some point in the busy section of San Francisco, engaged the taxicab and its driver, and directed him to take her to the St. Joseph's Hospital. It appeared that the driver of the taxicab did not know just where the hospital was, although he was otherwise a trained, skillful, and experienced driver of taxicabs, having driven such vehicles in the city mentioned for several years, and being, as the evidence shows, familiar with the streets of that city. He asked the plaintiff where St. Joseph's Hospital was, and she informed him it was out Haight street on Buena Vista avenue. The driver proceeded out Haight street and went up two steep hills to reach the hospital. Arriving at her destination the plaintiff alighted, went into the hospital, remained a while, and then came out and re-entered the taxicab. The driver undertook to return by the same route he had taken to reach the hospital. He descended one of the hills, which the evidence shows was the only feasible route at that point, and arrived at Haight street, where there was another hill to descend. It had been raining and the streets were wet. The driver undertook to go down this hill on Haight street, and on the way down the vehicle skidded and collided with a post, and the plaintiff was injured.

Upon the trial of the case the plaintiff undertook to show by witnesses that there were other routes by which the driver could have avoided going down this steep hill on this rainy day; that by taking a detour he could have avoided the steep declivity. The court refused to permit that proof to be made, to which refusal an exception was taken. There is, however, in the record some evidence that there were other such routes and that the driver knew of them.

[1, 2] The appellants contend here that the verdict was properly in their favor, for the reason that the driver took the route directed by the plaintiff, and that as a matter of law the plaintiff, having directed the driver to take a particular route, cannot maintain an action for damages if an injury occurs while the driver is obeying that direction. The evidence, however, in the case apparently in the opinion of the trial court—as it seems to us also—does not go so far as to amount to a direction on the part of the plaintiff that the driver take a particular route, because while he did not know where the particular hospital was, the evidence shows that he knew all of the streets of the city; that he had driven up and down this particular street before; and that the only direction she gave was the one as to the location of the hospital, namely on Buena Vista avenue, and was not a direction to him to pursue a particular route. But, however that may be, that direction only had reference to the route out and up the hill, and the plaintiff gave no direction as to the route which the driver should pursue on the return journey; and it may well be that the trial court took the view that while it might not have been dangerous to ascend this hill upon a rainy day, it was a matter of great danger to undertake to descend it when there were other routes available. It seems to us that these considerations may well have entered into the conclusion of the court in granting a new trial. We think that the discretion of the court thus exercised should not be interfered with under the circumstances.

The order is affirmed.

35 Cal. App. 171

HUTCHINSON v. SCOTT, MAGNER & MILLER. (Civ. 2187.)

(District Court of Appeal, First District, California. Oct. 29, 1917. Rehearing Denied Nov. 28, 1917; Denied by Supreme Court Dec. 27, 1917.)

PRINCIPAL AND AGENT 🔑166(3) — ACTS OF AGENT — RATIFICATION — KNOWLEDGE OF CONDITIONS.

Where a car was placed with an agent for sale for $800 cash, and the agent exchanged the car and got $50 cash, and sent $400 to his principal telling him he had exchanged and had received that amount on the trade, which the principal accepted conditionally, there was no ratification of the exchange, where there was no connection shown between the $50 and the $400, and the principal did not know with whom the car had been exchanged, or the conditions; because in order to constitute a ratification of the unauthorized acts of an agent the principal must be fully advised as to what the actual transaction was which the principal, by his acts or conduct, is to be held to have ratified.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Action by Joseph K. Hutchinson against Scott, Magner & Miller, a corporation. Judgment for defendant and plaintiff appeals. Reversed and remanded.

Joseph K. Hutchinson, of San Francisco, in pro. per. A. A. Sanderson, of San Francisco, for respondent.

RICHARDS, J. This is an appeal from a judgment in defendant's favor in an action for the recovery of the possession of personal property.

Concerning the facts of the case there is no substantial dispute. The plaintiff was the owner of a certain automobile known and designated as a "1915 Hupmobile Roadster," and which he desired to sell. While on a visit to the east he opened correspondence with a Mr. Llewellyn Johnson regarding the sale of his machine, as a result of which he sent the latter a telegram on September 20, 1915, to the effect that he had instructed the garage to deliver the car to him, as the plaintiff's agent, for sale at $800 cash; no delivery to be made until full price was paid. Johnson received the car under this instruction, and within a short while thereafter he made an exchange of it with the defendant for a touring car owned by it, receiving $50 cash on the trade. On October 22, 1915, Johnson wrote a letter to the plaintiff, who was then in New York City, that he had after some difficulty made a deal by which he had sold the plaintiff's automobile for $400 cash and a Hupmobile runabout, which he could sell for the same amount as soon as some repairs were made upon it, and that as soon as sold he would remit the balance of the purchase price. He inclosed in this letter a draft for $400 which he thus claimed to have received, but did not disclose the name of the purchaser of the plaintiff's car. Upon receiving this letter the plaintiff replied acknowledging the receipt of the $400 inclosed and stating that:

> "While I am not entirely satisfied with the sale of the car for less than $800 cash I shall accept the situation if I have both your promise to pay the remaining $400 to me in cash within the next thirty days, and a credit to me of that amount upon the Linz-Sanborn Motor Company. Please advise me if you can provide me with these assurances."

The Linz-Sanborn Motor Company referred to in this reply was a firm of dealers in automobiles with which the plaintiff had previously been led by Johnson to believe that he was connected in some responsible capacity. Receiving no reply from Johnson, the plaintiff returned to San Francisco a few weeks later and began to look the matter up. He saw Johnson and could get no satisfaction from him, either as to whom he had sold the car, or as to the terms of its sale, or as to the payment of the balance of its purchase price; but he learned that Johnson had deceived him with respect to his connection with the Linz-Sanborn Motor Company and that he had no such connection. He finally learned that his car was in possession of the defendant, who claimed to have purchased it from Johnson. The plaintiff thereupon wrote a letter to the defendant denouncing the acts of Johnson and demanding the return of the car, with damages for its depreciation and retention, and, these demands being refused by the defendant, the plaintiff instituted the present action.

The defendant in its answer claimed to be the owner of the car by virtue of its transaction with Johnson which it was claimed the plaintiff had ratified; but the defendants did not set forth in its answer the details of the transaction by which it had become possessed of the car, nor does it appear that the plaintiff was informed as to the terms of the transaction or of the payment of the $50 by the defendant to Johnson until the trial of the case.

The court found that the plaintiff had ratified the acts of Johnson in the premises and rendered judgment in defendant's favor, from which judgment the plaintiff prosecutes this appeal.

Upon the undisputed facts thus set forth, it seems clear to us that the finding of the trial court that the plaintiff ratified the transaction between the agent Johnson and the defendant finds no support in the evidence in the case. The instruction of the plaintiff to Johnson creating his agency and investing him with possession of the car limited his authority to the making of a cash sale of the plaintiff's automobile for the sum of $800, and required that no delivery of the car should be made until that cash price had been paid. The acts of Johnson in making an exchange of the plaintiff's car with the defendant for another car and $50 were clearly and grossly beyond the scope of his powers. The transaction which Johnson reported to the plaintiff, and which plaintiff, by his qualified acceptance of it, is claimed to have ratified, never in fact occurred, and, never having existed, of course could not be ratified. Nor can it be claimed that the retention of the $400 sent to the plaintiff by Johnson, or his qualified acceptance of the latter's purported acts, constituted a ratification of the real transaction between Johnson and the defendant, for the all-sufficient reason that in order to constitute a ratification of the unauthorized acts of an agent the principal must be fully advised as to what the actual transaction of the agent was which the principal, by his acts or conduct, is to be held to have ratified. Civ. Code, § 2310; Stemler v. Bass, 153 Cal. 791, 96 Pac. 809; Lambert v. Gerner, 142 Cal. 399, 76 Pac. 53; Maze v. Gordon, 96 Cal. 61, 30 Pac. 962; Meux v. Hogue, 91 Cal. 442, 27 Pac. 744; Hall v. Wells & Sons, 24 Cal. App. 238, 141 Pac. 53; Palo Alto Mut. B. & L. Ass'n v. First Nat. Bank, 164 Pac. 1124.

In the case at bar it is not pretended that the plaintiff knew anything whatever about the actual transaction between Johnson and the defendant at the time of his receipt of the letter from Johnson purporting to detail a transaction for the sale of his automobile which was an entire fiction, or at the time of his qualified acceptance of its terms, or at any time up to the actual trial of the cause. It is, however, contended by the respondent that, because the plaintiff received and retained the sum of $400 sent him by Johnson as part of the proceeds of a sale of his machine which had never occurred, he must be held to have received and retained a portion of the benefits of the actual transaction between Johnson and the defendant, and thus to have ratified the same. It is argued that the $50 which was paid by the defendant to Johnson is to be held to be included in the larger sum of $400 which the plaintiff received from Johnson as the result of the fictitious transaction which he reported to him. There are two answers to this contention, the first of which is that the record does not disclose any connection between the $50 paid to Johnson by the defendant and the $400 sent by Johnson to the plaintiff, or that he ever retained the $400 with knowledge that any portion of it was derived from the defendant. And the second answer is that the plaintiff was never informed, so far as the record discloses, as to what the transaction between the defendant and Johnson was, or as to any payment by the defendant to Johnson of any sum of money whatever in the course of the transaction until the actual trial of the cause; nor does it appear to have been intimated in that trial that the plaintiff's retention of the money received from Johnson amounted to such an acceptance of the benefits of the defendant's transaction as to prevent a recovery in this action. On the contrary, the findings of the court as to the plaintiff's ratification of his agent's acts expressly refers the same to October 22, 1915, the date of the plaintiff's qualified acceptance of Johnson's reported transaction. These findings, as we have shown, have no support in the undisputed evidence in the case.

The judgment is reversed, and the cause remanded for a new trial.

We concur: LENNON, P. J.; KERRIGAN, J.

(35 Cal. App. 116)

RYAN v. WALKER. (Civ. 1729.)

(District Court of Appeal, Third District, California. Oct. 25, 1917.)

1. BROKERS 🔑56(3) — COMMISSIONS — SERVICES.

Where a real estate broker introduced the purchaser to the owner of the property, he has done all that the law required of him to entitle him to his commission, even though the owner subsequently sells the property, or a part thereof, at a reduced price.

2. BROKERS 🔑43(1)—CONTRACTS—ACTIONS.

Under Civ. Code, § 1624, subd. 6, requiring agreements authorizing or employing an agent or broker to purchase or sell real estate for compensation or a commission to be in writing, an action will not lie by a real estate broker to recover upon a verbal contract for compensation for producing a purchaser of real estate.

3. BROKERS 🔑43(1)—REAL ESTATE—"MIDDLEMAN"—"AGENT."

Under Civ. Code, § 1624, subd. 6, requiring real estate employment contracts to be in writing, there is no distinction between a middleman and an agent, as applied to real estate brokers; such brokers being middlemen, whose business is to bring seller and buyer together.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Agent; Middleman.]

4. FRAUDS, STATUTE OF 🔑116(3, 4) — BROKERAGE CONTRACTS—PERSONALTY.

Civ. Code, § 1624, subd. 6, requiring agreements authorizing or employing an agent or broker to purchase or sell real estate for compensation to be in writing, does not apply to an agent's contract for the sale of personalty.

5. FRAUDS, STATUTE OF 🔑23(4)—DEBT OF ANOTHER—BROKERAGE CONTRACTS.

Civ. Code, § 1624, subd. 2, pronouncing invalid a special promise to answer for the debt, default, or miscarriage of another, has no application, where a prospective purchaser of real estate, upon the seller's refusal to pay a commission, promised to pay the broker a certain commission in case he purchased entire property; such promise not being one to answer for the default of the owner.

6. NOVATION 🔑1—BROKERAGE CONTRACTS.

Where an owner of property refused to pay a commission to a real estate broker, and the prospective purchaser promised to pay such commission in case the deal was closed, the transaction did not constitute a novation.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Novation.]

7. PLEADING 🔑193(6)—COMPLAINT—DEMURRER.

A complaint in an action for broker's commission for the sale of real property, and also for the sale of personal property, but not stating the two causes of action separately, was demurrable, under Code Civ. Proc. § 430, subd. 5, providing that the defendant may demur where several causes of action have not been separately stated.

8. BROKERS 🔑40—CONTRACT — CONSIDERATION.

A promise by a prospective purchaser of personal property to a broker to pay a commission in case he purchased was not enforceable, though part of the personalty was subsequently purchased from the owner without the broker's intervention; the agreement not being supported by a sufficient consideration.

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by Maurice F. Ryan against S. O. Walker. Judgment for defendant, and plaintiff appeals. Affirmed.

T. E. Clark, of Visalia, for appellant. Maurice E. Power, of Visalia, for respondent.

BURNETT, J. The appeal is from a judgment of dismissal after a demurrer to the second amended complaint had been sustained. The complaint itself is rather a curious piece of composition. It abounds in evidentiary and redundant matter. It comprises over 12 pages of the transcript, whereas every material allegation could have been expressed in one-fourth that space. It is unfortunate that the pleader did not carefully consult the case of Green v. Palmer, 15 Cal. 412, 76 Am. Dec. 492, before drawing his complaint. If he had done so, he probably would have saved himself much trouble and the court considerable anxiety in the effort to determine the theory of his cause of action. It appears to be an action for the recovery of a commission for the sale of real and personal property. It appears without question that there was an oral contract entered into with the owner of the property in the beginning. The contract seems thereafter to have been canceled, and a new contract made with the defendant, the respondent herein. To indicate the nature of the said contract it is probably sufficient to quote the seventh paragraph of the second amended complaint, as follows:

> "That plaintiff thereupon called the attention of said Mr. Leebon to the fact that the defendant was a customer whom he had produced, pursuant to the agreement of Mr. Leebon to compensate him for his services, and that he expected compensation at the rate of 5 per cent. on the sale price if Mr. Leebon sold to defendant. Mr. Leebon then informed plaintiff that if he should sell the property for less than $80,000 he could not pay plaintiff 5 per cent. on the same. Whereupon plaintiff remarked: 'This man is my customer; if you sell to him, I will expect you to pay me as you agreed to do.' In reply Mr. Leebon said: 'If I am obliged to pay you 5 per cent. on a less sum than $80,000, we will just call the trade off.' And he then and there turned to walk away. Defendant then spoke to Mr. Leebon and said: 'Hold on, Mr. Leebon; if I buy this property, I will pay Mr. Ryan 5 per cent. on whatever amount I agree to pay for it.' Whereupon plaintiff asked the defendant: 'Is that right?' And the defendant answered: 'Yes; I will pay you myself.' Defendant and Mr. Leebon then engaged in some further conversation, but did not at that time agree upon terms, and no deal was consummated that day, between defendant and Mr. Leebon, and plaintiff and defendant returned to Visalia."

[1] It thus appears, in connection with the fourth and fifth paragraphs of the complaint, that the owner of the property undertook to pay the agent a commission for finding a purchaser, and in pursuance of said agreement plaintiff did find a purchaser in the person of the defendant. There can scarcely be any doubt that plaintiff, by introducing defendant to the owner, performed all that the law required of him to entitle him to his commission, even though the owner saw fit subsequently to sell the property or a portion of it at a reduced price. Mattingly v. Pennie, 105 Cal. 514, 39 Pac. 200, 45 Am. St. Rep. 87; Brown v. Mason, 155 Cal. 155, 99 Pac. 867, 21 L. R. A. (N. S.) 328.

[2] It is the contention, however, of the respondent here, as it was in the court below, that, since the alleged promise was verbal, it is brought within the provisions of subdivision 6 of section 1624 of the Civil Code, requiring agreements authorizing or employing an agent or broker to purchase or sell real estate for compensation or a commission to be in writing. It is therefore contended, and it was so held by the trial court, that plaintiff counts upon a void promise. A large number of cases is cited, illustrating the application of this provision of the Code. It is not necessary to call attention to all of them, as the rule is very clearly stated in the Code itself, and there can be no question about it in the proper case. We content ourselves with referring to Dolan v. O'Toole, 129 Cal. 488, 62 Pac. 92; Jamison v. Hyde, 141 Cal. 109, 74 Pac. 695; Hicks v. Post, 154 Cal. 22, 96 Pac. 878.

[3] Nor is it any answer to this contention that plaintiff was a "middleman, and not an agent," as claimed by appellant. His complaint alleges that he was a real estate broker, and it is settled that a broker is a middleman, whose business is to bring seller and buyer together. He need have nothing to do with negotiating the bargain. 19 Cyc. 186; Brown v. Mason, 155 Cal. 155, 99 Pac. 867, 21 L. R. A. (N. S.) 328. No such distinction as claimed by appellant is recognized in this state. As to this point certain cases are cited from other jurisdictions, but they are under different statutes from that prevailing in this jurisdiction. Among the cases cited is Deitch v. Feder, 86 N. Y. Supp. 802. Therein it appears that the owner would not sell below a certain price if compelled to pay his agent a 1 per cent. commission, but that he was willing to sell for a less price if the buyer would bind himself to pay that commission. It appears that there was a definite agreement between the owner, buyer, and agent, by which the owner was released from his obligation to the agent, and the buyer in consideration of obtaining the property at a reduced price, agreed to pay the agent his commission. The sole point decided in the case was that the verdict of the jury must stand where the evidence is conflicting. A somewhat different question was presented in the case of Siegle v. Rosenzweig, 129 App. Div. 547, 114 N. Y. Supp. 179; it appearing therein that the buyer requested the agent to do nothing and to allow him to deal directly with the owner, the buyer promising the agent a commission for his inaction. The vital point in the case was apparently whether the transaction was based upon an immoral consideration, and the court held that it was not. Some of the other decisions are to the effect that contracts may be oral, if not required by statute to be in writing. Of course, as to this there can be no controversy. Nor can there be any question that a broker may in some instances require commissions from both parties.

[4] We think that it can be safely said that, as far as the action concerns the agreement to pay a commission for the sale of the real estate, it is within the provisions of said statute of frauds, and being invalid, it cannot be enforced, and this applies to the second agreement as well as the first. The complaint shows, however, that the transaction related, not only to real estate, but also to personal property, and we see no good reason against holding that it is, therefore, severable, and such statute is not applicable as far as the personal property is concerned; such contract not being required to be in writing. As to this latter property, it may be said, further, that there is an allegation in the complaint that:

> "Plaintiff was since the commencement of this action informed, and he now believes, and he therefore, upon information and belief, alleges, that defendant purchased at the time of the purchase of the said land, all of the aforesaid personal property that was upon said premises, and that was embraced in said Leebon's original proposition to sell, and which was separately valued, and by defendant purchased from said Leebon at the price of $15,000."

[5, 6] It is further contended by respondent that Walker's statement, as set out in the seventh paragraph aforesaid, was a promise to answer for the debt of Leebon, and therefore void under the provisions of subdivision 2 of said section 1624, pronouncing invalid "a special promise to answer for the debt, default, or miscarriage of another, except in the cases provided for in section 2794." We are not inclined to agree with respondent in this connection. We think it may fairly be inferred from the language of the complaint that the agreement between plaintiff and the defendant constituted an independent contract. It appears, in other words, that plaintiff had first entered into a contract with the owner of the property for a commission of 5 per cent.; but, after producing a purchaser, said contract seems to have been rescinded by mutual consent, whereupon defendant, in consideration of obtaining the property at a lower price, promised to pay plaintiff a commission of 5 per cent. upon what he should be required to

pay for said real estate and personalty. We can perceive no necessary connection between this contract and the one made with the owner. Strictly speaking, it is not a promise to answer for the default of the owner, nor is it a novation.

In the demurrer, which was both general and special, it is claimed that the said complaint is uncertain, in that it cannot be ascertained whether the cause of action grows out of a claim for commission for the sale of real property or the sale of personal property, or what portion of the said $2,700 the commission is claimed for one or for the other; furthermore, that it cannot be ascertained whether defendant ever promised to pay any commission or any sum whatever for the sale of the personal property, and that it cannot be ascertained whether or not defendant promised or agreed to pay any commission after or before any services were performed, if any were performed, by the plaintiff. These grounds of demurrer may be considered together. From paragraph 7 of the complaint, considered in connection with what precedes, the conclusion would follow that the parties had in view both the real and personal property, but in paragraph 8 we find this allegation:

> "That on the return trip to Visalia on the occasion last aforesaid, defendant and plaintiff talked over the possibility of handling the property and defendant remarked to plaintiff: 'You are now interested in the deal, 5 per cent. on whatever price I pay for the property, and unless I can get it at a price a great deal below what Mr. Leebon now holds it at, I cannot handle it, therefore, if you make anything out of the deal you should assist me in buying the property as low as possible and if I could get the ranch for a fair price, and leave the personal property out, I think I could handle it, but I don't want to get mixed up with the chattel mortgage on the personal property.'"

This would seem to qualify the promise as to the personal property and confine it to the realty. It does at least indicate an intention on the part of respondent that appellant should do nothing toward the purchase of the personalty, and we find that appellant acted upon the statement and actually performed no service for respondent in that particular.

[7] As to the point in reference to the apportionment of the $2,700, it does appear, as we have seen, that the personal property was sold for the sum of $15,000, and it is a mere matter of computation to determine how much of the commission was claimed for that sale. Another ground of special demurrer was that:

> "Two causes of action are united in said complaint, the one for the commission growing out of the transfer of real property, and the other for the commission growing out of the transfer of personal property, and said causes of action are not separately stated."

It seems clear that this position is well taken, and that for this reason the complaint was demurrable under subdivision 5 of section 430 of the Code of Civil Procedure.

[8] The other criticism, moreover, suggested by the general demurrer of respondent, seems to involve a fatal defect in the complaint. In considering it we must, of course, keep in view the fact that the contract with respondent was entirely distinct from the one made with the owner, and that the real property must be eliminated from consideration. Then the question arises whether plaintiff earned any commission, as against the defendant, for the sale of the personal property. If so, he must have performed some service for the defendant in connection with said sale. It is not sufficient that he may have earned his commission as against the owner by bringing the vendor and vendee together, since that service related to the first contract and had been completed when the second contract was made with the purchaser, and it would seem, on familiar principles, that the plaintiff, in order to earn his commission on the sale of said personalty, must have performed some service to effect said sale; but we look in vain through the complaint to find any such allegation. It does not appear that plaintiff had any further communication whatever with the owner in reference to said personalty, nor that he made any effort to bring the parties together in relation to it. It is true he performed some service in regard to the real property, but that cannot be considered, as before stated.

In fact, immediately after the agreement relied upon by plaintiff, he was informed by defendant, as we have seen, that he, the latter, did not desire to purchase said personalty, and it seems defendant purchased it without the knowledge of plaintiff. We can see no principle, therefore, upon which it can be held that plaintiff can recover from defendant for said sale. The promise to pay, if made, was entirely without consideration, and cannot be enforced. It amounts to no more than this: Defendant says to plaintiff:

> "If I buy the whole of this property for less than $80,000, I will pay you a 5 per cent. commission on the purchase price."

Defendant did thereafter purchase the personalty for $15,000 without any aid whatever from plaintiff. Indeed, as we have seen, it was understod that plaintiff was to perform no service in that connection.

There was no benefit conferred upon defendant, no prejudice suffered by plaintiff in consequence of said promise, nor was it intended that there should be. The promise, therefore, was without consideration and void as far as the personal property was concerned. Or the promise may be considered as implying that the services would be performed, and since there was no performance, to its entire extent the promise failed.

We think the judgment should be affirmed; and it is so ordered.

We concur: CHIPMAN, P. J.; HART, J.

35 Cal. App. 154

PEOPLE v. CAVALA. (Cr. 391.)

(District Court of Appeal, Third District, California. Oct. 27, 1917. Rehearing Denied by Supreme Court Dec. 24, 1917.)

1. WITNESSES 🔑304(4)—IMMUNITY—NONINCRIMINATING TESTIMONY.

Under Pen. Code, § 1324, relative to requiring one to testify against another, he is not immune from prosecution for the same offense, where his testimony, so given, did not incriminate himself.

2. WITNESSES 🔑304(4) — IMMUNITY — SELF-INCRIMINATION—STATUTE.

Pen. Code, § 1324, providing that an offender compelled without warning to testify against another like offender shall be immune from prosecution for the offense, his testimony, incriminating himself, does not apply to one called as witness on preliminary examination of another without suspicion that he was implicated in the offense.

3. CRIMINAL LAW 🔑1188—APPEAL—REVERSAL OF ORDER FOR NEW TRIAL.

Reversal of order erroneously granting new trial will be with direction for judgment on verdict.

Appeal from Superior Court, Merced County; Geo. H. Cabaniss, Judge.

John Cavala, after a verdict of guilty, was granted a new trial, and the People appeal. Reversed, with directions.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People. H. A. Gabriel, of San Jose, and J. J. Griffin and H. S. Shaffer, both of Merced, for respondent.

HART, J. Under an information filed in the superior court of Merced county, by the district attorney of said county, the defendant was convicted of the crime of grand larceny, in that he did, on the 29th day of April, 1915, feloniously steal, take, and drive away a certain cow, the personal property of J. B. Coito & Co., a firm engaged in the business of dairying in said county.

The court below, upon the application of the defendant, ordered a new trial, stating the ground therefor as follows:

> "The motion for a new trial made herein is granted on the ground that the court committed an error in refusing to grant defendant's motion that the action be dismissed, and that a verdict of 'not guilty' be pro forma rendered in the case, by reason of his immunity from prosecution for the offense charged in this information, because of testimony given by him as a witness upon the preliminary examination of that same matter or charge, wherein the people were prosecuting one George A. Avila."

The people appeal from said order. Obviously, the only question presented here is whether the defendant was entitled to immunity from prosecution for the charge preferred against him by the information under the terms of section 1324 of the Penal Code.

One George M. Avila had previously been prosecuted in the superior court for the identical offense charged against the defendant here, and the latter testified in that case. In this case the defendant did not take the stand, but his testimony, given in the Avila case, was introduced by the district attorney in the present case. In the Avila case, the defendant practically admitted that he stole the cow referred to in the information. It appears that Avila was engaged in the business of a butcher, and that he did his own slaughtering. On his ranch, where he conducted his business, the defendant, at the time of the commission of the larceny here charged, had about 30 head of milch cows, which he had left there a day or two before the larceny. Avila was to take care of said cows for the defendant and sell the same whenever the opportunity to do so presented itself. Avila maintained a slaughter house for the purposes of his business, but occasionally slaughtered cattle in his barn on the ranch.

On the 29th day of April, 1915, at about half past 8 in the evening, and a couple of hours after he had had supper at the Avila home with the family, the defendant, having previously left the Avila place in his automobile, returned to said place and brought with him the cow referred to in the information. According to his own testimony given in the Avila case, the defendant, as he was driving along the road on his return to the Avila ranch and when near the latter's house, observed a cow in the road and at the same time saw a man jump over the fence skirting the road and start to run. The defendant yelled at the man, but the latter made no response, and kept on running. He thereupon drove to Avila's house, there left his machine, and returned to get the cow, he then supposing, so he declared, that it was one of his cows. He drove the cow to Avila's place and, on turning a light on her, discovered that the animal did not belong to him. He then blew the horn on his auto, and Avila thereupon came out of his house and went to where the defendant was standing. The latter then requested Avila to kill the cow and ship the carcass to O'Connor Bros. at San Jose. The defendant thereupon left the premises; and, in accordance with the instruction given him by the defendant, Avila that night slaughtered the cow and dressed the carcass in his barn, but in the place of shipping the beef as directed by the defendant, cut it into meat and sent it out the next morning in a wagon, used by him for that purpose, to be peddled or sold to the people living in the country thereabouts, explaining that he had forgotten the address to which the defendant directed him to ship the beef, and that he would himself pay the defendant for it. The defendant, in his testimony at the trial of Avila, explained that the reason that he instructed Avila to slaughter the cow after discovering that the animal was not his property was because he "figured that the other man was going to get away with her, and I said if the owner shows up, I am willing to pay for her—I am willing to pay for the cow."

The owners of the cow, having missed her from their ranch the next morning after the above narrated incidents occurred, notified a constable of the fact, and that officer, with one of the owners of the cow, thereupon started to search for her. On the afternoon of that day they went to Avila's ranch, and in his barn they found what they identified as the hide of the cow in a roll on the floor or ground. Avila was questioned about the cow, gave equivocating and unsatisfactory answers, and was thereupon placed under arrest. Later he was formally charged before a magistrate with the larceny of the cow, and thereafter given a preliminary hearing and held for trial in the superior court. The defendant, as seen, was called by the district attorney to testify for the people at the preliminary examination of Avila.

At the trial of the defendant, after the people had presented and rested their original case, counsel for the defendant thereupon introduced in evidence the defendant's testimony given at the preliminary examination of the charge against Avila, and upon said testimony and the admission of the district attorney that section 1324 of the Penal Code was not at any time read to the defendant at said examination by the justice before whom the proceeding was held, presented a motion that the court instruct the jury to acquit Cavala on the ground that, under the showing thus made, the defendant "is immune from prosecution under the provisions" of said section. The court disallowed the motion, but, as seen, granted the defendant's motion for a new trial on that ground.

The section of the Penal Code referred to in substance provides that a person offending against any of the penal laws of this state is a competent witness against any other person so offending, and may be compelled to testify against such other person, and that if such person demands to be excused from so testifying on the ground that such testimony may incriminate himself he shall not be excused, but in that case the testimony so given by him shall not thereafter be used against him in any criminal prosecution against him (except for perjury in giving such testimony), nor shall he be liable for prosecution or punishment for the offense with reference to which such testimony was given, etc.; that a person giving such testimony shall not be exempt from prosecution or punishment for the offense with reference to which he may have thus testified if he so testifies voluntarily, or where he fails to ask to be excused as above indicated; that the person so testifying shall be deemed to be excused from testifying, unless, before any testimony is given, etc., the judge, foreman, or other person presiding at such trial, etc., shall distinctly "read this section of this Code to such witness," etc.

It is nowhere made to appear in the record as it is presented before us that Cavala, either before or at the time of the preliminary examination of Avila for the offense charged in the information against him, was formally charged with or otherwise accused of the crime set out in said information, or that the district attorney or any of the other officers connected with the prosecution of Avila then or at any time, until after the trial of Avila in the superior court upon said charge, supposed or even suspected or had any reason to suppose or suspect, other than that growing out of the mere circumstance of the presence of Cavala at the Avila ranch when the hide of the animal was found at said ranch, that the defendant was in any manner or degree connected with or implicated in the commission of said crime. On the contrary, in his opening statement to the jury, which is incorporated into and made a part of the record here, the district attorney declared that the defendant was not under arrest at the time he testified at the examination of Avila before the magistrate. Moreover there was nothing in the testimony of the defendant given before the committing magistrate at the hearing of the charge against Avila which incriminated the defendant or which tended to show that he was connected in any way with the commission of the crime. He was asked at the examination about his presence at the ranch of Avila at the time the latter was arrested; whether he had cattle of his own on said ranch, and, if so, when he took them there; whether he sold the stolen cow to Avila. He admitted having been at the Avila home at the time the hide of the stolen cow was discovered by the owner and the constable, and that he was there the previous day and evening; that he had the day before driven a number of head of his own milch cows to said ranch and left them in charge of Avila; that he did not sell the stolen cow to Avila, and knew nothing about the killing of the animal until Avila had told him of it. It appears that the stolen cow, when killed, was with calf and that, upon slaughtering her, the calf was taken from her and its carcass, with the hide unremoved therefrom, left in the barn. Cavala was asked at the hearing if he knew that a calf had been taken from the cow, and he replied that he knew it only from Avila himself—that he never saw the calf until the next day after the constable was at the Avila ranch looking for the cow. He stated that he sold one of his own cows to one Enos.

Thus we have given the sum and substance of Cavala's testimony before the magistrate at the examination of Avila, and, as before stated, there is nothing in it incriminatory of the defendant or indicating that the district attorney suspected him of being implicated in the crime or was using him as a witness against Avila upon the assumption that he was the latter's confederate in the crime. In brief and in fact, so far as the record shows to the contrary, the defendant's connection with the crime as a party thereto was not developed or discovered until after he had voluntarily or of his own volition testified as a witness for Avila in the latter's trial before the superior court, when, as we have seen, he admitted under oath that he stole the cow and turned the animal over to Avila to be slaughtered.

[1] It has been held that, to justify the application of section 1324 of the Penal Code where a witness who has given testimony in a criminal case or proceeding claims, under said section, immunity from prosecution for the offense concerning which he has given such testimony, it must be made to appear that the testimony so given has incriminated or tended to incriminate him. People v. Richman, 28 Cal. App. 761, 764, 155 Pac. 142. That case went to the Supreme Court on petition for a hearing in said court, and the petition was denied. We may, therefore, accept as settled the rule as thus stated, and, applying it to this case, the defendant, not having incriminated himself in the testimony given by him before the magistrate in the Avila case, is without a legal foundation upon which to base his claim to exemption from prosecution and punishment for the crime charged against him in the information.

[2] But, if we were to assume that his testimony before the magistrate in that case tended to or did in fact incriminate him or tended to or did in fact show that he was implicated in the commission of the crime charged against Avila before the magistrate and later against himself, the fact that at the time he gave such testimony he was not formally or otherwise charged with the crime or any offense growing out of said crime, and the further fact that the record does not show that he was then even suspected by the officers of the law of having been in any way connected with the commission of said or any crime still remain; and while, of course, we do not hold that, to have entitled a witness to invoke the benefit of section 1324 when called and required to testify against a confederate in crime, he must have first been formally charged with the offense with reference to which his testimony was so given, yet the fact that the defendant in this case was not so charged at the time he testified at the Avila hearing lends persuasive force to the conclusion to be drawn from the absence in the record of an affirmative showing to the contrary that he was not, at that time, supposed or believed by the officers to have been implicated in the commission of the offense to which his testimony at the hearing related, or not used by the district attorney as a witness at said hearing upon the theory or assumption that he was a confederate of Avila in the perpetration of the crime charged and under hearing against the latter. For aught that appears in the record to the contrary, the district attorney, the constable who arrested Avila and the magistrate who examined the charge against the latter, supposed and assumed, when the defendant was called and sworn and testified as a witness at the said preliminary hearing, that the defendant had nothing to do with the stealing of the cow. Indeed, from the character of the examination to which the defendant was subjected by the district attorney before the magistrate as well as the character of the testimony there given by him, the natural inference is that the district attorney and other officers did not at that time suppose or for a moment entertain even a suspicion that he committed or assisted in committing the crime charged against Avila. And, in the absence of an affirmative showing that the district attorney did believe from his investigations that the defendant was connected with the commission of the crime, or that he was in possession of evidence pointing to the defendant's guilty connection with the crime, and intended later to charge him therewith and prosecute him therefor, or for some other offense growing out of the offense to which his testimony before the magistrate related, we may assume that the district attorney then had no testimony against the defendant, and, when requiring him to testify at the hearing, had no intention or thought of prosecuting him for the crime under examination or any other offense arising out of said crime. The situation then stands thus: That the district attorney called a witness to the stand and required him to give testimony as to some fact or circumstance which he conceived might tend to establish probable or reasonable cause for believing that Avila committed the offense for which he was being preliminarily examined, and that, unexpectedly to that officer, it transpired or was discovered, after the witness had so testified, that he had himself committed or aided in the commission of said crime; that section 1324 was not read to the witness, as required, for the very good reason that his connection with the crime with reference to which he so testified was, when he gave his testimony, unknown to the district attorney and the magistrate who heard the case. Now, may it justly be declared that it was fairly and reasonably within the intent or contemplation of section 1324, that in such a case, the witness might legally have claimed (section 1324 was repealed by the Legislature of 1917 and since the trial of this case) and have been entitled to immunity from prosecution and punishment for his offense under the terms of said section? We think not. So to hold would compel a construction of said section which would, to protect the rights of the people in criminal cases, have required that said section be read to every witness called by the people to give testimony in support of the prosecution in every criminal case,

since it is not at all unlikely that some witness so called and testifying, unbeknown to the district attorney, the judge or justice or officer presiding in the proceeding in which such testimony was given, might have been a party to the very crime to which his testimony might have related or subject to prosecution and punishment for some other offense growing out of said crime and upon which such testimony might have some material bearing. It seems to us that the section cannot be so construed without reducing it to a manifest absurdity. "The purpose of the act," said the Supreme Court, in the very late case of People v. Fryer, 167 Pac. 382, referring to said section, "is to compel a confederate in the commission of crime to testify against his coconfederates, which could not be done under the law as it stood prior to the enactment of this section," and said section, proceeded the opinion, "is based on the assumption of the guilt of the person compelled to testify."

As is clearly true upon the record as we see it here, or upon the assumption justified by that record, the defendant was not introduced as a witness by the people at the Avila hearing upon the theory that he was the confederate of Avila, or that he had anything to do with the commission of the crime with reference to which he so testified. It did not then appear, in other words, that he was of the class of witnesses referred to by said section who were entitled to invoke the protection afforded to confederates in crime called by the people to give testimony against their coconfederate. He was not then a codefendant with Avila because, as we have shown, he had not at that time been jointly with the latter or otherwise formally charged with the commission of the offense. He was, in short, as any other ordinary witness might be, called to the witness stand by the district attorney and testified as a witness for the people, without any knowledge or belief on the part of the prosecuting officer and the magistrate that he was in any manner or degree implicated in the commission of the crime.

The cases of People v. Knowles, 27 Cal. App. 498, 155 Pac. 137, and People v. Fryer, 167 Pac. 382, are altogether different from the present case. In those cases, it will be noted, the witnesses, before being called by the people to testify concerning the offense under examination, were either formally charged with or were amenable to a grand jury indictment for the offense with reference to which they were asked and required to give testimony for the people, and the records of those cases, as they were presented for review by the appellate court, clearly so disclosed. Such is not the case here, as has been shown.

[3] We think the learned trial judge, upon the record as it is presented to this court, fell into error in granting the defendant a new trial on the ground stated, and therefore the order granting the same is reversed, with directions to the court below to proceed with the rendition of judgment upon the verdict as returned. People v. Tomsky, 20 Cal. App. 672, 686, 130 Pac. 184.

We concur: CHIPMAN, P. J.; BURNETT, J.

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35 Cal. App. 205

COLUSA & H. R. CO. v. GLENN. (Civ. 1535.)

(District Court of Appeal, Third District, California. Nov. 5, 1917.)

COURTS 🔑91(1)—FORMER DECISIONS AS AUTHORITIES—DECISION OF SUPREME COURT.

The decision of the Supreme Court in a condemnation suit was decisive on an appeal to the Court of Appeals, in a suit to condemn other land owned by a different party, where the physical conditions surrounding the two tracts were substantially the same, and the testimony, the rulings on the important points, and the instructions were practically the same, and all the important points urged for a reversal had been passed upon and overruled by the Supreme Court.

Appeal from Superior Court, Glenn County; Wm. M. Finch, Judge.

Condemnation proceedings by the Colusa & Hamilton Railroad Company against Charles H. Glenn. From a judgment for damages and an order denying a new trial, plaintiff appeals. Affirmed.

See, also, 25 Cal. App. 634, 144 Pac. 993; 31 Cal. App. 746, 161 Pac. 1011.

Frank Freeman and George Freeman, both of Willow, for appellant. Charles L. Donohoe and W. T. Belieu, Jr., both of Willow, for respondent.

PER CURIAM. This action is in eminent domain, and was initiated by the plaintiff for the purpose of condemning and thereby acquiring for its purposes a strip of land belonging to the defendant and comprising, as the jury found, 12.18 acres.

The jury assessed the damages for the land thus to be taken at the sum of $2,801.40 and for the land not taken, because of the depreciation in the value thereof by reason of its severance from the land proposed to be taken and the resulting damage, at the sum of $14,130. Upon the verdict so returned the court made and caused to be entered judgment, from which and from the order denying the plaintiff a new trial the latter appeals.

The tract of land from which the strip is sought to be taken in the present case adjoins the tract of land of which a portion, involving approximately the area sought to be taken in this case, was condemned in the case of the Colusa & Hamilton Railroad Co. v. Leonard, 167 Pac. 878. Upon an examination of the records of the present and the said Leonard Case, we have found that the physical conditions surrounding the two tracts of land are substantially, if not precisely, the same; that is to say, that the two tracts are similarly situated with respect to the conditions that the evidence showed would exist as the result of the building and the running of the railroad tracks of the plaintiff, according to the plan as shown, through and over the strips to be taken, and that each tract would be equally subject to the increased danger, which it was shown would result to the untaken lands, from the flood waters of the Sacramento river, in case the levees protecting the lands against said stream were to give way from any of the causes suggested; that therefore the elements contributing to and forming the bases determinative of the depreciation of the value of the lands not taken by reason of the severance therefrom of the strips taken and of the use to which the latter were to be put in conformity with the design disclosed by the evidence were practically and substantially the same in both cases.

The Leonard Case was the first of the two cases to be tried in the court below; the trial of the instant case following closely on the termination of the trial of the former. The testimony in both cases was practically the same, the rulings upon the important points the same, and the instructions, so far as the principles of law therein stated were concerned, were in all substantial particulars the same.

All the important points urged herein for a reversal of the judgment and the order appealed from were made and presented in the said case of Colusa and Hamilton R. R. Co. v. Leonard, supra. That case was elaborately and ably presented to the Supreme Court on behalf of the appellant in a large number of voluminous briefs, of which some were prepared by the attorneys of record in the case, and some by attorneys appearing amici curiæ, and all involving forceful and able support of the position of the appellant on the various points relied upon for a reversal. The Supreme Court, in a well-considered opinion in that case, after giving such of the points so made as it conceived were of vital importance in the determination of the appeal, held that the record was free from substantial error, and so affirmed the judgment and the order.

Although counsel for the plaintiff filed in this case, on October 20, 1917, an additional or supplemental brief in which they enter into an analytical examination of the instructions given herein with the view of demonstrating that they did not properly state the law upon the question of damages, or, in other words, as to the ascertainment of the depreciation of the value of the untaken property, claiming that upon that proposition the instructions were not consistent with themselves, and also that they were too abstract to furnish light upon the concrete elements entering into the basis upon which such depreciation may justly be founded, still we are perfectly satisfied that the decision of the Supreme Court upon all the vital points involved and presented in the Leonard Case is, for the reasons above stated, decisive of the present case.

It may be added that a petition for a rehearing of the Leonard Case was filed in the Supreme Court and the points therein decided and herein urged by the appellant again fully and ably discussed. A rehearing was denied by that court.

For the reasons above stated, we can see no reason for specifically examining and considering herein the points made against the validity of the judgment and the order appealed from. Accordingly, upon the authority of the case of Colusa & Hamilton Railroad Company v. Ella Glenn Leonard et al., the judgment and the order which are the bases of these appeals are affirmed.

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35 Cal. App. 215

McGRATH v. LANGFORD, Sheriff of Santa Clara County et al. (Civ. 2054.)

(District Court of Appeal, First District, California. Nov. 6, 1917.)

JUDGMENT 🔑412 — VOIDABLE JUDGMENT — RESTRAINING ENFORCEMENT.

The court set Saturday afternoon, which by Code Civ. Proc. §§ 10, 133, 134, has been made a nonjudicial period, for a hearing upon defendant's demurrer. Although defendant failed to appear, an order was made on said day overruling his demurrer, and giving ten days in which to answer, of which fact defendant was notified. No answer being filed by the defendant, judgment was rendered against him by default. Code Civ. Proc. § 135, provides that if any day mentioned in section 10, other than a special holiday, happen to be the day appointed for the holding or sitting of court, or to which it is adjourned, it shall be deemed appointed for or adjourned to the next day. *Held*, that as the hearing was by operation of law continued to Monday, the order was premature rather than void, and defendant's only remedy was by a direct attack in the original proceeding, and not by an action to enjoin a sale of his property under an execution issued upon the judgment.

Appeal from Superior Court, Santa Clara County; W. A. Beasly, Judge.

Action by E. O. McGrath against Arthur B. Langford and others. Judgment for plaintiff, and defendants appeal. Reversed.

F. J. Solinsky and Frank R. Wehe, both of San Francisco, for appellants. Beggs & McComish, of San Jose, for respondent.

LENNON, P. J. This is an appeal from a judgment in plaintiff's favor in an action brought to enjoin the sale of his property upon an execution issued upon a judgment of a justice's court rendered against the plaintiff herein in an action for work and labor, and also for goods furnished in connection with the operation of a mine, and which judgment defendant claims to be void.

The facts of the case are these: On or

about January 29, 1909, W. A. Lloyd, one of the defendants herein, commenced an action in the justice's court of Mokelumne township, county of Calaveras, against the plaintiff herein for three certain claims for work and labor, and goods alleged to have been furnished to said plaintiff and for which he had not been paid. Summons was duly issued and served in said action, and the defendant therein presently appeared by his attorney and filed a demurrer. The court, as affirmatively appears by its docket, set the hearing upon said demurrer for May 15, 1909, at 3 o'clock p. m. This date fell upon Saturday, and the stated time of hearing and trial of the issues of law raised by said demurrer was Saturday afternoon, which under the statute is a legal holiday. The defendant did not appear in person or by counsel at said time; but notwithstanding the foregoing facts the court proceeded to hear and overrule said demurrer, and to order that defendant be given ten days to answer. The docket of the justice contains this entry: "Demurrer overruled. Defendant given ten days to answer, and so notified by U. S. mail." No answer being filed within the allotted time, judgment was rendered against the defendant for the sum of $215.75 and costs. No notice of the rendition of this judgment was shown to have been given the defendant, and nothing further was done in the case until somewhat more than a year later, when, as the justice's docket shows, the judgment was docketed in the judgment docket of the superior court of that county, and an execution was issued to the sheriff of Santa Clara county, which was on September 10, 1910, returned unserved. On April 13, 1913, the plaintiff in said former action caused another execution to be issued, directed to the sheriff of Santa Clara county, with an instruction to him to levy upon the property involved in this action, which was done. Thereupon and on May 13, 1913, the defendant in that action appeared in said justice's court and moved the court to set aside the said default and judgment, which motion the court denied, whereupon he instituted the present action to enjoin the levy of said execution and the sale of his said property thereunder, setting forth in his complaint the foregoing facts, and further averring that he had no notice or knowledge of the rendition or entry of said judgment until the attempted levy of said last execution in May, 1913; and further alleging that he never owed said W. A. Lloyd anything, and that said Lloyd never had any cause of action against him, and that he had a substantial defense to said former action upon the merits. The sheriff presented no defense to this action, but his codefendant, W. A. Lloyd, answered, and upon the issues thus tendered the trial court gave judgment in plaintiff's favor, from which judgment the defendant Lloyd prosecutes this appeal.

The paramount point presented upon this appeal is whether the judicial determination by the justice's court of the issues raised by the defendant's demurrer in the case before it was void because done upon and during a half holiday, and that any later judgment which might be rendered would be necessarily predicated upon the previously void judicial action, and would also be void.

Saturday afternoon has been made a nonjudicial period by the Code. Code Civ. Proc. §§ 10, 133, 134. Section 135 of the Code of Civil Procedure provides that:

> "If any day mentioned in section ten of this Code other than a special holiday happen to be the day appointed for the holding or sitting of a court, or to which it is adjourned, it shall be deemed appointed for or adjourned to the next day."

Hence when the court set the hearing upon the demurrer for May 15, 1905, at 3 o'clock p. m., the time happening to fall upon a Saturday afternoon, it was by operation of law continued to the following day, which being Sunday was, in turn, by operation of law, continued to the following Monday, at which time the defendant had notice as a matter of law to appear for the hearing of the demurrer. The fact that the demurrer was heard and overruled and the order made that defendant be given ten days to answer on the said Saturday afternoon, which was before the time allowed by law for the hearing of the demurrer, renders the order a premature rather than a void adjudication. If the defendant in that action had acted upon the statutory notice as he should have done, the premature act of the court would doubtless have been corrected upon motion, and certainly would have been rectified upon appeal. Similarly, it has been held that the action of a court in rendering a judgment by default before the time allowed the defendant to answer had expired was merely voidable, and could only be attacked upon motion or on appeal. In re Newman, 75 Cal. 213, 220, 16 Pac. 887, 7 Am. St. Rep. 146.

The present action is one in equity to restrain the enforcement of the judgment rendered in the former action and claimed by defendant to be void. Usually in a case where the power of a court of equity is invoked to restrain the enforcement of a judgment in a court of law the validity of the judgment and the apparent right of enforcement is conceded. Metropolis Sav. Bank, etc., v. Barnet, 165 Cal. 449, 455, 132 Pac. 833. It is only upon direct attack by appeal from a judgment by default that there is no presumption in favor of the existence of any fact essential to the jurisdiction of the court over the defendant. But when an action is brought in equity to set aside a judgment at law the attack, although not collateral, is always indirect, and such an attack does not question or dispute the effect of the judgment as an adjudication, but seeks to be relieved from its operation upon equitable grounds. Eichhoff v. Eichhoff, 107 Cal. 42, 40 Pac. 24, 48 Am. St. Rep. 110.

Defendant's remedy was by a direct proceeding in the original action. Alderson v. Bell, 9 Cal. 315; Whitwell v. Barbier, 7 Cal. 54; and inasmuch as opportunity for relief was had in the original proceedings, equity will not now set the judgment aside. Chipman v. Bowman, 14 Cal. 157; Ede v. Hazen, 61 Cal. 360.

Judgment reversed.

We concur: KERRIGAN, J.; RICHARDS, J.

35 Cal. App. 129

PERRIN v. MILLER et al. (Civ. 1721.)

(District Court of Appeal, Third District, California. Oct. 25, 1917.)

1. Statutes ⟹188 — Construction—Meaning of Language.

The words of a statute must be interpreted according to their common acceptation, and if they have a technical as well as a popular meaning must be given their popular signification.

2. Dismissal and Nonsuit ⟹60(2)—Want of Prosecution — Failure to Bring to "Trial."

Within Code Civ. Proc. § 583, providing for the dismissal of any action, not brought to trial within five years after the answer is filed, the word "trial" refers to the hearing and determination of the issues of fact involved, and the hearing on a demurrer is not a trial.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Trial.]

3. Dismissal and Nonsuit ⟹60(6)—Want of Prosecution — Failure to Bring to Trial.

Code Civ. Proc. § 583, providing that an action shall be dismissed, unless brought to trial within five years after the answer is filed, except where the parties have stipulated in writing that the time may be extended, is mandatory, and an action was properly dismissed where more than six years had lapsed from the filing of the answer, and no written stipulation, extending the time, had been entered into, though plaintiff's attorney claimed to have been relying on an oral understanding with defendant's attorney, that the trial of the cause might be taken up at the pleasure of plaintiff's attorney.

Appeal from Superior Court, Tehama County; John F. Ellison, Judge.

Action by E. B. Perrin against Carrie M. Miller and another. From a judgment of dismissal, plaintiff appeals. Affirmed.

A. E. Bolton and Randolph V. Whiting, both of San Francisco, for appellant. C. E. McLaughlin, of Sacramento, and C. P. McLaughlin, of San Francisco, for respondents.

HART, J. The appeal is by the plaintiff from a judgment of dismissal because of his failure to bring the action to trial within five years after the answer was filed, pursuant to the provisions of section 583 of the Code of Civil Procedure. Said section, so far as applicable here, reads:

> "* * * Any action heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced or to which it may be transferred on motion of the defendant, after due notice to plaintiff, or by the court on its own motion, unless such action is brought to trial within five years after the defendant has filed his answer, except where the parties have stipulated in writing that the time may be extended."

The complaint in this action was filed on October 20, 1908, and the answer and cross-complaint on January 5, 1909. A demurrer to the answer and cross-complaint was filed on February 1, 1909, more than six years before the motion to dismiss the action was made. While the record discloses the fact that said demurrer was overruled, it does not show at what date such action was taken, but it is stated in respondents' brief that it occurred more than five years before the making of the motion to dismiss. Said motion to dismiss the action was heard upon affidavits. C. E. McLaughlin, attorney for defendants whose affidavit was dated May 14, 1915, deposed that at no time since the answer was filed had any stipulation been entered into, in writing or otherwise, extending the time in which said action might be brought to trial; that, in September, 1913, affiant and A. E. Bolton, attorney for plaintiff, had a conversation in substance as follows:

> That said Bolton said to affiant: "We must arrange to try the case of Perrin v. Miller. It should have been tried before this, but Perrin has had so much trouble with the government, and has been so annoyed, and so much of my time has been taken up in connection with his difficulties, that we have never seen our way clear to try the case." That affiant replied to said statement: "We are ready to try the case at any time, but a date must be fixed which will not interfere with my other engagements."

The affidavit of A. E. Bolton, attorney for plaintiff, referring to said conversation with Judge McLaughlin in 1913, was in practical accord with the latter's statement regarding the troubles of his client with the government, and proceeded:

> "That affiant does not remember the exact conversation that took place at that time but as affiant understood the substance thereof, said McLaughlin said he would take up the trial of said cause at the pleasure of affiant; and affiant assured said McLaughlin that there was no disposition on the part of affiant or said Perrin to put off the trial of the case; that the difficulties arose by reason of the condition of the affairs of said Perrin."

It is also stated that "affiant, by reason of the understanding of affiant, was taken by surprise" when he learned from Judge McLaughlin, in March, 1915, that his clients were insisting that the cause be dismissed, and "that affiant had relied upon said understanding."

Appellant, in his brief, says that:

> "After the demurrer of the plaintiff to defendant's answer and cross-complaint had been overruled, no notice of the overruling of the demurrer was given to the plaintiff."

And he further states:

"If the action was brought to trial by the filing and hearing upon the demurrer to the answer, then the action had been brought to trial and was pending, and could not be dismissed."

The following cases are cited holding that "a trial is the examination before a competent tribunal, * * * of the facts or law"—that is, "when a court hears and determines any issue of fact or of law for the purpose of determining the rights of the parties, it may be considered a trial": Tregambo v. Comanche M. Co., 57 Cal. 504; Redington v. Cornwell, 90 Cal. 62, 27 Pac. 40; Flagg v. Peterbaugh, 98 Cal. 136, 32 Pac. 863; Botto v. Vandament, 67 Cal. 332, 7 Pac. 753; Goldtree v. Spreckels, 135 Cal. 669, 67 Pac. 1091. Appellant then says:

"At the time of the enactment of section 583 in 1905, the word 'trial' had by these decisions been given a distinct meaning."

Said section 583 was first before the Supreme Court in the case of Romero v. Snyder, 167 Cal. 216, 138 Pac. 1002, wherein it was said that the section fixes—

"a maximum period of five years, upon the expiration of which, the delay is declared to be sufficient as a matter of law and the dismissal is made mandatory."

In Larkin v. Superior Court, 171 Cal. 719, 154 Pac. 841, the court said:

"Unless the parties have, in effect at least, stipulated in writing that the action need not be brought to trial within five years from the date of the filing of the answer, it must be dismissed at the expiration of such five years, if not 'brought to trial' within that time. * * * it is a stipulation in writing extending the five-year period that the statute provides for, and without such a stipulation, certainly in the absence of some element of estoppel, there can be no effective answer to a motion to dismiss, if the action has not been 'brought to trial' within such period. The language of the statute is so plain in this regard that no other intent can be attributed to the Legislature. We are not concerned here with the exact meaning of the term 'brought to trial,' for it is manifest that with whatever liberality we construe it in favor of plaintiff here, this action was not brought to trial within five years of the date of filing the answer."

In the case before us it becomes necessary that we should determine what was the intention of the Legislature when it used the expression, "brought to trial."

[1] Our Supreme Court has declared:

That "the words of a statute must be interpreted according to their common acceptation" (Quigley v. Gorham, 5 Cal. 418, 63 Am. Dec. 139; Gross v. Fowler, 21 Cal. 393; People v. Reis, 76 Cal. 269, 18 Pac. 309); and also that "where a word, having a technical as well as a popular meaning, is used in * * * a statute, the courts will accord to it its popular signification" (Weill v. Kenfield, 54 Cal. 111).

[2] There can be no question that, applying the above rules of construction to the section under consideration, the "common acceptation" and the "popular signification" of the word "trial" must be construed as referring to a hearing and determination of the issues of fact involved. To hold otherwise would be to give to the word a strained and technical meaning. If the judge of a superior court in this state should announce that he would proceed to set cases for trial, every attorney present would know that he meant that the issues of fact were to be tried. There may be several "trials" of issues of law besides the ruling on a demurrer, such as an order granting or denying a motion to change the place of trial, the ruling on a request of a party to be permitted to amend pleadings, etc. It is inconceivable that, if its attention had been directed to the various "trials" possible in an action, the Legislature should have been so careless as not to have inserted in the section words definitely indicating whether the trial referred to was one of fact or of law.

[3] If, as we hold, the word "trial" means the trial of the issues of fact, we are unable to perceive any just reason why the judgment should be reversed. Said section 583 is mandatory in its terms. It directs that:

An action "shall be dismissed by the court * * * except where the parties have stipulated in writing that the time may be extended."

More than six years had elapsed since the filing of the answer, and no written stipulation extending time had been entered into. If the conversation between the counsel for the respective parties, in September, 1913, was as stated by appellant's attorney, to have prevented the terms of the section from applying to his cause of action, the understanding should have been reduced to writing in the form of a stipulation to extend the time of trial and signed by the attorneys for both parties. By the entering into of such a written stipulation only could the imperative mandate of the section have been made unavailing to the defendants.

Much space is devoted in the briefs to a discussion of various questions arising under the pleadings—as to who are necessary parties, whether the demurrer to defendants' cross-complaint was properly overruled, etc. Inasmuch as we hold that the action was properly dismissed, we conceive it to be unnecessary to examine and decide the questions thus discussed.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

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36 Cal. App. 807

BRADLEY v. McDONALD et al. (Civ. 1748.)

(District Court of Appeal, Third District, California. Oct. 31, 1917.)

1. REPLEVIN ⟹72—PAYMENT—SUFFICIENCY OF EVIDENCE.

In an action of claim and delivery by a seller of goods under two contracts, evidence *held* sufficient to support a finding that the goods under one contract had been fully paid for.

2. REPLEVIN ⟹107 — JUDGMENT — UNCERTAINTY.

In an action in claim and delivery for goods sold under two contracts, where possession and title were found in defendant as to the goods under one contract, and possession in defendant, but title to the other goods in plaintiff, the plaintiff cannot complain that there was no alternative judgment for the value of such part of the goods as defendant had title to.

3. REPLEVIN ⚷107—JUDGMENT—CERTAINTY.

In an action for claim and delivery, where there was a finding that goods were entirely in the possession of one of several defendants, the judgment was not void for uncertainty in simply giving plaintiff judgment for the goods or their value, as such judgment could be only against the person in possession of the goods; the findings constituting part of the judgment.

Appeal from Superior Court, Kern County; Howard A. Peairs, Judge.

Action in claim and delivery by H. E. Bradley against Roland McDonald and L. Allen. From a partial judgment for plaintiff, he appeals. Affirmed.

Henry K. Norton and Wilbur Bassett, both of Los Angeles, for appellant. E. L. Foster and Charles A. Barnhart, both of Bakersfield, for respondents.

CHIPMAN, P. J. Plaintiff brings the action in claim and delivery as the assignee of the Brunswick-Balke-Collender Company, hereinafter referred to as the Collender Company. It is alleged in the complaint that on the 10th day of March, 1912, the Collender Company was, and ever since until the 17th day of January, 1913, has been, the owner and entitled to the immediate possession of certain saloon fixtures, the articles referred to being embraced in what is designated in the record as the first contract, and that the said Collender Company was on the said 17th day of January, 1913, the owner and entitled to the immediate possession of four booths with four mahogany tables referred to in the record as embraced in what is termed the second contract of sale, and that on the said 17th day of January, 1913, said company transferred and assigned all its right, title, and interest in and to said goods and chattels to the plaintiff, who thereupon became, and ever since has been, and is now the owner and entitled to the possession of the said goods and chattels, all of which are alleged to be of the value of $2,000; that the defendants, McDonald and Allen, "without the consent of the plaintiff and against his will, now detain the said goods and chattels from the possession of said plaintiff." It is also alleged "that the said goods and chattels are now in the actual possession of defendant L. Allen, but that plaintiff is informed and believes, and on such information and belief so alleges the fact to be, that defendant L. Allen is the agent for defendant McDonald, and has been at all times and is now acting under instructions from said defendant McDonald in this matter"; alleges that on said 17th day of January, 1913, and before the commencement of this action, plaintiff demanded of defendants and each of them possession of said goods, and possession was refused, and that defendants and each of them still unlawfully withhold and detain the said goods and chattels to the damage of plaintiff in the sum of $2,000.

A general demurrer was overruled, and defendants answered; denied on information and belief that the Collender Company was the owner of said goods as alleged in the complaint, and denied that it had transferred and assigned its right in the said goods to the plaintiff, and that the plaintiff is the owner and entitled to the immediate possession of the same; alleged that the said property was of no greater value than $1,000; denied that the defendants detain said goods otherwise than as hereinafter set forth; denied that the said defendant Allen is the agent of defendant McDonald or is acting under his instructions in any manner or at all; denied that they unlawfully withhold and detain said goods from the possession of plaintiff to his damage as alleged.

For separate answer and defense the defendants allege that the property described in the plaintiff's complaint was part of the estate of F. M. Carrillo, a bankrupt, and that the trustee in bankruptcy, under and by virtue of an order of the referee in bankruptcy in and for the county of Kern, sold at public sale all the right, title, and interest of the bankrupt, F. M. Carrillo, to the defendant L. Allen, and that the latter is now the owner of all the right, title, and interest of F. M. Carrillo, a bankrupt as aforesaid, and that said Carrillo was declared a bankrupt by the United States District Court in and for the Southern District of California, Northern Division, on or about the 25th day of May, 1912; that said Collender Company sold the said goods and chattels to said Carrillo, and that he had paid large sums of money on account of the purchase thereof, and that the said Collender Company had failed to give credit for the full amount paid thereon by said Carrillo, and that these defendants have demanded of said Collender Company that they give proper credit for payments made, and stated that, when such amount was ascertained, the defendant Allen would pay the said Collender Company the correct amount; allege that defendant Allen is willing, ready, and able to pay the correct balance due thereon.

The cause was tried by the court, a jury having been expressly waived, and the court made the following findings: That it was stipulated that plaintiff was simply the assignee of the Collender Company for the purpose of this suit, "and that all defenses raised by the defendants were applicable in this action against the plaintiff"; that the property described in plaintiff's complaint was sold to Carrillo under two contracts of sale, the first being for certain bar fixtures, and the second for four booths and four mahogany tables; that the first contract or agreement for sale of property referred to therein "had been fully paid by F. M. Carrillo, and that nothing was due thereon"; that it was stipulated by the respective parties that the value of all the personal property was $1,000; that the property described in plaintiff's complaint was part of the estate of F. M. Carrillo, a bankrupt, "and that the trustee in bankruptcy, J. W. McGrath, the duly appointed, qualified, and acting trustee in bankruptcy for the said estate, under and by virtue of an order of the referee in bankruptcy in and for the county of Kern, state of California, sold at public sale all the right, title, and interest of the bankrupt, F. M. Carrillo, to the defendant L. Allen, and that the defendant L. Allen was the owner of all the right, title, and interest of F. M. Carrillo, a bankrupt, and that the said F. M. Carrillo was declared a bankrupt * * * on or about May 25, 1912"; that the defendants do not detain the goods and chattels from the possession of the plaintiff mentioned in the first contract; that the said goods and chattels referred to in the second contract "are in the actual possession of the defendant L. Allen, and that L. Allen is not the agent of defendant Roland McDonald, nor is he acting under instructions from the said defendant McDonald in this matter"; that before the commencement of this action plaintiff demanded of the defendants at the time and as alleged in the complaint the possession of said goods and chattels, and defendants refused and still refuse to deliver the same to plaintiff; that on the 17th day of January, 1913, the Collender Company assigned, for the purposes of this action, all its right and interest in said goods; that the defendants have not damaged the plaintiff in the sum of $2,000 by withholding and detaining the same as alleged; that defendant Allen is the owner of and entitled to the immediate possession of the goods mentioned in the first contract, "and that the said contract for sale of same to F. M. Carrillo had been fully paid and discharged, and the title to said property was vested in F. M. Carrillo at the time that the said F. M. Carrillo was declared a bankrupt, and that the trustee in bankruptcy of his estate had the title, and right of possession to said property, and sold the same to the defendant L. Allen for a valuable consideration"; that the second contract was not paid in full by Carrillo, and title to same had not passed from plaintiff's assignor, "but that said four booths and four mahogany tables at all times have been and are now the property of the plaintiff," and that the value thereof is the sum of $425, "the balance due on the second agreement"; that all said property is now in the possession of the defendant L. Allen.

As conclusions of law, the court found that defendant Allen is the owner of, and entitled to the immediate possession of, the goods mentioned in the first contract; that the plaintiff is the owner and entitled to the immediate possession of the four booths and four mahogany tables mentioned in the second contract, "and in case delivery of the same cannot be had, then for the value thereof, to wit, the sum of $425, and plaintiff is entitled to his costs of suit." Judgment was accordingly entered.

By the judgment it was ordered, adjudged, and decreed that the defendant Allen is the owner of, and entitled to the immediate possession of, all the goods mentioned in the first contract, but there was no alternative provision in that connection for money judgment in case possession could not be delivered. As to the second contract, the judgment was for immediate possession of the goods therein mentioned "and in case delivery of the same cannot be had, then for the value thereof, to wit, the sum of $425, together with interest thereon at the rate of 7 per cent. per annum from date until paid." Plaintiff appeals from the judgment.

No contention arises concerning the second of these contracts, and it need not be considered. The question here is simply: Is the finding supported by the evidence that the first contract was fully paid? This contract in effect provides for a conditional sale, and took the form of a lease for the term of 12 months and 2 days from date (March 29, 1910) on the following terms:

> "$625 upon the execution of the contract, and the further sum of $80 to be paid on the 1st day of every month ensuing, commencing May 1, 1910, until the full term of 11 months and 2 days from this date shall have expired; said payments being for the rental use and wear of said property."

The purchaser, Carrillo, was to keep the property in good repair and return the same at the expiration of the term in good order, reasonable wear and tear thereof excepted, "it being specially agreed that the title to all said property is and shall remain vested in said party of the first part [the Collender Company]." The purchaser was to keep the property insured, the Collender Company to take out the policies at the purchaser's expense; purchaser also to pay all taxes assessed upon the property; interest at 8 per cent. was to be charged on unpaid installments. It was further provided that upon full performance on his part by the purchaser the Collender Company would sell and convey the said property to the purchaser, Carrillo, on the 1st day of April, 1911, for the sum of $106.80.

Witness F. P. Simpson, called for plaintiff, testified that he was vice president of the Collender Company, and acquainted with all the facts relating to these contracts. He testified:

> "Neither Mr. Carrillo nor any one acting for him has paid to the company or offered to pay to the company or tendered to the company any money or any property in payment of all of the money called for in the first contract covering the bar fixtures."

On cross-examination, and referring to the first contract, he testified:

> "Mr. Carrillo failed to keep the terms of his contract, because he failed to pay the insurance on the property covered by that contract. It was my recollection that that was the only breach of the first contract."

The evidence following this statement seems to have been introduced solely for the purpose of clearing up the single question whether or not there was a default in the first contract as to an item of insurance.

The Collender Company made a statement of the account between the company and Carrillo dated August 1, 1912, two months after the latter was declared a bankrupt. This bill includes items of merchandise, and among other items the following:

May 26, 1910.	To 1 yrs. ins. on bar fixtures, expiring May 24, 1911...........	$37 00
May 11, 1911.	To 1 yrs. ins. on fixtures, expiring May 24, 1912.............	37 00
Dec. 1, 1912.	Ins.	60 00

The balance struck showed $41.05 due from Carrillo.

It appeared, however, that the item of $60 was incurred in 1911, and was for insurance on the property covered by the second contract. The item of $60 being eliminated, there remained the two insurance charges of $37 each, May 26, 1910, and May 11, 1911. Counsel for plaintiff introduced a copy of two pages of the Collender Company's ledger "showing," as stated by counsel, "the payments made, and how made, and how they were credited on the two contracts." On the face of this ledger account it would appear that on April 1, 1911, the date Carrillo was given credit for $106.80, there was due on the first contract $746.80, and yet witness Simpson testified that this contract was fully paid except a claim for insurance, and this is confirmed by a letter written by the Collender Company's attorney to defendant's attorney. Unexplained, these ledger entries throw no light on the case, and as a complete statement of the account between the company and Carrillo they are of little value. As to the two items for $37 each for insurance, we are left to such aid as can be given by the exhibits referred to. The ledger shows a charge of $37, account of insurance on May 11, 1910, and opposite is a credit of $37. A group of items appears aggregating $156.50 debit, among which is an item "May 26, 1910, Insu. $37.00." Opposite is a group of credits, the items showing that they were intended as credits against the group of debits, aggregating $157.50, or $1 more than seems to have been charged, including insurance on the first contract. Among the credits shown on the statement dated August 1, 1912, is an item October 3, 1911, of $37, which paid the insurance charged May 11, 1911, expiring May 24, 1912. This is the same payment as shown on the ledger of the same date. This policy carried insurance to May 24, 1912. On April 26, 1911, Carrillo sent to the Collender Company a draft for $106.80, stating in his letter that it was the last payment on the bar fixtures, and the evidence shows that it was the final payment on the first contract. That being true, the Collender Company had no right to charge insurance under that contract covering the year ending May 24, 1912.

[1] So far as we are able to determine from the confused condition of the record, the findings of the court that the first contract was fully paid is supported by sufficient evidence. It was within the power of plaintiff to produce the original entries of debits and credits showing the exact condition of the account of plaintiff's assignor and Carrillo. This was not done. It is conceded that defendants acquired no rights to the property without having shown full performance on Carrillo's part, and that the trustee in bankruptcy acquired no better title than the bankrupt had.

[2, 3] It is claimed that the judgment is void for uncertainty. It was not necessary, as contended by appellant, that as to the goods included in the first contract there should have been an alternative judgment for the value. The court found that title and possession were in Allen, and this was sufficient. As plaintiff was entitled to neither title nor possession, he cannot complain of the form of the judgment. Claudius v. Aguirre, 89 Cal. 501, 26 Pac. 1077; Caruthers v. Hensley, 90 Cal. 559, 27 Pac. 411. It appeared without dispute that all the property was in the possession of defendant Allen, and that defendant McDonald had nothing to do with it. The following statement found in the respondents' brief, it seems to us, satisfactorily shows that the judgment as to the property involved in the second contract may be sustained. We quote:

> "Finding 14, that all of said property is now in the possession of defendant L. Allen, and was at all times, and not in the possession of any of the other defendants, the judgment necessarily refers to the findings, and the right of the immediate possession of the same; the right of possession of part is adjudged to Allen, and the other part of the personal property is adjudged to belong to Bradley, as against Allen, who has the possession of same, or for the sum of $425, as against Allen, together with interest thereon. This is made so expressly by the findings, as well as by the judgment, and the findings constitute part of the judgment. Consequently there is no uncertainty as against whom the judgment is rendered for the possession of the four booths and four mahogany tables, and in case delivery of the same cannot be had from L. Allen, then for the value, or $425, as against L. Allen."

The judgment and the order are affirmed.

We concur: HART, J.; BURNETT, J.

(35 Cal. App. 208)

PEOPLE v. BYLER. (Cr. 551.)

(District Court of Appeal, Second District, California. Nov. 5, 1917. Rehearing Denied by Supreme Court Jan. 3, 1918.)

1. Homicide 🔑250 — Manslaughter — Sufficiency of Evidence.

Evidence *held* to support verdict of guilty of manslaughter.

2. Homicide 🔑234(1) — Conviction — Evidence—Statute.

Under Pen. Code, § 1105, providing that, on trial for murder, homicide by defendant being proved, the burden of proving circumstances of mitigation or that justify or excuse it devolves on him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that defendant was justified or excusable, the people are under no stronger requirement than that they prove defendant's guilt of the offense of which he is convicted beyond a reasonable doubt under all the evidence.

3. Homicide 🔑145, 151(1) — Burden to Prove Mitigation—Statute.

The first part of Pen. Code, § 1105, dispenses with the necessity for a showing of intent on a trial for murder, and shifts the burden of proving mitigation after proof that defendant committed the homicidal act.

4. Homicide 🔑250—Conviction of—Sufficiency of Evidence — Rebuttal of Discredited Defense by People.

Whenever a defendant admits the killing of the person with whose murder he is charged, and the evidence of the people tends to show him guilty of manslaughter, and he offers evidence to mitigate, excuse, or justify the killing, the jury may justly assume that the defense offered is the only defense defendant has made, rejecting it if unreasonable on any account, and may convict him of manslaughter if satisfied of his guilt beyond a reasonable doubt from all the evidence, without any attempt by the people to rebut by evidence the incredible or discredited defense.

5. Criminal Law 🔑830—Trial—Requested Instructions.

Requested instructions which were not statements of law were properly refused.

6. Criminal Law 🔑829(1) — Trial — Instructions—Repetition.

A refusal of requested instructions given in effect in the instructions read to the jury was not erroneous.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

J. J. Byler was convicted of manslaughter, and from the judgment, and an order denying his motion for a new trial, he appeals. Judgment and order affirmed.

Power & McFadzean, of Visalia, J. E. Greene, of Dinuba, and Everts & Ewing, of Fresno, for appellant. U. S. Webb, Atty. Gen., Robert M. Clarke, Deputy Atty. Gen., and Frank Lamberson, Dist. Atty., of Visalia, for the People.

WORKS, Judge pro tem. The appellant was tried under an information charging him with the murder of Frank Meadows, was found guilty of manslaughter, and was sentenced to 4 years' imprisonment.

[1] At the time of the commission of the offense, Byler was over 60 years of age, while Meadows was about 50. Byler was somewhat weakened by disease. Meadows was of unusual physical strength and proportions. Both men were addicted to the use of liquor, and they were both probably intoxicated at the time of the tragedy; Byler certainly was. The killing occurred late at night, just outside Byler's house, near or at North Dinuba. The two men were together early in the evening, with some of their neighbors, at a pool hall in the village, and started home together, as their residences were not far apart, earlier than 9 o'clock. They were both then under the influence of liquor. The killing did not take place until nearly 1 o'clock. Upon these various points there is no dispute in the evidence.

Byler testifies that after he and Meadows left the pool hall they went to Meadows' home, stopped for a very brief time in the road in front of the place, and that Meadows went alone towards the house. Byler, according to his testimony, then went to his home, entered the house, lighted a couple of lamps, and "started to look over" certain newspapers, "over the headlines some." While he was thus engaged he heard a disturbance at his barn and went out to ascertain if anything was wrong with his horses, going into the barn and speaking to the animals. As he came out he says he met Meadows at the door. The latter asked if Byler did not have some wine, and he responded that he had some in his wagon, which was then standing in the yard. Meadows took two or three drinks from the bottle while the two were together, a period of 20 or 30 minutes, and started towards home, Byler at the same time returning to his house. Byler says there was no altercation or trouble between him and Meadows during the period just mentioned. Upon Byler's re-entry into the house he resumed his perusal of the newspapers, drank some wine, and soon began his preparations for bed. He extinguished the two lamps he had lighted and entered his bedroom, when he heard a knock at the kitchen door and responded to it. At this point it is proper to interrupt the narrative by stating that Byler testifies that he and Meadows saw a "hobo" camp fire near the road soon after they left the pool hall together, around which there were two or three men. This circumstance has much to do with the remainder of Byler's story.

When Byler got to the kitchen door, to resume his narrative, he stepped out on a platform at the door, and was seized by some one to him then unknown, who said, "Your change!" and who "grabbed me and hit me several times." The two went down together, according to Byler, after they had "scuffled" and "boxed around." The witness then went on:

"He grabbed me by the privates and by my chin. Q. Was that after you were on the ground? A. That was after I was on the ground, and I commenced, I tried to get my knife, and I got my knife some way, some how, I do not know how, and I got it open. And I commenced cutting him just anywhere and as fast as I could; any way to save my life. I saw that it was the only way to save my life. Q. After striking him with the knife, what happened? A. Well, some way he relaxed and I got loose and got up. Q. When you were striking were you on your back? A. Yes, sir; he was on top of me. Q. Were you on your side? A. Some way or the other; I was on my back, and he held me there, by the privates; held me this way, and I was striking him. I got my knife. * * * Q. After you got up what did you do? A. I jumped up to one side; I got up and got away, and there were a couple of parties got up and ran by me. I struck at one, once or twice. I thought that I hit him; did not know."

The latter portion of this quotation, as well as some of Byler's other statements in the record, indicate a belief on his part, either real or pretended, that his assailant was one of the men he had seen at the "hobo" camp, and that the others were near at hand and were assisting, or were ready to assist, the principal actor against him. Byler says that he ran to the house of a neighbor, near the store at North Dinuba, for help, as soon as he had extricated himself from the grasp of his assailant, and that he did not know that the stricken man was Meadows until others who examined the body told him so considerably later. Meadows had five wounds, all knife stabs; one of which penetrated one of the ventricles of the heart. This stab, according to the testimony of a physician who saw the wounds, must have caused death within a minute or a minute and a half. On the night of the tragedy Byler was alone at his house, as his wife had that day gone to Fresno to visit a sister.

The appellant contends that the evidence in the case is insufficient to support the verdict of the jury. In order to solve this question, we have first stated the evidence most favorable to Byler. By way of contrast, we now state the features of the case opposed to his story.

It will be remembered that Byler says Meadows left him, at Meadows' home, immediately after their departure together from the pool room. Mrs. Meadows' testimony, however, was to the contrary. She says she saw the two men come together to the front of the Meadows residence at about 8:30 o'clock; says that they stopped there and talked for some time, and then moved away towards Byler's house. Her testimony is direct and positive. She says the night was not dark, and that she had no lights in the house. She was attending to her children at the time, getting them covered for the night, and was watching for the return of an older daughter who had gone out with a young horse and for whom she was uneasy. She saw the men out of the window several times as they stood talking, heard and recognized their voices, Byler talking very loud, and recognized their outlines. As they moved along the road together she says it was the last time she saw her husband alive. She heard them cross a bridge which was on the way towards Byler's house, and she heard Byler's voice "all the way up to the house." She was sleepless until after midnight, last looking at her watch at 12:45, and heard the voices, particularly Byler's, until a few minutes before that time.

Another witness, Mrs. Guse, who lived a little distance from the Byler home, says she was outside her house for about five minutes, immediately after midnight, and heard Byler loudly quarreling with some one during the entire time, in the direction of his house, although she heard no other voice in response. Byler says, it will be remembered, that there was no altercation between him and Meadows during the only time they were together at Byler's place, a period of less than half an hour, previous to the moment of the killing. It is to be noted here, in connection with the statements of Mrs. Meadows and Mrs. Guse as to the loudness of Byler's voice, that several witnesses testified that he talked in the same manner at the pool hall.

On two or three occasions, within a short period following Meadows' death, Byler voluntarily told the sheriff of the county, and others, his story of the events of the night. On one or more of these occasions the sheriff told Byler that the story did not cover all the time during the evening. For instance, the sheriff testified, as to one occasion:

"I said, 'Now, Mr. Byler, you have about three hours or three hours and a half to account for. You say that you arrived home something before 9 and retired about 9. Now you did not show up at North Dinuba until about 1. Now, where were you from 9 o'clock until about 1?'"

To this question Byler's only response was:

"Well, you have heard my story, and that is the truth."

On another occasion Byler told the sheriff that his story was absolutely the truth, and that he would carry it, if need be, to the gallows. This state of affairs is alone almost controllingly significant for the reason that Byler at no time before the trial told of his meeting with Meadows outside the barn, when Meadows drank from the wine bottle at the wagon. On the telling of his tale at every previous time he leaves Meadows in front of the Meadows home, and does not see him again until he kills him, not then knowing his identity.

There are inherent defects in Byler's story, as told on every occasion. It is difficult to believe that his assailant, an unusually powerful man, having an advantage from the surprise of the attack, and getting Byler on the ground under him, should permit Byler, a man weakened by disease and advanced in years, to take a clasp knife from his pocket, open it, and use it with such terrible effect.

It would not be profitable to further refer to the showing made by the voluminous record of the trial, which consumed five days' time. There are many things in the evidence, naturally, which discredit and some which support the theory of Byler's innocence. There were several serious discrepancies in the stories he told, on the witness stand and elsewhere, concerning the happenings of the night whose events have enmeshed him. It is sufficient here to say that the verdict finds support in the record, and that the jury was within its province in believing that Byler did not tell the truth. In connection with appellant's contention that the evidence is insufficient to sustain the verdict, there yet remains a question to be discussed. It arises under the provisions of section 1105 of the Penal Code, which reads:

> "Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable."

[2-4] The appellant asserts that the latter portion of the section, commencing with the word "unless," operates strongly in favor of appellant, for it is contended that the evidence offered by the prosecution tended to show that Byler was guilty of manslaughter only. We need not pause to determine whether the people's evidence tended to so show. Whatever may be the effect of section 1105, it is certainly true that the people can be under no stronger requirement than that they prove a defendant's guilt of the offense of which he is convicted beyond a reasonable doubt under all the evidence. People v. Ashe, 44 Cal. 288. This rule ordinarily goes to the extent of requiring proof of guilty intent, or of circumstances from which the jury may properly infer such intent, but the first part of section 1105 dispenses with the necessity for a showing as to intent in a trial for murder and shifts the burden of proving mitigation to the defendant after mere proof that he committed the homicidal act. People v. Jones, 160 Cal. 358, 370, 117 Pac 176. The effect of the latter part of the section is to indicate that the ordinary rule as to reasonable doubt pertains to murder cases in which the evidence on the part of the people tends to show that the defendant is guilty of manslaughter only. In this case the defendant attempted to show that he killed Meadows in self-defense. After the evidence was all in it became the duty of the jury to determine, upon the entire evidence and under the instructions of the court, the crime of which Byler was guilty beyond a reasonable doubt; and the court gave an instruction setting forth the substance, and which was almost in the exact language of section 1105. But the defendant asked for a certain instruction, which was refused, and which was as follows:

> "If you believe from the evidence in this case that the prosecution has failed to establish that the crime committed amounts at most but to manslaughter, then and under those circumstances you are instructed that the burden of proving circumstances of mitigation or that justify or excuse such crime of manslaughter does not devolve upon the defendant in this case, but that the prosecution must show by evidence beyond a reasonable doubt that such circumstances of mitigation or such circumstances that justify or excuse the crime of manslaughter did not exist, and the prosecution must so show the same affirmatively and beyond a reasonable doubt, otherwise it is your duty to acquit the defendant."

The assertion in the latter half of the requested instruction that "the prosecution must show by evidence beyond a reasonable doubt that such circumstances of mitigation or such circumstances that justify or excuse the crime of manslaughter did not exist," does not properly set forth the law applicable to the case. It cannot be that after a defendant has made his proof in mitigation, excuse, or justification, on his trial for murder, whether the evidence of the people tends to show him guilty of murder, or of manslaughter only—it cannot be, we say, that the people must in rebuttal show by affirmative evidence that the mitigating, justifying, or excusing circumstances do not exist, however weak, improbable, or perjured the evidence produced by the defendant may be. Whenever a defendant admits the killing of a person with whose murder he is charged, as the defendant here does, and the evidence of the people tends to show him guilty of manslaughter, and he offers evidence to mitigate, excuse, or justify the killing, the jury may justly assume that the defense offered by him is the only defense he has, may reject the defense if it be unreasonable on any account, and may convict him of manslaughter if satisfied of his guilt beyond a reasonable doubt from all the evidence, without any attempt on the part of the people to rebut, by evidence, the incredible or discredited defense. This view seems to be supported by People v. Forsythe, 65 Cal. 101, 3 Pac. 402, although that case was one in which the evidence of the people did not reduce the showing to one of manslaughter only. The Supreme Court there said:

> "If the defendant introduced evidence which tended to prove that the homicide was justifiable or excusable, it simply raised a conflict for the jury to determine, subject only to the power of the court below to grant a new trial."

Surely, a defense of mitigation, excuse, or justification may as well be met, in the minds of the jurors, upon considerations arising from the inherent weakness of the defense, as from evidence produced by the people in rebuttal of the defense. A defense which is no defense can require no rebuttal. The court gave the usual instructions on the question of reasonable doubt, and that was sufficient as against the defendant's request for the giving of the proposed instruction quoted above.

[5, 6] The appellant contends that the trial court committed error in refusing various instructions requested by him, but the instructions were properly refused, as some of them were not statements of the law, and all the

remainder were given, in effect, in instructions read to the jury. It is also claimed that there was error in certain rulings upon the admissibility of evidence. If the claim be just as to any of the rulings whatever, the errors were of such a nature as not to affect the substantial merits of the case. We are satisfied, after a careful examination of the entire cause, including the evidence, that no error complained of by appellant has resulted in a miscarriage of justice in the case.

The judgment and order are affirmed.

We concur: CONREY, P. J.; JAMES, J.

(35 Cal. App. 200)

MINOR v. CARPENTER et al. (Civ. 1720.)

(District Court of Appeal, Third District, California. Nov. 5, 1917.)

1. BILLS AND NOTES 🔑491 — AFFIRMATIVE MATTERS IN ANSWERS—BURDEN OF PROOF.

In an action on a note and to foreclose a mortgage securing its payment, the burden was upon defendant to establish the affirmative matters set up in his answer.

2. BILLS AND NOTES 🔑527(1)—PAYMENT—FINDING—EVIDENCE.

In such action, evidence *held* sufficient to sustain a finding that the note was not paid.

3. BILLS AND NOTES 🔑516—EXTENSION OF TIME FOR PAYMENT—FINDING—EVIDENCE.

Evidence in such action *held* to sustain a finding that the time for payment of the note had not been extended.

4. NOVATION 🔑12 — SUFFICIENCY OF EVIDENCE.

In such action, evidence *held* not to show a novation by the giving of certain instruments.

5. BILLS AND NOTES 🔑491 — PAYMENT — EXTENSION—PROOF.

Where a party depends upon an extension of time to meet his obligation, he must show an agreement for a time certain.

6. EVIDENCE 🔑385—WRITTEN INSTRUMENTS —PAROL EVIDENCE.

In an action upon a note and to foreclose the mortgage securing it, parol evidence was not admissible to vary the terms of written instruments set up by way of defense.

7. EVIDENCE 🔑471(29)—OPINION EVIDENCE.

In such action, questions to a witness as to the understanding of the parties and as to the intention and consideration in and for the execution of certain instruments, were objectionable as calling for his opinion.

Appeal from Superior Court, Siskiyou County; James F. Lodge, Judge.

Action by Theodore H. Minor against Samuel Carpenter and others. From a judgment for plaintiff, and from an order denying a motion for a new trial, defendants Carpenter and Pentuff appeal. Appeal dismissed as to defendant Pentuff, and judgment and order as to defendant Carpenter affirmed.

L. F. Coburn, of Yreka, for appellants. Frank M. McGowan, of San Francisco, and Clifford E. Butler, of Berkeley (Blaine McGowan, of San Francisco, of counsel), for respondent.

BURNETT, J. The action was for the amount due on a promissory note and to foreclose a mortgage given to secure the payment of the same. The complaint is in the usual form, and the genuineness and the execution of the note and mortgage were not denied.

The defenses were: (1) That the note was fully paid on December 21, 1909; (2) that by virtue of certain instruments in writing set out in the answer "the time for the payment of the debt represented by said promissory note and mortgage sued upon herein was extended and postponed to the time of the expiration of the said bond for a deed, Exhibit C, to wit, to the 20th day of August, 1916"; (3) that Exhibit A was taken and accepted by plaintiff as a substitution for the said promissory note and mortgage, with the intention to extinguish the same, and that "there was a novation of said contract, Exhibit A, for said promissory note and mortgage, and that said promissory note and mortgage was thereby annulled, extinguished and fully paid"; (4) that the execution and delivery of a certain deed was intended "as a full and complete payment of all and every debt of all and every kind, due from said Carpenter to said plaintiff, including the promissory note and mortgage debt involved in this action; that plaintiff accepted said deed as such full payment, and then and there agreed with said Samuel Carpenter to reconvey to said Carpenter the said property described in said deed on the payment by Carpenter to him of the sum of $26,400."

The findings and judgment were in favor of plaintiff, and the appeal is from the judgment and the order denying the motion for a new trial. Defendant Pentuff, who had taken a bond for a deed of the premises, has filed a stipulation herein that the appeal as to him may be dismissed, so that in considering the cause upon its merits only the interest of the plaintiff and the defendant Carpenter will receive attention.

[1, 2] It is not disputed that the burden was upon the defendants to establish the affirmative matters set up in their answers. Brenneke v. Smallman, 2 Cal. App. 306, 83 Pac. 302; Melone v. Ruffino, 129 Cal. 514, 62 Pac. 93, 79 Am. St. Rep. 127. That the debt was not paid and the note discharged as an existing obligation, either by the payment of money or by virtue of the execution of any instrument in writing or agreement of the parties, is fully shown by the evidence. It also appears, at least sufficiently to support the finding of the court, that the time for the payment of the obligation was not extended. To show abundant support for the conclusion of the trial court, respondent calls attention to various portions of the transcript wherein are revealed important facts that justify the inference that the original obligation remained in full force and effect. A brief résumé of these facts may not be amiss:

Plaintiff testified positively that no part of the note had been paid. In defendant Carpenter's original proposition, the words "cancel my note and mortgage" were included, but they were omitted from said "Exhibit A" with Carpenter's knowledge and consent. In said "Exhibit A," signed by him on December 20, 1909, occur these words, "the mortgage and interest and notes heretofore given T. H. Minor, amounting at this date to about $15,000, will be paid, and T. H. Minor to have *besides* the payment of the mortgage notes and interest, $11,400, out of the first payment made on sale, bond, or lease." The words "and additional accrued interest on existing mortgage" were inserted in supplemental agreement of December 21, 1909, with full knowledge of the matter. The power of attorney, prepared by defendant Carpenter and dated September 1, 1911, contains this significant phrase, "Cash and additional accrued interest at 8 per cent. per annum upon the existing $12,462.15 mortgage upon said 800 acres of land from December 20, 1909, to the date of sale or bonding." Carpenter admitted that he included $12,462.15 at 8 per cent. interest in his statement in the amount specified in the bond, the sum for which this mortgage herein was given. In the deed to plaintiff dated November 14, 1910, defendant incorporated this provision, "subject, however, to $12,462.15 at 8 per cent. per annum, mortgage dated December 13, 1907, and executed by Samuel Carpenter in favor of T. H. Minor," and he had in his possession this deed containing this exception from November 14, 1910, until September 1, 1911. At no time did defendant ask to have the mortgage canceled. Other significant circumstances are pointed out, but the foregoing are sufficient to show how substantial is the support for the finding of the court that the note was not paid nor the time extended.

[3-5] Indeed, the language of the instruments themselves, upon which Carpenter relies as operating to discharge the indebtedness or to extend the time for its payment, affords no ground for his contention. There is nothing of the kind provided therein. No expression is used from which the inference would follow that the parties thereby intended or contemplated that a novation should take place, or that the obligation arising from the note was extinguished, extended, or modified in any respect. The terms of said instruments, to the contrary, expressly recognize the validity of said note as an existing obligation. In addition, as to the extension of time it may be said that no definite time is stated or intimated to which the payment is to be deferred, and, of course, it will not be disputed that, where a party depends upon an extension of time to meet his obligation, he must show an agreement for a time certain. Prather v. Young, 67 Ind. 480; Brennecke v. Smallman, supra.

It is apparent that only by virtue of parol evidence could it be held that the instruments referred to should be deemed as constituting a novation or modification of the terms of said note. Appellant, indeed, claims that parol evidence was admissible to show such intention of the parties, and he insists that the court erred in sustaining the objection to certain questions having that object in view. The inquiry assumed various forms, but the following will illustrate the situation:

"What was your agreement with Col. Minor with reference to the mortgage and notes here in controversy, as connected with or modified by the Exhibit A contract which is now in evidence?

"What was your understanding at that time—what was your belief, rather—as to the understanding Col. Minor had as to whether that mortgage and note would be in existence, or this would take its place?

"You may state whether or not, at the time of the execution of Exhibit A, from Mr. Minor's conversation with you at the time, you believed, and now believe, that he understood at that time that by the execution of Exhibit A the debt represented by the note and the mortgage in this case was to be extended until you bonded, sold, or leased the Gold Mountain mine and received the money therefor?"

In considering the ruling of the court upon these and other similar questions, we can hardly lay out of view the utterly inconsistent attitude assumed by appellant. Necessarily these instruments could not constitute at once a novation, an extinguishment of the obligation on the note, and an extension of the time for its payment. It is difficult to understand how such could have been the intention of the parties, or of either of them; and it seems rather strange that an attempt was made to show these contradictory purposes. If it could be said that the parties had in view such condition when they executed said instruments, then it would follow that the instruments themselves, by reason of this uncertainty and inconsistency, could not be effectual for any purpose.

[6, 7] Moreover, it is clear from what has already been said that it was not a proper case for the consideration of such parol evidence. The written instruments disclosed the contrary of such intention, and the claim of appellant brings him within the inhibition of the rule as to varying the terms of a written instrument. The question is more fully discussed in Piper v. Kellerman, 32 Cal. App. 128, 162 Pac. 423, to which we refer for additional consideration of the matter. Again, it is manifest that some of said questions were objectionable, as calling for the opinion of the witness as to the understanding of the parties, and, moreover, he did testify quite fully on the cross-examination as to what was the intention and consideration in and for the execution of said instruments. He even went so far as to give his impression of the effect of said transactions, and to state that he would not have executed the instrument of December 20th and 21st, if it had not provided for the payment of the mortgage out of the sale or bonding or leasing of the property.

Of course, it is possible that it was intended that said written instruments should operate as claimed by appellant; but, if so, the pleadings should have been framed so as to call for a suitable reformation of said instruments. Or, if appellant believed that he was defrauded, he should have tendered the issue by appropriate averment. As the matter is presented to us, there is no ground for interfering with the conclusion of the trial court.

The appeal as to Pentuff is dismissed. The judgment and order as to Carpenter are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

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35 Cal. App. 64

McCLELLAN et al. v. LEWIS. (Civ. 1713.)

(District Court of Appeal, Third District, California. Oct. 22, 1917. Rehearing Denied by Supreme Court Dec. 20, 1917.)

1. JUDGMENT 🔑725(4)—RES JUDICATA—TITLE TO LAND—STATUTES.

Under Code Civ. Proc. §§ 1908–1912, relative to the effect of judgments or final orders on rights in various cases, the effect of other judicial orders, what is deemed adjudged in a judgment, etc., where a husband and wife were sued for specific performance of their contract to sell a house and lot by the trustee of a fraternal order, who secured judgment with findings that the wife's declaration of homestead was void, etc., and that there was a contract of sale as set out in the complaint, such judgment determined the questions presented in a subsequent action by husband and wife to quiet title, and was conclusive therein, though the declaration of homestead was filed by the wife, who knew of the sale, before the judgment was docketed.

2. JUDGMENT 🔑720—RES JUDICATA—COMMUNITY CHARACTER OF PROPERTY.

Where the character of a house and lot as community property was admitted in a suit for specific performance against husband and wife, and adjudicated by the court to be such, its character as such became a matter res judicata, not subject to be again litigated in action to quiet title by the husband and wife.

3. HUSBAND AND WIFE 🔑267(1)—COMMUNITY PROPERTY—SALE BY HUSBAND—INTEREST OF WIFE—STATUTE.

A husband, by Civ. Code, § 172, had power to sell community property of himself and wife as if it were his separate property for an adequate consideration, so that it was immaterial that his contract to sell it was not signed or acknowledged by his wife; her interest being a mere expectancy.

4. JUDGMENT 🔑586(2) — RES ADJUDICATA — IDENTITY OF SUBJECT-MATTER.

An action against husband and wife for specific performance of the husband's contract to sell a house and lot, community property, and a subsequent action to quiet title to such property by husband and wife against plaintiff in the former action, were actions in equity relating to the same subject-matter.

5. HOMESTEAD 🔑128—RIGHTS OF PURCHASERS.

The rights of the purchasers of community property acquired, under the husband's contract of sale, by their action for specific performance, were superior to the homestead declared by the wife, because they related back to the time of the sale of the property, previous to the filing of declaration of homestead by the wife.

6. HUSBAND AND WIFE 🔑267(8) — EQUITABLE TITLE OF PURCHASERS.

Where a husband sold community property for adequate consideration, the purchasers acquired an equitable title, and became the equitable owners, and the husband, the vendor, held the legal title merely in trust for them.

7. HOMESTEAD 🔑81 — ACQUISITION BY WRONGFUL POSSESSOR.

Homestead right in community house and lot wrongfully in possession of the wife, her husband having previously sold it and holding legal title merely in trust for his vendees, could not be acquired by the wife by filing declaration of homestead.

Appeal from Superior Court, San Joaquin County; D. M. Young, Judge.

Action by Minnie McClellan and F. E. McClellan against John T. Lewis. From a judgment for defendant and an order denying their motion for new trial, plaintiffs appeal. Judgment and order affirmed.

See, also, 169 Pac. 438.

A. H. Carpenter, of Stockton, for appellants. Max Grimm and John R. Cronin, both of Stockton, for respondent.

BURNETT, J. The action is to quiet title. The claim of appellants is grounded upon the consideration that said Minnie McClellan filed a declaration of homestead upon the house and lot in controversy. Defendant relies upon a contract of sale executed by said F. E. McClellan to said Lewis, as the trustee of the Stockton Grove No. 118, United Ancient Order of Druids, and upon a final judgment in favor of said Lewis in a former action between the same parties.

The court found that on April 1, 1913, the defendant Lewis for and on behalf of said grove brought an action, No. 10741, in said superior court, against said F. E. and Minnie McClellan, for the conveyance of said property, setting out in his complaint sufficient facts to justify specific performance; that said defendants appeared and filed separate answers denying plaintiff's allegations (except that no denial was made by either of said defendants that the property in controversy was community property); that thereafter the case came on regularly for trial on the 29th day of May, 1913, both defendants being represented by counsel; that upon the conclusion of the trial the court orally announced judgment for the plaintiff and directed findings to be prepared in the case; that findings were prepared by both parties in said action and presented to the judge of the court, and left with him; that the findings prepared by the plaintiff were signed by the judge on the 28th day of June, 1913, and on said date judgment in said case was also signed and filed, and was docketed on the 13th day of July, 1913; that in and by said judgment it was and is adjudicated that the real property in question herein was the community property of Frank E. and Minnie McClellan; that the contract of sale was entered into as set out in the complaint in said action; that the purchase price agreed upon, $4,250, was a fair and adequate consideration and value of the said property, and said contract was just and reasonable between said grove and said F. E. McClellan; and that said judgment is conclusive and binding in this action. There is also a finding to the effect that the said Lewis, acting for the said grove, had made the first payment called for in said contract of sale, and had tendered the balance due, and had deposited the same in the bank to the credit of said F. E. McClellan and Minnie McClellan; that the said McClellans appealed from portions of the judgment in said case to the Supreme Court of the state of California, and that thereafter, to wit, on the 2d day of March, 1914, the appeal was dismissed by said court; also that the lis pendens was filed in the office of the county recorder of the county of San Joaquin; furthermore, that on the 18th day of October, 1913, said F. E. McClellan drew and received from the Commercial Savings Bank of Stockton, Cal., the sum of $2,750, which had been deposited therein by said Lewis as the representative of the said grove of Druids to the account and credit of the said McClellan; furthermore, that said plaintiff Minnie McClellan had full knowledge and notice of the execution of the said contract of sale by said plaintiff F. E. McClellan before the institution of said action to enforce the conveyance of said property. As to the declaration of homestead it was found by the court that on the 3d day of June, 1913, five days after the trial of the case in which judgment was rendered in favor of said Lewis and against the plaintiffs herein, the said Minnie McClellan and F. E. McClellan moved onto the property in question, and on the 4th day of June, 1913, said Minnie McClellan executed a declaration of homestead, and on June 30, 1913, two days after the findings and judgment were signed by the judge and filed as a record of the court said declaration of homestead was recorded in the office of the county recorder of the county of San Joaquin, and that the judgment in said action was entered on the same day that the homestead was recorded.

[1] There are also findings to the effect that said declaration of homestead is null and void, and that the act of plaintiffs in taking possession of said premises and the execution and filing and recording of the declaration of homestead were "illegal, wrongful, and fraudulent." There can be no serious question as to the sufficiency of the facts to sustain the material findings of the court, and, directing our attention to the judgment rendered in the former action, it is equally plain that it bars any judgment for plaintiffs in the present suit. We think there can be no serious controversy as to the following proposition: The character of the property and the title and interests of the parties therein were fairly in issue and determined in said action No. 10741, and therefore said judgment fully determines the material questions that are presented in this action. Sections 1908 to 1912, Code Civ. Proc.; Boston v. Haynes, 33 Cal. 31.

[2] The character of the property in controversy, namely, that it was community property, was admitted in the original suit and adjudicated by the court to be such, and therefore became a matter res adjudicata, and not subject to be again litigated. Jackson v. Lodge, 36 Cal. 28.

[3] It was immaterial that the contract of sale was not signed or acknowledged by Minnie McClellan, since the husband had power to sell the community property the same as if it were his separate property, for an adequate consideration. Section 172, Civ. Code; Tolman v. Smith, 85 Cal. 280, 24 Pac. 743; Farrington v. McClellan, 26 Cal. App. 375, 146 Pac. 1051. The interest which the wife had was a mere expectancy. Estate of Moffitt, 153 Cal. 359, 95 Pac. 653, 1025, 25 L. R. A. (N. S.) 207.

[4] There can be no doubt that said action No. 10741 and the present action are actions in equity and relate to the same subject-matter. Gish v. Ferrea, 10 Cal. App. 537, 101 Pac. 27. It must be plain, therefore, that the judgment therein is conclusive as to the merits of the case before us, nor does it make a particle of difference that said declaration of homestead was filed before said judgment was docketed. The wife knew before she declared the homestead that her husband had sold the property to the Druids for $4,250, being $250 more than the value of the property, according to the testimony. It must be plain upon principles of equity, as well as upon authority, that she could not, by herself or with the connivance of her husband, declare a valid homestead thereon after the same had been sold for a sufficient consideration.

[5] The rights of the Druids, acquired under the contract of sale, are superior to the homestead (Smith v. Bangham, 156 Cal. 359, 104 Pac. 689, 28 L. R. A. [N. S.] 522), because such rights related back to the time of the sale of the property. In the Smith Case, supra, it is said in reference to an option for the purchase of land that:

> It "vests in the grantee the right or privilege of acquiring an interest in the land, and, when accepted, entitles him to call for specific performance. * * * Such right, when exercised, must necessarily relate back to the time of giving the option * * * so as to cut off intervening rights acquired with knowledge of the existence of the option. A subsequent purchaser with notice of a valid and irrevocable option would certainly take subject to the right of the option holder to complete his purchase, * * * and we see no reason why the declarant of a homestead should stand in any better position. A declaration of homestead creates no new or additional title. It attaches certain privileges and immunities to such title as may at the time be held."

See, also, Copple v. Aigeltinger, 167 Cal. 706, 104 Pac. 1073.

[6, 7] Stating the case a little differently, there can be no question that under the terms of the said contract of sale of December 19,

1912, F. E. McClellan having sold the property to the Druids for an adequate and sufficient consideration, they acquired an equitable title to said property, and they thereby became the equitable owners, and the vendor held the legal title merely in trust for said vendees. Baldwin v. Morgan, 50 Cal. 585; Gilbert v. Sleeper, 71 Cal. 290, 12 Pac. 172. The Druids were therefore entitled to the possession of the property on February 1, 1913, which was well known to Mrs. McClellan. She was therefore a wrongful possessor of said property when she filed said declaration of homestead, and the homestead right could not thereby be acquired. Mann v. Rogers, 35 Cal. 316.

Indeed, it is quite apparent from the record that to give effect to said declaration of homestead and to decree that plaintiffs are entitled to judgment would be to tolerate and encourage a fraudulent transaction, and to make of the homestead law a cloak for wrongdoing. No one, of course, would contend for such a construction of this beneficent provision. Shinn v. MacPherson, 58 Cal. 598.

The situation, then, if we may state it in a few words, is as follows: The husband made a contract of sale of the property for an adequate consideration. The court, having jurisdiction after trial had in which both parties herein were defendants and appeared in the cause, found said property to be community estate. This finding was a final determination of the character of said property, and could not thereafter be controverted by either of said defendants, who are plaintiffs herein. The vendee under said contract of sale paid a part of the purchase price, and at the time specified tendered the balance due. In fact, the vendee complied with all the terms of said contract, was clothed with the equitable title, and was in a position to demand the legal title to said property, and had, therefore, the right to enter into possession of it. After the foregoing situation had developed, plaintiff Minnie McClellan, with knowledge of said sale, attempted to file upon said property a declaration of homestead, claiming it as her separate estate. The foregoing statement inevitably demands the conclusion that her attempt thus to defeat the claim and interest of the vendee in and to said property can find no support either in law or in equity.

It is apparent from what has gone before that plaintiffs and appellants appear before the court in an unenviable light. Having sold the property for a full and adequate consideration, plaintiffs refused to make a proper and legal conveyance, compelled the purchaser to resort to legal proceedings to enforce the contract, and, upon being defeated in court, appellants attempted to cloud the title of the property and incumber it with a homestead. More than that, after defeating, as they supposed, the just and equitable rights of the purchaser, appellant McClellan drew out the balance of the purchase price for the property, which had been deposited in the bank to the account and credit of plaintiffs, and they thereupon commenced an action, averring that they are the owners in fee thereof; in other words, they want both the money and the property. It seems somewhat incredible that such claim should be made in a court of justice. In fact, about the most astonishing thing in connection with this whole matter is that the appeal should ever have been taken from the conclusion of the lower court.

Some minor considerations are advanced by appellants, but they are sufficiently answered by respondent, and they do not demand specific notice.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

35 Cal. App. 133

McCLELLAN v. LEWIS. (Civ. 1712.)

(District Court of Appeal, Third District, California. Oct. 25, 1917. Rehearing Denied by Supreme Court Dec. 24, 1917.)

1. JUDGMENT ⚷461(5) — MODIFICATION FOR FRAUD — FINDINGS — SUFFICENCY OF EVIDENCE.

In an action by a wife for damages and to modify judgment for defendant in his suit against her and her husband for specific performance of their contract to sell realty, evidence *held* to support the trial court's findings of fact that the judge in the previous case was not deceived or imposed upon by defendant's attorney, that the previous judgment was not false, fictitious, fraudulent, wrong, etc., and that by such judgment it was adjudicated that the realty in question was the community property of the husband and wife.

2. TRIAL ⚷393(3) — ORAL STATEMENTS BY JUDGE—MODIFICATION IN MAKING FINDINGS—STATUTES.

Under Code Civ. Proc. § 632, requiring that the court's decision must be given in writing and filed with the clerk, and section 633, providing that in giving the decision the facts and conclusions of law must be separately stated, and judgment on the decision must be entered accordingly, in an action against husband and wife for specific performance of their contract to sell realty, the remarks of the trial court as to the question of costs and the wife's relation to the case, made at the close of trial, did not preclude him from making different findings to meet the issues in accordance with the facts, being but the court's informal views subject to future modification when he came to make his findings.

Appeal from Superior Court, San Joaquin County; D. M. Young, Judge.

Action by Minnie McClellan against John T. Lewis. From judgment for defendant, plaintiff appeals. Judgment affirmed.

A. H. Carpenter, of Stockton, for appellant. Max Grimm and J. R. Cronin, both of Stockton, for respondent.

CHIPMAN, P. J. This action grew out of the action entitled Minnie McClellan and F. E. McClellan, Her Husband, Plaintiffs and Appellants, v. John T. Lewis, Defendant and Respondent (Civil No. 1713) 169

Pac. 436, in which the opinion of this court was filed October 22, 1917. That action was brought by plaintiffs therein to quiet title to a certain lot situated in the city of Stockton. It will appear from the opinion in that action that the defendant relied upon a contract of sale executed by the said F. E. McClellan to the said Lewis as trustee of the Stockton Grove No. 118, United Ancient Order of Druids; that on April 1, 1913, the defendant, Lewis, on behalf of said grove, brought an action, No. 10741, in the superior court of the county of San Joaquin against the plaintiff herein and her said husband for the conveyance of said property, sufficiently alleging facts to justify specific performance; that both of said defendants in that action answered, but neither of them made a denial that the property in controversy was community property; that thereafter said case came on for trial on May 29, 1913, both defendants being represented by counsel, and at the conclusion of the trial, the court announced its judgment in favor of the plaintiff and directed findings to be prepared; that findings were prepared by both parties and presented to the judge of the court; that the findings prepared by plaintiff in the action were adopted by the judge on the 28th day of June, 1913, and judgment was duly signed and filed on that date and was docketed on July 13, 1913; that by said judgment it was adjudged that the real property in question was the community property of the said Frank E. and Minnie McClellan; that the contract of sale was entered into as set out in the complaint in said action; that the purchase price agreed upon was a fair and adequate consideration; that the contract was just and reasonable; and that the said judgment is conclusive and binding in the said action, Civil No. 1713, in which opinion was filed October 22, 1917.

The foregoing and some other facts in the said action No. 10741 are set forth in the plaintiff's amended complaint in the present action, but it is alleged that at the close of the trial of said action last referred to the court announced from the bench:

> "That Minnie McClellan did not sign the agreement that plaintiff seeks to have specifically enforced, and the judgment of the court can only be that Mr. McClellan execute the deed; that there is nothing upon which the court could direct Minnie McClellan to execute a deed; that the court is satisfied that Minnie McClellan is not in this case; she is entitled to judgment for any costs she has; and the attorney for plaintiff (Max Grimm) will prepare without delay the findings and decree in accordance with these instructions."

It is then alleged:

> That the attorney for plaintiff, the said Max Grimm, "willfully neglected and refused to prepare or present said findings and decree to the court for a period of about 30 days, and until he knew that the attorney for Minnie McClellan had left the state for a 3 months' absence, and that then, in the absence of said attorney, and on the 28th day of June, 1913, and for the purpose of taking advantage of the said Minnie McClellan in the absence of her attorney, and of deceiving and imposing upon the judge who tried said case, and of thereby injuring and defrauding the plaintiff herein, as one of the defendants in said case, and of depriving her of all her right and title to said real property, presented to the judge who tried said case in the said superior court, the findings and decree as drawn by him and as they now appear in said case, and which contain, among other things, the following findings, to wit: That the said defendant Minnie McClellan did not sign or execute the said agreement with Stockton Grove No. 118, U. A. O. D.; that the said Minnie McClellan has no title to the aforesaid described real property, and her claim and interest therein is subject to and inferior to the rights and title thereto of the plaintiff, Lewis, and that all the material allegations of the answer of the said Minnie McClellan are not true and are not sustained by the evidence."

It is further alleged that it was adjudged in said action:

> "That said Minnie McClellan has not now, and never has had, any right, claim, title, or interest in or to said real property, except as the wife of the defendant F. E. McClellan, and that the said Minnie McClellan be, and she is hereby, restrained and enjoined from hereafter asserting any right, claim, or interest of, in, or to the property described in plaintiff's complaint herein."

It is then alleged:

> That the said Max Grimm, as attorney for the plaintiff in said case, "willfully, unlawfully, fraudulently, and in violation of said express instructions of the court, and for the purpose aforesaid, omitted and left out from both the said findings and decree in said case the following portions of said decision as announced by the court at the close of said trial, namely: That there is nothing upon which the court could direct that Minnie McClellan execute a deed; that the court is satisfied that Minnie McClellan is not in this case, and that she is entitled to judgment for any costs she has, and that each and all the aforesaid additions, interpolations, and omissions were wrongfully, unlawfully, fraudulently, and in violation of the express instructions of said court, added to, inserted in, or omitted from said findings and decree, as hereinbefore averred, for the express purpose of enabling the said Lewis, as the plaintiff in said case, to fraudulently secure said real property from the plaintiff herein, and thereby cheat and defraud her of her homestead right without due process of law; and that the said Max Grimm then and there, on said 28th day of June, 1913, falsely represented to the said judge that said findings and decree, with all the aforesaid wrongful interpolations, additions, and omissions, were drawn in all respects as directed by the court at the close of the trial as aforesaid, and that the judge, relying upon said false statements and without noticing the aforesaid irregularities, signed both said findings and decree, and thereafter, on the said 28th day of June, 1913, the same were filed with the clerk of said court and duly entered and docketed in said court and cause, as provided by law."

It is further alleged:

> That the said Max Grimm by his conduct in said matter "imposed upon and deceived the judge and caused him to sign said findings and decree through mistake of their contents, and that said findings and decree as signed were wrong, erroneous, absurd, inconsistent, not in accordance with said court's express instructions, entirely without the issues raised by the pleadings, and extremely prejudicial to the plaintiff herein, as she was deprived of her costs in said case, and was forever enjoined from

asserting title to her real property, in violation of the express instructions of the court as hereinbefore pointed out."

It is further alleged in the amended complaint:

That, after the said superior court had announced its decision from the bench, "it had no right, authority, or jurisdiction to adjudge or decree in said findings in said case that Minnie McClellan has or had no right or title to the aforesaid real property, or that her claim and interest therein is or was subject to or inferior to the rights and title thereto of the said Lewis, or that the material allegations of the said Minnie McClellan's answer are not or were not true or sustained by the evidence, or to adjudge or decree in the judgment in said case that the said Minnie McClellan has not now or never has had any right, title, or interest in or to said described real property, except as the wife of said F. E. McClellan, or to enjoin or restrain the said Minnie McClellan from thereafter, or at all, asserting any right, claim, title, or interest in or to the aforesaid real property or any part thereof, and that all such adjudications and findings were nugatory, void and without the issues raised by the pleadings in said case."

It is further alleged:

That the plaintiff herein, through her attorney, heard the said original decision of the court as made at the close of the trial, and believed that the findings and decree therein would be made and entered in accordance with said decision, "and that by reason thereof the plaintiff herein, as one of the defendants in said case, allowed her time to appeal from said judgment in said case to expire without taking such appeal or preparing the record for the same by bill of exceptions or otherwise, and that, after such right of appeal had lapsed, she discovered the aforesaid fraudulent and deceitful acts whereby said decision was procured and entered, and that the same was so rendered and entered without the knowledge or consent of the plaintiff herein, and not by reason of any negligence on her part."

It is further alleged that the plaintiff herein, on June 30, 1913, while actually residing on the property with her husband, duly made, executed, and acknowledged a declaration of homestead upon the land and premises, and on said date recorded the same in the office of the county recorder of said county, and plaintiff alleges:

That since said last-named date the said "real property and premises have been, and now are, the duly selected and declared homestead of the plaintiff herein, and that this action concerns and relates thereto."

It is further alleged:

That since the rendition of said judgment as aforesaid "the said defendant and his attorney have repeatedly disturbed, annoyed, and threatened to eject and remove plaintiff, who is and at all times herein named and referred to has been an invalid, from said premises which she claims and occupied as a homestead, and have taken execution out of said superior court in said case, * * * whereby the sheriff of said county was thereby falsely and fraudulently authorized and empowered to remove and eject plaintiff from her said homestead, and that in pursuance thereof the said sheriff, under the instructions of said defendant and his said attorney, has been upon said premises, attempted to eject, and threatened to eject and remove plaintiff from her bed and her said homestead, and forcibly take possession of the same for the said defendant, and has repeatedly harassed and annoyed plaintiff with notices and demands for such possession and threats of ejectment, whereby plaintiff has been and is damaged by the rendition and entry of said false, fictitious, and fraudulent judgment and the said proceedings had and taken thereunder in the sum of $5,000."

The prayer of the complaint is:

For judgment in the sum of $5,000 and her costs of suit; that the aforesaid judgment entered in the said case of John T. Lewis, Plaintiff, v. F. E. McClellan and Minnie McClellan, Defendants, of date June 28, 1913, "be reviewed, modified, and changed so as to conform to law and with the original announcement thereof by the said superior court, and in the following particulars: (1) That the findings and conclusions of law be made to recite that the plaintiff therein, John T. Lewis, is not entitled to specific performance or any relief whatsoever against the defendant Minnie McClellan, and that she is entitled to judgment for her costs herein incurred"; (2) that the judgment therein be made to recite that plaintiff is not entitled to specific performance, and that plaintiff herein is entitled to judgment for costs; (3) that the "interpolation that the defendant Minnie McClellan has no right or title to the aforesaid described real property * * * be stricken from said findings and conclusions of law"; (4) likewise the findings that the material allegations of Minnie McClellan's answer are not true, and that they be stricken out; (5) likewise the provision that the plaintiff herein be restrained from asserting any right in the premises be stricken out from the conclusions of law and the judgment; (6) that the portion of the judgment adjudging that the said Minnie McClellan has not now, and never has had, any right, claim, title, or interest in the property be stricken from said judgment, and that "said John T. Lewis be forever enjoined and restrained from enforcing said judgment in its present form, and for such other relief as may seem meet to the court."

An amendment to the amended complaint was made by leave of court to the effect that the said contract of sale was intended to be signed by both McClellan and his wife, and that it was understood that until it was so signed by both it was to be ineffectual for any purpose, and that thereafter, and before the said contract was signed or executed by both of said last-named parties, "the same was canceled and annulled, and that by reason thereof the same never became binding upon either or any of the proposed parties thereto."

A demurrer on general and specific grounds was overruled, and the defendant answered; denied that on the 1st day of April, 1913, or at any time, the defendant commenced an action against the McClellans to enforce the specific performance of an unjust or unreasonable contract, or that the said contract was unfair or the consideration inadequate; alleged that at the time of the execution of said agreement the said realty was the community property of the said McClellan and his wife; denied the averment of the amended complaint that the real property "had been purchased largely with moneys that plaintiff had received from her deceased father's estate, and that it was in truth and in fact, or in truth or in fact, her individual property"; denied that said plaintiff was at said time or at all entitled to select and claim said property as a homestead; denied that the plaintiff herein did at any time "duly select and claim or claim as her homestead under and by virtue of the laws of this state said real property"; denied the allegations as to what occurred at the time of the close of the trial referred to in the complaint; and avers "that at close of said trial said court made certain oral statements from the bench, but which oral statements were not its judgment, and which were in substance and in part as follows: That it would be the duty of the court to direct specific performance upon the part of Mr. McClellan; that the judgment of the court can only be that Mr. McClellan execute the deed; that there was nothing upon which the court could direct the wife to execute a deed, whereupon the following and the only colloquy or conversation took place between the counsel and the judge presiding upon said trial." We do not think it necessary to set out this colloquy.

Defendant denied that he willfully or at all refused to prepare or present the proper findings and decree to the court "for a period of about 30 days and until or until he knew that the attorney for Minnie McClellan had left the state for a 3 months' absence"; denies that "on the 28th day of June, 1913, or at any time or at all, and for the purpose or for the purpose of taking advantage of the said Minnie McClellan in the absence of her attorney and of deceiving and imposing or of deceiving or of imposing upon the judge who tried the said cause, or thereby or of thereby injuring and defrauding or of injuring or of defrauding the plaintiff herein, as one of the defendants in said case, and of depriving her or of depriving her of all her right and title or right or title to said real property, presented to the judge who tried the said cause in the said superior court, the findings and decree or the findings or decree in said case, or as they now appear in said case, but, on the contrary, said defendant avers that said findings and conclusions of law and judgment as they are now were drawn, prepared and submitted to said court by said attorney, Grimm, for signing without any fraud or deceit and without imposing upon said court and without any purpose on the part of said attorney or the plaintiff in said case of unlawfully, wrongfully, or fraudulently depriving her of any rights to said property."

Other of the accusatory averments of the amended complaint are also denied, and defendant alleged "that said attorney for the plaintiff in said case, well knowing that the said oral remarks and announcements of said trial judge in said case at the conclusion of said trial do not and did not constitute the judgment and decision in said case, and well knowing that the defendant Minnie McClellan was not entitled to judgment for costs under the pleadings and issues raised in said case, and the proofs had therein, and that the said plaintiff, Lewis, in said case was entitled to all the facts found in said findings and to the relief obtained and contained in said judgment and decree, said attorney prepared and submitted said findings and judgment to the said trial judge for signature as they now are." The defendant alleges "that all of the representations made by the said Max Grimm to the judge who tried said cause, upon presentation of the findings and conclusions of law and decree in said cause, were true and correct, and were within the issues as raised by the pleadings in said cause"; alleged "that the plaintiff herein was not entitled to judgment against the plaintiff, Lewis, in said cause, for her costs in said action; that he was entitled to the judgment and decree of this court in said cause; that the plaintiff's right, title, interest, and claim in and to said realty, under the pleadings in said cause, could be adjudicated in said action and was adjudicated in said action;" alleged that all of the facts and matters set forth in the findings in said action were within the issues raised by the pleadings in said case, "and the said court acquired jurisdiction and authority to adjudge and decree upon all of said matters as raised by the pleadings in said case, and as they are now in said findings and judgment"; denied that any fraudulent or deceitful acts of any kind or nature "were done or committed by said Lewis or his attorney in said case of procuring said judgment and said findings or of having said findings or any judgment entered, and further denies that said decision and judgment was procured and entered without the knowledge or consent of said plaintiff Minnie McClellan"; denied that the said Minnie McClellan was on June 30, 1913, the owner of said real property or any part thereof, and denied that she duly made, executed, or acknowledged the declaration of homestead upon the said premises; alleges that on said date, "after the said plaintiff, Minnie McClellan, had full knowledge and information that the superior court of the county of San Joaquin, state of California, in said cause, had made and entered judgment in said case adjudging and decreeing that the said plaintiff, Lewis, in said action, for and on behalf of said grove, was the true and lawful owner of said real property described in plaintiff's complaint herein, said Minnie McClellan, by and through the advice and counsel of her husband, F. E. McClellan, and one A. R. Carpenter, her counsel, fraudulently and with the intent and purpose to defeat the said judgment and decree of said court, and in violation of its terms and provisions, and for the purpose of clouding the title to said property and vexing and annoying the said plaintiff, Lewis, in the ownership and possession thereof, attempted to make and declare and file a homestead thereon, and in pursuance thereof did cause to be recorded in the office of the county recorder of the county of San Joaquin, state of California, a pretended and attempted homestead on said premises; that said alleged and pretended homestead is fraudulent, illegal, void, and of no force and effect."

Defendant avers that the only notices and demands sent to or made upon said Minnie McClellan in the said action above referred to were sent and made in accordance with the lawful judgment and decree of said court in said case, and denies that said plaintiff in this action has been damaged in the sum of $5,000 or any sum whatsoever by reason of any of the acts or conduct of the said Lewis or his attorney, Grimm. Defendant also pleads in bar of the action all the proceedings, findings, and judgment had in the action of Lewis v. McClellan, above referred to, numbered 10741. For further answer, also, defendant alleges the pendency of an action commenced by the said Minnie McClellan and her husband against the said John T. Lewis, defendant herein, on November 12, 1913, in said court, said action being numbered 10943, in which the plaintiffs seek to have the title to said property quieted and their homestead rights determined; that the said defendant, Lewis, has appeared in said action and filed an answer and cross-complaint therein; that the said action numbered 10943 is between the same parties as the action numbered 10741, and that the subject-matter of the action in both cases is the same; that said action is an issue of fact and is undetermined.

The present cause was tried by the court without a jury, and the court made findings in favor of the defendant herein, and judgment was accordingly entered, from which plaintiff appeals. Among the findings are the following:

"That at no time subsequent to the trial of said action No. 10741, or at any time or at all, did the attorney for the plaintiff, Lewis, in said action, to wit, Max Grimm, deceive or impose upon the judge who tried said case, as to the contents or substance of the findings signed by the judge in said action, and the judge in said action signed said findings after reading and understanding same, and he refused to sign the findings presented by the attorney for the defendants in said action."

"That the said judge was not deceived or imposed upon by the said Max Grimm, or any other person, as to the contents of the said findings, and no fraud, deceit, or imposition was committed upon said court by any person in connection with the signing of said findings, or in procuring said judgment in said action No. 10741."

"That the said judgment in said action No. 10741 was not false, fictitious, fraudulent, wrong, absurd, erroneous, or inconsistent, but was supported by the evidence therein, and was obtained without fraud, mistake, inadvertence, or imposition, and is in all respects a good and valid judgment."

"That in and by said judgment in the case 10741 it was and is adjudicated that the real property in question herein was the community property of Frank E. and Minnie McClellan; that the purchase price agreed upon of $4,250 was a fair and adequate consideration and value for the said property, and said contract was just and reasonable between said grove and said F. E. McClellan."

"That said plaintiff, Minnie McClellan, did not suffer any damages whatsoever by reason of said findings, conclusions of law, or judgment rendered, filed, and entered in said action No. 10741."

As conclusions of law, the court found:

That plaintiff "is not entitled to recover any judgment for damages, and is not entitled to have the findings, conclusions of law, or judgment in said action No. 10741 amended, modified, changed, or reformed, nor to any other relief from the defendant, and the court further finds and decides that the defendant, John T. Lewis, have judgment for his costs incurred herein."

[1] We think there is ample evidence in the record to support the findings of fact. Upon the principle stated in Bacon v. Bacon, 150 Cal. 477, 484, 89 Pac. 317, that a party may have relief against a judgment on the ground of fraud or mistake, it is contended that it sufficiently appears from what occurred at the conclusion of the trial in the case of Lewis v. McClellan that the findings and judgment, as entered in that case, were not the findings and judgment directed to be entered by the court. It is also contended that the announcement made by the judge from the bench must be treated as the decision, and that the findings and judgment, not being in accord with such decision, must be treated as void.

[2] We do not think it reasonably inferable from the oral statements of the judge at the close of the trial in Lewis v. McClellan that he was precluded from making findings to meet the issues in accordance with the facts. The statute requires that the decision of the court "must be given in writing and filed with the clerk" (Code Civ. Proc. § 632); and "in giving the decision, the facts and conclusions of law must be separately stated. Judgment upon the decision must be entered accordingly." Code Civ. Proc. § 633. The remarks of the court touching the question of costs and Mrs. McClellan's relation to the case were but the informal views of the court, subject to future modification when it came to make its findings, "as only properly they could be found, in the formal findings of fact and conclusions of law." Montecito Valley Co. v. Santa Barbara, 144 Cal. 578, 595, 77 Pac. 1113. In Wadleigh v. Phelps, 149 Cal. 627, 645, 87 Pac. 93, the court had rendered a written opinion in which it said:

"Let each party herein pay his, her, or their own costs."

Subsequently the court made findings and entered judgment thereon:

That "plaintiffs recover their costs incurred in this action."

There the claim was made:

That "the court, having announced its views as to the costs in the written opinion, could not in the findings and judgment make different provision from that indicated in the opinion."

The Supreme Court said:

"This written opinion was, however, no part of the decision in the case, cannot be treated as such, and was entirely without legal effect."

That the findings were not made through fraud or mistake was fully supported by the evidence, and that they were framed to meet and were based on the issues in the case is clearly shown.

Plaintiff's alleged rights arising from the homestead filed by her, from her claim that the property was not community property, but was purchased with her money, from the fact that she did not sign the contract of sale—in fact, every claim advanced by her in support of her title to the property was adjudicated and decided against her contention in the action of McClellan et al. v. Lewis, and the judgment has been affirmed on appeal to this court.

Plaintiff has failed to establish the truth of the averments in her amended complaint.

The judgment is therefore affirmed.

We concur: BURNETT, J.; HART, J.

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35 Cal. App. 70

J. I. CASE THRESHING MACH. CO. v. COPREN BROS. et al. (Civ. 1697.)

(District Court of Appeal, Third District, California. Oct. 22, 1917.)

1. Appeal and Error 🔑520(3)—Papers and Files in Case — Matter Appearing in Transcript on First Appeal.

Matter appearing only in the transcript, on appeal from the judgment rendered in the first trial, does not properly form any part of "the papers and files in the case," on appeal from an order to change the place of second trial.

2. Venue 🔑21—Trial in County of Defendants' Residence—Change.

Under Code Civ. Proc. § 395, defendants had a right to have the case tried in the county of their residence, but such right was subject to the right given either party, by section 397, to have the place of trial changed when there is reason to believe that an impartial trial cannot be had in the county where the action is pending.

3. Venue 🔑72—Change—Burden of Proof —Local Prejudice.

The burden was on plaintiff, moving to change the place of trial from the county of defendants' residence to another, to establish that a fair and impartial trial could not be had by a jury in the county of defendants' residence.

4. Appeal and Error 🔑837(1)—Review—Change of Venue—Facts Considered.

On appeal from an order changing place of trial, on the ground that a fair and impartial trial could not be had by a jury in the county of defendants' residence, only the facts set forth in the affidavits, and such other facts as were before the court and had been made part of the record, can be considered.

5. Appeal and Error 🔑912 — Review — Change of Venue—Presumption.

On appeal from an order to change the place of trial from the county of defendants' residence, on motion of plaintiff, a foreign corporation, the court cannot indulge any presumption that the citizens of the county of defendants' residence are incapable to administer justice fairly and impartially between a foreign corporation and defendants, citizens of the county.

6. Venue 🔑50—Change—Local Prejudice —Evidence.

In an action by a foreign corporation against individual defendants, brought in the county of their residence, it is not a reasonable conclusion that a fair and impartial trial cannot be had by plaintiff in such county, from the facts that plaintiff is unacquainted in the county, which is sparsely settled, its population being 4,098, that a defendant has served the county as assessor, and that defendants are widely and favorably known in the county.

7. Venue 🔑50—Change—Difficulty to Secure Impartial Trial—Conduct of Jury on First Trial.

That the jury on first trial hesitated to render a verdict for plaintiff as directed furnished no ground to assume that plaintiff foreign corporation could not have an impartial trial in the county as against defendants, individuals widely known and influential therein.

Appeal from Superior Court, Sierra County; Stanley A. Smith, Judge.

Action by the J. I. Case Threshing Machine Company, a corporation, against Copren Bros., a copartnership, and William J. Copren and C. A. Copren, as partners and as individuals. From an order to change the place of trial, defendants appeal. Order reversed.

See, also, 32 Cal. App. 194, 162 Pac. 647.

John V. Copren and W. I. Redding, of Downieville, for appellants. Dunn, White & Aiken, of Oakland, for respondent.

CHIPMAN, P. J. Appeal from an order to change the place of trial from Sierra county to Plumas county on motion of plaintiff made on the ground that an impartial trial cannot be had in Sierra county. The action was to recover judgment upon certain promissory notes executed by the defendants for the purchase price of a certain traction engine, and was begun in the city and county of San Francisco, but the venue was changed to Sierra county on the ground that all the defendants resided therein.

The cause was tried before a jury in Sierra county and a verdict directed by the court was rendered in favor of plaintiff. An appeal was taken to this court which resulted in a reversal of the judgment. The remittitur went down in January, 1917, and on April 18, 1917, the court made its order from which this appeal was taken. As yet the cause had not been set for trial and, of course, no attempt had been made to obtain a jury. The motion was heard upon the affidavit of Jesse J. Dunn, attorney for plaintiff, and "upon the papers and files in the case," and upon the affidavits in rebuttal of John V. Copren, attorney for defendants, and Wm. J. Copren, one of the defendants in the action.

By the affidavit of Attorney Dunn, it appears that plaintiff had fully stated all the facts in the action to him, and that plaintiff was advised by him that it had a good and sufficient cause of action; that the facts of the case are within the knowledge of affiant who makes the affidavit in plaintiff's behalf. The grounds for the motion are set forth in the affidavit as follows:

> "That the said plaintiff is a foreign corporation and a manufacturer of threshing machines and engines, and that in the year 1912 it sold to the said defendants one of its said engines; that on a failure of the said defendants to make payment, in accordance with their contract therefor, plaintiff brought suit in the above named county, and defendants have asked for a jury trial of the said action; that on a previous trial thereof, a jury was impaneled, sworn, and charged, and the case presented in the said court before the said jury; that on the conclusion of the action, the court instructed the jury to return a verdict in plaintiff's favor, which the said jury refused to do until after admonished by the court that it could not avoid it except by the violation of their jurors' oaths; that the said plaintiff is practically unacquainted in the said county; that the said defendants, as your affiant is informed and believes, were born and raised in the said county, and are well and favorably known throughout its entire length; that they lived there nearly, if not entirely, the whole of their lives, and are at this time mature men; that the county is a sparsely settled county, and the acquaintanceship of the said defendants extends throughout its course and length; that one of the said defendants, Honorable William J. Copren, has for a number of years occupied the position of county assessor of said county, and is of wide and consequential influence therein."

It is then stated:

> "That the plaintiff, by reason of the foregoing facts, believes and has a good reason to believe, and avers as a fact, that it cannot have a fair and impartial trial of its said action before a jury in the said county."

Attorney Copren, in his affidavit, avers that he is now and has been the attorney for the defendants, and is familiar with all the facts in the case; denies that by reason of the alleged facts in the affidavit of Attorney Dunn, or by reason of any fact, the plaintiff cannot have a fair and impartial trial before a jury in Sierra county; alleges that on the previous trial of the action in September, 1915, a jury was impaneled and the cause presented before the said jury, that at the conclusion of the trial, the court instructed the jury to return a verdict for plaintiff "which the said jury did, and judgment was accordingly entered thereon in favor of plaintiff," that on appeal to the District Court of Appeal the judgment was reversed, "that since the reversal of said judgment in favor of plaintiff, no motion has been made to set the above-entitled case for trial, and, as yet, no jury has been demanded," "that at the previous trial there was no difficulty had in impaneling a jury, that there were but 13 jurors examined, and each and every one of the said jurors qualified and was accepted by plaintiff, that one juror was excused by reason of the fact that his hearing was defective, * * * that plaintiff's rights were in every way protected at said former trial, and no subsequent fact has arisen upon which plaintiff can base its contention that a fair and impartial trial of said action cannot be had by a jury in Sierra county, or that there would be any difficulty in impaneling an unbiased jury in said action in Sierra county, and no such fact is alleged, or attempted to be alleged, in plaintiff's said affidavit on motion for change of venue; denies that any acquaintanceship of defendants, or either of them, in Sierra County, would affect the trial of said action, or prevent plaintiff from having a fair and impartial trial of said action before a jury in said Sierra county"; alleges that all the facts in the case are within the knowledge of affiant and that he believes, and has so advised the defendants, that they have and each of them has a good and substantial and valid defense to the action.

The defendant Wm. J. Copren, in his affidavit, denies that the acquaintanceship of his codefendant, C. A. Copren, "extends throughout the course or length of said Sierra county," and alleges that the said C. A. Copren "is unacquainted in said county, except in the Sierra Valley and in and about the town of Sierra City in said county"; admits that affiant for a number of years occupied the position of county assessor of said county, "but denies that he is of wide or consequential influence therein, and in this connection he states that neither he nor the said defendant C. A. Copren have ever used, attempted, or intended to use, nor do they now intend to use, the influence of said defendants, or either of them, or of any other person, either social, political, official, or otherwise, to prevent the plaintiff from having a fair or impartial trial of the issues herein before a jury, or otherwise, or at all"; admits that the county of Sierra is sparsely settled, and that his acquaintanceship extends throughout its course and length, "but he states that he is not acquainted with all of the persons subject to jury duty in said county, and that quite a large percentage of such persons are unknown to him." Affiant then states at some length the facts relating to the topography of the county and the various settlements of the people therein, and shows that, by reason of mountain barriers and the location of the valleys of the county, these settlements of inhabitants are so separated by mountain barriers "as to have but little communication, social or otherwise" with each other; that in various portions of the county the inhabitants are engaged exclusively in mining, and that in other portions the industries are grazing, agricultural, and lumbering, "and that each of said sections is almost entirely independent of the others in their business relations, and to the extent that the inhabitants of each section have almost no business relations with the inhabitants of the other sections." It is further averred in the affidavit "that the fact that the jury, on a previous trial of this action, temporarily refused to return a verdict for the plaintiff does not establish that a fair and impartial trial cannot be had before a jury selected from the body of the county, and that such fact can only be established after an attempt has been made to impanel a jury and it is then demonstrated that a fair and impartial trial cannot be so had." Affiant denies that plaintiff, by reason of the facts set forth in the affidavit of merits made by Attorney Dunn, or by any fact, cannot have a fair or impartial trial of the action before a jury in said county, but, on the contrary, that there is no reason why plaintiff cannot have a fair and impartial trial therein.

[1] Some reference is made in respondent's brief to what occurred at the former trial when the jury was instructed to bring in a verdict for the plaintiff, and some reliance is placed by respondent upon that episode as tending to show that the plaintiff cannot have a fair and impartial trial in Sierra county. This matter is not made a part of the record in this appeal and does not properly form any part of "the papers and files in the case," for it appears only in the transcript on appeal from the judgment rendered in the first trial. The certificate of the judge is that the foregoing record "is a full, true, and correct transcript of all papers and files used, and of all proceedings had and conducted, at the hearing and in the determination of the motion of the plaintiff for a change of the place of trial of the above-entitled cause." It may be doubted whether what occurred at that time can properly be considered on this appeal. Lest, however, we may do respondents an injustice, we will quote what purports to have occurred at that time, as shown by the respondent's brief, to which is added, also, a paragraph appearing in appellants' reply brief as part of what then occurred. This matter, as shown by respondent's brief, is as follows:

> "The Court: Mr. Dunn, you will prepare the verdict in accordance with the ruling of the court.
>
> "(The Court instructed the jury and they retired to the jury room. Jury returned.)
>
> "The Court: The clerk may call the names of the jurors.
>
> "(Jurors all present.)
>
> "The Court: Gentlemen of the jury, have you agreed upon a verdict in this case?
>
> "Foreman: We can't agree to this; we can't come to this verdict.
>
> "The Court: Do any of the jurors misunderstand the instructions of the court that you are to find in favor of the plaintiff in the sum of $918, there being no issue in the case for your determination? The court has determined that for you.
>
> "Foreman: I thing it is understood that we are to follow your instructions, whatever they are, but we don't like to subject ourselves to that will.
>
> "The Court: As the court instructed the jury, there is no issue before you. Under the rulings of the court, the testimony in behalf of the defendants' answer was incompetent and consequently the court instructed you accordingly.
>
> "Foreman: They don't like to be parties to forcing the payment of the $198 [$918].
>
> "The Court: That is a matter that they have nothing to do with. Perhaps I should have stated to the jury that three-fourths of you are a sufficient number to agree upon a verdict. In a civil case nine are a sufficient number to agree on the verdict.
>
> "Foreman: There is no other verdict that we can agree on, is there? Do we have to agree to this verdict that is handed to us?
>
> "The Court: Unless you wish to violate your oaths as jurors."

To the foregoing is added, as shown by appellants' reply brief, the following:

> "Foreman: The plaintiffs have put in their evidence and in that contract it is stated that they sold a 30 horse power engine. Our judgment as citizens leads us to believe that their signatures over that agreement to sell a 30 horse power engine should be binding, and that they should sell a 30 horse power engine.
>
> "The Court: That is a matter that under the instructions of the court, you have nothing to do with. I think perhaps you had better retire again to the jury room. You should have no trouble in determining whether you are going to comply with the instructions of the court, or not."

The jury returned a verdict as directed by the court. The foregoing presents all the facts which the trial court had before it in ruling upon the motion, including what occurred at the rendering of the verdict, which is not a part of the record, and was not before the court when the motion was heard and decided.

[2] Under section 395, Code of Civil Procedure, defendants had a right to have the case tried in the county of their residence, but this right is subject to the right given either party by section 397, Code of Civil Procedure, to have the place of trial changed "when there is reason to believe that an impartial trial cannot be had" in the county where the action is pending.

[3, 4] Beyond dispute, the burden was upon plaintiff to establish the fact that a fair and impartial trial could not be had by a jury in Sierra county, and to determine that fact only the facts set forth in the affidavits, and such other facts as were before the court and have been made part of the record, can now be considered. People v. Yoakum, 53 Cal. 566; People v. Kromphold, 172 Cal. 512, 157 Pac. 599. It was stated in Stockton Combined Harvester & Agricultural Works v. Houser, 103 Cal. 377, 37 Pac. 179:

> "Applications like this are addressed to the sound legal discretion of the trial court, and its action cannot be disturbed on appeal unless it clearly appears that there was an abuse of that discretion." Citing Hanchett v. Finch, 47 Cal. 192; Avila v. Meherin, 68 Cal. 478, 9 Pac. 428; Clanton v. Ruffner, 78 Cal. 268, 20 Pac. 676; People v. Vincent, 95 Cal. 427, 30 Pac. 581.

In People v. Vincent, supra, the court said:

> "It is true that the discretion of a trial court to grant or refuse a change of venue is not an arbitrary discretion—a mere naked, irresponsible power; but when there has been fair room for the play of such discretion, and its exercise has not gone beyond legitimate and reasonable limits, it cannot be rightfully interfered with by the appellate court."

The right of appeal given to a party aggrieved by the order granting or refusing a change of venue presupposes that the reviewing court may determine for itself, from the record presented, whether the trial court "has gone beyond legitimate and reasonable limits" in making the order in question.

In support of the order, counsel for respondent in part relies with apparent confidence upon certain presumptions which they claim the court had the right to and did indulge in when considering the application. We quote from respondent's brief:

> "Courts, it has been said, are presumed to know the things which people generally know, and we submit that not only people generally, but every practicing lawyer and court in the land knows, as an indisputable fact, that when controverted questions of fact are submitted to trial juries in communities such as this, between a foreigner and a favorably known local citizen, that the citizen has more than an 'even break'; he has all the best of it; that every reasonable, possible intendment and conclusion that can be drawn in his favor is drawn for him against his foreign antagonist. Lawyers know this; people know it generally, and, of course, courts know it. If this is true of a foreign individual, how much more true is it when, as is set forth in this affidavit, the plaintiff is a foreign corporation, which is generally considered nothing more nor less than a natural enemy of every local resident when controversy arises. That the foreign corporation shall not be permitted to win, if it is a possible thing to beat it, is always orthodox. No citizen, lawyer nor court expects anything else, and the foreign corporation does not look for it. We submit that the foregoing statements are recognized facts by everybody, and, being so, the trial court, when considering the affidavit filed in this case, started in with that knowledge and had a right, and it was its duty, to consider that knowledge in weighing the affidavit submitted."

We confess to some surprise that this court should be asked to give countenance to such a doctrine. We are loath to believe that the inhabitants of Sierra county are different in moral and intellectual fiber from those of any other county in the state. We are not willing to believe that they are incapable of fairly and impartially administering justice between a foreign corporation and one of their citizens. Respondent's proposition means that while a foreign corporation must bring such an action as this in the county of the defendants' residence, a presumption arises, which, if invoked, the trial court must treat as a fact, that the corporation cannot have a fair and impartial trial in that county, and if it seeks to change the venue, its application must for that reason be granted, for it would be impossible to overcome this presumption, since the entire inhabitants are inoculated with this hostile virus.

[5] In our opinion, no such presumption can be indulged in support of the order. The fact that plaintiff is a foreign corporation is an inconsequential factor, and of no probative value in determining the question. The remaining facts relied upon are: That at the former trial, when instructed by the court to render a verdict for plaintiff, the jury showed reluctance to do so, although after so expressing themselves, they did obey the instruction of the court; that plaintiff is practically unacquainted in Sierra county, while defendants were born and have lived to mature age therein, "and are well and favorably known throughout its entire length"; that the county is sparsely settled "and the acquaintanceship of said defendants extends throughout its course and length"; and that one of the defendants "has for a number of years occupied the position of county assessor of said county, and is of wide and consequential influence therein." Except that plaintiff is unacquainted in said county, and that the county is sparsely settled, and that one of the defendants has served the county as assessor, these alleged facts are controverted by respondents. The population of Sierra county, as shown by the census of 1910, was 4,098. It appeared that there was no difficulty in obtaining a jury at the first trial; the members as called having been accepted by both parties. Since then the case has not been set for trial and, of course, no attempt made to secure a jury.

[6] We do not think it a reasonable conclusion from the facts alleged that a fair and impartial trial cannot be had in Sierra county. It is an unwarranted inference that an impartial jury cannot be called from the citizens of that county capable of impartially trying a case between a foreign corporation and residents therein simply because these persons are widely and favorably known in the county. To disqualify the entire inhabitants of a county to sit as jurors on such grounds would, in our opinion, be an unreasonable exercise of judicial power. This impeachment of its citizens would include logically the judge of the superior court, and for like reasons his disqualification to sit in the case might be invoked.

Speaking generally of statutory provisions for change of venue, the Supreme Court said, in Cook v. Pendergast, 61 Cal. 72, 79:

> "So he [plaintiff] may move on the ground that a fair and impartial trial cannot be had in the county where the action has been commenced or whenever he ascertains the disqualification of the judge. But neither plaintiff nor defendant can move for a change of the place of trial because of the convenience of witnesses, or because a fair trial cannot be had, until the event has occurred which, in the one case, can alone enable the court to decide what facts are material to be proved by the respective parties, or which, in the other case, will assist the court in ascertaining whether such local prejudice exists as may influence the conduct of the jury. The fact that an impartial trial cannot be had must be clearly established. So plainly does it appear that a motion on this ground should be made after answer, that the practice of attempting to secure a jury before passing on the motion has been approved. It has even been held that nothing less than an actual experiment, by way of trial or attempt, to impanel a jury, and a consequential failure, will be sufficient to show that a fair and impartial trial cannot be had." Citing Messenger v. Holmes, 12 Wend. (N. Y.) 203; Patchin v. Sands, 10 Wend. (N. Y.) 570; 2 Wait's Practice, 620.

It has been several times held that it is not error to postpone the consideration of an application for a change of venue until an attempt has been made to impanel a jury, where leave is granted to counsel to renew his application if the facts disclosed in the impanelment should further warrant it. People v. Staples, 149 Cal. 405, 412, 86 Pac. 886, and cases cited.

While we do not hold that a change of venue on the grounds here stated would, under no condition of circumstances, be granted, until an unsuccessful attempt had been made to impanel a jury, no case has come under our observation in which a change of venue was sought or granted where there had not been one trial, or where some effort had not been made to obtain a jury. It is conceivable that a showing might be made of a prejudice against a plaintiff so widespread, intense, and outspoken, through the public press and otherwise, as to warrant a conclusion that the plaintiff would not have a fair trial where the action was pending. But it must be conceded that, without making an attempt to secure an impartial jury, it would require something more than a showing that the defendants "are well and favorably known throughout the entire length of the county," and that one of them, "is of wide and consequential influence therein" because he had been intrusted with the office of county assessor. As above shown, there was no difficulty in getting a jury at the former trial.

[7] That they hesitated at first to render a verdict as directed, it seems to us, furnishes no ground for assuming that an impartial trial cannot be had in that county. Defendants' right to have the case tried at the place of their residence is given them by statute. This right should not be taken from them without the plaintiff clearly shows that its right to a fair and impartial trial cannot be had where the action is pending.

We do not think sufficient showing has been made to justify the order. We think the learned trial judge has, in the exercise of his discretion, "gone beyond legitimate and reasonable limits."

The order is therefore reversed

We concur: HART, J.; BURNETT, J.

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35 Cal. App. 225

DONLON et al. v. MEYER et al. (Civ. 2177.)

(District Court of Appeal, First District, California. Nov. 7, 1917.)

1. Sales 🔑152—Demand for Delivery—Actual Payment or Offer.

Where bags sold were not present when the buyers demanded delivery of the sellers, it was unnecessary that actual payment or offer thereof accompany the demand for delivery, for, if the goods are not present, the buyer may accompany his demand with an offer to pay when actual delivery is made to him.

2. Sales 🔑406—Refusal of Sellers to Deliver—Accrual of Buyers' Cause of Action—Performance or Offer of Performance as to Payment—Statute.

Where the buyers of goods demanded delivery of the sellers, subsequent to the time when delivery was due under the original contract, and the sellers notified the buyers they would make no other or further delivery under the original contract, the buyers' cause of action accrued, under Civ. Code, §§ 1439, 1440, providing when performance of conditions is essential and when excused, without the necessity of previous performance or offering to perform the condition of payment on their part.

3. Sales 🔑411 — Complaint Good under One of Two Constructions.

In an action by the buyers of goods against the sellers for breach of contract, if either construction of the complaint concerning demand to uphold its validity be correct, in the absence of special demurrer, it must be held that the complaint stated a cause of action on the original contract.

4. Estoppel 🔑78(1)—Oral Agreement to Extend Written Contract.

Under Civ. Code, § 1698, providing that a contract in writing may be altered in writing or by an executed oral agreement, and not otherwise, where the buyers of goods, by written contract, orally agreed to an extension of the contract, at the request and for the convenience of the sellers, in the buyers' action for breach, the sellers are not estopped from asserting that they are not bound by the oral agreement.

5. Frauds, Statute of 🔑125(1) — Oral Agreement to Extend Written Contract —Suit on Original Contract—Statute.

Civ. Code, § 1698, does not prevent a plaintiff from suing on an original written contract which has been orally extended, since the rule that neither a plaintiff nor a defendant can at law avail himself of a parol agreement to vary or enlarge the time for nerforming a contract previously made in writing, and requiring so to be by the statute of frauds, serves rather to preclude defendant from setting up an agreement to enlarge the time for delivery, than to prevent plaintiff from suing on the original contract for breach.

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

Action by James D. Donlon and Peter A. Donlon, copartners doing business as Donlon Bros., against Celine Meyer and others, copartners doing business as L. Meyer & Co. From a judgment for plaintiffs, defendants appeal. Judgment affirmed.

M. R. Jones and Titus, Creed, Jones & Dall, all of San Francisco, for appellants. W. S. Tinning and A. B. Tinning, both of Martinez, and Matthew Ward, of Antioch, for respondents.

LENNON, P. J. This is an appeal from a judgment in favor of the plaintiffs. Defendants appeal on the judgment roll alone, and urge as grounds for a reversal of the judgment the following points, namely, that the amended complaint does not state a cause of action, and that the findings do not support either the conclusions of law or the judgment.

It appears from the record that on April 29, 1915, L. Meyer & Co. agreed to sell, and Donlon Bros. agreed to buy, 30,000 grain bags at 6¾ cents per bag, payable on delivery, delivery to be made during the months of June and July, 1915. Up to June 30, 1915, defendants, in pursuance of the contract, had delivered to plaintiffs 2,000 bags. About the middle of July, 1915, plaintiffs demanded of the defendants delivery of the remaining 28,000 bags, but defendant requested that they be allowed to deliver the remaining bags within a reasonable time after the month of July, 1915, and plaintiffs, upon the representation of defendants that the postponement would be of advantage to the defendants, orally consented to the proposed postponement. Thereafter, and up to January 22, 1916, the defendants continued to deliver bags to the plaintiffs. On that date defendants refused to deliver any more bags. The value of the 11,069 bags which remained undelivered to plaintiffs on January 22, 1916, was $1,300.62, and as the contract price was $747.17, the court awarded damages in the sum of $553.45.

In support of the first point defendants contend that the amended complaint is defective because it does not contain an allegation that plaintiffs tendered the price of the bags. While it is true that the complaint is not free from uncertainty as to whether or not a demand was made for delivery during the months of June and July, 1915, which was the time provided for delivery by the original contract, nevertheless, we think, it is fairly inferable from the allegations of the complaint as a whole that such demand was made, accompanied by a statement in effect that the plaintiffs were ready, able, and willing to accept delivery of the bags and pay therefore.

[1] It is also fairly inferable from the allegations of the complaint that while the plaintiffs and the defendants were both doing business in the town of Antioch, in Contra Costa county, the bags, which were the subject-matter of the contract, were in the warehouse in San Francisco. Hence it is apparent that the bags were not present at the time of the demand to be delivered to the plaintiffs, and therefore it was unnecessary that actual payment or offer thereof accompany the demand for delivery, for "if the goods are not present to be delivered to the buyer, the buyer may accompany his demand with an offer to pay when actual delivery is made to him." Pearson v. McKinney, 160 Cal. 649, 660, 117 Pac. 919.

[2] Even if it cannot be said that the complaint does, in effect allege a demand for delivery at the times when delivery was due under the original contract, still other allegations of the complaint, even though they were intended to be the foundation for a cause of action, in part, for the failure to deliver pursuant to the parol agreement to extend the time of delivery, nevertheless suffice, in our opinion, when read and considered with the allegations of the complaint as a whole, to constitute a demand for delivery subsequent to the time when delivery was due under the original contract. The complaint further avers that in response to that particular demand the defendants notified plaintiffs that they would make no other or further delivery under the terms of the original contract. That being so, then pursuant to the provisions of sections 1439 and 1440 of the Civil Code the plaintiffs' cause of action accrued without the necessity of previous performance or offering to perform the condition of payment on their part.

[3] If either construction of the complaint concerning the demand be correct, then, in the absence of a special demurrer, it must be held that the complaint stated a cause of action upon the original contract.

[4] The trial court made a finding to the effect that the time of performance of the original contract was extended by an unexecuted oral agreement. Defendants contend that under this finding the trial court should have declared as a conclusion of law that the oral extension of the contract was invalid. The plaintiffs, on the other hand, argue in support of the finding and conclusion of law that, inasmuch as they entered into the oral agreement at the request and for the convenience of the defendants, defendants are estopped from asserting that they are not bound by the oral agreement, and the case of Seymour v. Oelrichs, 156 Cal. 782, 106 Pac. 88, 134 Am. St. Rep. 154, is relied upon to support this contention. That case affirms the right of courts of equity to hold a person estopped to assert the statute of frauds where such assertion would amount to practicing a fraud, stating that the operation of this equitable doctrine is not limited to any particular class of contracts included within the statutes of frauds, provided, always, the essential elements of an estoppel are present, and that to constitute an estoppel by acts or conduct the presence of fraud on the part of the person estopped is necessary.

In the present case the complaint contains no allegation of fraud on the part of defendants, nor any averment from which fraud might be inferred, nor did the court find fraud.

> "The rule which prohibits the modification of a written contract by parol is a rule, not of evidence, but of substantive law. * * * By that law the solemn obligations of parties evidenced by their writings may not be modified or set aside for fraud unless the rules of this substantive law in pleading the fraud are duly complied with." Harding et al. v. Robinson et al., 166 Pac. 808.

To extend the equitable doctrine expounded in Seymour v. Oelrichs to cover a case of this kind, where there is no fraud, and the only injury consists in the breach of the contract, would be, in effect, to do away with section 1698 of the Civil Code.

[5] However that section does not prevent a plaintiff from suing on the original written contract. The rule that neither a plaintiff nor a defendant can at law avail himself of a parol agreement to vary or enlarge the time for performing a contract previously entered into in writing, and required so to be by the statute of frauds, serves "rather to preclude

the defendant from setting up an agreement to enlarge the time for delivery in answer to the plaintiff's demand, than to prevent the plaintiff from suing on the original contract for a breach of it." Hickman v. Haynes, L. R. 10 C. P. 598; Williston on Sales, §§ 123-124.

While the finding that the extension of time within which to perform rested in parol should have compelled the conclusion of law that such extension was invalid because in contravention of the provisions of section 1698 of the Civil Code, nevertheless the plaintiffs' complaint pleads, and the cause of action proceeds, primarily upon the original written contract and a breach thereof by the defendant resulting in damage to the plaintiff. This finding is not assailed, as, indeed, it cannot be in the absence of a record showing the evidence adduced upon the trial of the case.

This finding in itself is sufficient to support the judgment, and the judgment is therefore affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

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35 Cal. App. 184

DURST et al. v. JOLLY et al. (Civ. 1730.)

(District Court of Appeal, Third District, California. Oct. 31, 1917.)

1. SPECIFIC PERFORMANCE ⟹28(2)—LEASES—UNCERTAINTY OF TERMS.

Where, under an unsigned memoranda of lease, defendants went into possession and made improvements under promise of the execution of a lease, they cannot enforce specific performance where the memoranda left for future settlement, terms and payment of rents, leveling of land, and purchase of plaintiffs' implements, as a court of equity cannot fix the terms and conditions to which the parties are to bind themselves.

2. SPECIFIC PERFORMANCE ⟹121(9)—TERMS OF INSTRUMENT—EVIDENCE.

Where a court is called on to specifically enforce an instrument, it must ascertain the terms from the instrument itself, and a pleading cannot construe such instrument or supply deficiencies.

3. QUIETING TITLE ⟹39—ANSWER—RIGHT OF POSSESSION—TENANTS HOLDING OVER.

In an action to quiet title, answer and cross-complaint *held* not sufficient to raise the issue that defendants, who held under an unenforceable agreement to execute a lease, had held over so as to entitle them to possession as tenants from year to year under Code Civ. Proc. § 1161, subd. 2.

4. QUIETING TITLE ⟹39—ANSWER—ALLEGATIONS IN CROSS-COMPLAINT.

An answer, in an action to quiet title, alleging that defendants' interest in the property was "as will more fully hereinafter appear," followed by a cross-complaint seeking specific performance of an agreement to lease, made the cross-complaint a part of the answer, although the cross-complaint was held bad as to the affirmative relief prayed for.

5. PLEADING ⟹349—JUDGMENT ON PLEADINGS—ADMISSION.

As owner of land is presumed to be entitled to possession, where a complaint to quiet title alleges ownership in plaintiff and the owner admits such allegation without negativing right of possession, there is no issue as to such right and the court properly gave judgment on the pleadings.

Appeal from Superior Court, Yuba County; E. P. McDaniel, Judge.

Action to quiet title by Rose Francis Durst, Murray H. Durst, Ralph H. Durst, Jonathan H. Durst, and Vernon R. Durst, against A. Jolly, Raphael Jolly, and Jane Doe Jolly. Judgment for plaintiffs, and defendants appeal. Affirmed.

E. Ray Manwell, of Marysville, and John M. Fulweiler, of Auburn, for appellants. W. H. Carlin, of Marysville, for respondents.

HART, J. The complaint was filed in January, 1915, and is in the usual form of an action to quiet title; the lands involved being ranch property in the counties of Yuba and Placer.

The defendants, A. Jolly, Raphael Jolly, and Mrs. Minnie Jolly, filed an answer in which they admitted that plaintiffs were the owners of the lands in question, but denied that they (plaintiffs) were entitled to the possession thereof. Defendants A. Jolly and Raphael Jolly admitted:

> "That they assert a claim and interest in and to said lands, and to the possession thereof, * * * but they deny that Mrs. Minnie Jolly * * * has or claims any interest whatever in or to said described lands, except as residing thereon with her husband, A. Jolly."

By way of cross-complaint, the defendants A. Jolly and Raphael Jolly alleged:

> "That on and prior to about the 1st day of September, 1913, the said defendants were and had been residing upon and cultivating and farming and raising hops on and under a lease from year to year for the plaintiffs a large portion of the lands described in the complaint; that on or about said 1st day of September, 1913, the plaintiffs were desirous of leasing to these two defendants the lands described in the complaint, to be farmed and cultivated by defendants as hop lands and to be farmed as such, for the term of five years, and after considerable negotiations the plaintiffs drew up and submitted to the defendants a memoranda of lease containing the terms and conditions of the lease to be executed and delivered to the defendants within a reasonable time thereafter, a copy of the said memoranda of lease is hereunto annexed and made a part hereof, and marked 'Exhibit A.'"

The said memoranda were not signed by either of the parties.

It is next alleged that defendants "accepted the terms and conditions of said proposed lease"; that it was understood and agreed that a lease, in accordance with the terms of said "memoranda of lease," should be drawn and executed by plaintiffs; that in the meantime defendants were to enter into possession of said lands, the same as if said lease had been executed and delivered; that defendants went into the possession of said lands and began the farming and cultivation thereof according to the terms of said "memoranda of lease," believing a lease would be executed to them for the term of five years from the month of September, 1913, to the 1st of October, 1918; that, relying on said "memoranda of lease," defendants began farming said lands and planted the same in hops, expended large sums of money in putting a certain levee in proper condition, in clearing about 20 acres of land, boring a well, the purchase of wagons and mules, etc. It is alleged that, about the 15th day of December, 1913, plaintiffs presented to and asked defendants to sign a lease, but that defendants refused so to do "because the said lease was altogether different and much more onerous than the one agreed upon, as set out in said Exhibit A, and plaintiffs promised and agreed to change the same, and told defendants to go right ahead the same as had been agreed upon for the term of five years, that the matter would be fixed out thereafter as originally agreed upon"; that, relying upon said understanding, defendants continued to work said lands as required by the terms of said Exhibit A, "and at the end of the year in September, 1914, had done so at a loss of more than $250, besides the performance of their own labor up to said date." It is further alleged that, relying upon said understanding and with the consent of plaintiffs, defendants, in September and October, 1914, did a large amount of work on said ranch preparing the same for cultivation in the season of 1915, at a cost to them of more than $2,100.

The prayer of the cross-complaint is:

> "That plaintiffs be required to execute and deliver to said defendants a lease of the lands described in the complaint for a term of five years in accordance with and containing the terms and conditions set out and contained in the memoranda of lease, Exhibit A."

Exhibit A, attached to the complaint, covers four typewritten pages and, in terse sentences, specifies what each of the parties to the proposed lease was expected to do. To said cross-complaint and to said Exhibit A, plaintiffs filed a demurrer on general grounds and also specifying that certain designated portions thereof were ambiguous, uncertain and unintelligible. The judge presiding at the hearing of the demurrer in the court below filed a written opinion which, among other matters, contained the following:

> "An inspection of the memoranda prepared and set forth as Exhibit A in the complaint shows that the minds of the parties never met in many of the terms to be contained in the lease. These terms were left for after consideration and agreement between the parties. * * * The cross-complaint seems to be full and well pleaded. I cannot see how it will be possible for defendants to state the matters therein stated, or to supply any allegation that would render the pleading unobjectionable. Therefore the demurrer is sustained without leave to amend."

On the 28th of June, 1915, the cause coming on regularly for trial, plaintiffs moved for judgment upon the pleadings in accordance with the prayer of plaintiffs' complaint. The motion was granted, and judgment was entered quieting plaintiffs' title to the premises described in the complaint and decreeing that they were entitled to the possession thereof. The appeal is by defendants from said judgment.

[1] The demurrer to the cross-complaint was properly sustained, and, since the relief demanded by that pleading depended entirely on the "memoranda of lease," it is manifest that no cause of action for such relief could be stated by the plaintiffs; hence the order refusing leave to amend was proper.

As seen, the learned trial judge, who heard and disposed of the demurrer to the cross-complaint, filed a written opinion setting forth his reasons for sustaining the demurrer. Said opinion is printed in the transcript on appeal. One of the reasons advanced by him in said opinion for holding that the cross-complaint failed to state a cause of action for the relief demanded by that pleading was that it appeared from the "memoranda of lease" referred to in said complaint that the agreement or lease to be executed by the parties was to be reduced to writing, and that, since the instrument just named was signed by neither of the parties and the proposed lease was not executed or put in writing and signed by the parties, there was no completed contract or agreement which was binding upon either of the parties, thus bringing the case as made by the cross-complaint within the doctrine enunciated in the following cases: Fuller v. Reed, 38 Cal. 100; Spinney v. Downing, 108 Cal. 666, 41 Pac. 797; Ambler v. Whipple, 20 Wall. 546, 22 L. Ed. 403; Morrill v. Tehama, etc., Co., 10 Nev. 125—which hold that where parties agree to reduce to writing contracts of a certain character whereby and wherein they propose to set forth the terms and conditions of the agreement verbally made with respect thereto, and fail to put their agreement in writing, there is a failure to make a completed contract or one that is binding upon either of the parties, and that an action on such an agreement cannot be maintained, notwithstanding that one of the parties may have partly executed the terms thereof. It may be observed that it is further held in said cases that, as to contracts of the character of those dealt with therein, the party who claims to be entitled to the benefit of such contract on the ground of part performance with the knowledge of the other party cannot set up an estoppel as a defense against the repudiation of the agreement by the latter.

Cases may readily be conceived in which verbal agreements for the sale or leasing of real property might be enforced, or where the attempted repudiation or rejection of such agreements by the vendor or lessor might be met or overcome by setting up and establishing an estoppel. Cases in which contracts not enforceable in courts of law because they contravene the statute of frauds, but which will nevertheless be enforced by courts of equity, are not uncommon. But the facts in such cases must be so clear that there can be little or no question as to their effect or that they plainly and clearly call for the favorable interposition of equity. The case here, however, so far as the cross-complaint is concerned, proceeds entirely upon the theory that the instrument called the "memoranda of lease" clearly and unmistakably discloses the terms and conditions of the proposed lease, or sufficiently so to render the writing capable of being specifically enforced so that the result would be that the defendants, through a decree requiring the specific performance of its terms, would secure the lease which they conceive that its provisions call for. This in effect is the relief demanded by the cross-complaint. But the instrument is not clear and unmistakable as to its meaning and terms. Indeed, the difficulty standing in the way of its specific enforcement lies in the very fact of its manifest uncertainty and indefiniteness as to the terms upon which the land was to be leased to the defendants for the term of five years. In fact, as is stated and was pointed out by the trial judge in his written opinion:

> "An inspection of the memoranda shows that the minds of the parties never met on many of the terms to be contained in the proposed lease. These terms were left for future consideration, ascertainment, and agreement between the parties."

A few of the particulars in which the instrument referred to is wholly wanting in certainty and definiteness as to terms and conditions may be given: It is provided therein:

> "It is contemplated that Jolly & Sons shall have a lease for five years. However, we must arrive at terms and rates of pmts. etc."—evidently meaning, "terms and rates of payments."

Again, it is provided that:

> "Durst Bros. stand ready to advance Jolly & Sons money to buy their cattle or other stock, if proper terms according to their judgment can be obtained."

It is further provided that:

> "Jolly & Sons to buy Durst Bros. farming implements—wagons, scales, etc., as mutually agreed on."

Furthermore, the "memoranda of lease," while containing a provision that the proposed lease shall likewise contain a provision that a certain portion of the land shall be "leveled," in no way designates or describes the portion of the land to which that provision refers. Nor is there any provision or statement in the instrument indicating when the lease shall begin.

The foregoing is sufficient to show that there were vital features of the proposed lease upon which the minds of the parties had not met or come together. The writing upon which the defendants rely is therefore too indefinite and uncertain to make it capable of specific enforcement or to justify a decree compelling the plaintiffs to execute a lease in purported conformity thereto.

A court of equity obviously cannot prescribe or fix the terms and conditions to which the parties are to bind themselves by a contract or an agreement, and this is what the court in this case would be required to do in the several particulars above indicated if it were to attempt to compel the plaintiffs to execute to the defendants a lease to run for five years. It would have to ascertain, perhaps upon conflicting evidence, the matter of the "rates and terms of payments." It would be required to ascertain, perhaps upon conflicting evidence, when the five-year lease was to commence, and it would have to determine, possibly upon conflicting proofs, what portion of the land demised was to be leveled by the defendants. In addition to the particulars above mentioned in which the instrument called the "memoranda of lease" is deficient because of uncertainty and indefiniteness, there are other particulars in which the provisions contained in said instrument are ambiguously phrased, and this language would require construction to get at or ascertain the real meaning thereof. That the parties themselves do not agree as to the full meaning of the "memoranda of lease" is shown by the fact that the plaintiffs submitted to the defendants a written lease, which the latter refused to accept because, as they claimed, it did not conform to the terms set out in said memoranda.

"An agreement, the terms of which are not sufficiently certain to make the precise act which is to be done clearly ascertainable," cannot be specifically enforced. Civ. Code, § 3390, subd. 6; Magee v. McManus, 70 Cal. 553, 12 Pac. 451; Smith v. Taylor, 82 Cal. 533, 23 Pac. 217; Berry v. Woodburn, 107 Cal. 504, 40 Pac. 802; Stanton v. Singleton, 126 Cal. 657, 59 Pac. 146, 47 L. R. A. 334; Reymond v. Laboudigue, 148 Cal. 691, 84 Pac. 189.

In Magee v. McManus, supra, it is said:

> "Whether the true contract be that which the court finds or that which the plaintiff alleges, it is indefinite and uncertain not only as to the time of the payment of the note and mortgage to be executed, but as to the amount for which the mortgage was to be given, and the rate of interest upon the debt. It appears that these things were to be the subject of future ascertainment and agreement, so that the mortgage when executed would be sufficient security for the plaintiff. As therefore the agreement was not final, and it was indefinite and uncertain in its terms and in itself, specific performance of it could not be enforced in equity"—citing Morrison v. Rossignol, 5 Cal. 65; Los Angeles, etc., Ass'n v. Phillips, 56 Cal. 539; Potts v. Whitehead, 20 N. J. Eq. 55.

In Pomeroy on Contracts, § 159, it is said:

> "A greater amount or degree of certainty is required in the terms of an agreement which is to be specifically executed in equity than is necessary in a contract which is the basis of an

action at law for damages. An action at law is founded upon a mere nonperformance by a defendant, and this negative conclusion can often be established without determining all the terms of the agreement with exactness. The suit in equity is wholly an affirmative proceeding. The mere fact of nonperformance is not enough; its object is to procure a performance by the defendant, and this demands a clear, definite, and precise understanding of all the terms; they must be exactly ascertained before the performance can be enforced."

[2] It is not necessary to cite authorities to support the proposition that the court, when called upon specifically to enforce an agreement, must ascertain the terms of the instrument sought to be enforced from the instrument itself and not from the construction put upon it in the pleading demanding its enforcement. A complaint in specific performance cannot supply the deficiencies which may render the contract nonenforceable in equity.

[3] But there appears to be some claim that the cross-complaint shows that the defendants held over and remained in possession of the land after the expiration of their first year's possession thereof under the alleged lease a sufficient length of time, without any demand of possession or notice to quit by the plaintiffs, to raise the presumption, declared in subdivision 2 of section 1161 of the Code of Civil Procedure, that they were then holding the possession by permission of the plaintiffs and so entitled to hold under the lease for an additional full year. The section mentioned provides that a holding over by the tenant for a period of 60 days under the circumstances above indicated will have the effect stated.

There is no such issue set up in the cross-complaint. Nor is there anything therein showing precisely when the defendants went into the possession of the land under the agreement whereby the plaintiffs are alleged to have agreed to execute the five-year lease of the land to the defendants; and there is no allegation showing when their first year of possession under said agreement expired. As we have shown, the cross-complaint alleged that "about the 1st day of September, 1913," the defendants were and had been residing on and cultivating, etc., the land; that "on or about the 1st day of September, 1913, the plaintiffs were desirous of leasing to these defendants the lands described in the complaint," etc.; and that after considerable negotiations the plaintiffs submitted to the defendants the "memoranda of lease," above referred to, and the latter accepted the same. In paragraph 4 of the cross-complaint, it is alleged that the defendants entered into the possession of said land with the knowledge and consent of the plaintiffs and began the farming and cultivation thereof according to the terms of said memoranda of lease, and believing that "said properly executed lease of said lands would be drawn up and delivered to them for the term of five years from the month of September, 1913, up to the 1st day of October, 1918." Elsewhere the complaint sets forth in detail the work and improvements put upon the land by the defendants during the first year they occupied the same under the agreement, and concludes by alleging:

> "And did other and all the work on said lands necessary to properly farm and occupy the same for the year ending October, 1914, and also for the full term of five years," etc.

Again, it is alleged that all that was required of the defendants by the alleged agreement in the way of working and farming the land was faithfully performed by the defendants "and at the end of the year in September, 1914, they had done so at a loss," etc. In paragraph 11 it is alleged that "these defendants during the months of September and October, 1914, continued to farm and work said lands," etc. In the same paragraph it is alleged that the defendants cleared the land in certain particulars preparatory to "the cropping of said lands for the year 1915," etc. In paragraph 12 it is alleged that the defendants "laid out and expended in cash and labor between the 25th day of September and the 19th day of October, 1914, the sum of $2,139.65," etc.

The above is a reproduction, in substance, of every allegation in the cross-complaint respecting dates or the times when the several acts referred to by the said complaint were done; and from said allegations it cannot be told whether the first year expired in the month of September or the month of October; nor is it made to appear therefrom that the defendants were in possession after the expiration of the month of October, 1914. Assuming, though, that the cross-complaint shows that the first year expired on the 1st of October, 1914, and that the defendants were in possession down to the last day of October or to the 1st day of November, 1914 (and this does not clearly appear from said pleading to be true), and yet the showing thus made or assumed to be made is not sufficient as to the time of holding over to bring the case within the terms of section 1161, subd. 2, of the Code of Civil Procedure, so as to entitle the defendants to the possession of the land "for another full year."

We do not think the court erred in granting the motion of the plaintiffs for judgment on the pleadings.

In paragraph 1 of the answer, the defendants, while admitting that the ownership of the land is in the plaintiffs, deny that the "plaintiffs were at the time of the commencement of this action or are now entitled to the possession of the lands or any part thereof, as will more fully hereinafter appear." In paragraph 2 it is alleged that the defendants admit that they assert and claim an interest in and to said lands, and to the possession thereof, "as will more fully hereinafter appear." In paragraph 3 the defendants "deny that their claim of interest in or to said described lands, or that their or any of their estate or right or title or interest or claim in or to said lands or premises is without right, but on the contrary they aver that their said estate and right and title and interest and claim is good and valid."

[4, 5] Taken alone or without reference to the cross-complaint, the answer might perhaps properly be held to be sufficient to have submitted an issue upon the right of possession to the land in controversy. But it is evident that, in support of the denials of the answer or as showing the grounds upon which the defendants based their claim to the right of possession, the intention was to make the allegations of the cross-complaint a part of the answer, and that the answer does in fact do so by the words, used in two of its paragraphs, "as will more fully hereinafter appear." In fact, counsel for the appellants insist that, notwithstanding the order sustaining the demurrer to the cross-complaint, whereby the latter pleading as such was eliminated from the case, its allegations must, nevertheless, in so far as they may go in support of the denials of the answer, be regarded and considered as a part of the last-named pleading. We think that this position is sound. The effect of the language, "as will more fully hereinafter appear," followed by the allegations of the cross-complaint setting forth in detail the nature of the claim of the defendants to the right of possession, is to make the latter allegations a part of the answer as effectually as though they were actually incorporated into and made a part of the answer. So far, therefore, as said allegations were intended as a cross-complaint calling for the affirmative relief appropriate thereto, they are no longer in the case; but, as a part of the answer or the defense set up thereby, they can still be considered; and, so considering them, the irresistible conclusion is that they do not support the general denials of the answer. To the contrary, they vitiate or set at naught or contradict said denials. The complaint, as we have seen, alleges ownership in the plaintiffs. The answer admits this allegation. The presumption following from ownership is that the right of possession is in the owner. This presumption of the right of possession was not negatived by the allegations of the answer considered as above indicated. There was, then, no issue of fact to try, and, consequently, there was nothing left for the court to do but to order judgment on the pleadings.

We have discovered no reason for disturbing the judgment, and it is, accordingly, affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

35 Cal. App. 150

CLINE, Sheriff, v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al. (Civ. 2478.)

(District Court of Appeal, Second District, California. Oct. 26, 1917.)

1. Certiorari 🔑5(1)—Existence of Other Remedy.

Under Code Civ. Proc. § 1068, as to writ of review, the writ does not lie when petitioner has a right of appeal from the order which he seeks to have reviewed.

2. Appeal and Error 🔑115—Right of Appeal.

Where a sheriff after levy of execution upon personal property, and service on him of written claim under Code Civ. Proc. § 689, refused to make sale without indemnity bond, which plaintiff declined to furnish and plaintiff in the action procured and served on him an order to show cause, upon which the court ordered him to make the sale without requiring bond, he had a right of appeal from such order, it having the effect of a judgment against him as to his claims of rights under Code Civ. Proc. § 689, and he having, by the order to show cause and the subsequent proceedings thereunder, been made a party to a collateral proceeding arising in the action.

Petition by John C. Cline, Sheriff, for writ of review against the Superior Court of the State of California in and for the County of Los Angeles and Charles Monroe, judge thereof. Writ discharged, and proceeding dismissed.

Loewenthal, Loeb & Walker, of Los Angeles, for petitioner. A. W. Ashburn, of Los Angeles, for respondents.

CONREY, P. J. In this proceeding a writ of review has been issued whereby the petitioner seeks to obtain judgment annulling an order made by the superior court of Los Angeles county. In an action wherein one E. O. Lenox was plaintiff, judgment was entered against several defendants, one of whom was Max Goldschmidt. A writ of execution upon that judgment was duly issued and placed in the hands of the petitioner as sheriff of Los Angeles county. Pursuant to instructions in writing by the attorney of Lenox, the sheriff levied upon all the right, title, and interest of Max Goldschmidt in and to certain personal property described as property of Goldschmidt Bros., it being claimed by Lenox that Max Goldschmidt was a partner in that firm. After the levy had been made, one Herman Goldschmidt served upon the sheriff a written claim, verified by his oath and made out in accordance with the provisions of section 689 of the Code of Civil Procedure, claiming as his property the said property levied upon by the sheriff and setting out the right of said Herman Goldschmidt to the possession thereof. Thereupon the sheriff informed the plaintiff's attorney that he would not make sale of the property, unless the plaintiff would deliver to the sheriff a bond in the sum of $300,000 to indemnify the sheriff against such third party claim. The plaintiff declined to furnish the indemnity bond, and the sheriff refused to proceed further in the matter without indemnity. Thereupon Lenox, by his attorney, filed in said action an affidavit which stated the foregoing facts and the circumstances in full detail, and asked that the court order the sheriff to advertise for sale and sell the interest of Max Goldschmidt in said property without requiring the delivery of any bond by the plaintiff. An order to show cause was issued and served upon the sheriff, and a hearing was had before the court upon the above-mentioned affidavit and counter affidavits. The court determined the matter against the sheriff, granted the motion of Lenox, and ordered the sheriff "to sell the interest in the partnership property without requiring bond." The principal facts are not only stated in the petition, but are admitted by the return filed herein. Together with its return, respondent court demurred to the petition, and has moved the court for an order dismissing this proceeding upon several grounds, of which one is that the petitioner has a right of appeal from said order of the superior court.

[1] The writ of review does not lie when the petitioner has a right of appeal from the order which he seeks to have reviewed. Code Civ. Proc. § 1068; Stoddard v. Superior Court, 108 Cal. 303, 41 Pac. 278.

[2] We are satisfied that the sheriff has a right of appeal from the order in question. It is admitted that he is not a party to the action in which the writ of execution was issued, and that he is not interested in the subject-matter of that writ; but he is interested in the order made against him, and in the protection of the rights which he claims to have under the provisions of section 689, Code of Civil Procedure. As to those claims the order in question has the effect of a judgment against him. By virtue of the order to show cause and the subsequent proceedings thereunder, the sheriff has been made a party to a collateral proceeding arising in the action, and he has a right to appeal from an order having the nature and effect of a judgment against him in such proceeding. The case is governed by the principles announced by the Supreme Court in Anglo-Californian Bank, Ltd., v. Superior Court, 153 Cal. 753, 96 Pac. 803. In that case it appeared that in an action to which the Anglo-Californian Bank was not a party, the superior court made an order requiring that the bank pay over to the receiver in the action money which the bank had in its possession as agent of the California Safe Deposit & Trust Company, an insolvent corporation. The bank did not claim any interest in the funds, but refused to pay to the receiver because claims were made to the bank by third parties who asserted ownership in said funds. Claiming that the order was one made in excess of the jurisdiction of the superior court, the bank applied to the Supreme Court and obtained a writ of review. After full consideration of the matter, that court determined that the writ was improperly issued because the petitioner had a right of appeal from the order. For that reason the proceeding was dismissed. The court said:

> "That an order of the character of the one under consideration is generally appealable by one affected thereby who is a party to the record is practically conceded by learned counsel for plaintiff, and it must be under the decisions of this court. The theory upon which the decisions sustain such right of appeal by such a party from such an order is that the order is in effect a final judgment against him in a collateral proceeding growing out of the action—is so far independent of the suit itself as to be substantially a final decree for the purposes of an appeal. * * * See Grant v. Superior Court, 106 Cal. 324 [39 Pac. 604]; Grant v. Los Angeles, etc., Ry. Co., 116 Cal. 71 [47 Pac. 872]; Los Angeles v. Los Angeles, etc., Co., 134 Cal. 121 [66 Pac. 198]. Plaintiff's position on the merits is that by reason of the claim made against it by the third parties as to this money, it cannot safely pay the same to the receiver except in pursuance of some judgment or order made in a proceeding to which such claimants are parties, and that it is entitled either to retain the money until such controversy is determined, or to pay the money into a court having jurisdiction thereof, to abide such determination. The order in question is a final adjudication against plaintiff upon these matters. Its effect, if valid, is to require plaintiff to forthwith pay such money to the receiver, and finally deprive it of possession thereof without securing it against the claims of such third parties. It is clearly within the class of orders referred to in the cases last cited. Plaintiff was, of course, a party to the record, so far as such collateral proceeding was concerned, having been brought in as such a party by the order to show cause, and is fully within the rule of Elliott v. Superior Court, 144 Cal. 506 [77 Pac. 1109, 103 Am. St. Rep. 102], in regard to parties entitled to appeal."

In the case at bar the sheriff has been made "a party to the record, so far as such collateral proceeding was concerned, having been brought in as such party by the order to show cause." Being thus before the court and having been subjected to an adverse judgment affecting his substantial rights, he has the right of appeal from that judgment. It follows that the writ of review in this proceeding was improperly issued.

The writ is discharged, and the proceeding dismissed.

We concur: JAMES, J.; SHAW, J.

(35 Cal. App. 194)

PEOPLE v. CASA CO. et al.

CHOWN v. ALEXANDRE et al.

(Civ. 2022, 2191.)

(District Court of Appeal, First District, California. Nov. 1, 1917. Rehearing Denied by Supreme Court Dec. 31, 1917.)

1. CONSTITUTIONAL LAW 🔑306—NUISANCE 🔑60—DUE PROCESS OF LAW—ABATEMENT ACT.

The abatement act (St. 1913, pp. 20, 22), declaring all buildings and places used for purposes of assignation, or prostitution to be "nuisances," and providing for their abatement and prevention by injunction or otherwise, does not violate the Fourteenth Amendment, by depriving one of his property in consequence of a misdemeanor committed therein, without his knowledge, connivance, or consent, as every owner of property who leases it owes the public a certain degree of diligence, and as proof of general reputation of the place is sufficient to impute knowledge to him, and as the act does not undertake to provide for a judgment of abatement otherwise than against persons properly joined as defendants in an action and brought in by proper process and afforded an opportunity to be heard.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Nuisance.]

2. NUISANCE ⟹77, 81, 88 — ABATEMENT — PROCEEDING.

The suppression of a nuisance is essentially a proceeding in rem operating upon the property used in the maintenance of the nuisance, and while the owner having no actual knowledge of the character of the business carried on in his building might personally be bound for the costs, the building and furniture may be proceeded against and subjected to forfeitures prescribed by the state.

3. CONSTITUTIONAL LAW ⟹81—FOURTEENTH AMENDMENT—POLICE POWER.

The Fourteenth Amendment does not affect or in any manner curtail the police power of the state, and all owners hold their property subject to such police power and to such reasonable conditions as may be deemed by the governing authority essential to the public safety, comfort, and health.

4. NUISANCE ⟹60—ABATEMENT ACT—VALIDITY—PENALTY.

St. 1913, pp. 20, 22, declaring all buildings in which acts of lewdness, assignation, or prostitution occur, or which are used for such purposes, to be nuisances and providing for their abatement and prevention by injunction or otherwise, and permitting the building to be closed and kept closed against its use for any purpose for one year, unless sooner released in the manner provided by law, is not invalid as harsh, unreasonable, and oppressive, and in effect a penalty.

5. STATUTES ⟹64(6)—PARTIAL INVALIDITY—ABATEMENT OF NUISANCE.

The provision of section 6 for punishment by contempt is not a necessary or inseparable part of such act, and may be entirely eliminated, and the remainder of the statute be treated as valid.

6. STATUTES ⟹76(1)—GENERAL OR SPECIAL LAW.

The Legislature has power to determine whether a general law can be made applicable to any given case, and to make different laws for different classes of persons, which determination may not be interfered with by the courts, unless the classification is palpably arbitrary.

7. STATUTES ⟹77(1) — SPECIAL LAWS — CLASSIFICATION—ABATEMENT OF DISORDERLY HOUSES.

The abatement act (St. 1913, pp. 20, 22) is not objectionable as special legislation, as such classification is justifiable and in furtherance of the public policy of the state to suppress houses of prostitution.

8. NUISANCE ⟹82—ABATEMENT—"PROSECUTION" IN NAME OF PEOPLE.

Such act, providing not merely for the abatement of the nuisance described, but also for the removal and sale of all the personal property used in its maintenance and for the effectual closing of the building or place for one year against its use for any purpose, unless sooner released as provided by law, is not a "prosecution" within Const. art. 6, § 20, which must be conducted in the name of the people of the state; the word "prosecution" being used in a limited sense to signify only prosecutions of a criminal character.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Prosecution.]

9. NUISANCE ⟹60 — PRESUMPTION OF CONSTITUTIONALITY — NATURE OF REMEDY — ABATEMENT LAW.

Every presumption is in favor of the constitutionality of such act, and the fact that the criminal aspect of the maintenance of houses of prostitution was fully covered by existing statutes fortifies the presumption that the Legislature intended thereby to provide a remedy for the prevention and abatement of a recognized evil which would be in the nature of a civil proceeding rather than a criminal prosecution.

10. NUISANCE ⟹77—INJUNCTION—JURISDICTION OF EQUITY.

Courts of equity have jurisdiction to restrain and enjoin common nuisances.

11. NUISANCE ⟹60—ABATEMENT LAW—VALIDITY—SUIT BY CITIZEN.

The abatement law (St. 1913, pp. 20, 22) is not invalid because authorizing an action to abate a nuisance to be brought by an individual citizen without a showing that he is especially damaged, as it prevents a multiplicity of suits; that being a mere matter of legislative discretion, not reviewable by the court.

12. NUISANCE ⟹82—ABATEMENT OF PUBLIC NUISANCE—RIGHT OF PRIVATE INDIVIDUAL.

The state may confer the right to bring an action to abate a public nuisance upon a private individual in addition to his existing right to bring such action where there is a special injury to him, and such power is expressly conferred by Code Civ. Proc. § 369.

13. NUISANCE ⟹77 — ABATEMENT LAW — "BILL OF ATTAINDER."

The abatement law (St. 1913, pp. 20, 22) declaring buildings in which acts of lewdness, assignation, or prostitution occur, or which are used for such purposes, to be nuisances, and providing for their abatement by injunction or otherwise, is not in the nature of a "bill of attainder," the purpose of which at common law was to punish by forfeiture and corruption of blood, but the object of the act is not to punish, but to effect a reformation of the property itself, and is not a "bill of attainder" for the further reason that there is no forfeiture of property.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Bill of Attainder.]

Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by the People against the Casa Company, the Landry C. Babin Company, and Harry Fournier. Action by James C. Chown against Joseph Alexandre and others. Judgment for plaintiff in first case, and defendants appeal, and for defendants in second case, and plaintiff appeals. Judgment affirmed in first case, and reversed in second case.

Civ. No. 2022:

Walter H. Linforth and George Appell, both of San Francisco (A. S. Newburgh, of San Francisco, amicus curiæ), for appellants. Chas. M. Fickert, Dist. Atty., and A. L. O'Grady, Asst. Dist. Atty., both of San Francisco (Edward C. Harrison, of San Francisco, of counsel, and Alvin Gerlack and J. E. White, both of San Francisco, amici curiæ), for respondents.

Civ. No. 2191:

Edward C. Harrison and Maurice E. Harrison, both of San Francisco, for appellant. J. A. Cooper, of San Francisco, for respondents.

LENNON, P. J. These actions were instituted against the defendants pursuant to the provisions of an act entitled "An Act declaring all buildings and places nuisances wherein or upon which acts of lewdness, assignation or prostitution are held or occur, or which are used for such purposes, and providing for the abatement and prevention of such nuisances by injunction and otherwise." Stats. 1913, pp. 20, 22.

In the case of People of the State of California v. Casa Co. et al., the trial court made its findings in substantial accord with the allegations of the complaint, and to the effect that the designated building had been and was being used and occupied for the purposes of lewdness, assignation, and prostitution, and that because thereof the said building was a public nuisance. Accordingly judgment was entered decreeing that said building and each and every part thereof be effectively closed against its use for any purpose, and so kept closed for a period of one year, unless sooner released in the manner provided by law.

The appeal is from the judgment upon the judgment roll alone, and the points made in support of the appeal are directed solely to the constitutionality of the act in question.

[1, 2] Appellants contend that the act provides for a judgment which may deprive a man of his property in consequence of misdemeanors committed thereon without his knowledge, connivance, or consent, and therefore that it violates the Fourteenth Amendment to the federal Constitution. This point is not well taken. Every owner of property who leases it or puts another in possession of it owes to the public a certain degree of diligence, and proof of the general reputation of the place is sufficient to impute to him knowledge. State v. Gilbert, 126 Minn. 95, 147 N. W. 953. Furthermore, the suppression of a nuisance is essentially a proceeding in rem, operating upon the property used in the maintenance of the nuisance, and "while, therefore, the owner having no actual knowledge of the character of the business carried on in his building might personally be bound for the costs, the building and furniture may nevertheless be proceeded against and subjected to the forfeitures prescribed by the statute." People v. Barbiere, 166 Pac. 812.

The act does not undertake to provide for a judgment enforcing and insuring abatement of the nuisance otherwise than as against persons who are properly joined as defendants in the action and brought in by proper process and afforded an opportunity to be heard, and thus the constitutional requirement of due process is fully complied with. Littleton v. Fritz, 65 Iowa, 488, 22 N. W. 641, 54 Am. Rep. 19; State v. Jordan, 72 Iowa, 377, 34 N. W. 285; State v. Gilbert, 126 Minn. 95, 147 N. W. 953.

[3] The Fourteenth Amendment to the federal Constitution does not affect or in any manner curtail the police power of the state (Barbier v. Connolly, 113 U. S. 27, 31, 5 Sup. Ct. 357, 28 L. Ed. 923), and since all owners hold their property subject to such police power and to such reasonable conditions as may be deemed by the governing authority essential to the public safety, comfort, and health, the real question to be determined is whether or not the act is a valid exercise of the police power by the Legislature.

[4] Appellants contend that the provision of the statute in question permitting the building to be closed and kept closed against its use for any purpose for one year unless sooner released in the manner provided by law is unduly harsh, unreasonable, and oppressive, and that it is in effect a penalty. In answer to this contention we need only point out that the states of Nebraska, Washington, Minnesota, and Illinois all have red light abatement statutes similar in substance and form to the act under discussion, and in each of these states this provision of the act has been held constitutional and valid against precisely the same contention made here. English v. Fanning, 96 Neb. 123, 147 N. W. 215; State v. Emerson, 90 Wash. 565, 155 Pac. 579, L. R. A. 1916F, 325; State v. Gilbert, 126 Minn. 95, 147 N. W. 953; People v. Smith, 275 Ill. 256, 114 N. E. 31, L. R. A. 1917B, 1075.

[5] It is unnecessary to consider the point made by appellants to the effect that the provisions of section 6 of the act in regard to punishment for contempt are void because they are in the nature of special legislation and in conflict with section 1218 of the Code of Civil Procedure, fixing a penalty for contempts generally. In the first place, appellants are not aggrieved by this section, inasmuch as no contempt was alleged or found to have been committed, and, in the second place, this provision is not a necessary or inseparable part of the act, and may therefore be entirely eliminated, and the remainder of the statute be treated as valid. Davidson v. Von Detten, 139 Cal. 469, 73 Pac. 189; State Commission v. Chicago Co., 275 Ill. 555, 114 N. E. 325, Ann. Cas. 1917C, 50.

This point and the other points raised on this appeal are fully discussed and decided adversely to appellants' contentions in a recent decision of the appellate court of the Third district in the case of People v. Barbiere, 166 Pac. 812, and we are satisfied with the reasoning of, and the conclusion arrived at, by Mr. Justice Hart in that case, and concurred in by his associates.

The case of Chown v. Alexandre et al. comes up on an appeal from a judgment sustaining defendants' demurrer to a complaint, similar in purpose and allegations to the case previously considered.

[6] The only additional point raised in this case involves the constitutionality of the act under consideration to the extent that it provides for and permits the institution and maintenance of the action by an individual citizen in his own name without a showing that he is specially damaged.

[7] In this behalf it is argued that a general law can be made applicable to the present case, and that therefore the act in question is objectionable as special legislation. It is well settled that the Legislature has power to determine whether a general law can be made applicable to any given case and to make different laws for different classes of persons, and we may not interfere with its determination upon that question unless the classification is palpably arbitrary. People v. Mullender, 132 Cal. 217, 221, 64 Pac. 299. It has been decided that the classification is justifiable and in furtherance of the public policy of the state to suppress houses of prostitution. Pon v. Wittman, 147 Cal. 280, 292, 81 Pac. 984, 2 L. R. A. (N. S.) 683.

[8] It is contended that, inasmuch as the act provides not merely for the abatement of the nuisance described, but also for the removal and sale of all the personal property used in the maintenance of the nuisance and for the effectual closing for one year of the building or place against its use for any purpose, unless sooner released in the manner provided by law, that the act is penal in its nature, and that therefore a proceeding under it constitutes a prosecution within the meaning of section 20 of article 6 of the state Constitution, and consequently must be conducted in the name of the people of the state.

That the word "prosecution" in section 20 of article 6 of the Constitution is used in a limited sense, viz. as signifying only prosecutions of a criminal character is not questioned, but it is insisted that, while the action is in form a civil action in equity to abate a nuisance, in substance it is a criminal prosecution. We do not so construe it. The purpose of the statute as stated in its title is "the abatement and prevention of such nuisances by injunction and otherwise," and, we think, the provisions of the statute merely effectuate this purpose.

[9] Every presumption is in favor of the constitutionality of the statute (Stubbe v. Adamson, 220 N. Y. 459, 116 N. E. 372, 376), and the fact that the criminal aspect of the maintenance of houses of prostitution was already fully covered by existing statutes when the statute in question was enacted fortifies the presumption that the Legislature intended thereby to provide a remedy for the prevention and abatement of a recognized evil which would in its nature be a civil proceeding rather than a criminal prosecution (Pen. Code, §§ 315, 316; State v. Gilbert, 126 Minn. 95, 147 N. W. 953).

[10, 11] The jurisdiction of courts of equity to restrain and enjoin common nuisances affecting the public generally has never been denied, and is not here disputed. But in this connection it is argued that the statute is invalid because it authorizes an action to abate a nuisance to be brought by an individual citizen without a showing that he is especially damaged. The reason for the rule in this behalf was to prevent a multiplicity of suits, but that is a mere matter of legislative discretion, and questions of policy or expediency in legislation are for the lawmaking power itself, and not for the courts to determine. Littleton v. Fritz, 65 Iowa, 488, 22 N. W. 641, 54 Am. Rep. 19.

[12] It is well established that the state may confer the right to bring an action to abate a public nuisance upon a private individual in addition to his existing right to bring such actions where there is a special injury to him (State v. Fanning, 96 Neb. 123, 147 N. W. 215; Littleton v. Fritz, supra), and in this state this power is expressly conferred by section 369 of the Code of Civil Procedure, which states that a person expressly authorized by statute may sue without joining with him the person for whose benefit the action is prosecuted.

[13] The point urged by amicus curiæ to the effect that the act is in the nature of a bill of attainder is without merit. The purpose of attainder at common law was to punish and its consequences were forfeiture and corruption of blood. Jones' Blackstone, vol. 2, § 430. The object of the act in question is not to punish; its purpose is to effect a reformation in the property itself. Furthermore, there is no forfeiture of property. The closing of the place for one year with the privilege of sooner releasing it in the manner provided by law is merely a means of abating the nuisance, and that it is a reasonable method for enforcing the judgment of abatement has been decided in several jurisdictions where similar enactments exist. People v. Smith, 275 Ill. 256, 114 N. E. 31, L. R. A. 1917B, 1075; State v. Fanning, supra.

It follows that the judgment in the case of People v. Casa Co. is affirmed, and the judgment in the case of Chown v. Alexandre et al. is reversed.

We concur: KERRIGAN, J.; RICHARDS, J.

177 Cal. 25

BRUCE v. WESTERN PIPE & STEEL CO. (L. A. 4054.)

(Supreme Court of California. Dec. 20, 1917. Rehearing Denied Jan. 17, 1918.)

1. Pleading 🔑237(8) — Amendment to Conform to Proof—New Cause.

In an action for personal injuries due to the breaking of a rafter, an amendment of the complaint after the close of evidence, by the elimination of the charge that it did not adopt the proper and safer method of doing the work, did not constitute a change in the cause of action, where the pleading also alleged that it was necessary for plaintiff to stand on a board supported by the rafter, which defendant well knew was not sufficiently strong to support plaintiff, and that while at work the rafter broke, whereby he fell and was injured.

2. Evidence 🔑359(4) — X-Ray Picture — Personal Injury.

In a personal injury case, it was not error to allow plaintiff to introduce in evidence an X-ray picture of a normal foot for illustration to enable the jury to compare it with plaintiff's foot after the injury, although the X-ray was taken in the absence of defendant; there being no claim that the picture was inaccurate.

3. Witnesses 🔑240(2) — Leading Questions—Discretion of Court.

It is largely within the discretion of the trial court to allow leading questions.

4. Trial 🔑260(8)—Instructions—Gross Negligence—Request for Definition.

Under Employers' Liability Act of 1911 (St. 1911, p. 796), allowing a deduction from damages caused by an injury resulting from the combined negligence of employé and employer, where the negligence of the employé is slight and that of the employer gross in comparison, the omission from an instruction of the definition of gross negligence was not error, in the absence of a request for a more definite one.

5. Trial 🔑185—Instructions—Comments on Evidence.

It is not error for the trial court to state to the jury that certain testimony has been given in the case, provided it states the same with accuracy and not in a manner to mislead the jury; Const. art. 6, § 19, providing that judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law.

6. Master and Servant 🔑293(15) — Injuries to Servant—Instructions.

In a personal injury action, based upon the breaking of a rafter upon which plaintiff stood, an instruction as to defendant's duty to exercise ordinary care to discover hidden defects in the rafters was not erroneous, as against an objection that the rafter broke at a knot, which was obvious, where the break occurred at another point.

7. Negligence 🔑101—Comparative Negligence—Injuries to Servant.

Under Employers' Liability Act of 1911, providing that, where the employé's negligence contributed to his injury, recovery may nevertheless be had, if the employé's negligence was slight in comparison with that of the employer, the jury may diminish the damages in proportion to the amount of negligence attributable to the employé.

8. Master and Servant 🔑293(21) — Injuries to Servant—Instructions.

In an injury action, due to the breaking of a defective rafter, an instruction that the master is not under any duty to warn or instruct servants who have already enjoyed ample opportunity to become acquainted with the danger, or where the servant has had prior experience, or where the employment is not for a hazardous undertaking, was erroneous, as being too broad and sweeping; the term "hazardous undertaking" being too indefinite.

9. Trial 🔑260(1) — Requested Instructions—Instructions Given.

It is not error to refuse to give instructions as to matters already covered by instructions given.

Department 1. Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by William Bruce against the Western Pipe & Steel Company. From a judgment for plaintiff, and a denial of a new trial, defendant appeals. Affirmed.

Morton, Hollzer & Morton, J. Crider, Jr., W. O. Morton, Harry A. Hollzer, and Chas. E. Barrett, all of Los Angeles, for appellant.

C. Ibeson Sweet and W. D. Van Nostran, both of Los Angeles, for respondent.

SHAW, J. The defendant appeals from the judgment, and from an order denying its motion for a new trial.

The action was to recover damages for injuries alleged to have been sustained by the plaintiff while in the service of the defendant. The plaintiff was working for the defendant in putting a wooden roof on a circular steel tank 22 feet high and 42 feet in diameter. At the time he was injured the roof was so far constructed that there were rafters, 2 inches by 6 inches in size and over 20 feet long, extending from the edge of the tank to the center thereof. In order to do the work, it was necessary for him to lay a board across two of these rafters, and to stand on the board thus supported. While so standing, one of the rafters supporting the board on which he was standing suddenly broke, and in consequence thereof he fell to the ground and was injured. The action was to recover the damages caused by the injuries so received.

[1] Upon the trial, after the close of the evidence, the court allowed the plaintiff to file an amended complaint to conform to the proof. There was no error in this ruling. The cause of action was not essentially changed by the amendment. It is true that the previous pleading had charged that the defendant did not adopt the proper and safer method of doing the work in which plaintiff was engaged at the time of his injury, and that the amendment at the trial omits this charge. But the former pleading also alleged that it was necessary for plaintiff to stand on the board supported by said rafters, as aforesaid, and that defendant well knew that the rafters so placed were not sufficiently strong to support him while he was doing the work referred to, and that while he was so at work, supported thereon, one of them broke, whereby he fell and was injured. In substance this is the same charge as that contained in the amended complaint filed at the trial, and upon which the plaintiff bases his right to recover.

[2] The plaintiff was allowed to introduce in evidence an X-ray picture of a normal foot, for illustration, and to enable the jury to compare the same with the condition of the plaintiff's foot after the injury. This was not error. The fact that the X-ray was taken in the absence of the defendant, or without his knowledge, does not of necessity affect the propriety of this evidence. It is not claimed that the picture of the normal foot was inaccurate.

[3] It should not be necessary to remind attorneys that it is within the discretion of the court to allow leading questions. It is usually the proper way to conduct the examination until the attention of the witness is brought to the point to which he is expected to testify. It saves time and tends to make the testimony clearer. The allowance or exclusion of such questions rests almost entirely in the discretion of the trial court. It was not improper to allow the plaintiff to be asked the question, "Did the foreman in charge warn you of any danger?" when it was obvious that the answer would be in the negative. No abuse of discretion is shown by the record.

[4] Objection is made to the giving of an instruction on the law of contributory negligence, as qualified by the Employers' Liability Act of 1911 (Stats. 1911, p. 796), allowing a deduction from the damages caused by an injury, where it is the result of the combined negligence of the employé and employer, and the negligence of the employé is slight and that of the employer gross in comparison; the complaint being that the court did not define the meaning of the term "gross negligence." The defendant was at liberty to offer instructions upon any subject upon which it desired to have the jury informed. It could have done so at the close of the instructions given, if the occasion required it. It did not request any additional instruction on the subject except that one of the instructions asked and refused stated that if the negligence of the defendant "was not gross—that is, great or palpable"—the plaintiff could not recover. We cannot perceive that the addition of the words "great or palpable" would materially assist in the understanding of the meaning of the word "gross." The meaning of the latter is as well known and as definite and clear, as the meaning of the words "great" and "palpable." The defendant should have asked a more elaborate instruction on the subject, if it desired the jury to have fuller information. We do not think the failure of the court to add these adjectives, in connection with the word "gross," is of sufficient importance to justify a reversal of the judgment, even if it were error.

[5] It is not error for the trial court to state to the jury that certain testimony has been given in the case, provided it states the same with accuracy, and not in a manner to mislead the jury. "Judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law." Const. art. 6, § 19. The instruction complained of did not misstate the testimony, nor tend to mislead the jury in any respect.

[6] The appellant complains of an instruction relating to its duty to exercise ordinary care to discover hidden defects in the rafters on which plaintiff was required to stand while at work. The ground of the objection is that the evidence disclosed that the defect was not latent but was patent. There was a knot in the rafter upon which the board on which the plaintiff was standing rested when the rafter broke. This knot was about midway of the length of the rafter from the edge to the center of the tank. The plaintiff, before placing the board upon the rafter, observed this knot, called for a board 1 by 8 inches in size, and several feet long, for the purpose of strengthening the rafter, and nailed said board upon the rafter for that purpose, at the location where the knot was found. The plaintiff contends that this was the defect which caused the rafter to break, and that it was visible and patent, and not a latent defect. There is evidence, however, that the rafter did not break at the point where the knot was located, but that it broke at a point some 2 feet away from said knot, at which point the evidence does not show that any weakness was discovered by the plaintiff. The jury, therefore, might have found that the defect was latent, and the instruction was proper for their information as to the law on the subject. This observation applies to the complaints of the same

character regarding other instructions upon the subject of latent defects.

[7] The defendant excepted to the refusal of the court to give several instructions, to the effect that if the jury should find that the plaintiff was injured by reason of his own contributory negligence, the verdict should be for the defendant. Since the enactment of the Employers' Liability Act of 1911, above mentioned, the fact that employé's negligence contributed to his injury, does not exonerate the employer, where the employé's negligence is slight and that of the employer gross in comparison. In such a case the jury may diminish the damages in proportion to the amount of negligence attributable to the employé. The court of its own motion correctly instructed the jury on this subject, and it was not required to repeat the same doctrine at the request of the defendant.

[8] The court refused to give the following instruction asked by the defendant:

> "The master is not under any duty to warn or instruct servants who have already enjoyed an ample opportunity to become acquainted with the danger, or where the servant has had prior experience, or where the employment is not for a hazardous undertaking. Servants are expected and required to keep their eyes open and exercise such reasonable care for their own safety as their situation permits. They are bound to use all their faculties of seeing and hearing, and are charged with what they might see, hear, or learn by the use of their senses of hearing or sight. The master is therefore under no duty of warning or instructing a servant as to dangers which are discoverable by the exercise of ordinary care and the use of his faculties on his part, with such knowledge, experience, and judgment as he actually possesses or as the master is justified in believing he possesses."

The language of this instruction is too broad and sweeping. The fact that a servant has had prior experience does not, in all cases, excuse the master from the duty of warning him of a danger which is known to the master at the time the servant is put to work in the particular place where he is injured; nor can it be said, as matter of law, that the master is absolved from such duty in all cases where "the employment is not for a hazardous undertaking." The term "hazardous undertaking" is too indefinite. There may be employments or undertakings which in ordinary parlance would not be called hazardous, but where it is nevertheless the duty of the master to warn the servant of such dangers as there may be in the surroundings. The jury were fully instructed by the court that it was the duty of the plaintiff to use ordinary care for his own protection while engaged in the work. The instruction was properly refused.

[9] We have already stated that the plaintiff himself strengthened the rafter at the knot, and that there was evidence that the rafter did not break at that place, but at another place where there was no proof that any weakness was discovered. With reference to the knot, the court instructed the jury that if they should find that plaintiff, upon discovering the knot, attempted to make the rafter safe by nailing the board alongside of it, and that the injury occurred because of the weakness at that point, and because of his failure to reinforce it sufficiently, the plaintiff could not recover. The defendant asked several instructions, numbered respectively 13, 14, 15, and 17, which were refused, based upon the theory that the rafter broke at the knot, instead of at the other place, and to the effect that plaintiff could not recover if the jury found such to be the fact. The instruction given by the court on the subject was clear and covered all the points presented in the instructions asked and refused on this subject.

The instructions last mentioned, and some others which the court refused, dwell at length upon the duty of the plaintiff to exercise ordinary care for his own protection while engaged in his work, and that for that purpose he must use his natural faculties. The instructions given stated this duty repeatedly, and there was no error in refusing further repetitions at the request of the defendant.

The appellant claims that the evidence was insufficient to justify the verdict. We need not discuss this question in detail. It is sufficient to say that an examination of the defendant's brief in connection with the evidence in the record satisfies us that there was enough evidence to support the verdict.

The judgment and order are affirmed.

We concur: SLOSS, J.; LAWLOR, J.

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177 Cal. 12

In re FELTON'S ESTATE.

CHAMBERS, State Controller, v. FELTON.

(S. F. 8276.)

(Supreme Court of California. Dec. 19, 1917.)

STIPULATIONS 🔑14(12)—CONSTRUCTION—INTEREST ON JUDGMENT.

Where it was stipulated that a decree as to inheritance tax should bear 7 per cent. interest if affirmed, such an award of interest was required where the decree was modified and affirmed.

Department 2. Appeal from Superior Court, Sacramento County; Geo. H. Buck, Judge.

In the matter of the estate of Charles N. Felton, deceased. Appeal by John S. Chambers, as Controller of the State of California, from a decree fixing inheritance tax as to Charles N. Felton, Jr. Modified and affirmed.

Robert A. Waring, Inheritance Tax Atty., of Sacramento, and John C. Altman, of San Francisco, for appellant. Pillsbury, Madison & Sutro, of San Francisco, for respondent.

PER CURIAM. Upon this appeal it was stipulated that if the decree in the matter of the above-entitled estate fixing the inheritance tax due and payable to the state should be affirmed, then the amount of the award of the inheritance tax should bear interest at the "rate of 7 per cent. per annum from and after the 13th day of March, 1916." The decree thus referred to was ordered modified, and, as modified, affirmed. Estate of Felton, No. 8242, 169 Pac. 392, opinion filed December 12, 1917.

It is therefore ordered that the modified decree which will be entered by the court in probate in the matter of said estate shall contain as a part thereof an award of interest upon the amount of such decree at the rate of 7 per cent. per annum from and after the 13th day of March, 1916.

176 Cal. 776

WESTERN INDEMNITY CO. v. INDUSTRIAL ACCIDENT COMMISSION OF STATE OF CALIFORNIA.

(S. F. 8122.)

(Supreme Court of California. Dec. 18, 1917.)

1. MASTER AND SERVANT 🔑419—WORKMEN'S COMPENSATION ACT—SUFFICIENCY OF EVIDENCE—DISABILITY.

In a proceeding on an injured employé's claim for compensation filed in 1914, consolidated with his widow's claim filed after his death in 1916, evidence *held* to sustain a finding of the Industrial Accident Commission that a slight disability consisting of a sinus and hernia were present continually from the day of the first operation by the insurer's physicians in 1914, until the second operation by them in 1916, followed by death from peritonitis.

2. MASTER AND SERVANT 🔑419—WORKMEN'S COMPENSATION ACT—CLAIMS—LIMITATIONS.

Under Workmen's Compensation Act (St. 1913, p. 279) § 16, as amended by St. 1915, p. 1085, § 5, providing that unless compensation is paid or agreed to be paid within the time limited in the section for instituting proceedings for its collection the right to such proceedings shall be barred, and by subdivision b (2) providing that proceedings for the collection of the death benefits can only be maintained when death ensues within one year from the date of the injury, or when the injury causing death also caused a disability continuing to the date of death, for which a disability indemnity was paid, or an agreement for its payment made or proceedings for its collection commenced within the time limited for the commencement of proceedings to recover disability indemnity, a widow's proceeding wherein such continued disability was found was not barred; the ability of the young workman to perform the labor for which he is employed not being the sole measure of disability, so that the fact that he went back to work did not necessarily contradict a finding of continuous disability.

3. MASTER AND SERVANT 🔑419—WORKMEN'S COMPENSATION ACT — PROCEEDINGS — CONSOLIDATION.

Though a proceeding by an employé for injury and a proceeding two years later by his widow for his death were separate, the latter was supplementary to the former, where the injury and death arose out of the same casualty, so that the continuing jurisdiction given by Workmen's Compensation Act, § 25d, is immaterial to the widow's application, and an order consolidating the proceedings was an unnecessary caution.

4. MASTER AND SERVANT 🔑419—WORKMEN'S COMPENSATION ACT — CLAIM — EVIDENCE—FINDINGS AND AWARD.

In a proceeding for compensation for the death of an employé brought by his widow after his death arising from the same casualty as the injury, the findings and awards made by the Industrial Accident Commission upon the original proceeding by the injured employé, having the effect of a judgment binding upon the insurer, were admissible.

5. MASTER AND SERVANT 🔑419—WORKMEN'S COMPENSATION ACT—AWARD OF COMPENSATION—DEATH CONSEQUENT UPON INJURY.

Where an employé was injured, and underwent an operation performed by the insured's physicians, and obtained an award of compensation for temporary total disability, and a slight disability was found to have been present continually from the date of the first operation until the date of the second operation, followed by his death, the Industrial Accident Commission in a proceeding by his widow for compensation had power to award compensation for his death.

In Banc. Application for writ of certiorari by the Western Indemnity Company against the Industrial Accident Commission of the State of California, to review the Commission's award of compensation to the widow of John Henne, deceased. Writ dismissed, and award affirmed.

Eugene F. Conlin, of San Francisco, for petitioner. Christopher M. Bradley, of San Francisco, for respondent.

MELVIN, J. A writ of certiorari was issued to the end that this court might review the award of the Industrial Accident Commission to the widow of John Henne, deceased.

Henne had been employed by J. H. Hjul, and in March, 1914, while engaged with other workmen in lifting certain cabinets, he suffered injuries for which he demanded and received treatment from the physicians of the insurance carrier. On May 6, 1914, he filed an application for compensation, and after the insurance carrier had answered and a hearing had been given by the commission upon the issues joined an award was made in his favor on June 6, 1914, for temporary total disability. The Western Indemnity Company paid the weekly indemnity as provided by the award until June 29, 1914, when upon the advice of its medical staff the corporation ceased further payments upon the theory that the injured man had recovered. The total amount paid to that date was $175.75. There was no formal order by the Industrial Accident Commission exempting the insurance carrier from further payment to Henne, but it is the contention of the petitioner here that the evidence shows without contradiction a complete recovery before the date of the last payment.

Henne engaged in various occupations during the ensuing two years, and in March, 1916, two years after the accident, he applied to the Western Indemnity Company for further treatment. During initial disability an operation had been performed involving the excision of the umbilicus and certain surrounding tissues and when he made application for further treatment Henne was suffering from that which he asserted to be a recurrence of his former trouble. A second operation was found necessary and was performed by a surgeon employed by the Western Indemnity Company. After the operation peritonitis supervened, and on April 10, 1916, the patient died. In the following month Elizabeth Henne, the widow of John Henne, filed with the Industrial Accident Commission an application for a death benefit award, asserting that John Henne had died as a result of the injury received by him two years before. The Western Indemnity Company duly answered denying the causal connection between the original injury and the man's death, and pleading the alleged fact that full compensation had been paid in accordance with the award of the Industrial Accident Commission. A hearing was had and during its progress the commissioners made an order consolidating the widow's claim with that which had been filed by her husband in 1914. After the taking of testimony the Industrial Accident Commission made findings and an award in favor of Elizabeth Henne for $2,141.59, and thereafter denied a motion by the Western Indemnity Company for a rehearing. It is the contention of the petitioner that respondents acted in excess of their jurisdiction, and that the award is in violation of petitioner's rights under the provisions of article 1, section 13 of the Constitution of California.

[1] The finding which is attacked by petitioner as being without support in the testimony is, in its substantial part, as follows:

> "That on the 7th day of April, 1914, the said John Henne was operated upon by the medical staff of the defendant insurance carrier for the cure of the condition proximately caused by said injury; that the operative wounds received at said operation never wholly healed, and that by reason of a defective closing of said operative wounds, a postoperative sinus resulted in the region of the navel and a postoperative peritoneal hernia in the same region, both of which conditions were proximately caused by the said accident and operation and continued until remedied by the second operation hereinafter described; that while the applicant returned to, and continued at, work for the greater part of the time from the date of his discharge by the first operating physician until the date of said second operation, a slight disability, consisting of said sinus and hernia, was present continually from the date of the first operation until the date of the second operation; that on the 3d day of April, 1916, the said John Henne was operated upon by the medical staff of the defendant Western Indemnity Company for the relief of said hernia and sinus, and that on the 10th day of April, 1916, the said John Henne died, his death being caused by peritonitis proximately resulting from the said sinus or from the said second operation for the removal of the said sinus and hernia; that said death was proximately caused by the said accident of March 21, 1914, and was not caused or influenced by the intervention of any extraneous cause or other accident or injury."

Petitioner insists with emphasis that the testimony wholly fails to substantiate that part of the finding to the effect that "a slight disability, consisting of said sinus and hernia, was present continually from the date of the first operation until the date of the second operation." Without reviewing the testimony at length it is sufficient to say that there is ample support for the finding. Petitioner properly lays stress upon the fact that Henne returned to work, after the last payment of indemnity in June, 1914; that all outward evidence of injury had disappeared as shown by the testimony of the patient's wife and the surgeon; and that in April, 1915, he made application to the baker's union for medical examination and admission to standing as one entitled to sick benefits in the future. In said application he represented that he was in good health, but the medical examiner of the union found that there was a hernia, and that a small amount of pus exuded from the site of the previous operation. Undoubtedly the fact that he returned to work, that there was no visible sign of continuing trouble with the surgical wound, and that he believed himself cured, were strong circumstances for the commissioners to consider in determining whether or not the condition present at the time of the second operation was a proximate result of the original injury. But disappearance of external signs does not preclude the existence of a wound, and the fact that this strong man was able to work part of the time does not necessarily prove that he was free from trouble with such a wound.

Dr. Ophuls, who performed the autopsy, was questioned at length regarding the probable connection between the original injury and the fatal result. The following quotation from his testimony illustrates his views and supports the finding of the commission:

> "Q. Taking a case of this man, where the operation had been performed in the first instance, and the concretion and the umbilicus entirely removed, where the wound had healed completely and the man had gone to work for a year, then he was examined by his physician and his physician reports on May 1st merely the presence of this umbilical hernia, and no evidence of any inflammation or discharge, and then a year after that, again, or two years from the first trouble, the inflammation develops in the same general region, peritonitis appears, sinus is found but not connected with the umbilicus, sinus that was removed, as I understand it—would you say that this last trouble from which he died was directly connected with the original trouble for which the first operation was had? A. I think very likely it was. Q. In your opinion, there was some infection dormant during that time? A. I think so. Q. Would it, in your opinion, become active in the two years, without some cause? A. Well, these infections that remain after operations of infected wounds, they often lie dormant for

years, and then they come to light again. You have heard of people for instance with gunshot wounds, like that—people who have been wounded in battle, carrying these things around, and then years after it begins to trouble them, the infection lying dormant all the time."

Dr. Sewell, who performed the second operation, testified in part as follows:

> "Q. Do you connect the peritonitis with the sinus? A. Yes, can't connect it anywhere else. Some of the ramifications of the sinus were not seen. Q. Would the fact that he had peritonitis two years before in that region have anything to do with it? A. Have a great deal to do with it, from the fact that it caused a thickened peritoneum, and a peritoneum not so able to withstand infection, and a great deal of the serous part of the membrane being taken up by the scar tissue. Q. You found a hernia, a ventral hernia. Where was this hernia with reference to the operative wound to the principal previous operative wound? A. Right in the center of it."

It will thus be seen that from the location of the sinus found at the time of the second operation and from the other surrounding circumstances there was substantial support for the finding which petitioner attacks.

[2] It is argued that the claim of Mrs. Henne was barred by the provisions of section 16 of the Compensation Act. That section so far as it is material to the present inquiry is quoted by petitioner as follows:

> "Unless compensation is paid or an agreement for its payment is made, within the time limited in this section for the institution of proceedings for its collection, the right to institute such proceedings shall be wholly barred. * * *
>
> "(2) Proceedings for the collection of the death benefit provided by subsection (c) of said section 15 must be commenced within one year from the date of death, and in any event within two hundred forty weeks from the date of the injury, and can only be maintained when it appears that death ensued within one year from the date of the injury, or that the injury causing death also caused disability, which continued to the date of the death and for which a disability indemnity was paid, or an agreement for its payment made, or proceedings for its collection commenced within the time limited for the commencement of proceedings for the recovery of the disability indemnity." St. 1915, p. 1085, § 5.

The case comes within the last clause of subdivision 2 of section 16 above quoted; that is, the original injury to Henne, which eventually caused his death also, in the meantime caused a disability which continued to the date of his death, and for this disability he began proceedings for compensation within the time limited therefor by the act, and in pursuance thereof a disability indemnity was paid to him. In such a case, under the terms of the first part of subdivision 2, the proceeding can be maintained, although death ensues more than one year from the date of the injury, provided it is commenced within one year from the date of the death, and within 240 weeks from the date of the injury. This proceeding by the widow was begun within a short time after the death, and within less than 240 weeks from the date of the injury. Therefore, by the terms of said subdivision, it is not barred by the provisions of the section. The ability of the workman to perform the labor for which he is employed is not the sole measure of disability (Frankfort General Insurance Co. v. Pillsbury, 173 Cal. 56, 159 Pac. 150) and therefore the fact that Henne went back to work does not necessarily contradict the finding of continuing disability. But petitioner insists that since there were two separate proceedings, one instituted by Henne and the other by his widow, the court erred in consolidating them and in treating the later as a part of the earlier one.

[3] It is true that the two proceedings—the one by the employé for the injury, and the other by the widow for his death—are separate ones, although the latter is supplementary to the former and allied to it by reason of the fact that the two compensable conditions, the injury and the death, arose out of the same casualty. The continuing jurisdiction given by section 25d is immaterial to the widow's application, and the order consolidating the two proceedings was a mere act of caution and without significance or effect being wholly unnecessary.

[4] The introduction in evidence of the findings and award made by the commission upon the original proceedings was not erroneous. These findings and award had the effect of a judgment binding upon the Western Indemnity Company in a matter pertinent to the inquiry regarding the cause of Henne's death. The fact that his widow and not Henne himself was the petitioner does not affect the admissibility of this evidence. But petitioner here insists that the testimony of the injured man given at the hearing on his own application was improperly admitted, and that subdivision 8 of section 1870, Code of Civil Procedure, is not any warrant for the reception of such evidence because the parties to the two proceedings differed. It is not necessary to consider this contention because Henne's testimony furnished merely the evidentiary basis for the findings of the commission in the original matter wherein Henne was himself the petitioner, and such findings and the award, as we have seen, were properly admitted. Therefore it makes no difference whether or not the testimony itself was properly admissible. Its reception, in any view of the case, was harmless.

[5] Petitioner quotes and seeks to apply to the proceedings before the commission the following language from the Ehrhart Case, 172 Cal. 621-626, 158 Pac. 193, 194:

> "But the order made in this proceeding upon the second hearing was just as foreign to the original one as if the commissioners had been dealing with a different individual."

The quoted passage may not be justly so applied. We were there discussing two proceedings of which the later one referred to an alleged injury having no possible connection with the other casualty which was the only one investigated by the Industrial Accident Commission at the original hearing. We held that the statute of limitations barred the second application which related to something having no possible causal connection with the accident originally reported to and investigated by the commission. It is undenied that the site of the inflammation which caused Henne's disability was about the same as the location of the trouble which produced his death. Therefore there is no proper application of the quoted passage to the proceeding which we are here reviewing. In the Ehrhart Case we were at pains to point out the rule with reference to a later disorder occurring at the same place as the earlier one and due to the same general causes, for we there said:

> "Let us suppose, by way of illustration, that after Salvatore's leg had healed and he had returned to work he should have suffered with necrosis of the bone in the vicinity of the fracture, it would have been perfectly proper for the Industrial Accident Commission to have investigated the second disability and to have determined the facts from the record made at the original hearing and the evidence adduced at the later inquiry, and, if justified by those facts, to have ordered a resumption of payment of an indemnity."

And if such power exists with reference to a later development causing compensable disability, it must also inhere in the commission when the ultimate effect of the injury is the workman's death.

No other matters presented by the briefs require comment or analysis.

The writ is dismissed, and the award affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOSS, J.; HENSHAW, J.; LORIGAN, J.

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34 Cal. App. 781

McVITTY v. FLENTGE. (S. F. 8570.)

(Supreme Court of California. Dec. 10, 1917.)

LANDLORD AND TENANT 🔑95—LEASE—"IMMEDIATELY"—"REASONABLE TIME"—CONDITIONS AS TO SALE—OPTIONS—TIME OF EXERCISE.

Under a lease providing that, if there be a sale of the land, the lessee is to be paid for all summer fallow, "providing purchaser wants possession immediately," a sale did not necessarily terminate the lease, whether or not there was any summer fallow, but the purchaser had an option and a reasonable time in which to exercise it, the word "immediately" in such cases not meaning instantly or without any appreciable lapse of time, but meaning a reasonable time dependent on the circumstances existing at the time of the sale and following presently thereafter, and involving the questions of waiver and estoppel.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Immediately.]

In Bank. Appeal from Superior Court, Monterey County; J. A. Bardin, Judge.

Action in unlawful detainer by Edward Q. McVitty against Obi Flentge. Judgment for defendant, and plaintiff appealed. Reversed by District Court of Appeal. Rehearing denied.

The following is the opinion of Richards, J., in the District Court of Appeal, concurred in by Lennon, P. J., and Kerrigan, J.:

This is an appeal from a judgment in the defendant's favor after motion for nonsuit granted.

The action was for unlawful detainer. The defendant was in possession of the premises in question under a lease for the term of three years commencing November 1, 1915, at an annual cash rental of $110, payable yearly in advance. The plaintiff is the successor in interest of one Otto L. Harden, the lessor of the premises, having purchased the same from him, the conveyance thereof being delivered to said plaintiff on January 22, 1917. The lease under which the defendant claims the right to hold possession for the remainder of its term contains the following provision: "If said land is sold before expiration of said lease, the party of the second part to be paid for all summer fallow at the going price per acre, providing purchaser wants possession immediately." The formal demand for possession on the part of plaintiff as grantee of the lessor was not made until April 6, 1917, and was then refused by the lessee, whereupon this action was begun.

Upon the trial it appeared by the pleadings and admissions of the parties that the land had not been summer-fallowed for the previous year. The sole question presented to the court upon the motion for nonsuit and to this court upon appeal is as to the proper construction to be placed upon the above-quoted clause in the defendant's lease, the latter contending that, the demand for possession on the part of the purchaser not having been made immediately upon the consummation of his purchase of the leased premises, the lessee is entitled to hold for the remainder of the term. The interpretation which we place upon the above-quoted clause does not lead us to sustain this view.

The clause in the lease in question was intended by the parties to it to be a reservation in favor of and for the benefit of the lessor, and is to be so interpreted. Civ. Code, § 1069; Diepenbrock v. Luiz, 159 Cal. 716, 115 Pac. 743, L. R. A. 1915C, 234, Ann. Cas. 1912C, 1084. Thus interpreted, it expressed briefly and somewhat vaguely, it is true, the evident intent of the parties that the owner of the premises should have the right to transfer to his grantee the right to the possession thereof upon a sale, and thereby terminate the lease. The only limitation upon that right expressed in the clause conferring it had reference, not to the time when the lease should be terminated, but merely to the terms upon which the grantee of the premises might exercise his right to receive possession. If the land had been summer-fallowed, and if the purchaser desired to obtain the benefit arising from such cultivation in the way of resultant crop, he must have offered to pay the lessee the amount expended by him in summer-fallowing the land in order to obtain possession of the premises so as to receive the benefit of the crop, and he must do this immediately upon consummation of his purchase. But in the case at bar there had been no summer-fallowing of the land for the previous year, and hence there was no sum which the purchaser was bound to tender or which the lessee was entitled to receive as a condition of surrendering possession of the premises; and therefore there was no necessity for an immediate demand and payment on the part of the purchaser in order to retain his right to such possession. The fact that there happened to be a volunteer crop upon the land is a false quantity in the case, for the reason that the lease contained no reservation of any right in the lessee by which he was to be paid for such crop, or was to have any right to possession of the premises for the purpose of harvesting the same. His lease was terminated upon the transfer; and the only right retained by him was the right of being paid for the cost of summer-fallowing the land in case he had made such outlay previous to the sale. In such event only was he entitled to an immediate demand for possession and to the repayment of the amount of his outlay. Otherwise the purchaser was entitled to the possession of the property upon his proper demand therefor whenever made. Such demand was made on April 6, 1917; and in respect to both form and time was such as to have entitled the plaintiff to possession of the premises. This being so, we are of the opinion that the defendant's motion for a new trial was improperly granted, and that the judgment in the defendant's favor based thereon must be reversed; and it is so ordered.

C. F. Lacey, of Salinas, for appellant. Alex Webster and Chas. R. Nelson, both of Paso Robles, for respondent.

PER CURIAM. The petition for a rehearing is denied. It is necessary to say, however, that in our opinion the decision of that court as to the effect of the reservation in the lease is not exactly correct. A sale of the land by the vendor would not, of necessity, terminate the lease. The purchaser would, upon such sale, have the option to terminate the lease, pay the cost of summer-fallowing at the going price, if any had been done, and take possession of the land, or of allowing the tenant to hold possession during the term of the lease. The phrase "providing purchaser wants possession immediately" does not mean that the buyer must take possession forthwith after his purchase or not at all. The word "immediately," when it refers to something to be done after a preceding event, where the thing to be done involves further inquiry or the exercise of discretion or of an election, does not mean that the thing must be done instantly or without any appreciable lapse of time after the preceding event. In such cases it is almost universally construed to mean that the succeeding act must be done within a reasonable time after the preceding event. First National Bank v. Haug, 52 Iowa, 538, 3 N. W. 627; Cashau v. N. W. Nat. Ins. Co., 5 Fed. Cas. 270; Fidelity, etc., Co. v. Robertson, 136 Ala. 379, 412, 34 South. 933. The question what is a reasonable time would depend upon the circumstances existing at the time of the sale and following presently thereafter. The defendant in his answer alleged facts which, if true, would show that the option of the purchaser to take possession under the reservation was not exercised within a reasonable time after his purchase, and which would have the effect of a waiver on his part, or create an estoppel which would defeat his right to possession at the time this action was begun. But he did not avail himself of this defense, but saw fit to rest his case upon a motion for a nonsuit, upon the theory that the reservation in the lease required the purchaser to exercise his right to take possession without any delay whatever, and that by his delay in doing so from January 22d to April 6th of the same year the purchaser lost his right to take possession. Upon a new trial the defendant will have the opportunity of proving, as alleged in his second defense, that the plaintiff, shortly before his purchase, notified the defendant that he would not interfere with the defendant's possession until November 1, 1917, and that, relying upon said notice, defendant proceeded to cultivate a portion of the premises and to raise a crop thereon, which had partly matured at the time the defendant asserted his right to possession under the reservation. With this modification the defendant should have no difficulty in preserving such rights as he may have.

176 Cal. 752

CARTER v. SUPERIOR COURT OF KERN COUNTY et al. (L. A. 5376.)

(Supreme Court of California. Dec. 15, 1917.)

1. Costs 🔑124—Security for Costs—Nonresident Plaintiff—Statutes.

Under Code Civ. Proc. § 1036, providing that a nonresident plaintiff may be required to give security for costs, and that until an undertaking executed by two or more is filed with the clerk conditioned that "they" will pay such costs, the proceeding must be stayed, and section 1037, providing that after 30 days from the service of notice requiring security, and on proof that it has not been filed, the court may order a dismissal, and in view of section 1056, providing that a corporation qualified as required by law may be accepted as a sole and sufficient surety, an undertaking by a corporate surety is sufficient, and its qualification need not appear therein.

2. Costs 🔑121—Security for Costs—Sufficiency—Statute.

A surety company's undertaking on the part of a nonresident plaintiff that the "plaintiff" would pay costs, charges, etc., containing no express promise by the surety to pay any sum of money, was insufficient.

3. Costs 🔑137 — Nonresident Plaintiff — Failure to File Security—Jurisdiction.

Under such provisions, the failure to file such undertaking does not deprive the court of jurisdiction of the action, or operate as a dismissal thereof, though the court should grant a motion to dismiss in the absence of anything excusing the failure to file the security, but in the absence of a dismissal it retains jurisdiction, and the security may be filed at any time before dismissal.

4. Costs 🔑134 — Security for Costs — Filing—Discretion of Trial Court.

Even if the statute be construed to require the filing of such security within the statutory time, the trial court, in the exercise of a sound discretion, might permit a new security to be filed, and should do so where a party in good faith originally endeavors to comply with the statute by filing a defective undertaking.

5. Prohibition 🔑5(3) — Proceeding with Action — Failure to File Security for Costs.

In view of Code Civ. Proc. § 1036, providing that a nonresident plaintiff shall give security for costs, and that all proceedings may be stayed until an undertaking executed by two or more is filed with the clerk to the effect that "they" will pay such costs, and where no such security was filed, prohibition will lie to prevent further proceedings pending the filing of the undertaking where the court has refused to dismiss, and is proceeding without any undertaking, as defendant has no plain, speedy, and adequate remedy in the ordinary course of law.

In Bank. Application for writ of prohibition by George D. Carter against the Superior Court of Kern County and Hon. Milton T. Farmer, Judge thereof. Peremptory writ to issue.

Charles W. Chase, of Los Angeles, for petitioner. Muhleman & Crump, of Los Angeles, for respondents.

ANGELLOTTI, C. J. Petitioner, Carter, is a defendant in an action pending in the superior court of Kern county, in which one Mary V. Douthit, a resident of the state of Oregon at and ever since the commencement of the action, is the plaintiff. He regularly made demand as provided by sections 1036 and 1037, Code of Civil Procedure, for security for the costs and charges which might be awarded against the plaintiff in the action. Within 30 days of such demand the plaintiff filed what is claimed to be a sufficient undertaking in the sum of $300 with the Fidelity & Casualty Company of New York as sole surety. Claiming that no such undertaking as is required by the law had ever been filed, Carter, after the expiration of 30 days from the date of the demand, made a motion in the superior court that the action be dismissed. The superior court, apparently holding the undertaking sufficient, denied the motion, and is about to proceed with the trial of the case. Carter then instituted this proceeding in the District Court of Appeal of the Second Appellate District to obtain a writ of prohibition restraining further proceedings in said action in the superior court. Judgment was therein given perpetually restraining all further proceedings in the superior court. On petition to this court, this judgment was vacated, and the matter ordered heard herein.

[1] Section 1036, Code of Civil Procedure, provides that, when the plaintiff in an action or special proceeding resides out of the state, security for the costs and charges which may be awarded against him may be required by the defendant. It further provides:

> "When required, all proceedings in the action or special proceeding must be stayed until an undertaking, executed by two or more persons, is filed with the clerk, to the effect that they will pay such costs and charges as may be awarded against the plaintiff by judgment, or in the progress of the action, * * * not exceeding the sum of three hundred dollars."

Section 1037 provides that:

> "After the lapse of thirty days from the service of notice that security is required, * * * upon proof thereof, and that no undertaking as required has been filed, the court or judge may order the action or special proceeding to be dismissed."

Any suggestion that the undertaking filed is insufficient because executed by only one surety, instead of two or more, as provided in section 1036, Code of Civil Procedure, is answered by section 1056, Code of Civil Procedure, which provides that a corporation qualified as required by law for that purpose may be accepted as sole and sufficient surety in all cases where an undertaking with any number of sureties is authorized or required. It is not claimed that the surety here was not in fact such a corporation; the only claim in that connection being that such fact does not appear from the undertaking itself. We do not consider it essential to the validity of the undertaking that such fact appear on its face. The statute makes no such requirement. The vital thing is that it is in fact qualified as provided by law.

[2] The remaining objection is more serious, and is the one upon which the learned District Court of Appeal based its conclusion that a sufficient undertaking had not been filed. As we have seen, section 1036, Code of Civil Procedure, requires that the undertaking must be to the effect "that they (the sureties) will pay such costs and charges," etc. The undertaking filed does not expressly so provide; the express undertaking and promise therein being simply one "on the part of the plaintiff that said plaintiff will pay all costs and charges which may be awarded against the plaintiff, * * * not exceeding the sum of $300." Nowhere therein does the surety expressly promise to pay any money or expressly declare itself bound in any sum of money. In view of the recent decision of this court in San Luis Obispo Co. v. Ryal et al., 165 Pac. 1, it is certainly at least very doubtful whether any recovery thereon could be had by Carter. However this may be, it is not the kind of undertaking prescribed by the statute, which calls for one in which the sureties themselves expressly promise to pay such costs and charges as may be awarded against the plaintiff, not exceeding the specified sum. We are of the opinion that a defendant demanding security for costs, etc., under section 1036, Code of Civil Procedure, has the right to insist upon an undertaking measuring fully up to the requirements of the section, and that in the particular under discussion this bond did not do so.

[3] It does not follow, however, that because of this failure on her part the superior court may be perpetually restrained from all further proceedings in the action. The failure to file such an undertaking within 30 days from the service of notice that security is required or at all does not deprive the court of jurisdiction of the action, or operate as a dismissal thereof. Certainly the statute does not so provide. There is no requirement in the statute that the undertaking must be filed within any specified time, and no requirement that the action must be dismissed if the required undertaking is not

filed within a specified time. Section 1037, Code of Civil Procedure, the section relative to dismissal, simply provides that:

> "After the lapse of thirty days from the service of notice that security is required, * * * upon proof thereof and that no undertaking as required has been filed, the court or judge may order the action * * * to be dismissed."

In the connection in which it is used, there is no reasonable ground for reading the word "may" as "must." Doubtless the court should grant such a motion to dismiss in the absence of circumstances tending to excuse the failure to file the required undertaking, and perhaps, where the evidence is without conflict and tends to show no excuse, could be compelled to do so by mandate. But, whether it grants or denies the motion, it is acting in the exercise of its jurisdiction, and in the absence of a dismissal the court retains jurisdiction of the action. It seems clear also that the required undertaking may be filed at any time prior to dismissal.

[4] Even if the statute be so construed as to require such filing within the 30 days, there can be no doubt that the trial court, in the exercise of a sound discretion, could permit such filing, and should do so where it appears that a party in good faith has originally endeavored to comply with the statute by filing an undertaking which was defective. This has been expressly held in relation to the bond required in actions for libel and slander to secure the defendant as to costs and charges, where the statute expressly provided that "an action brought without filing the undertaking shall be dismissed." The decisions under this act fully sustain our views on the question of jurisdiction and the power of the court on motion for dismissal for failure to file bond. Dixon v. Allen, 69 Cal. 527, 11 Pac. 179; Stinson v. Carpenter, 78 Cal. 571, 21 Pac. 304; Becker v. Schmidlin, 153 Cal. 669, 671, 96 Pac. 280. In the last case cited, it was assumed by this court that the bond filed was in fact void. But it was apparent that counsel for the plaintiff was at least acting in good faith under a belief that it was valid, when he filed it. The order of the lower court refusing leave to plaintiff to file a new bond and dismissing the action was reversed. The court said:

> That the undertaking, as here, was intended to secure defendant in the costs and charges which might ultimately be awarded him, and that "the provision is for his sole benefit, and, this being true, the discretion vested in the court of permitting plaintiff to file a new undertaking which will afford a defendant all the protection the law intends should be exercised to effect that end."

In Dixon v. Allen, supra, no bond was filed, and the trial court denied a motion for dismissal, giving plaintiff leave to file such a bond, which was subsequently done. This court said:

> "The statute * * * does not deprive the superior court of jurisdiction in case the undertaking is not filed. The object of the statute is accomplished, if, when the objection is made, the undertaking is executed, and the defendant thus secured the costs and charges, which may be awarded to him."

See, also, Farmer v. Warner, 64 Kan. 878, 68 Pac. 1127.

In the recent case of Estate of Baker, 168 Pac. 881, 882, this court said, speaking of a supposed failure to comply with the requirements of the statute here involved (sections 1036 and 1037, Code Civ. Proc.):

> "It does not follow that the court is bound to dismiss it, or that, if it refuses to do so, its further proceedings therein are without jurisdiction and void."

The case of Meade County Bank v. Bailey, 137 Cal. 447, 70 Pac. 297, relied on by petitioner, is not in conflict with anything we have said. There the trial court dismissed the action because no proper bond was ever filed, and the matter came before this court on appeal from such order. The opinion does not suggest that any showing of excuse was made in the lower court or that there was any offer to file a proper bond therein, and it was held that the court did not err in dismissing the action.

[5] However, it is clear that proceedings in the action should be stayed pending the filing of the required undertaking. This much is expressly provided in section 1036, Code of Civil Procedure, and manifestly is essential to accomplish the object of the statute. Of this provision it was said in Meade County Bank v. Bailey, supra:

> "The statute vests in the defendant the right to have the bond, and the court cannot against his will deprive him of that right, or alter the amount or terms of the bond required. When the demand for security for costs is made in the proper case, the law itself enjoins further proceedings on the part of the plaintiff until the demand is complied with according to the provisions of the Code."

Will prohibition lie to prevent such further proceedings pending the filing of the undertaking? Where the court refuses to dismiss an action for failure to file the required undertaking, and is proceeding to try the cause without any undertaking being on file, manifestly the defendant has no plain, speedy, and adequate remedy in the ordinary course of law. A similar situation was presented in Hayne v. Justices Court, 82 Cal. 284, 23 Pac. 125, 16 Am. St. Rep. 114, where the lower court was proceeding to try a case in disregard of the provisions of section 45 of the Insolvency Act, which plainly prohibited prosecution to final judgment of actions against the debtor until the question of his discharge was determined. This court there said:

> "This is a plain and direct prohibition against any further proceedings in the justice's court, and the petitioner, having brought himself within the statute, is entitled to the relief prayed for. * * * A court that proceeds in the trial of a cause against an express prohibition of a statute is exceeding its jurisdiction, and may be prevented by prohibition from this court."

It appears to us that in no other way could the petitioner here receive the protection that the statute guarantees, and the decision is certainly sufficient authority for the proposition that, seeking and insisting upon such protection, he is entitled to have proceedings stayed in the lower court, pending the filing of the required bond, by prohibition.

It is ordered that a peremptory writ of prohibition issue prohibiting respondents from further proceedings in the action of Mary V. Douthit, Plaintiff, v. George D. Carter et al., Defendants, now pending in the superior court of Kern county, in so far as said defendant George D. Carter is concerned, pending the execution and filing by the plaintiff therein of the undertaking for costs and charges required by section 1036, Code of Civil Procedure, saving and excepting to respondents the right and power to entertain and determine any motion for dismissal of said action under the provisions of section 1037, Code of Civil Procedure, as well as the right and power to allow a proper bond to be filed in accord with the requirements of said section 1036, Code of Civil Procedure.

We concur: VICTOR E. SHAW, Judge pro tem.; SLOSS, J.; SHAW, J.; MELVIN, J.; HENSHAW, J.

176 Cal. 746

RAMAGE v. GOULD. (S. F. 8206.)

(Supreme Court of California. Dec. 15, 1917.)

CORPORATIONS ⚷130—TRANSFER OF STOCK—ATTACHMENT.

An attachment upon corporate stock is merely a lien on the shares, and does not interfere with the right to transfer the title to the stock, and the corporate officers must issue a new certificate to an assignee or be liable to a penalty as provided by Civ. Code, § 324; attachment in such cases being regulated by Code Civ. Proc. § 542, subd. 4, relating to attachment of corporate shares, and not by subdivision 5, relating to attachment of personal property not capable of manual delivery, and section 544, making persons having in their possession or under their control personal property belonging to the defendant liable to the plaintiff, does not apply.

In Bank. Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by Stanley Ramage against C. W. Gould. Judgment for plaintiff, and defendant appealed. Judgment was affirmed by the District Court of Appeal. On rehearing. Affirmed.

Fred L. Dreher, of San Francisco (Frederick J. Wichman, of San Francisco, of counsel), for appellant. Alfred J. Harwood, of San Francisco, for respondent. Heller, Powers & Ehrman, of San Francisco, amici curiæ.

SLOSS, J. This appeal was, in the first instance, heard in the District Court of Appeal for the First District, where the following opinion, prepared by Mr. Justice Richards, was filed:

"This is an appeal from a judgment in plaintiff's favor in an action brought against the defendant as the secretary of a corporation to recover the statutory penalty for refusing to transfer shares of stock of said corporation to the plaintiff upon his production of an assignment of the certificate of said stock and his demand for such transfer.

"The facts of the case are practically undisputed and are as follows: On February 15, 1915, one Andrew Ramage was the owner of 200 shares of the capital stock of the Growers' Co-operative Agency, a corporation. On that date an action was commenced against him in the justice's court of the city and county of San Francisco upon a debt, and an attachment was thereupon issued out of said court, which was straightway levied upon the said shares of stock of the defendant in said corporation. On March 15, 1915, said Andrew Ramage sold, indorsed and delivered to Stanley Ramage, the plaintiff herein, 199 shares of said stock, and delivered the certificate evidencing the same to him. The plaintiff immediately presented said certificate to the defendant herein, as the secretary of said corporation, and requested the issuance of a new certificate therefor to him. The defendant then informed the plaintiff and also Andrew Ramage, his assignor, of the fact of said attachment, and stated to the plaintiff that he would sign and issue said stock as soon as said attachment had been released. On August 5, 1915, the plaintiff renewed his demand on the defendant for the issuance to him of said stock. The action against Andrew Ramage was still pending and said attachment had not been discharged or released, and the defendant then stated that he was not at liberty to issue a new certificate for the attached stock, but that he would do so as soon as said attachment had been released. This action was thereupon instituted to recover from the defendant as liquidated damages the statutory penalty provided by section 324 of the Civil Code.

"The sole question presented for decision in this case is as to whether the officers of the corporation can refuse to transfer certificates of shares of stock in their corporation to a purchaser and holder thereof demanding such transfer, when a writ of attachment has been levied on the shares or interest of the original holder of such stock, the lien of which attachment has not been released, but is still subsisting at the time of such demand.

"We are unable to distinguish this case in principle from the case of Craig v. Hesperia Land & Water Co., 113 Cal. 7, 45 Pac. 10, 35 L. R. A. 306, 54 Am. St. Rep. 316. In that case the action was to recover damages for a conversion of the plaintiff's stock by the officers of the corporation through their failure or refusal to transfer said stock upon demand, the reason for such refusal consisting in the claim that the corporation had a lien on the stock for unpaid assessments. In upholding the plaintiff's contention in that case the Supreme Court says: 'The lien, however, is upon the shares, and not upon the certificate. The certificate is merely evidence of ownership of the shares. When an old certificate is surrendered, and a new one issued, the new certificate represents the same shares, but the shares themselves remain subject to any lien the corporation may have upon them, and the new owner takes subject to such lien.' It is, however, urged by the appellant that the above case is to be distinguished from the case at bar by the fact that in the case of a corporate lien for unpaid assessments the records of the corporation would disclose such lien and put subsequent transferees of the certificate of stock upon notice thereof; while in the instant case the lien created by the attachment would not become a matter of corporate record, and purchasers of the stock under attachment subsequent thereto would have no notice of the lien. This distinction, however, is not important, since shares of stock in a corporation are not negotiable but, like other kinds of personal property, have the doctrine of caveat emptor applied to their transfer.

"The appellant also seeks to derive some comfort from the language used by this court in deciding the case of Spangenberg v. Nesbitt, 22 Cal. App. 274, 134 Pac. 343, but that was a case of conflicting claims to the title of the particular stock in question; and while the court did suggest that under such conditions the officers of the corporation were entitled to a reasonable time to determine its duty in the premises, it also clearly indicated that there was one of two safe courses to be taken by such officers if they would avoid the penalty which the section of the Civil Code involved in this action imposes; they might either make an independent investigation as to where the rights of the parties lay; or they might institute an action for interpleader between the rival claimants, and relieve themselves of responsibility by depositing the stock in court. Neither of these courses was followed by the defendant in the case at bar, although five months elapsed between the plaintiff's first and second demand.

"We find no error, therefore, in the ruling of the trial court holding the defendant liable to the penalties of the statute under the circumstances of the present case.

"Judgment affirmed."

Thereafter, an order was made transferring the cause to this court for hearing and determination. The application for such transfer was supported by friends of the court, who attacked the judgment under review upon grounds differing somewhat from those advanced by the appellant himself. Our further examination of the case has satisfied us that neither petition shows any good ground for reversing or modifying the judgment appealed from. The opinion of the District Court of Appeal is adopted as embodying a satisfactory statement of the facts, and of the reasons for the conclusion reached. A few words may, however, be added, in view of the differing lines of attack made upon this conclusion.

The appellant himself takes the position that the plaintiff was not entitled to have a certificate issued to him so long as the attachment remained in force. This contention cannot be maintained, unless it find justification in the statutes relative to attachment. There is no such justification. An attachment is a mere lien upon the shares of stock. Such lien, like any other, is upon the shares themselves, rather than upon the certificate of stock. The identity of the shares is not altered by the issuance of a new certificate, and the lien, if valid in its creation, will persist, notwithstanding the surrender of the certificate and the issuance of a new one to some person other than the defendant in the attachment suit. To this extent the decision in Craig v. Hesperia L. & W. Co., 113 Cal. 7, 45 Pac. 10, 35 L. R. A. 306, 54 Am. St. Rep. 316, is precisely in point. The levy of an attachment does not deprive the owner of the shares of his title. He still owns the stock, and may exercise all of the rights of ownership, subject to the lien of the attachment. He may sell and transfer the shares (always subject to the attachment), and vest in his transferee all the rights which he has. One of those rights, that of voting the shares, cannot be exercised except by one having the stock in his own name upon the books of the corporation. Civ. Code, § 312. The mode of attaching shares of stock of a corporation is defined by subdivision 4 of section 542 of the Code of Civil Procedure. Specific provision being thus made, the general language of subdivision 5 of the same section, prescribing the method of attaching debts and credits and other personal property not capable of manual delivery, must be restricted to forms of property other than corporate shares. Section 544, making persons "having in their possession, or under their control," personal property belonging to the defendant, liable to the plaintiff, unless the property be delivered up or transferred to the sheriff, is complementary to subdivision 5 of section 542, and has no application to attachments of shares under subdivision 4. Even if the officers of a corporation may be said to have the stockholder's shares in their possession or under their control, section 544 could not be applied to shares of corporate stock without holding that the officers of the corporation, upon being served with the writ, may issue a certificate to the sheriff. Manifestly the Code provisions do not contemplate this result.

There is, accordingly, no statutory provision authorizing the corporate officers to deny the stockholder or his assignee the rights incident to the holding and ownership of the shares attached. If, as is contended, this conclusion makes it possible for the owner of shares which have been attached to deceive others by inducing them to purchase shares in ignorance of the levy, the remedy lies with the Legislature. The courts would not be justified in attributing to an attachment an effect greater than that which the statute gives, or in depriving stockholders in corporations, or their transferees, of any of their legal rights.

All of this is virtually conceded by learned counsel who appear here as amici curiæ. They contend, however, that while the plaintiff, as purchaser of the shares and indorsee of the certificate, is entitled to have the shares transferred to his name on the corporate books, and to have a new certificate issued, the transfer should be made and the certificate issued subject to a notation that the shares have been attached. The claim is based upon Spreckels v. Nevada Bank, 113 Cal. 272, 45 Pac. 329, 33 L. R. A. 459, 54 Am. St. Rep. 348, where it was held that a pledgee of stock is entitled to have the fact of the pledge entered upon the books of the corporation. Authority for this ruling was found in section 324 of the Civil Code, the court holding that "transfers by way of pledge" were included within the transfers which, under this section, may be entered upon the books of the corporation. It may well be doubted whether the levy of an attachment constitutes in any sense a transfer of the shares, or of any interest therein. It is not necessary, however, in this case to decide whether the corporate officers would be justified in refusing to issue to the transferee of a stockholder whose shares had been attached any certificate except one showing the fact of attachment. No such question was raised in this case, nor could it have been raised upon the record before us. The complaint alleged, and the court found, that the defendant had refused to issue any certificate to the plaintiff. The findings must be construed, if possible, so as to support the judgment. So construed, the finding that the defendant refused to issue any certificate should be taken to mean, not merely that he refused to issue a general, unrestricted form of certificate, but that he refused to recognize the right of the plaintiff to have a certificate in any form issued to him. This, too, is the necessary implication of the answer, which, in effect, declares that the defendant refused to issue a certificate so long as the attachment remained in force. It is apparent from the defendant's own pleading that a demand for a certificate, of whatever form, would have been unavailing. It does not, therefore, lie in the defendant's mouth to claim that the plaintiff did not ask for the particular kind of certificate to which he was entitled.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; MELVIN, J.; LAWLOR, J.; HENSHAW, J.

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176 Cal. 784

In re MARSHALL'S ESTATE. (S. F. 8155.)

(Supreme Court of California. Dec. 18, 1917. Rehearing Denied Jan. 17, 1918.)

1. Appeal and Error 🔑151(2)—Right to Appeal—Interest—Parties Aggrieved.

Where parties appealing from a decree determining heirship merely attack the sufficiency of the evidence establishing the kinship of the respondent, without attempting to establish their own kinship, they had no standing as parties in interest, nor as parties aggrieved by the decree, and their appeal could not be considered.

2. Wills 🔑300 — Beneficiaries — Determination—Evidence.

Evidence *held* to sustain decree that a nephew was the sole heir of testatrix, who devised all her property to her own family.

3. Wills 🔑501 — Construction — Designation of Beneficiaries.

Civ. Code, § 1334, providing that a testamentary disposition to family, without any other words of qualification, vests the property in those who would be entitled to succeed in case of intestacy, and section 1386, subd. 8, providing that, where the property was community property, one-half thereof, on intestacy of a surviving spouse, goes to the heirs of the deceased spouse, do not apply where testatrix devised all her property "to my own family who I think are all in Mexico," and the husband's heirs, who were not in Mexico, were not entitled to participate.

Department 2. Appeal from Superior Court, San Francisco County; Thos. F. Graham, Judge.

Proceedings in the estate of Juana B. Marshall, deceased, wherein a contest over the right of heirship arose between Jose Maria Beltran and Maria Refugio Chavez and others. From the decree rendered, Maria Refugio Chavez and others appeal. Affirmed.

J. J. Lermen, W. F. Postel, Karl C. Partridge, Frank J. Hennessy, and Frank W. Sawyer, all of San Francisco, for appellants. A. E. Bolton, Chas. S. Perry, and H. L. Bradford, all of San Francisco, for respondent.

HENSHAW, J. [1] Juana B. Marshall died testate. By her will she declared that:

> "All that is left of my estate, after my just debts are paid, I leave to my own family who I think are all in Mexico."

Contest arose over the determination of the right of heirship and succession to her estate. The court found and decreed that Jose Maria Beltran was her nephew, and was the only one who had proved heirship. Separate appeals are taken by Maria Refugio Chavez and Maria Martiniana Ochoa, by Josephine L. Flores, and by the heirs of Joseph S. Marshall, deceased, formerly the husband of Juana B. Marshall, the testatrix. The appeal of Maria Chavez and Maria Ochoa contents itself with attacking the sufficiency of the evidence establishing the kinship of the respondent, without attempting to disclose evidence establishing the kinship of the appellants. Under such circumstances they neither stand as parties in interest nor as parties aggrieved by the decree, and for these reasons their appeal is not entitled to further consideration.

The appeal of Josephine L. Flores is based upon her own statement to the effect that she was a grandniece of the deceased, upon the testimony of Mrs. Stefan Ibera that she had heard the deceased speak of the contestant as her grandniece, and also the testimony of Mrs. Josephine Ybarra to the same effect, though the nature of the relationship was confused in the witness' mind, since in referring to this contestant the witness declares that the contestant's mother had been declared by the deceased to be her first cousin "and aunt and niece both."

The difficulty in securing more satisfactory evidence upon the question of heirship arose from two facts: First, that the deceased, Juana B. Marshall, had been an Indian girl who had come to California from Mexico in her extreme youth; the second, that because of the disturbed conditions existing in Mexico, it was difficult to procure depositions.

[2] On behalf of respondent it was shown by numerous witnesses that he had twice been an inmate of Mrs Marshall's home once

during the lifetime of her husband, and once after his death; that upon both occasions she had publicly introduced him as her nephew. The court accepted this evidence, to the rejection of the asserted claims of the appellants, and it was justified in so doing.

[3] The last appeal, as has been said, is by the heirs of the husband of the testatrix. They base their right to inherit upon the language of the will above quoted, taken in connection with sections 1334 and 1386 of the Civil Code. By the first of these sections—

> "a testamentary disposition to * * * 'family' * * * without other words of qualification * * * vests the property in those who would be entitled to succeed to the property of such person, according to the provisions of the title on succession, in this Code."

By section 1386 (subd. 8) where, as here, the property was community property, acquired by the wife from her husband, then one-half of such common property so acquired upon the intestacy of the surviving spouse goes to the heirs of the other deceased spouse. The question then is whether the word "family" as employed in this will is so employed "without other words of qualification." Clearly we think it is not. She leaves her estate to her own family, and even if these words were not sufficient, as we think they be, to qualify the use of the word "family" so as to indicate that the testatrix meant heirs of her own blood, it is further qualified by the fact that she points out that the family she means are in her belief residents of Mexico, as the Marshall heirs were not.

The decree appealed from is therefore affirmed.

We concur: MELVIN, J.; LORIGAN, J.

177 Cal. 21

LEVEY v. HENDERSON et al. (L. A. 4059.)

(Supreme Court of California. Dec. 20, 1917.)

1. Trial 🔑419—Waiver of Error—Motion for Nonsuit.
Where the defendant proceeds with his defense after his motion for a nonsuit is denied, and the evidence thereafter given by the other party supplies the defect or omission in the original evidence for the plaintiff, the ruling on the motion is not available as ground for the reversal of a judgment for the plaintiff.

2. Payment 🔑65(6)—Defense.
The defense of payment is affirmative matter, and requires proof by defendant.

3. Bills and Notes 🔑499—Payment—Presumption from Possession of Note.
Possession by a plaintiff of the note sued on, bearing no indorsement or other evidence of payment, raises a presumption that the note is wholly unpaid.

4. Appeal and Error 🔑1011(1)—Review—Conflicting Evidence—Finding.
A finding upon conflicting evidence cannot be interfered with on appeal.

5. Bills and Notes 🔑135—Collateral Security—Equities Between Principals.
Where all the makers of a note executed it as principals, that one of them gave his note to the holder of the first note, long after the first note had matured, as collateral security for its payment, created no equity in the other makers of the first note, which entitled them to object to the return of the collateral note by the holder of the first note.

6. Appeal and Error 🔑1170(7)—Reversal—Trivial Error—Exclusion of Evidence.
Exclusion of evidence, competent merely to furnish a reason why appellants called a certain individual as their witness, was of too slight importance to justify reversal, even if erroneous.

7. Bills and Notes 🔑437—Release of Principals.
Where makers of a note all signed as principals, and none were in fact sureties for any of the others, none of them were released by the withdrawal of stock originally pledged to secure the note.

Department 1. Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by H. C. Levey against George W. Henderson and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Williams, Goudge & Chandler and Goudge, Robinson & Hughes, all of Los Angeles, for appellants. H. C. Millsap, of Los Angeles, for respondent.

SHAW, J. The defendants Henderson and Robinson appeal from the judgment. The action is upon a joint and several promissory note dated January 19, 1909, for $2,000, payable six months after date, executed to the Merchants' National Bank by F. E. Davis, Lester L. Robinson, M. O. Whelan, Geo. W. Henderson, and Geo. C. Peckham. M. O. Whelan died before the action was begun. F. E. Davis and Geo. C. Peckham made no defense and their default was entered. The present appeal involves only the defense made by Robinson and Henderson. The complaint alleges that about January 20, 1910, the Merchants' National Bank sold, assigned, and transferred the note to Frank G. Hogan, and indorsed thereon the words: "Without recourse on us. Merchants' National Bank, Los Angeles, Cal., by W. H. Holliday, President"—and that thereafter Frank G. Hogan assigned the note to the plaintiff. Robinson and Henderson, in separate answers, each denied the assignments and alleged that, prior to January 20, 1910, the said promissory note was fully paid by the defendant F. E. Davis to the said Merchants' National Bank.

[1] The appellants claim that the court erred in denying their motion for a nonsuit on the ground that the indorsement and transfer by the bank were not proven. Where the defendant proceeds with his defense after his motion for a nonsuit is denied, and the evidence thereafter given by the other party supplies the defect or omission in the original evidence for the plaintiff, the ruling on the motion is not available as ground for the reversal of a judgment for the plaintiff. Ringgold v. Haven, 1 Cal. 117; Smith v. Compton, 6 Cal. 24; Schlessinger v.

Mallard, 70 Cal. 334, 11 Pac. 728; Russell v. Pac. Can. Co., 116 Cal. 530, 48 Pac. 616; Scrivani v. Dondero, 128 Cal. 31, 60 Pac. 463; Lyon v. United Moderns, 148 Cal. 472, 83 Pac. 804, 4 L. R. A. (N. S.) 247, 113 Am. St. Rep. 291, 7 Ann. Cas. 672. This proposition disposes of the point. In the course of the trial thereafter there was ample evidence of the indorsement and transfer by the bank to Hogan. The finding on the subject of payment of the note is that no sum whatever has ever been paid thereon, and, specifically, that F. E. Davis did not at any time pay either the principal or the interest of the note. The appellants contend that this finding is contrary to the evidence.

[2-4] The defense of payment is affirmative matter and requires proof by the defendant to support and establish it, and possession by the plaintiff of the note itself, bearing no indorsement or other evidence of payment, raises a presumption that the note is wholly unpaid. Light v. Stevens, 159 Cal. 292, 113 Pac. 659. The claim of the plaintiff is that Davis paid the note. Davis testified that he had never paid the note or any part of it. Conceding that there was other evidence to the contrary, the result would merely be a finding against the defendants upon conflicting evidence. With such a finding we cannot interfere. So far as the defense of payment is concerned the contention of the defendants upon this appeal is therefore without support.

[5] The theory of the defendants appears to be that in some manner Davis himself became the owner of the note, and that proof of this fact controverts the finding of the court that the note had been signed and transferred to the plaintiff and had not been paid. There is evidence to the effect that in January, 1910, Davis executed a note to Hogan. As we understand the position of appellants, it is that this note was given to Hogan either as payment to Hogan of the note here sued on, which about that time was indorsed by the bank, or for a loan by Hogan to Davis for the purpose of enabling Davis to buy the note from the bank, and that the transfer by the bank, apparently to Hogan, was really for the benefit of Davis, the real purchaser. There was evidence, however, that the note executed by Davis to Hogan was given to Hogan merely as collateral security for the payment of the note in suit, that he had never been the owner of the note sued on, and that afterwards, in a settlement of other transactions and dealings between them, this collateral note was returned by Hogan to Davis. Davis testified to that effect. The claim of the appellants that we must disregard the testimony of Mr. Davis because of its inherent improbability deserves little consideration. The inherent improbability does not appear in the record, and the court below evidently gave it full credit. It was corroborated on the main points by the testimony of Jutten and by documentary evidence. The makers of the note executed it as principals, and consequently the giving of the collateral note by Davis directly to Hogan created no equity in the other makers which entitles them to object to the subsequent return thereof by Hogan to Davis. The collateral note was given long after the note sued on had matured; the other makers were not parties to the transaction, and they cannot complain of its rescission and the return of the Davis note. Giving the greatest effect possible to the evidence on which the appellants base their claims, it creates nothing more than a conflict of evidence, in which case this court cannot disturb the finding of the court below.

[6] The defendants proved that several months after the note was indorsed by the bank to Hogan, and before any transfer to plaintiff, Levey, Davis had delivered it to one Wilson and that Wilson had brought a suit upon it in his own name, which was afterwards dismissed. Claiming to be surprised by the testimony of Davis that he never had been the owner of the note and had not paid it, the defendants offered to prove that Davis, at the time he handed the note to Wilson, said to Wilson that the wife of Davis had the note and that Wilson could apply the proceeds of the collection on a debt owing by Davis to Wilson. The court refused to allow the evidence on the ground that Davis was the witness of the defendant, was himself a defendant, and that there was no evidence that he had any authority from Hogan to make such statements. The evidence thus sought to be elicited would not have been competent evidence against the plaintiff or Hogan, to prove that Davis or his wife, and not Hogan, then owned the note. It would serve merely to furnish a reason why the appellants had called Davis to testify as their witness. As evidence for that purpose its exclusion was of two slight importance to justify a reversal of the judgment, even if it were erroneous, which we do not decide.

[7] There is no force in the contention that the appellants were released by the withdrawal of a part of the stock which was originally pledged to secure payment of the note. The makers of the note all signed as principals, and it is not claimed that the appellants were in fact sureties for the others, or any of them. Nor is there any evidence to show that the stock was pledged by any one as principal debtor, or by whom it was pledged. The release of the stock would therefore not operate to release any of the makers of the note. Moreover, that defense was not pleaded. No other points are presented that are worthy of discussion.

The judgment is affirmed.

We concur: SLOSS, J.; LAWLOR, J.

(177 Cal. 1)

MURRAY v. SOUTHERN PAC. CO.

(Sac. 2649.)

(Supreme Court of California. Dec. 18, 1917.)

1. APPEAL AND ERROR 🔑2—ORDERS APPEALABLE—MOTIONS FOR NEW TRIAL.

Where a motion for a new trial was pending when St. 1915, p. 209, abrogating appeals from orders denying new trials, went into effect, an order denying such motion will be reviewed.

2. NEGLIGENCE 🔑136(9)—TRIAL—QUESTIONS OF LAW AND FACT.

Even when there is no conflict in the evidence, negligence is a question of fact for the jury, if different conclusions upon the matter can rationally be drawn from the evidence; but, if only one conclusion can be drawn, it is a question of law for the court.

3. RAILROADS 🔑330(3) — ACCIDENTS AT CROSSINGS—CONTRIBUTORY NEGLIGENCE.

The driver of an automobile damaged in a collision at a railroad crossing was negligent barring recovery in not getting out and looking up the track, although no whistle was blown nor bell rung, where he was driving on the left-hand side of the roadway, on which side a building obstructed his view of the track, and he was well acquainted with the dangerous conditions, and knew that several accidents had occurred there.

In Bank. Appeal from Superior Court, Yolo County; W. A. Anderson, Judge.

Action by J. A. Murray against the Southern Pacific Company, a corporation. From a judgment for plaintiff, defendant appealed. Reversed by the District Court of Appeal. Opinion and judgment of the District Court of Appeal is adopted.

Hudson Grant, of Woodland, and Devlin & Devlin, of Sacramento, for appellant. A. G. Bailey and A. C. Murray, both of Woodland, and Geo. Clark, of San Francisco, for respondent.

PER CURIAM. Before the Court of Appeal, which had original jurisdiction of this case, the following decision was rendered by Hart, J.:

This is an action for damages for injuries alleged to have resulted to an automobile owned by the plaintiff from the negligence of the defendant. The accident resulting in the alleged damage to the automobile occurred at Woodland, Yolo county, between the hours of 8 and 9 o'clock in the morning of August 26, 1914. The complaint states that the automobile was a Westcott four-passenger machine of the value of $925, and alleges that on the day mentioned, "while said machine was in charge of and under the direction of the plaintiff's agent, and while said automobile was proceeding eastward, with due care, along Court street, in the city of Woodland, * * * across the [railroad] tracks of the said defendant, and which said tracks cross the east end of said Court street at right angles, the said defendant, without any care, and without ringing a bell or blowing a whistle, and without any warning whatever, and by reason of its negligence and the negligent operation of one of its locomotives, caused one of defendant's locomotives to come in collision with said automobile, thereby smashing, wrecking, and destroying said automobile, and thereby causing said automobile to be damaged, wrecked, and destroyed."

Judgment for the sum of $925, the alleged value of said machine, was prayed for.

The answer specifically denies the allegations of the complaint, and, furthermore, charges that the injuries resulting to the plaintiff's automobile were proximately caused wholly by the negligence of plaintiff's agent, in charge of and driving said machine at the time of the alleged collision, and further charges that the plaintiff's said agent, when at a point of safety, did not stop or look and listen for the approach of a train, nor exercise ordinary care in approaching said crossing; "that, had said agent stopped or looked or listened, he would have discovered and known of the approach of said locomotive which it is alleged caused the injury to plaintiff's automobile," etc.

The cause was tried by a jury, and a verdict awarding the plaintiff damages in the sum of $300 returned. Judgment was entered accordingly. The defendant appeals from said judgment and the order denying it a new trial.

[1] The motion for a new trial was pending prior to August 8, 1915, the time at which the law abrogating appeals from orders denying new trials (Stat. 1915, p. 209) went into effect, and therefore the said order in this case may be reviewed upon the record upon which the motion for a new trial was made. Schmitt v. White, 172 Cal. 554, 158 Pac. 216.

The appellant complains here of the action of the trial court in admitting, over its objection, certain testimony and in reading to the jury certain instructions. It is also claimed that the evidence does not support the verdict, in that thereby it is made clearly to appear that the accident causing the damage to the plaintiff's automobile was brought about solely through the inexcusable and negligent conduct of the driver of the machine.

The testimony upon which the verdict was obviously principally founded was that given by Earl Murray, son of the plaintiff, and who was the driver of the machine when the accident happened. In fact, as to the immediate circumstances of the collision, his was the only testimony given for the plaintiff. We may therefore state in narrative form the facts as he detailed them to the jury. It will be the more orderly, however, first to describe the physical surroundings of the scene of the misadventure.

Court street is one of the principal streets of the city of Woodland, and runs in an easterly and westerly direction, and is crossed by the tracks of the defendant railroad company. The city proper or the business and principal portion thereof lies on the west side of said tracks. On the northwest corner of Court street and the railroad crossing is situated the building of the Woodland Grain & Milling Company. In said building, and on the east side thereof, there are two doors. One of these is situated at approximately 21 feet from the southeast corner of the building, and the other about 77 feet from said corner and north of the former. The west line of the main tracks of the defendant's railway is located about 44 feet east of the east line of said building. These tracks constitute a part of the main line of the California and Oregon division of the defendant's system, and are also used by the defendant for its traffic between local points in this state north of the city of Woodland and the cities of Sacramento and San Francisco.

A siding or switch track is located and runs along the east side of the mill building and at an average of 6½ feet from and along the east line thereof. This siding was apparently so located and is being so maintained for the special convenience of the business of the milling company as well as that of the defendant in the matter of the transportation of the former's freight.

Earl Murray, the driver of the automobile, was living, and for some six or seven years prior to the time of the accident had lived, at 947 Court street, which is about two blocks from the railroad crossing above referred to. He was familiar with the crossing and its surroundings. He knew (so he said) that it was a dangerous crossing, and that a number of accidents, some fatal to human life, had occurred to persons attempting to pass over it.

On the day the accident happened, which, as above stated, was the 26th day of August, 1914, and between the hours of 8 and 9 a. m., he started with the plaintiff's Westcott machine from his home to go to his ranch, which is situated about 5½ miles southeast of Woodland, traveling in an easterly direction and toward the railroad crossing. According to his story, upon approaching the crossing, he slackened the speed of the machine so that he was then traveling at the rate of between 2 and 3 miles per hour. When he reached a point in the street opposite the mill, he observed a freight engine on one of the main tracks going in a southerly direction. After this engine had passed him, he looked south to see whether it was going to return. Satisfying himself that it would not return he then looked in a northerly direction to see if there was another engine or a train coming from that direction. At this point of time—that is, when he turned his eyes to the north—the front end of his machine was about 6 feet from the west rail of the siding, and from where he sat in the machine the distance to the said west rail was from 15 to 18 feet; it being 6 feet from the front part of the seat to the front end of the machine. From this point he could not, on account of the mill, see further north than a distance of some 15 or 18 feet. He saw no cars or engine north of him. He heard from the north no warning of any kind, such as the blowing of a whistle or the ringing of a bell or escaping steam or the noise ordinarily made by a locomotive passing over a track, notwithstanding (so he declared) he "listened carefully." He did, however, hear a "rumbling noise" from and the ringing of the bell on the engine which had just passed him going southward. He proceeded on, and had just reached and was crossing the west rail of the side track when a locomotive, which, according to the testimony of the trainmen, had a few moments previously backed a freight car up to the north door of the mill, appeared at the south corner of the building, going south. Murray, then observing the engine for the first time, stopped his machine as quickly as he could and threw on the reverse. He had barely started to reverse when the engine struck about 2 feet of the front end of the automobile. The locomotive struck the machine with such force that the impact threw the rear end of the machine underneath the drivewheels of the engine. The machine was, of course, greatly damaged.

On cross-examination Earl Murray testified that from where he was sitting in the machine at the time he "slowed down" on approaching the crossing, which was a distance of approximately "15 or 16 feet from the tracks," he could not, when looking north past the south corner of the mill building, have seen the tender of the engine on the siding at a greater distance than from 20 to 25 feet beyond said corner. "I looked from that point and didn't see anything," he said. "It is not a fact that if I had stopped when the seat of my auto was just opposite the southeast corner of the mill building that my machine would have still cleared. It isn't a fact that I could have stopped 15 feet from the rail and still have seen more than 20 feet past the corner. I went down and tried it. The mill building obstructed my view. I knew the mill building was there when I looked. I knew it was there when I started towards the crossing. I didn't stop my machine." Further testifying on cross, he said: "I was watching a car going the other way because it had just crossed the crossing, and I wanted to see if it was coming back. * * * I was concerned with that engine. I looked to see if it was not going to run into me; it attracted my attention; I looked back that way the second time after I looked up—at the train that was a block and a half away—to see whether it was coming my way, and at the time I last saw it it was going the other way."

The witness Morse, an employé of the milling company, was in the building at the time of the collision. He saw the wrecked automobile from a window on the Court street side of the building immediately after the collision. He was then a distance of from 25 to 35 feet from the side track of the defendant. He testified that he did not hear a bell ringing at or immediately previous to that time. He said that he did not know "that there was an engine on that track."

The foregoing comprehends a statement, substantially, of the facts brought out by the plaintiff.

On the close of the plaintiff's case the defendant moved for a nonsuit, but the motion was denied.

We think the motion should have been granted, as, to our minds, it is clearly manifest that the plaintiff's agent, the driver of the automobile, did not, in attempting to make the crossing, exercise ordinary care.

It is proper at this point to state that no evidence was introduced by the defendant in any manner supplying proof of negligence by its agents or of the want of negligence on the part of the driver of the automobile. The plaintiff's case therefore rests wholly upon the testimony of the witness Earl Murray.

[2] The general rule applicable to negligence cases may be stated to be: That, even when there is no conflict in the evidence, negligence is a question of fact for the jury, if different conclusions upon the matter can rationally be drawn from the evidence (Fernandes v. Sacramento, etc., R. R. Co., 52 Cal. 45; McKeever v. Market St. R. R. Co., 59 Cal. 294; Chidester v. Consolidated D. Co., 59 Cal. 197; House v. Meyer, 100 Cal. 592, 35 Pac. 308); but, if but one conclusion can reasonably be reached from the evidence, it is a question of law for the court.

In this case the driver was, according to his own testimony, thoroughly familiar with the crossing and its surroundings. He knew that it was a dangerous place to pass over with an automobile or other vehicle. He knew of the existence of the switch track running alongside the mill building. Knowing these facts, he, upon approaching the crossing, slackened the speed of the automobile to the rate of between 2 and 3 miles an hour, and in this connection it may be observed that at that rate of speed he could easily have stopped his machine within a distance of 3 feet. But his fundamental fault lay in his not exercising proper or ordinary care in ascertaining whether there was an engine or train prepared for action on the side track north of and beyond the southeast corner of the building. He said that from the point at which he slackened the speed of the machine, some 15 or 18 feet of the crossing or the west rail of the side track, he could see no farther than 15 or 18 feet beyond the corner of the building north; that he then looked north, and that he saw no engine; that he proceeded on, and when about crossing the west rail of the siding he first saw the engine coming toward him, and then so near his machine that he was unable to reverse it so as to clear the rail before the engine reached him.

Either one of three different theories only upon which the accident may be accounted for may consistently be deduced from his testimony, viz.: (1) That he did not look north at all, his attention being wholly occupied by the locomotive which had just passed him going south, a theory which is to some extent supported by his statement during his testimony that he was concerned with the engine going south, and that twice he looked in that direction to see if that locomotive was returning or preparing to return toward the crossing; (2) that, if he did look north at the point where first he "slowed down" the machine, he was then so situated with reference to the mill building that his view was thereby so obstructed that he could not have seen the engine on the siding near the point where the north door of the building is situated, from which point it returned south; (3) that the first time he looked to the north, if at all, was when the locomotive was within a few feet of his machine at a point south of the corner of the building.

It is immaterial which of the three theories above suggested is the correct one, for in either the result is the same, the driver being himself entirely to blame for the mishap. But, in reaching our conclusion, we have assumed that he was correct in saying that he did look north from the point from which he said he could not see the siding a greater distance than 15 or 18 feet beyond the corner of the building. It was his duty, knowing what he did of the inherent dangers of the situation into which he was about to place himself, to first stop, look, and listen and so ascertain with certainty that there was no engine or train approaching or likely to approach while he was in the act of making the crossing. If the mill building obstructed a full view of the siding to the north end thereof from the point at which he said he looked north and beyond which he said he could not have moved his machine without being struck by the part of the engine projecting over and beyond the west rail, then he should have stopped his machine, alighted, and himself gone to a point from which he could have had an unobstructed view of the entire length of the siding north of the corner of the mill. This he failed to do, according to his own testimony, but proceeded on upon the assumption that, having seen no engine as far as he was able to see the siding beyond the corner of the mill building, there was none on the track. Under all the circumstances and conditions existing, and with which he was perfectly familiar, he had no right to so assume.

In Herbert v. S. P. Co., 121 Cal. 227, 230, 53 Pac. 651, it is said: "The railroad track of a steam railway must itself be regarded as a sign of danger, and one intending to cross must avail himself of every opportunity to look and to listen for approaching trains. What he must do in such a case will depend upon circumstances. If the view of the track is obstructed, he should take greater pains to listen. If, taking these precautions, he would have seen or heard the approaching train, the very fact of injury will raise a presumption that he did not take the required precautions."

In Green v. Southern Cal. Ry. Co., 138 Cal. 1, 70 Pac. 926, the court makes the following declaration, which is peculiarly applicable to the conduct of the plaintiff's agent here in proceeding to pass over the crossing without looking further north along the side track than the distance of 15 or 18 feet beyond which his view was obstructed by the mill: "The fact that they looked to the east as they passed the gate, or opening, further up the street, as above noted, which was of little benefit to them, is no excuse for not looking or listening at points near the track, where such looking would have been effective."

So here the fact that the agent of the plaintiff did not, because he could not on account of the building obstructing his view, look further up the side track beyond a distance of 15 or 18 feet from the corner of the building, is no excuse for his not having placed himself in a position from which he could have seen up to the extreme north end of said track, "where such looking [in this case] would have been effective."

In Griffin v. San Pedro, L. A. & S. L. R. R. Co., 170 Cal. 772, 151 Pac. 282, L. R. A. 1916A, 842, after stating the facts, the court said: "From these facts it is clear that Mr. Griffin neglected the simplest and plainest precautions for the safety of himself and the others in the automobile. It is the duty of a traveler on a highway approaching a railroad crossing to use ordinary care in selecting a time and place to look and listen for coming trains. He should stop for the purpose of making such observations when necessary. It is his duty to use all his faculties, and it is not enough if he merely listens, believing that the people in charge of any approaching engine will ring a bell or sound a whistle. * * * He [Mr. Griffin] had his car under perfect control. * * * He was running at a very low rate of speed, and it would have been easy for him to stop a short distance beyond the fence corner at a place of complete safety and one well suited to observation. Failing to do this amounts to contributory negligence on his part."

As above suggested, if in this case the plaintiff's agent could have gone no further toward the tracks than the point from which his view up the siding was limited to a distance of 15 or 18 feet without danger of getting so close to the track as to have been struck by the part of the engine extending beyond the rails, he should have stopped his machine, alighted, and taken a complete view of the situation. He had no right to assume in the face of the conditions existing in and about the crossing, and of which he had knowledge that if there was an engine out of his sight on the siding, the trainmen in charge of the engine would "ring a bell or sound a whistle."

It is, of course, true as was said by Mr. Justice Burnett in the very recent case of Thompson v. Southern Pacific Co., 31 Cal. App. 572, 161 Pac. 24, that the rule requiring the traveler to stop is not an absolute one. "If," continues the opinion in that case, "the view is entirely unobstructed, the traveler, while going toward a crossing, may see whether a train is approaching in dangerous proximity. Of course, in a case like that it would be idle to require the traveler to stop to find out something that he can ascertain just as well without stopping. He must, however, avail himself of the vision, and if he is exercising ordinary care, he need not stop except to allow an approaching train to pass so as to avoid a collision. But where the view is obstructed, he must place himself in a position where he can use his faculties of observation to advantage. In such case he stops, not primarily to avoid a collision, but to ascertain whether a collision is threatened. Whereas, if the view is unobstructed, if he stops, it is to allow the approaching train to pass."

[3] In this case, as has been shown, the driver of the machine, though confronted by an obstruction to such a view as would enable him to see and ascertain whether there was an approaching engine, did not stop, and thus by his own act of negligence failed to avail himself of a position where he could have used his "faculties of observation to advantage." And thus he failed to exercise ordinary care in attempting to cross the defendant's railroad tracks, and in so doing met with the accident and resultant injuries of which the plaintiff complains. Of course, under these circumstances the plaintiff has no legal ground for claiming compensatory damages, and cannot recover.

There are, as seen, some other points presented by the appellant; but, in view of the conclusion at which we have arrived, viz. that the plaintiff's own testimony shows that the injuries to his machine were entirely due to the culpable negligence of his agent, the driver of the automobile, said points need not be considered.

A hearing was granted by this court, principally because of the very urgent insistence of the respondent that the decision of the Court of Appeal was revolutionary and declared as an inflexible rule of law that the driver of a motor vehicle approaching a steam railroad crossing was negligent if, his vision being obstructed, he did not stop his vehicle, leave it, and go forward for purposes of observation. Such, of course, is not the adopted rule of law in this state, but a fair reading of the opinion of the court of appeal will disclose that it does not lay down this proposition as being the law. Its discussion is addressed to a motion for a nonsuit under the particular facts of the case before it, and it is held that the motion should have been granted because of the manifest contributory negligence of the driver of the motor vehicle in doing what he did. It is unnecessary in detail to recapitulate the facts as above set forth. But in brief the driver was approaching a crossing which he knew and declared to be an especially dangerous one. He was approaching the crossing upon the left-hand side of the roadway, on which side a building obstructed his view of the railroad track on his left hand. He would have had a larger and freer view had he been driving on the right side of the road. When he passed beyond the projection of the building so that he could see down the track, the space, by his own testimony, was so narrow that he had already put himself in a position of danger. Yet he did so drive, on the left side, without even stopping, and he did so place himself that the injury to the automobile was inevitable. It is in dealing with these facts that the language of the Court of Appeal is to be read, and, so read, that language is sound in law.

The opinion and judgment of the Court of Appeal is adopted, and for the reasons therein given the judgment is reversed.

ANGELLOTTI, C. J. (concurring). I concur in the judgment, and also in the opinion, except that portion thereof which appears to hold that, upon the facts of this case, the language of the District Court of Appeal to the effect that, if the view of the plaintiff was so obstructed by the mill building, he could not otherwise see the approaching engine in time, it was his duty, as matter of law, to alight from his machine and go on foot to a point where he would have an unobstructed view, is sound in law. To my mind the best that can be said upon this matter for defendant is that the question whether as a reasonably careful man he should have so done was one for the jury. However, this language is not essential to the conclusion that plaintiff was guilty of contributory negligence, as is sufficiently shown by what is said in the opinion.

176 Cal. 763

KLANN v. HOFFMAN et al. (L. A. 4073.)

(Supreme Court of California. Dec. 17, 1917.)

1. New Trial 🔑118—Motion—Notice.

Where defendant obtained an order "granting him ten days in addition to the ten days required by law in which he may file his motion of intention to move for new trial," defendant's motion for new trial cannot be disregarded because the extension order used the word "motion" instead of "notice" of intention to move for a new trial; the error being an obvious misprision.

2. New Trial 🔑118 — Time for Filing — Notice.

Under Code Civ. Proc. § 659, requiring a party intending to move for new trial to file with the clerk and serve on the adverse party notice of intention to move for new trial within ten days after receiving the notice of entry of judgment, prior to the amendment by St. 1915, p. 201, which forbade the extension of time by order or stipulation, an order allowing defendant ten days additional to the ten days provided by law in which to file his notice of intention to move for new trial extended, not only the time for filing the notice, but the time for serving the same.

3. Mechanics' Liens 🔑132(8)—Time of Filing—Extension of Time.

Where a subcontractor employed to construct chimneys and a brick porch for a house completed the laying of the brickwork in December, he could not, under Code Civ. Proc. § 1187, declaring that every lien claimant save the original contractor must file his lien within 30 days after he has ceased the labor or furnished materials, or within 30 days after the completion of the original contract, file his lien in the following August, on the theory that it was within 30 days after completing the work, even though the subcontractor in that month replaced a small ash-pit door in one of the chimneys, and it was his custom in such cases to leave some small insignificant portion of the work undone so that he could return every 30 days.

Department 1. Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by John F. Klann against W. E. Hoffman, J. C. Le Claire, and C. C. Pitzer, copartners, doing business as the United States Investment Company, and others, and C. W. Bateman. From a judgment for plaintiff and an order denying his motion for new trial, the last-named defendant appeals. Reversed.

P. S. McNutt, of Los Angeles, for appellant. J. B. McLaughlin, of Los Angeles, for respondent.

SLOSS, J. Action to foreclose mechanic's lien. Plaintiff had judgment, from which, and from an order denying his motion for a new trial, the defendant owner appeals.

[1, 2] The respondent makes a preliminary objection to the consideration of the statement on motion for new trial, or of the ruling denying such motion, upon the ground that notice of intention to move for a new trial was not filed and served within the time allowed. It appears that written notice of the entry of judgment was served upon

the appellant on January 16, 1914. This started the running of the period of ten days within which he was required, if he desired to move for a new trial, to file with the clerk and serve upon the adverse party a notice of his intention so to do. Code Civ. Proc. § 659. At the time of the proceedings here in question, the section just cited had not yet been amended so as to prohibit an extension of this time by order or stipulation. See Stats. 1915, p. 201. On January 21, 1914, the appellant obtained from the court an order granting him "ten days in addition to the ten days required by law in which he may file his motion of intention to move for a new trial in said cause." Within the time, as thus extended, he duly served and filed his notice of intention. It is objected that the order of extension was ineffectual for two reasons. The first objection, based upon the appearance in the order of the word "motion," instead of "notice," is not worthy of serious consideration. The use of this inappropriate term was manifestly the result of a mere clerical error, which could not mislead any one. The further point is that the order of court merely extended the time for filing, but not the time for serving, the notice; both steps being essential to the initiation of a proceeding for new trial. We are not disposed to give to the order so narrow and literal an interpretation. The appellant, in applying to the court, was doubtless seeking additional time within which to take the steps required to enable him to move for a new trial. It is hardly to be supposed that the court intended to give him ten days to file his notice, without at the same time extending his time to serve it. The rulings of the court heretofore have been in the direction of a liberal construction of orders of this kind. In Cottle v. Leitch, 43 Cal. 320, there was an order allowing the defendant 30 days "for preparing and filing motion for a new trial." This the court regarded as sufficient to extend the time for taking all of the steps required to give a valid notice of intention, i. e., both the filing and the service of such notice. In Burton v. Todd, 68 Cal. 485, 9 Pac. 663, it was held that section 1054 of the Code of Civil Procedure, when it permits the extension of time for the service of a notice, also authorizes the court to extend the time for filing such notice. In Bryant v. Sternfeld, 89 Cal. 611, 26 Pac. 1091, the plaintiffs had been granted an extension of time "to prepare their statement on motion for a new trial," and it was held that this carried with it the same extension of time to serve the statement. These decisions are in harmony with the general spirit of our practice, which favors the determination of causes on their merits, rather than upon technical niceties of procedure. We hold, accordingly, that the order extending time authorized not only the filing but the service of the notice within the additional time granted.

[3] The complaint alleges that J. C. Le Claire and C. C. Pitzer, copartners under the name of United States Investment Company, as contractors, made a contract with W. E. Hoffman, as owner, for the construction of a frame dwelling upon a lot in the city of Los Angeles. The plaintiff made a subcontract with Le Claire and Pitzer for the furnishing of all labor and materials necessary to construct two chimneys and one brick porch in said building, for $128, and the lien sought to be foreclosed is for this amount. Plaintiff alleges that he fully completed his said contract on the 29th day of August, 1912, and that he filed his claim of lien on the 30th day of August, 1912, within 30 days after said work was completed and said materials furnished by him. Appellant, Bateman, answered, alleging that he has succeeded to the interest of the true owner; and denying, among other things, that the plaintiff filed his lien within 30 days after the work and labor was completed, or the materials furnished, by said plaintiff. The answer contained other allegations and denials which need not here be stated. The findings were in favor of the plaintiff, and judgment was entered foreclosing the lien for the amount claimed.

The statement on motion for new trial specifies various particulars in which the evidence is insufficient to support the findings. In particular, the finding that plaintiff filed his lien within 30 days after completing his work and labor is attacked. Under section 1187 of the Code of Civil Procedure every lien claimant, save the original contractor, must file his claim of lien within 30 days after he has ceased to labor or to furnish materials, or both, or, at his option, within 30 days after the completion of the original contract. By his complaint the plaintiff did not undertake to show a compliance with the latter alternative. His allegation was that he had filed his claim of lien within 30 days after ceasing to labor or furnish materials, and the judgment in his favor is based upon a finding of such filing. We think it clear that the finding is not sustained.

The plaintiff testified that the last work he did on his contract was to put a door in a chimney on August 29, 1912, the day before he filed his claim of lien. His further examination, however, left no room for doubt that, in reality, he had completed the entire work called for by his contract in December, 1911. The work that he was required to do was to construct two chimneys and a porch, and this consisted, in the main, of furnishing and setting brick. The brickwork was all completed in December, 1911. The door of which we have spoken was a small iron ash-pit door, eight by ten inches in size, at the base of one of the chimneys. It cost 75 cents, and was supplied to replace one which had been furnished before, but had been stolen. The plaintiff testified that it was his practice, when he was uncertain about payment on a job, to leave something undone, so that he could "come back every 30 days," and thus, as he thought, prevent such a completion of his work as would start the running of the time for filing a claim of lien. For several months, at least, prior to August, 1912, he had presented to the contractors bills calling for payment of the full sum agreed to be paid him.

The evidence which we have outlined shows clearly that the plaintiff had, in substance and in fact, completed his contract seven or eight months before he filed his claim of lien, and that he had himself treated the contract as completed. Passing the point that a door had once been furnished, the omission to supply this trivial item was, on plaintiff's own admission, a mere subterfuge to support the pretense that the work had not been completed. A lien claimant cannot by such means, clearly not employed in good faith, prolong indefinitely the statutory time for filing his claim.

It is unnecessary, in view of these conclusions, to consider any other point.

The judgment and the order denying a new trial are reversed.

We concur: SHAW, J.; LAWLOR, J.

176 Cal. 758

HARMON v. DE TURK et al. (L. A. 4047.)

(Supreme Court of California. Dec. 15, 1917.)

1. Appeal and Error 🔑70(2)—Appealable Orders—Overruling Demurrer.
An appeal from an order on a demurrer is not authorized.

2. Appeal and Error 🔑870(5) — Appeal from Judgment—Matters Reviewable.
Rulings on demurrer are reviewable on appeal from final judgment.

3. Appeal and Error 🔑907(2), 934(2)—Review—Presumption—Judgment—Findings—Evidence.
Findings being waived, a judgment for plaintiff imports that the court found for him on all material issues, and where no evidence is brought up by the record, it will be assumed that the findings are fully supported.

4. Appeal and Error 🔑1078(3) — Waiver of Error.
Where the order sustaining plaintiff's demurrer to defendants' cross-complaint is not argued on appeal, it will not be reviewed.

5. Injunction 🔑46—Trespass on Land.
As a general rule injunction will not lie to restrain mere trespassing on land; an action at law ordinarily affording an adequate remedy.

6. Injunction 🔑49—Trespass—Adequate Remedy of Law.
It is not the usual practice of courts of equity to permit an injunction suit to be substituted for an action of ejectment, though an injunction may be granted to restore land where the threatened injuries will be irreparable and the legal remedy inadequate.

7. Injunction 🔑49 — Interference with Lessee's Possession — Adequate Remedy of Law.
Plaintiff, who had the exclusive right under a lease to remove rocks, sand, and gravel from the premises subject to the provision that he should have erected upon the premises a suitable plant within 90 days, was entitled to injunctive relief where he was excluded from the land by obstructions wrongfully erected, and was ordered not to enter for the purpose of carrying out the terms of the lease, as an action at law would not give possession in time to enable plaintiff to carry out his obligations under the lease.

8. Injunction 🔑49—Grounds for Relief—Prescriptive Rights.
That the acts of defendant, if allowed to continue, might ripen into a prescriptive right in itself, called for interposition of equity.

Department 1. Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by N. O. Harmon against Martha H. De Turk and husband. Judgment for plaintiff, and defendants appeal. Affirmed

M. Randall, of Los Angeles, for appellants. Davis & Rush, of Los Angeles, for respondent.

SLOSS, J. The purpose of this action was to obtain an injunction restraining the defendants from interfering with the plaintiff in the free use and occupancy of a tract of land in the county of Los Angeles. The complaint alleged that on May 2, 1914, the defendant J. G. De Turk was the owner of said land; that on that day he executed and delivered to the plaintiff a written lease of said land for the term of one year, with the privilege of renewals. By said writing the lessee was given the exclusive right of excavating, grading, and removing sand, rock, and gravel from said land, subject to the proviso that within 90 days he should have erected upon the premises a suitable plant and equipment for the work, and that after said 90 days he should remove at least 1,000 cubic yards per month of said sand, rock, and gravel, paying the lessor at the rate of 10 cents for each cubic yard so removed. It is alleged that in order to carry out said agreement the plaintiff contracted for the purchase of machinery, lumber, and other materials to the value of several thousand dollars, in order to erect the required plant, and that he has made contracts with various persons for the delivery to them of sand, rock, and gravel to be taken from the premises. On or about June 9, 1914, the plaintiff attempted to enter the premises for the purpose of erecting and constructing the plant and carrying out the terms of his lease, but found the premises inclosed by a fence, and the entrance gate locked. He entered the premises, and was making measurements for the purpose of complying with his contract, when the defendant Martha H., wife of the lessor, ordered plaintiff off the premises, and stated that she had put the lock on said gate, that she would not permit plaintiff to enter for the purpose of carrying out the terms of said lease, or for any other purpose, and that she would prevent him from erecting any building on said premises, or from removing therefrom any sand, gravel, or rock. The complaint contains the usual allegations that said defendant wife will, unless restrained, carry out her threats and prevent plaintiff from entering the property, and from performing the terms of the lease on his part, and will prevent him from carrying out his obligations to persons with whom he has contracted to deliver sand, rock, and gravel, and with whom he has made contracts for the erection of a plant on said premises, "all to the great and irreparable damage of the plaintiff herein." It is also alleged that defendant Martha H. De Turk is insolvent and unable to respond in damages for any judgment that might be obtained against her. The demurrer of the defendant Martha H. De Turk having been overruled, she answered and filed a cross-complaint, in which she attacked the validity of the lease, asserting that she owned an interest in the land. J. G. De Turk filed a separate answer, in which he, in effect, joined in the request that plaintiff be granted an injunction against the defendant Martha H.

Plaintiff's demurrer to the cross-complaint having been sustained with leave to amend, and no amendment having been made, the cause came on for trial. Findings were waived, and the court entered judgment granting the plaintiff the relief for which he had prayed. The notice of appeal states that the defendant Martha H., "and for her husband, J. G. De Turk," appeals from the judgment and the order of the court overruling the demurrer of the defendants and the order of the court sustaining the demurrer of the plaintiff to the defendants' cross-complaint.

[1, 2] The only appeal that can be considered is that from the judgment, since our law does not authorize an appeal from an order overruling or sustaining a demurrer. The rulings on demurrer are, however, reviewable on the appeal from the judgment itself.

[3] The court in its judgment recites that it finds all of the allegations of the complaint to be true, and all of the allegations in the answer of the defendant Martha H. De Turk, claiming an interest in the property, to be untrue. Even without this, the judgment itself would, in view of the fact that findings were waived, import that the court had found in favor of the plaintiff on all material issues. No evidence being brought up in the record, we must assume that such findings are fully supported.

[4] The only question to be decided is whether the complaint states facts entitling the plaintiff to the relief sought. We are not called upon to consider the propriety of the ruling sustaining plaintiff's demurrer to the cross-complaint, since the appellants have not seen fit to argue this question.

The contention of the appellant wife is that on the facts alleged there is no such showing of irreparable injury to the plaintiff, or of inadequacy of a remedy at law, as to justify the interposition of a court of equity by means of an injunction.

[5, 6] It is, no doubt, the general rule that injunction will not lie to restrain mere trespasses on land, and this for the simple reason that an action at law will ordinarily afford an ample and adequate remedy for the wrong. Mechanics' Foundry v. Ryall, 75 Cal. 601, 17 Pac. 703; Cal. Nav. Co. v. Union Trans. Co., 122 Cal. 641, 55 Pac. 591; Randall v. Freed, 154 Cal. 299, 97 Pac. 669. And, on like grounds, it is not the usual practice of courts of equity to issue injunctions for the purpose of restoring land to a claimant out of possession—in other words, to permit an injunction suit to be substituted for an action of ejectment. 22 Cyc. 826. The injunction may, however, be granted, even in such cases, where the threatened injury would be irreparable, and the legal remedy inadequate. 22 Cyc. 827.

[7] These requisites are shown to exist in the case at bar. We have more here than a threat of repeated trespasses, or a bare withholding of possession. The plaintiff is entitled to enter under an agreement which authorizes him to remove the very substance of the land itself, and makes his right dependent upon the construction of improvements within a limited time and a continuing activity thereafter. He is excluded from the land by physical obstructions wrongfully erected and threatened to be maintained by the appellant Martha, who is, in fact, the only defendant complaining of the decree. An action at law would not give him an undisturbed possession in time to enable him to carry out his obligations under his lease. These facts, entirely apart from the allegations of insolvency, make out a case of irreparable damage sufficient to warrant relief by way of injunction.

[8] Furthermore, the acts of the defendant, if allowed to continue, might ripen into a prescriptive right, and this consideration, in itself, calls for the interposition of a court of equity. Moore v. Clear Lake Waterworks, 68 Cal. 146, 8 Pac. 816; Mendelson v. McCabe, 144 Cal. 230, 77 Pac. 915, 103 Am. St. Rep. 78.

The claim that Martha H. De Turk was improperly joined as a party defendant is obviously without merit.

The appeals from the orders overruling and sustaining demurrers are dismissed.

The judgment is affirmed.

We concur: SHAW, J.; LAWLOR, J.

(177 Cal. 13)

SCHUH v. R. H. HERRON CO. (L. A. 4040.)

(Supreme Court of California. Dec. 19, 1917.)

1. WITNESSES 🔑379(7) — CROSS-EXAMINATION—INCONSISTENT PLEADINGS.

Where plaintiff machinist, in action against his employer for injuries, in his last amended complaint and in his testimony stated that his hand was caught between the plies on defective belt, and his arm drawn down between the cone of the lathe and the body of the machine, whereas his previous complaints alleged his hand was drawn in between the belt of the lathe and the cone thereof, and did not allege his hand was caught between the plies of the belt, such prior pleadings were admissible in his cross-examination to show prior inconsistent statements.

2. EVIDENCE 🔑208(6) — ADMISSIONS — PRIOR PLEADINGS.

A pleading which has been superseded by an amendment can no longer perform any office as a pleading, and cannot be used on the trial as admissions to contradict an allegation in a subsequent amendment.

3. WITNESSES 🔑379(7) — CROSS-EXAMINATION—INCONSISTENT PLEADINGS.

Where the person who files and verifies a pleading subsequently amended is himself a witness on the trial, he may, on cross-examination, be questioned concerning the portions of his original pleadings which are inconsistent with the pleading upon which the trial is had, to show statements inconsistent with his testimony on the stand.

4. MASTER AND SERVANT 🔑274(7)—ACTION—EVIDENCE—CONTRIBUTORY NEGLIGENCE.

In a machinist's action against his employer for injuries received while attempting to shift a moving belt claimed to be defective, evidence that defendant had posted notices expressly directing employés to examine tools before use, and report and not use them if defective, and not to shift belts while the shafting was in motion, which notices it was inferable plaintiff had seen and knew the contents of, was admissible on the issue of contributory negligence, since, if plaintiff had this knowledge, it would tend to show him negligent, first, in proceeding to use the defective belt without examination or without reporting it, and, second, in attempting to shift it while the shaft was in motion.

5. APPEAL AND ERROR 🔑171(3)—THEORY OF CASE BELOW.

An erroneous exclusion of evidence of contributory negligence could not be justified on appeal on the ground that the plea of contributory negligence was so defective as to raise no issue thereon, where no objection to the pleading was made below, and the trial proceeded as if such issue were made.

6. MASTER AND SERVANT 🔑228(1) — EMPLOYERS' LIABILITY ACT.

The abolition of the defense of assumption of risk by the Employers' Liability Act (St. 1911, p. 796) did not destroy the defense of contributory negligence.

7. MASTER AND SERVANT 🔑247(5) — CONTRIBUTORY NEGLIGENCE.

If an employé is ordered to examine a tool for defects and report the same, if any, before using it, and, failing to do so, is injured from a defect which ordinarily careful examination would have disclosed to him, his neglect of his duty to obey the order would be a contributing cause of his injury.

8. MASTER AND SERVANT 🔑247(5) — CONTRIBUTORY NEGLIGENCE.

If an employé, ordered not to shift a belt while the shafting is in motion, nevertheless does so and is injured thereby, he would be guilty of negligence contributing to his injury.

9. MASTER AND SERVANT 🔑203(1) — "ASSUMPTION OF RISK."

The doctrine of assumption of risk means that the law implies, as a part of the contract of service, that the servant agrees to and assumes all the ordinary risks of personal injury incident to the business and not caused by the direct negligence of his employer.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Assumption of Risk.]

10. MASTER AND SERVANT 🔑217(13) — ASSUMPTION OF RISK.

If a servant goes to work in a place which he knows to be dangerous, he assumes the risk arising from such known dangers.

11. MASTER AND SERVANT 🔑217(13) — ASSUMPTION OF RISK.

If a servant accepts for his use a tool furnished by the master knowing it to be defective, and that such defect makes it dangerous, he assumes the risk of injury that may be caused to him therefrom.

12. MASTER AND SERVANT 🔑281(8) — CONTRIBUTORY NEGLIGENCE—CUSTOMARY METHOD OF WORK.

That it was not unusual in a certain machine shop for those using lathes to shift the belt by striking it with the bare hand did not establish that this method of shifting the belt was not negligent or dangerous.

Department 1. Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by August Schuh against R. H. Herron Company. From judgment for plaintiff and an order denying new trial, defendant appeals. Reversed.

Gray, Barker & Bowen and Wm. Bowen, all of Los Angeles, for appellant. William C. Jenkins, Earle H. Smith and Wm. Coleman, all of Los Angeles, for respondent.

SHAW, J. In an action for personal injuries the plaintiff recovered judgment against the defendant for damages. The defendant appeals from the judgment, and from an order denying its motion for a new trial, the latter having been taken before the law abolishing such appeals was enacted.

The defendant was carrying on a machine shop. It had therein a lathe, built on a steel table and fastened to a horizontal shaft turned by a belt from a countershaft above. For the purpose of changing the speed of the lathe the shaft and countershaft are each fitted with what are called "cones." A cone is a succession of pulleys, each slightly larger than the one before, with an approach or inclined plane connecting them so that the belt will easily pass from one to the other. The cone on the countershaft above increases in size from right to left; that on the lathe shaft was to the left of the lathe and increases in size from left to right. On the upper cone the belt is shifted by means of a stick or lever hanging down from a point above the cone and by the side of the belt. By pressing it against the belt the latter may be moved to another part of the upper cone. On the lower cone the belt may be moved sidewise by pressing against it with a stick or tool or with the bare hand. But in doing this when the belt is in motion it is necessary first to shift the belt on the upper cone to a smaller part thereof so as to loosen it.

In the complaint upon which the trial was had plaintiff alleged that he was in the service of the defendant, and was operating a lathe which was turned by means of a belt so arranged that it could be shifted along the shaft to make the lathe run faster or slower, as desired; that the power to operate the belt, and which ran the lathe, was controlled by a lever directly over and above the lathe; that the lathe was defective and unsafe; that the plies or layers of the belt had become unglued or split in certain places so that they would separate; that said lever was difficult to move and operate because it was improperly connected and adjusted, and its connections were rusty and old; that while plaintiff was operating said lathe he attempted to shift said belt, and by reason of its defective condition his left hand was caught between the plies of the belt, and thereby his left arm was drawn down between the cone of the lathe and the body of the machine or table, causing the arm to be cut and bruised and the bone fractured, for which injury the damages were claimed. The particulars concerning the manner in which the injury occurred were inserted in the complaint by an amendment made three days before the trial. This was the third amendment of this part of the complaint.

[1-3] The first error complained of is the ruling of the court below upon cross-examination of the plaintiff while testifying as a witness in his own behalf. His testimony in chief was that in shifting the belt he attempted to do so with his bare hand; that the belt was slack at that instant and the plies open wide enough to admit his fingers; that they were caught between the two plies, which immediately became taut, and drew his arm down between the cone of the lathe and the body or table of the machine. The original complaint alleged on this subject that the shifting arrangement and its connections, and the lever by which it was operated, were loose, rusty, and worn out, and were by reason thereof unsafe to operate, and "that by reason of said worn-out condition of said shifting arrangement, lever, and the belts connected thereto," the plaintiff's "left arm was pulled in under and between the belt and the cone of said lathe," instead of it having been caught in the plies and "drawn down in and between the said cone of said lathe and the body of said machine," as alleged in the final amendment. In another amendment thereto the plaintiff had alleged that the lathe was defective and unsafe and the shifting belt was torn, worn, patched, and split, and said lever difficult to move because it was improperly adjusted and connected, and its connections loose, rusty, and worn out, and that by reason of said defects, and while plaintiff was operating said lathe, his left arm "was caught between the shifting belt and the cone of said lathe," and thereby severely injured, as afterwards alleged. On the cross-examination he was first asked whether at any time prior to the filing of the last amendment to the complaint, filed a few days before, he had filed any pleading intimating that there was any opening in the plies of the belt. This was ruled out as not proper cross-examination. The evidence would perhaps have been incompetent, for the pleadings were the best evidence of their contents. But that was not the ground of the objection. Thereupon the original and amended complaint referred to were introduced in evidence. Later, however, the court ordered that said pleadings be stricken out, and instructed the jury that they should not be considered. It will be observed from the foregoing statement as to the pleadings that there was a distinct variance between the statements of the witness in his testimony and in his last amendment on the subject and his statement concerning it in the previous pleadings, in this, that in the last pleading and in his testimony he stated that his hand was drawn down between the cone of the lathe and the body of the machine, whereas in the previous pleadings he had alleged that it was drawn in between the belt of the lathe and the cone thereof. Also, in the first complaint he did not state that his hand or fingers were caught between the plies of the belt, or that the belt was defective by reason of the plies coming apart. The court erred in striking out the pleadings. It is true, as stated by the court in making its ruling, that a pleading which has been superseded by an amendment can no longer perform any office as a pleading, and cannot be used on the trial as admissions to contradict a fact alleged in a subsequent amendment. Mecham v. McKay, 37 Cal. 165. But this rule is not universal, and there is an exception in cases where the person who files and verifies the pleading is himself a witness on the trial. In such a case he may, on cross-examination, be questioned concerning the portions of his original pleadings which are inconsistent with the pleading upon which the trial is had, for the purpose of showing statements inconsistent with his testimony on the stand. Johnson v. Powers, 65 Cal. 180, 3 Pac. 625; Estate of O'Connor, 118 Cal. 71, 50 Pac. 4. It was proper, therefore, for the jury to have before it the varying statements of the plaintiff on the subject of the exact manner in which he received his injury.

[4] Evidence was given that the defendant had posted notices in a number of conspicuous places in its machine shop entitled "No-

tice to Employés," wherein the employés were forbidden to use or work with any tools or machinery which through use had become defective, and were ordered to examine all tools before using, and if found defective to refrain from using them and report to the foreman or superintendent, and that belts should not be shifted except while the shafting was not in motion, and that if any employé violated these rules he did so at his own risk. It was further shown that the plaintiff had been a machinist and had known about the operation of lathes and the handling of pulleys and shifting levers for about 17 years; that for 10 years his special work had been in connection with lathes, and that he had been working in the defendant's shop on lathes and otherwise, as general machinist, for 6 or 7 months prior to the accident. Objection to this notice was made on the ground that it was immaterial, and that the defendant could not, by posting such notice, relieve itself of responsibility or liability for neglect. This objection was sustained and the evidence excluded. In this ruling the court erred. The evidence was of such a character that the jury might reasonably have inferred that the plaintiff had seen the notice and knew its contents. It expressly directed that employés should examine all tools before using them, and report them and not use them if defective, and that belts should not be shifted while the shafting was in motion. If the plaintiff had this knowledge, it would tend to show that he was negligent, first, in proceeding to use the defective belt without examination or without reporting the same; and, second, in attempting to shift it while the shaft was in motion, as the evidence shows that he did. The defendant was entitled to have this evidence go to the jury in order that they might determine the question whether or not the plaintiff was guilty of contributory negligence.

[5] The plaintiff contends that the ruling cannot be reviewed, because, as he claims, there was no issue on the subject of contributory negligence, pointing out that the only allegation thereof in the answer was that the injury to plaintiff "was solely and proximately caused by the failure of plaintiff to exercise ordinary care on his own behalf for his own safety"; and, further, that "the negligence of plaintiff and his failure to exercise ordinary care on his own behalf for his own safety contributed to any injury or damage suffered by plaintiff"; in support of which claim he refers to Crabbe v. Mammoth, etc., Co., 168 Cal. 505, 143 Pac. 714. In this case, however, the defense of contributory negligence was considered as properly pleaded throughout the trial. No objection was made at any time on the ground that it was not pleaded. A large part of the testimony on the trial was devoted to that subject, and the instructions of the court show that it was deemed a matter in issue to be submitted to the jury. Under these circumstances a defective plea cannot be made available in support of an erroneous ruling on the subject. Kelly v. Santa Barbara, etc., Co., 171 Cal. 421, 153 Pac. 903, Ann. Cas. 1917C, 67; Perry v. Angelus H. Ass'n, 172 Cal. 316, 156 Pac. 449.

[6-11] The injury occurred in 1913, after September 1, 1911, when the Employers' Liability Act of 1911 took effect, and before the Workmen's Compensation Act of 1913 (St. 1913, p. 279), was in force. The act of 1911 provides that, in any action by an employé against an employer for damages from an injury caused by the employer's neglect, "it shall not be a defense: (1) That the employé either expressly or impliedly assumed the risk of the hazard complained of." Stats. 1911, p. 796. The respondent argues that the only effect of the notice as evidence was to show that the plaintiff had assumed the risks incident to his employment, and that, as the above statute abolishes that defense, the notice was immaterial to the case. The court below apparently based its ruling upon that theory. It is obvious that the abolition of the defense of assumption of risk does not destroy the defense of contributory negligence. The act of 1911 itself recognizes this fact. The notice was offered as evidence of contributory negligence by plaintiff, and it had a direct tendency to prove such negligence, if, as the jury might have inferred, the plaintiff was aware of its contents. If the employé is ordered to examine a tool for defects, and report the same, if any, before using it, and, failing to do so, he is injured from a defect which an ordinarily careful examination would have disclosed to him, it is obvious that the order made it his duty to make the examination, that his failure to obey would be a neglect of that duty, and that this neglect would be a contributing cause of his injury. Likewise, if he is ordered not to shift the belt while the shafting is in motion, and nevertheless does so, and is injured thereby, it may be true that he assumes the risk of injury from so doing, but by the same act he would be guilty of negligence contributing to his injury. "Violation by an employé of a rule promulgated by his employer for his protection is an act of negligence per se, and, when it contributes to his own injury, precludes a recovery." Dallas Coal Co. v. Rotenberry, 85 Ark. 240, 107 S. W. 997. To the same effect see Shanny v. Androscoggin Mills, 66 Me. 420; Foley v. Boston, etc., Co., 198 Mass. 532, 84 N. E. 846; Haynes v. Penfield, 231 Pa. 329, 80 Atl. 565; Carlson v. Marston, 68 Minn. 400, 71 N. W. 398; Andrews v. Valley Ice Co., 167 Cal. 21, 138 Pac. 699; Thompson on Negligence, § 5395. The doctrine of assumption of risk means that the law implies, as a part of the contract of service, that the servant agrees to

and assumes all the ordinary risks of personal injury incident to the business and not caused by the direct negligence of his employer. Beeson v. Green Mountain, etc., Co., 57 Cal. 29. If a servant goes to work in a place which he knows to be dangerous, he assumes the risk arising from such known dangers. So, if he accepts for his use a tool furnished by the master, knowing it to be defective, and that such defect makes it dangerous, he assumes the risk of injury that may be caused to him therefrom. This doctrine has no necessary relation to the doctrine of contributory negligence. If the doctrine of assumption of risk were not a part of the law of master and servant, as it has not been since the act of 1911, the law of contributory negligence would remain, and if the servant contributes to his own injury by negligent disregard of his master's orders, given to him for his own safety, he cannot recover, notwithstanding the abolition of the defense of assumption of risk.

[12] These errors were not trivial or unimportant. There was evidence that, while it was safer to shift the belt on the lower cone by means of a tool or other article, it was not unusual in the defendant's machine shop for those using such lathes to shift the belt below by striking it with the bare hand. There was evidence that this was the custom. This, however, does not of necessity establish the proposition that this method of shifting the belt was not negligent or dangerous. It might also be said to establish the proposition that the employés of the defendant, by constant exposure to danger, had grown careless of their own safety against such danger. It was for the jury to determine which was the correct theory. And in any event, if the defendant had positively forbidden the shifting of the belt while in motion, or the use of a defective tool without examination for defects, when such defects were easily discernible with ordinary care, the act of the servant in doing so would be negligent, and he could not recover for the consequent injury if, at the time of committing the act, he knew of the order forbidding him to do so. We cannot say that the defendant did not suffer substantial prejudice from these rulings. The judgment must therefore be reversed.

Numerous objections are made to the instructions given, and to the refusal to give instructions asked. We do not deem it necessary to consider these objections. For the most part the grounds of the criticisms are entirely removed by other parts of the instructions given, which complete the statement of the law on the subject, and the others are not of sufficient importance to justify consideration. The instructions upon another trial will probably not follow the exact verbiage of those given by the court upon the trial below. It is also unnecessary to consider the objection that the evidence does not sustain the verdict.

The judgment is reversed.

We concur: SLOSS, J.; LAWLOR, J.

176 Cal. 767

WEILE v. STURTEVANT, Superior Court Judge. (S. F. 8383.)

(Supreme Court of California. Dec. 18, 1917.)

1. COSTS 🔑277(1)—STAY OF PROCEEDINGS — COMMON LAW.

Under the common law, a court of general jurisdiction had power to stay proceedings upon a second action or a retrial following a reversal on appeal, where the costs of the prior action or appeal had not been paid, on the ground of power to prevent a vexatious multiplicity of suits.

2. COSTS 🔑277(1)—STAY OF PROCEEDINGS—POWER OF SUPERIOR COURT—DISCRETION.

Such inherent power of courts of common law is vested in the superior courts of the state, the superior court may stay a retrial following a reversal on appeal if the costs of the appeal had not been paid, and, if the facts show oppression or hardship in the particular case, the mere nonpayment of costs not coupled with other circumstances not being a cause for a stay, but such power should be exercised with discretion.

In Bank. Mandamus by C. M. Weile against Geo. A. Sturtevant, as Judge of the Superior Court of the State of California in and for the City and County of San Francisco. Application denied.

See, also, 28 Cal. App. 676, 153 Pac. 960.

Howard Harron, of San Francisco, for appellant. Andros & Hengstler, of San Francisco, for respondent.

LAWLOR, J. This is a proceeding for a writ of mandate. J. M. Brown, Inc., a corporation, had recovered a judgment in the superior court in San Francisco against W. P. Fuller & Co. Thereafter, on appeal, the judgment was reversed and a new trial ordered. Subsequently J. M. Brown, Inc., having been adjudicated a bankrupt, the trustee sold the chose in action which the bankrupt had against W. P. Fuller & Co. to the petitioner, who then had the cause set for a retrial in the court below in the department presided over by the respondent. Before the day set for the retrial, W. P. Fuller & Co. filed its bill of costs on appeal and moved to stay all further proceedings in the cause until such costs be paid. This motion was granted by the respondent, who also denied petitioner's motion to vacate the order staying proceedings. The purpose of this proceeding is to secure a writ compelling the respondent to proceed with the retrial of the cause.

[1, 2] Respondent's contention, in answer to the alternative writ issued in this case, is that it is one of the inherent powers of a court of general jurisdiction to stay proceedings upon a retrial until costs of appeal

have been paid; the exercise of such power to be within the sound discretion of the trial court, reviewable only for abuse of such discretion. The circumstances surrounding the making of the order staying proceedings are not before us, and the petitioner does not claim that if the power contended for does exist its exercise was not justified under the facts in this case. Petitioner's right to a writ of mandate rests solely on the determination of the question whether, under any conceivable set of facts, the superior court, before which a case is pending for retrial after a judgment for the plaintiff has been reversed on appeal, has the power to stay such retrial until the costs of the appeal have been paid. If in any case such a stay can be ordered, if such power is vested in the superior court, then its exercise in this instance must be deemed proper. The subject here involved is a matter of first impression in this state. It is nowhere touched upon in the statutes or decisions. We must therefore look to the practice at common law. If the power to stay proceedings as contended for by respondent was inherent in courts at common law, such power would still be vested in the superior courts of this state. Pol. Code, § 4468; Burns v. Superior Court, 140 Cal. 1, 4, 73 Pac. 597; Lukens v. Nye, 156 Cal. 498, 508, 105 Pac. 593, 36 L. R. A. (N. S.) 244, 20 Ann. Cas. 158; Ex parte Karlson, 160 Cal. 378, 382, 117 Pac. 447, Ann. Cas. 1912D, 1334. In the common-law courts of England it was the general practice to stay a second action in ejectment, one recovery not being res adjudicata, until the costs of the prior action had been paid. This was done "as a measure of just protection to the party who was thus subjected to repeated litigations over the same cause of action." Buckles v. C., M. & St. P. Ry. Co., [C. C.] 47 Fed. 424. See, also, Henderson v. Griffin, 5 Pet. 151, 158, 8 L. Ed. 79; 11 Cyc. 256. In time the same practice was extended to all classes of cases where the second action was between the same parties and involved the same subject-matter, the theory being that the court has inherent power to prevent a vexatious multiplication of suits. The rule is stated and the reasons for it are well summarized in Gerety v. Reading, 9 Phila. (Pa.) 153; the court saying:

> "The practice of courts in staying proceedings in a second action for the same cause between the same parties, where the plaintiff has failed in his first suit, until he shall have paid the costs of that suit, is a very beneficial one, and too well settled to admit of any doubt. It is founded upon the necessary control which courts of justice have over their own proceedings, and their duty to prevent them from being made the means of oppression and vexation. 3 Wilson. 149; 2 Wm. Bl. 741; 1 Tidd's Pr. 94; 2 T. R. 501, n; Beames on Costs, 209. It is a practice which, as has been well said, is convenient and just in all the aspects in which it can be viewed. Whatever may have been its origin, it is not confined to actions of ejectment, but applies equally to all forms of action. Nor is it confined to cases in which there has been a trial on the merits. It is applicable also to cases of nonsuits (Nevitt v. Lade, 3 Doug. 396); and to cases of discontinuance, non pros., and judgment on demurrer. Neither will a slight variation in the names of the parties make any difference (Lampley v. Sands, 1 Tidd's Pr. 539), or the fact that the first action was in another court."

Upon the same theory it has been held that a similar power exists in the case of a retrial following a reversal on appeal where the costs of appeal have not been paid. Such a stay was ordered in Jackson v. Schauber, 4 Wend. (N. Y.) 216. Other jurisdictions have also affirmed the discretionary power of trial courts to stay a retrial until payment of costs on appeal. Clark v. Bay Circuit Judge, 154 Mich. 483, 117 N. W. 1051; McIntosh v. Hoben, 11 Wis. 400; Felt v. Amidon, 48 Wis. 66, 3 N. W. 825. In these cases the decision was put upon the same grounds as those stated in Gerety v. Reading, supra, as grounds for staying a new action for the same relief. In only one state where the matter has been before the court for decision has the power here contended for by respondent been denied. In Ex parte Matthews, 145 Ala. 505, 40 South. 78, relied upon by petitioner, the court recognizes and sanctions the practice of staying a second action until costs of the first have been paid, citing Alabama cases where this was done. The opinion further admits that:

> "The main theory upon which the courts exercise this right of staying the proceedings until the costs have been paid is founded upon the necessary control which courts have over their own proceedings, and their duty to prevent them being made the means of oppression and vexation," and that "the rule is well established that the proceedings in the second suit will be stayed until the costs in the prior case have been paid."

But the court can "see no good reason for extending the rule of staying proceedings," on the ground that a retrial is not like a second action, and would not be oppressive or vexatious or encourage a multiplication of suits. In fact, however, there is no real difference between a second action and a retrial in this particular. Either case will depend on the circumstances. Many instances may be imagined where to proceed with the retrial after a reversal would be just as oppressive and vexatious as to bring a second action. If such hardship is apparent in such a case, then we have as strong reason for a stay of proceedings as could be advanced for the stay of proceedings in a second action for the same cause. This does not mean that such a stay must be had or even may be had in every case where the costs of appeal have not been paid. There must be facts showing oppression or hardship, although what such facts are must be determined in the particular case. Mere nonpayment of costs, not coupled with any other circumstances, would not be cause for a stay. Felt v. Amidon, supra. The discretion vested in the court "should be exercised cautiously, ex æquo et bono, employing or declining the power as the right and justice of the particular case may seem to require." Buckles v. C., M. & St. P. Ry. Co., supra. Thus properly guarded against abuse, the power to stay proceedings is a most useful one to prevent the hardship to which the unlimited right of suit sometimes leads.

As already stated, we have in the case at bar no facts before us from which the propriety of the respondent's order can be determined. It must therefore be assumed that the discretion was properly exercised.

The conclusion reached makes it unnecessary to pass upon the point that the petition is barred by laches.

The application for a writ of mandate is denied.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOSS, J.; HENSHAW, J.

176 Cal. 793

GROSSETTI v. SWEASEY et al.

(S. F. 7557.)

(Supreme Court of California. Dec. 18, 1917. Rehearing Denied Jan. 17, 1918.)

1. Pleading 🔑8(17)—Conclusion—Negligence.

It is necessary only to allege negligence by general averment that defendant did the particular act which resulted in damage to plaintiff.

2. Street Railroads 🔑114(5)—Operation—Injuries to Persons — Negligence — Evidence.

Evidence *held* to sustain finding of negligence of motorman in charge of car which struck a surrey, injuring plaintiff.

3. Evidence 🔑539 — Expert Testimony — Admissibility.

Motormen skilled in the operation of street cars and the application of brakes may testify as experts regarding the adequacy of a brake.

4. Witnesses 🔑268(3)—Cross-Examination —Propriety.

In an action for personal injuries when street car struck the surrey in which plaintiff was riding, where a witness had testified that another witness had said that he would "bawl the company out" when he got on the witness stand, it was proper on cross-examination to ask him whether the other witness had said he would tell the condition of the cars, and in that manner bawl them out.

5. Appeal and Error 🔑1060(1)—Harmless Error—Conduct of Counsel.

Alleged misconduct of counsel in referring to a witness as the one who would not accept a subpœna was not injurious where the witness later admitted under oath that he had twice refused to accept a subpœna from a brother of the plaintiff.

6. Appeal and Error 🔑1060(1)—Harmless Error—Argument of Counsel.

In action for injuries when street car struck surrey in which plaintiff was riding, the statement in argument that the brakes were criminally insufficient, even if not justified by the evidence, was not of sufficient importance to require reversal, since the jurors knew that they were not trying any one for a crime.

7. Appeal and Error 🔑216(1)—Preservation of Grounds of Review—Misconduct of Counsel.

In the absence of request for instruction to disregard alleged misconduct of counsel, the appellant cannot complain of such misconduct.

8. Street Railroads 🔑113(3)—Personal Injuries—Evidence—Street Car Brakes.

In action for injuries when a street car struck a surrey in which plaintiff was riding, it was not error to admit evidence of the faulty condition of the brakes on the car by showing the condition before and after the accident by testimony by those who operated the brakes.

9. Evidence 🔑558(1)—Experts—Cross-Examination.

In an action for injuries when a street car struck a surrey in which plaintiff was riding, where plaintiff alleged that the brakes were in a defective condition, it was proper on cross-examination to ask an expert testifying as to defendant's custom regarding replacing brake shoes, whether defendant had not used brake shoes for so long a time that they wore thin, broke off, and dropped upon the streets.

10. Evidence 🔑558(1)—Experts—Cross-Examination.

In action for injuries when struck by a street car, where plaintiff alleged that the brakes were defective, and a witness was testifying as an expert regarding the life of brake shoes, it was proper for plaintiff to cross-examine him with reference to different sorts of shoes and their capacities for wear.

Department 2. Appeal from Superior Court, Humboldt County; Geo. D. Murray, Judge.

Action by Valentine Grossetti against Richard Sweasey and the Humboldt Transit Company. There was a nonsuit as to Sweasey, and a judgment for plaintiff, and order denying motion for new trial against the other defendant, and the Transit Company appeals. Affirmed.

Coonan & Kehoe, of Eureka, for appellant.
Pierce H. Ryan, of Eureka, for respondent.

MELVIN, J. The Humboldt Transit Company appeals from a judgment against it in a suit for damages for personal injuries and from the order denying its motion for a new trial. The accident was due to the coming together in violent contact of one of the transit company's electric street cars and a carriage of the "surrey" type belonging to Richard Sweasey, the owner of a livery stable. Plaintiff was a passenger in the surrey. Sweasey was made a defendant, but a nonsuit as to him was granted by the court.

[1] Appellant demurred upon various grounds to each of the six causes of action pleaded. The first two causes of action charged negligence in the operation of the car in that it did "crash and run into the said surrey, thereby overturning said surrey and causing plaintiff to be thrown violently upon the ground," etc. The first two causes differ slightly as to their allegations regarding the exact means by which plaintiff met his injuries, whether by being struck by the car or run over by the surrey after being thrown from that vehicle. Without considering all of appellant's criticisms of these counts it is sufficient to call attention to the rule, frequently announced by this court, that

it is necessary only to allege negligence by general averment that defendant did the particular act which resulted in the damage to plaintiff. Rathbun v. White, 157 Cal. 254, 107 Pac. 309; Smith v. Buttner, 90 Cal. 99, 27 Pac. 29. And the matter of pleading becomes unimportant when a case is fairly tried, as this one apparently was, upon the merits and under circumstances which indicate that nothing in the pleadings misled appellant to its injury. Stein v. United Railroads of San Francisco, 159 Cal. 368, 113 Pac. 663; Bank of Lemoore v. Fulgham, 151 Cal. 234, 90 Pac. 936; Dow v. City of Oroville, 22 Cal. App. 215, 134 Pac. 197; Ingalls v. Monte Cristo Oil & Development Co., 167 Pac. 857.

The third cause of action charged that on the day upon which the accident occurred the appellant carelessly omitted to provide its car with any safe and suitable brake, but that it—

> "was provided with a brake known as a lever brake, operated by means of a hand lever, and with no other means or brake or appliance to stop the same; that * * * said lever brake was and is unsuitable and insufficient for the purpose of stopping said car promptly and readily, and was on said day in a defective and unsafe condition in this, that the same was so worn in its parts and so defective that motion was lost in the operation thereof, so that the brake blocks could not be readily and promptly applied to the wheels of said car, and that said brake was weakened, unserviceable, and inadequate, thereby rendering it impossible to stop said car promptly and readily by means thereof, all of which defendant then and there knew, or by the exercise of ordinary care might have known."

Appellant's demurrer was based upon the specification that this count contains two causes of action not separately stated. At the trial, however, it was stipulated that plaintiff did not contend that a hand lever brake as such was unsuitable, but the complaint was directed to the condition of the brake upon the car at the time of the injury. Therefore appellant's objection to the third count is answered by the authorities last cited. The objections to the fourth cause of action in which the alleged inadequacy of the brake is also set forth may be in like manner disposed of. The other two causes of action so far as they apply to this appealing defendant sufficiently allege negligent failure on the part of the motorman to stop the car after he saw that the carriage in which plaintiff was a passenger was too near the track to admit of the passage of the car without striking the other vehicle. The appellant was not injured by the ruling on the demurrers.

The evidence shows that the car and the surrey were proceeding in the same direction on a public street in the city of Eureka. The rails of appellant's track are to the west of the center of said street, and other vehicles travel customarily a sufficient distance to the eastward on a well-defined roadway to permit the electric cars to pass without danger of striking them. Sweasey's surrey was behind a slow moving motor truck near the middle of the road. The driver turned his horses toward the track in an effort to pass the motor truck. He whipped the animals, and one of them became frightened and pranced. He made efforts to pass the motor truck two or three times, and then a collision between the car and the surrey took place. There is a conflict of testimony regarding the manner of the contact, the motorman saying that the frightened horses tipped the surrey against the car and then ran for some distance, drawing both the car and the surrey, because the latter had become entangled in the timbers of the open part of the car; and other witnesses testifying that the car struck the surrey with such force as to overturn it, spill the passengers, and push the vehicle and horses along the track for a number of yards. The story of the accident as related by the motorman fully supported the theory that he saw the imminence of a collision because the surrey was too near the track to permit the car to pass without impact with it; that he applied the brakes; that they proved utterly inadequate; and that if they had been suitable and proper brakes he could have accomplished his purpose. There was abundant evidence to justify respondent's theory that the car struck the surrey from behind; and there is support for the conclusion that the motorman saw the danger; that the driver of the surrey did not see it; and that the motorman was prevented from averting the collision by reason of the inadequate brakes.

[2] It is appellant's contention that respondent placed entire reliance upon the alleged insufficiency of the brakes, making no effort to show negligence on the part of the motorman, who testified on behalf of the plaintiff. There was evidence, however, to sustain an implied finding of negligence on the part of the motorman. For example, witness Porter testified that the surrey could be seen in dangerous proximity to the track when the car was 600 or 700 feet distant from it; that when almost that far away the car was running at a rate of about 20 miles an hour; and that the street was congested with vehicles. As was said in O'Connor v. United Railroads, 168 Cal. 43-47, 141 Pac. 809, 811, by Mr. Justice Lorigan in delivering the opinion of the court:

> "It must be apparent that in operating a street car over a public street a motorman cannot under ordinary circumstances run down a vehicle proceeding in the same direction without having been negligent in the operation of his car. The mere fact that he does so furnishes cogent evidence of negligence which is rarely capable of explanation. Richmond Traction Co. v. Clarke, 101 Va. 383 (43 S. E. 618); Vincent v. Norton, etc., Ry. Co., 180 Mass. 104 (61 N. E. 822); Thompson on Negligence, § 1404."

The failure of the brakes to perform their proper function was described by the motorman. Appellant insists that he was impeached by competent evidence and contradicted by other witnesses. But we may not weigh the evidence as the jury might weigh it in reaching a verdict and as the trial court in passing upon a motion for a new trial. Therefore the discussion of the credibility of this witness has no place in the briefs. He testified in part as follows:

> "When I noticed the buggy pulling down towards the track, at that time I could have passed it all right. I noticed when I got within 100 feet that I could not pass it. * * * Q. When you saw the carriage driving from the highway down towards the railroad track, what did you do? A. I started to throw on my brake. * * * I pulled the brake as far back as I could, way down like that (shows), and I kept that up until I got within 50 feet of the surrey, and then when the brakes would not stop it I started to apply the reverse, release the brake, and threw on the reverse; I tried throwing the power off the car, all the time, and the reverse would not hold it. Q. Would the brake hold it? A. No, sir."

He further testified that the switch blew out, and therefore the reverse did not operate; in other words, that both brakes and reverse were used without appreciable effect. There was other testimony that the brakes, partly from structural faults and partly from the condition of the brake shoes, were not in proper condition.

[3] Both the motorman who had charge of the car which was in collision with the surrey and another motorman named Henninger testified as experts regarding the inadequacy of the brake. Attack is made upon their testimony on the ground that the matters about which they spoke were not subjects of expert testimony, and in this behalf appellant cites such cases as Sappenfield v. Main, 91 Cal. 48–59, 27 Pac. 590, Kauffman v. Maier, 94 Cal. 269–281, 29 Pac. 481, 18 L. R. A. 124, Parkin v. Grayson Owen Co., 157 Cal. 41–43, 106 Pac. 210, and Lawyer v. Los Angeles Pacific Co., 161 Cal. 53–59, 118 Pac. 237. Undoubtedly the courts do not permit the introduction, under the guise of expert evidence, of opinions upon matters not properly the subjects of explanation by persons of special skill. But the ordinary citizen does not know anything about the structure or operation of brakes on electric cars. Men skilled in the operation of cars may be examined upon such matters. For example, a witness properly qualified may testify regarding the distance within which a car going at a given speed may with proper care be stopped. Howland v. Oakland Consolidated Street Railway Co., 110 Cal. 513, at page 522, 42 Pac. at pages 983, 985, of that report the court used this language, which is peculiarly applicable to the case at bar and the testimony to which appellant objected:

> "The manner of running electric cars, their rate of speed, and the facility with which they can be stopped or handled, is not a matter of such common knowledge that the jury could judge as intelligently as one skilled in their use."

The same principle has been frequently stated as we might show by citation of numerous authorities. It is sufficient to refer further to the recent case of Vallejo & Northern R. R. Co. v. Reed Orchard Co., 169 Cal. 545–570, 147 Pac. 238, and the cases cited therein upon this subject.

Appellant calls attention to several instances of alleged misconduct of counsel for respondent. Counsel referred to one of appellant's witnesses as "the same man who refused to answer a subpœna in this case." In argument to the jury counsel said that plaintiff claimed that the brake was "criminally" insufficient. Again, in commenting upon the offered proof that cars must be run at certain speed to maintain a proper schedule, he said:

> "If the cars would have to run over people to keep their schedule, they had better break their schedule first."

When appellant's counsel suggested to one of the witnesses that he measure the surrey respondent's counsel said he didn't think there was very much of it left—that it was "pretty badly demolished." The remark was withdrawn. Witness Morgan testified for the defense that witness Brown had said he would "bawl that company out, good and proper," when he should get on the witness stand. On cross-examination these questions, the asking of which is assigned as misconduct, were propounded to him:

> "Did he state to you that he would tell in a court of justice the condition in which they kept and maintained their cars on the streets of this city, and in that manner bawl them out, did he? * * * Did not he tell you that, did not you and he discuss at that time, Mr. Morgan, and did not you agree with him that the brakes on the cars of the Humboldt Transit Company were in a deplorable condition, and did he say further to you that he was going to testify to the fact, and in that manner bawl out the company?"

[4-7] None of these alleged instances of misconduct amounted to error which would justify a reversal. The questions propounded to the witness, who had testified regarding Brown's alleged slangy threat, were entirely proper cross-examination. The remark about the refusal of a witness to answer a subpœna was not injurious to appellant because the witness later admitted under oath that he had twice refused to accept a subpœna from a brother of the plaintiff. The statement in argument that the brakes were "criminally" insufficient, while possibly not justified by the evidence, was not of sufficient importance to require a reversal of the judgment. The jurors knew that they were not trying any one for a crime. It may be legitimate argument to call a jury's attention to the fact that very gross negligence may take the place of specific intent in a prosecution for certain crimes. The term "criminal negligence" is used to designate that sort of negligence. Pen. Code, § 20. Counsel was merely telling the jury that the negligence which he believed he had proven was of the sort that would have justified a

conviction of the guilty person if death had resulted to a victim of the accident. No person hearing him could have understood that he was accusing the defendant corporation of crime. Without further discussion it is sufficient to say that in our opinion no harm resulted from the other instances of alleged misconduct. There was no request that the court instruct the jury to disregard the supposed misconduct. Therefore appellant is not now in a position effectively to complain regarding it. People v. Shears, 133 Cal. 154–159, 65 Pac. 295; People v. Mancuso, 23 Cal. App. 146, 137 Pac. 278; People v. Wing, 23 Cal. App. 53, 137 Pac. 48.

[8] There was no error in admitting evidence of the faulty condition of the brakes on the car which was in the collision. The condition before and after the accident was sought to be established by testimony of those who had operated the brakes. This was proper. Craven v. Central Pacific R. R. Co., 72 Cal. 345, 13 Pac. 878; Dyas v. Southern Pacific Co., 140 Cal. 296–304, 73 Pac. 972; Dow v. Sunset Telephone & Telegraph Co., 157 Cal. 182–188, 106 Pac. 587; Brunger v. Pioneer Roll Paper Co., 6 Cal. App. 691–693, 92 Pac. 1043.

[9] One of appellant's witnesses testified as an expert generally with reference to brakes and particularly with regard to appellant's custom regarding inspection and replacing of worn brake shoes. He was asked on cross-examination if he had not known of the Humboldt Transit Company using brake shoes on their cars for so long a time that they wore thin and broke off and dropped upon the streets of the city. This was perfectly proper cross-examination entirely justified by the general character of the examination in chief.

[10] The same witness was asked on cross-examination about the relative merits of cast-iron brake shoes such as those used by appellant and brake shoes faced with steel. It is contended that this evidence was not within the issues because plaintiff had stipulated that the kind of brake used was not in itself and when in good condition an inadequate appliance. The witness was testifying as an expert regarding the life of brake shoes when in constant use. It was proper for plaintiff to examine him with reference to different sorts of shoes and their capacities for wear. We cannot see how appellant was injured by such cross-examination.

We have examined the instructions, and find that the jury was fully and fairly instructed, and that appellant's criticisms of the court's action in refusing certain charges and giving others are without substantial merit. No other alleged errors require discussion or analysis.

The judgment and order are affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

(176 Cal. 802)

HARRINGTON v. TAYLOR et al. (two cases).
(S. F. 7530, 8057.)

(Supreme Court of California. Dec. 18, 1917.)

1. ASSIGNMENTS FOR BENEFIT OF CREDITORS 🔑311 — CONSTRUCTION — POWERS OF TRUSTEES.

Where four brothers owning as tenants in common made a trust agreement followed by four separate trust deeds, each setting forth a schedule of the creditors and of their declared priority, and naming the trustees to manage the properties, and in event of default to sell them, divide the moneys, and pay the balance to the extinguishment of the debts, enjoining the trustees to sell the property in L. or S., or both, but to sell that in L. first, the net remainder to be divided into four portions, and out of the four respective residues the four sets of trustees to pay off each its set of lien creditors parties to its trust deeds, respectively, and in the order and rank provided for in said trust deeds, respectively, the trustees were not on sale of both properties required to prorate the moneys received, but the terms of the trust fairly contemplated that the property in L. should be sold alone if it would extinguish the indebtedness, and that the creditors could be paid in full from the proceeds thereof in the order of priority stated in the deeds, though some of them had no liens on the S. property.

2. MARSHALING ASSETS AND SECURITIES 🔑 1—PROPRIETY OF REMEDY.

The right to marshal is a mere equity which may never be invoked when its operation will accomplish inequity, and can only become a vested right by a due demand, and cannot be invoked long after sales of trust property and disbursements of the money.

Department 2. Appeal from Superior Court, City and County of San Francisco; Charles Monroe, Judge.

Action by Sarah E. Harrington against Henry W. Taylor and others, as trustees of Huff Trusts Nos. 3 and 4. Judgment for plaintiff, and defendants appealed, and moved for new trial, which was granted, and from the order granting new trial, plaintiff appeals. The appeals were heard together. Judgment reversed, and order granting new trial affirmed.

H. M. Anthony, of San Francisco, for appellants. Charles F. Hanlon, of San Francisco, for respondents. Edward Lande, of San Francisco, amicus curiæ.

HENSHAW, J. Plaintiff brought her action against defendants as trustees, alleging that the trustees, without right, had refused to pay her moneys due her and in their possession as trustees, and demanded judgment accordingly. She recovered, and the trustees appealed. They moved for a new trial, which was granted, and from the order so doing plaintiff has appealed. These cross-appeals may with advantage be considered together.

Four brothers Huff owned as tenants in common land in the city of Los Angeles and land in the city and county of San Francisco. They were in debt to numbers of persons. While some of these persons were the creditors of all, others were creditors of individual brothers. They entered into a trust agreement, followed by four separate trust deeds, which trust deeds, saving for the list of creditors and the amounts due these creditors, were identical. Each trust deed set forth a schedule list of the creditors of the brother executing it, with declared priority of the liens of these creditors upon one or another, and in certain instances on both, of the real properties above mentioned. The trustees named were to manage the trust properties, and in the event of default to sell the properties, divide the moneys secured from the sales to the payment of charges arising under the trust, and to the extinguishment of the creditors' obligations, with balance over to the trustors. The trustees were enjoined to sell either the Los Angeles or the San Francisco properties, or both, if necessary, but to sell the Los Angeles property first. Out of the gross proceeds of each sale was to be paid charges and disbursements pertaining to the property sold. The net remainder was to be divided into four portions, and "out of the four respective residues the four sets of trustees shall pay off each its set of lien creditors parties to its trust deeds, respectively, and in the order and rank provided for in said trust deeds, respectively." The creditors' indebtednesses were evidenced respectively by promissory notes made to them, and it was further provided that the promissory notes, principal and interest, remaining unpaid at the time of sale, should be paid, "but in order as they rank as liens and charges as set forth in said notes and as provided for herein."

The list of creditors with the designated priority of their liens in the Claude Huff trust, known as trust No. 3, and the Bion Huff trust, known as trust No. 4, may thus be tabulated:

Claude Huff.

Notes to	To Secure.	Lien on Los Angeles Property.	Lien on San Francisco Property.
Henry Meyer..........	$ 8,155 00	1st lien	1st lien
Chas. F. Hanlon......	11,082 56	2nd lien	2nd lien
Chas. Adler...........	1,125 00	3rd lien	none
Sarah Harrington....	1,375 00	4th lien	none
Chas. F. Hanlon......	15,090 00	5th lien	3rd lien
E. R. Marriott........	2,408 08	6th lien	4th lien
A. A. Barber..........	300 00	7th lien	5th lien
George C. Conde......	1,100 00	8th lien	6th lien

Bion Huff.

Henry Meyer..........	$ 8,155 00	1st lien	1st lien
Chas. F. Hanlon......	10,251 87	2nd lien	2nd lien
Charles Adler.........	1,125 00	3rd lien	none
Sarah Harrington....	1,375 00	4th lien	none
Archibald Reid.......	1,425 80	5th lien	3rd lien
Chas. F. Hanlon......	13,625 95	6th lien	4th lien

Time came when the trustees under their trust were obliged to sell the real estate. In conformity with the mandate of the trust they first sold the Los Angeles property, and devoted the net proceeds of the sale to the extinguishment of the trustors' indebtedness according to the indicated priority. Thereafter they sold the San Francisco property and made like disposition of the proceeds arising therefrom. This the trustees contend they were fully authorized to do under the terms and meaning of the trust agreement and the trust deeds, and herein it is said that the very purpose of the trust mandate that the Los Angeles property should be sold first was that this precise thing should be done; that no one could foresee at the time when the sale took place what would be the extent of the trustors' liabilities, and those liabilities might be wholly extinguished by the sale of one piece of property. Therefore the Los Angeles property was designated as the property first to be sold, and if the proceeds of that sale when applied to the extinguishment of the indebtedness was not sufficient to accomplish this end, a sale of the San Francisco property was to follow. This was the method they adopted, and it is the method of which plaintiff complains. In her complaint she urges and argues that she was entitled in the case of each of these trusts to a marshaling of the assets and to ratable and proportionate distribution among the lien claimants of the joint funds arising from both sales. Thus, to illustrate, assuming that under trust No. 4 the net proceeds of the Los Angeles property and the net proceeds of the San Francisco property amounted each to $14,000, there would be in the hands of the trustees $28,000; from each of these $14,000 funds should be taken one-half of $8,155, the amount of the Henry Meyer first lien, and one-half of $10,251.87, the amount of the Hanlon second lien; that this method would leave in the Los Angeles fund some $4,000 which could and should have been devoted to the extinguishment of the Adler debt, amounting to $1,125, and, next, to plaintiff's own debt, amounting to $1,375. The method in fact adopted by the trustees was to pay the Meyer first lien in full out of the sale of the Los Angeles property and the Hanlon second lien in so far as the funds were adequate for that purpose. Thus nothing was left to satisfy the Harrington lien, and funds were left, by the method which the trustees adopted, to serve in part extinguishment at least of the Reid third lien on the San Francisco property and the Hanlon fourth lien thereon.

Upon trial the court refused to admit in evidence the trust agreement upon the ground that the deeds of trust were complete and spoke for themselves. It found that the method of disbursement adopted by the trustees was arbitrary and in disregard of the just rights of the plaintiff. It found, "as a fact and conclusion of law, that under the terms of the said trust deeds it was provided that said trustees should pay the liens of Henry Meyer and Charles F. Hanlon out of the joint sums of money derived from the sales of both parcels of real estate, and that the proceeds from each parcel should contribute toward the payment of each of said liens of said Meyer and Hanlon, being the first and second liens, in the same proportion as the said two funds bore to each other in amount." The court found that Hanlon was not a necessary party in this marshaling of assets, notwithstanding the fact that by the method which the court proposed to adopt for the disposition of the trust funds his rights would be injuriously affected. It recognized that it would affect Mr. Hanlon injuriously, but found that it could be done "without impairing any rights of said Hanlon that should not be impaired." The judgment as above indicated followed these findings, necessarily to the detriment of Mr. Hanlon.

[1] It is unnecessary to discuss in detail the matters urged for and against the soundness of the order of the court in granting the new trial, the error in refusing admission to the declaration of trust, in denying to Mr. Hanlon the right to be joined in the action as a party in interest, and other similar considerations. The judgment of the court rests wholly upon its interpretation, which it declares to be one of mixed law and fact, that it became the duty of the trustees "under the terms of said trust deed to prorate the proceeds from each parcel of land sold." Clearly no such duty is imposed upon the trustees by the terms of the trust. The terms of the trust fairly contemplate that the Los Angeles property may be sold alone if its sale will extinguish the trustors' indebtedness, and in terms declares that the proceeds of the sale shall be used to extinguish the lien claims in order of their priorities.

[2] It can only be by what the trial court conceived to be the proper application of the equitable doctrine of marshaling of assets that the court reached the determination which it gave, and which, so far from being in accord with the language of the trust deed, is, if anything, in violation of it. We may here take for convenient illustration the tabulated list of the Bion Huff lien claimants as above set forth. The lands to which these liens respectively attach are specifically declared, their priorities enumerated with particularity. The right to marshal is a mere equity which may never be invoked when its operation will accomplish inequity. In its simplest form it is, as set forth by Judge Story (Eq. Jur. § 633) as follows:

> "If A. has a mortgage upon two different estates for the same debt, and B. has a mortgage upon one only of the estates for another debt, B. has a right to throw A. in the first instance, for satisfaction upon the security, which he (B.) cannot touch, at least where it will not prejudice A.'s rights, or improperly control his remedies."

See, also, Pom. Eq. Rem. § 867; Mack v. Shafer, 135 Cal. 114, 67 Pac. 40. But a lien claimant may invoke this equitable principle of marshaling assets only when it will benefit him without injuring others, and if this cannot be done, then equity will but follow the law. This familiar principle has been codified in sections 2899, 3433, Civil Code. Moreover, it is equally fundamental that equity will apply the doctrine only to conditions existing at the time when it is invoked. "It can only become a fixed right by taking proper steps to have it enforced, and until this is done it is subject to displacement and defeat by subsequently acquired liens upon the fund. This inchoate right or equity is not a lien, and is therefore subject to defeat at any time before it is attempted to be enforced." Richards v. Cowles, 105 Iowa, 734, 75 N. W. 648. In this case no demand was made upon the trustees. Equity's aid was not invoked until long after the sales and disbursements of the moneys by the trustees under the sales. But, of more consequence still, an inspection of the table above given will disclose that the method of distribution insisted upon by Mrs. Harrington, though to her advantage, could not be adopted without corresponding injury to the third lien claim on the San Francisco property held by Archibald Reid for $1,245.80 and to the fourth lien claim of Charles F. Hanlon upon the same property for $13,625.95. Therefore, as equity could not intervene for the advantage of one lien claimant without working proportionate injury to another, it must and will leave them where they have placed themselves under the law.

What is thus said of trust 4 has, of course, identical application to trust 3, and for the reasons given the judgment appealed from is reversed, and the order granting a new trial is affirmed.

We concur: MELVIN, J.; LORIGAN, J.

35 Cal. App. 66

PEOPLE v. LEPORI. (Civ. 2202.)

(District Court of Appeal, First District, California. Oct. 22, 1917. Rehearing Denied by Supreme Court Dec. 20, 1917.)

1. LARCENY 🔑23 — "GRAND LARCENY" — ELEMENTS.

Under Pen. Code, § 487, "grand larceny" is committed by taking property exceeding $50 in value, or taking from another's person, or when the property taken is a horse, cow, mule, etc.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Grand Larceny.]

2. CRIMINAL LAW 🔑241—COMMITMENT—INFORMATION.

A commitment to answer merely for grand larceny is supported by an information charging grand larceny by taking from the person, under Pen. Code, § 872, requiring the commitment to state generally the nature of the offense.

3. BAIL 🔑58—LIABILITY ON BOND—GRAND LARCENY.

Under Pen. Code, § 1287, requiring bail bonds to state the offense generally, designating the offense as grand larceny, is sufficient, although the information charged grand larceny by taking from another's person.

4. ACKNOWLEDGMENT 🔑60—EFFECT.

Under Pen. Code, § 1287, requiring bail bonds to be acknowledged before the court, the certificate of acknowledgment is but prima facie evidence of the acknowledgment.

5. BAIL 🔑61—CRIMINAL PROSECUTION—ACKNOWLEDGMENT.

An acknowledgment is not part of a bail bond given in a criminal prosecution.

6. BAIL 🔑51—CRIMINAL PROSECUTION—FIXING AMOUNT.

Under Pen. Code, § 1269, authorizing acceptance of bail for defendant's appearance, the superior court may adopt the amount fixed by a police court judge before filing of the information.

7. BAIL 🔑57—CRIMINAL PROSECUTION—SUFFICIENCY.

A bail bond reciting that, an information having been filed, the signers undertook that accused would answer "the charge above mentioned," *held* not unduly onerous because requiring accused to answer the charge instead of the information, since "charge" is here equivalent to "information," and Pen. Code, § 985, authorizes bond for accused's appearance to answer the charge against him.

8. WORDS AND PHRASES—"CHARGE."

"Charge" may mean a formal complaint, information, or indictment.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Charge.]

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by the People of the State of California against C. Lepori. Judgment for plaintiff, and defendant appeals. Affirmed.

Application for rehearing in Supreme Court denied, 169 Pac. 694.

Stetson & Koford, of Oakland, for appellant. W. H. L. Hynes, Dist. Atty., and Wm. T. Satterwhite, Deputy Dist. Atty., both of Oakland, for the People.

LENNON, P. J. One Fassio was held to answer in the police court of the city of Oakland, on the 9th day of August, 1910, by a commitment reciting that: "It appearing * * * that the offense, felony, to wit, grand larceny, has been committed," etc. The complaint in the police court charged Fassio with grand larceny in stealing, taking, and carrying away personal property, to wit, $600.15. On the 23d day of August, 1910, the district attorney filed an information charging Fassio with stealing, taking, and carrying away from the person of one Giambattista personal property, to wit, $600.15. On the 24th day of August, 1910, the defendant in this case executed a bond obligating himself to pay to the people of the state of California the sum of $2,000 in case Fassio failed to appear and answer the crime of grand larceny, as charged in the information. Fassio failed to appear on the day set for trial, and the court ordered and declared the undertaking on bail forfeited. Subsequently judgment was entered in this action against the defendant, and the appeal is from the judgment and from the order denying a new trial.

Appellant urges to defeat the enforcement of the penalty of the bond that the information filed against Fassio is void because it charges the defaulting defendant with grand larceny under subdivision 2 of section 487 of the Penal Code, viz. larceny from the person, while he was held to answer for grand larceny without further description of the offense.

[1] Grand larceny is larceny committed in either of the following cases: (1) When the property taken is of a value exceeding $50; (2) when the property is taken from the person of another; (3) when the property taken is a horse, mare, gelding, cow, steer, bull, calf, mule, jack, or jenny. Pen. Code, § 487.

[2] Appellant's contention that the information charges a different offense than that for which defendant was held to answer, i. e., that grand larceny is something different from the offense defined in Penal Code, § 487, subd. 2, is untenable. Grand larceny is a general term designating the offense which the three subdivisions of section 487 of the Penal Code more particularly define. The commitment in the present case complied with the parenthetical injunctions of section 872, Penal Code, and held for the "offense according to the fact, stating generally the nature thereof," and the information charged the crime stated in the commitment, only stating it with greater particularity.

[3] Defendant cannot rightfully complain of the designation of the offense as "grand larceny" in the bond, for the Code merely provides that the bond "designate it generally." Pen. Code, § 1287. A designation of the offense as grand larceny in a bond under a statute declaring that it shall "state briefly the nature of the offense" has been held sufficient. State v. Birchim, 9 Nev. 95.

[4, 5] Appellant contends that the bond in suit was not acknowledged as required by statute, and bases his contention upon the absence of any certificate of acknowledgment. Section 1287 of the Penal Code merely provides that the undertaking be "acknowledged before the court." A certificate of acknowledgment is but a mode of proof, but prima facie evidence of a fact, and there is no indication in the statute of a purpose to make a certificate the exclusive evidence of the fact of acknowledgment. But, even if the statute did require a certificate of acknowledgment, a plea of its absence would not, we think, avail appellant. The Code provides that bail must in all cases justify by affidavit (Pen. Code, §§ 1280, 1288), and yet it has been held that the justification forms no part of the contract, and its absence will not permit a bondsman to escape his liability (Murdock v. Brooks, 38 Cal. 596, 602; Carpenter v. Furrey, 128 Cal. 665, 669, 61 Pac. 369). A parity of reasoning compels the conclusion that an acknowledgment is not a part of the contract.

[6] Appellant claims that the bond was not fixed by the proper magistrate, in that, no bail having been given before the filing

of the information, its amount should have been fixed by the superior court. The fact that the superior court adopted the amount fixed by the judge of the police court is immaterial. The important fact is "the acceptance by a competent court or magistrate, of the undertaking of sufficient bail for the appearance of the defendant, according to the terms of the undertaking, or that the bail will pay to the people of this state a specified sum," and it is the acceptance that constitutes the taking of bail as defined by the Code. Pen. Code, § 1269.

The bond itself conformed to the requirements of section 1287 of the Penal Code, which gives the form of undertaking, and the record discloses that the bondsmen presented the bond in the superior court of Alameda county for the purpose of releasing Fassio from custody; that the superior judge accepted and approved the bond, and the bond was filed and became a matter of record in the superior court of that county.

[7] Appellant contends that the bond is more onerous than that prescribed by law, because the bond does not recite that the above-named Fassio will appear and answer the information above mentioned, but avers that he will appear and answer the charge above mentioned. In this behalf he argues that there is a difference between being required to answer to the charge and to answer to the information; that the word charge is more inclusive than the word information. The bond reads:

> "An information having been filed, * * * we * * * undertake that the above-named Alferdo Fassio will appear and answer the charge above mentioned."

[8] Charge may mean a "formal complaint, information, or indictment" (People v. Garnett, 129 Cal. 366, 61 Pac. 1114), and, as here used, cannot mean anything more or different than information. Furthermore, the Code itself is an authority for the form used. Pen. Code, § 985.

Judgment affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

35 Cal. App. 60

PEOPLE v. LEPORI. (S. F. 7861.)

(Supreme Court of California. Dec. 21, 1917.)

BAIL ⚷56 — CRIMINAL PROSECUTION — LIABILITY.

If the information charged a different offense from that under which accused was committed, it would not be void, but only subject to be set aside under Pen. Code, § 995, and would constitute no defense to an action on accused's bail bond.

In Bank. Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by the People of the State of California against O. Lepori. Judgment for plaintiff was affirmed by a District Court of Appeal (169 Pac. 692), and defendant applies for a hearing in Supreme Court. Application denied.

Stetson & Koford, of Oakland, for appellant. W. H. L. Hynes, Dist. Atty., and Wm. T. Satterwhite, Deputy Dist. Atty., both of Oakland, for the People.

PER CURIAM. The application for a hearing in this court after decision by the District Court of Appeal of the First Appellate District is denied. We do not question in the slightest degree the correctness of the views expressed by that court in regard to the claim that no recovery can be had on the bond because, as is urged, the information charges a different offense from that for which the defendant in the criminal case was held to answer. We deem it proper to say, however, that even if the information did state a different offense as claimed, that fact would not be a good defense in an action on the bond. The information would not be void in such a case, but only subject to be set aside on proper motion (section 995, Pen. Code), and a bond given on release of the defendant from custody to secure his appearance as required during the pendency of the proceeding on the information filed would certainly be a valid obligation.

35 Cal. App. 318

ROBINSON v. BAKER et al. (Civ. 1954.)

(District Court of Appeal, Second District, California. Nov. 14, 1917. Rehearing Denied by Supreme Court Jan. 10, 1918.)

SHERIFFS AND CONSTABLES ⚷118—LIABILITY FOR NEGLECT OR MISCONDUCT — LEVYING WRIT OF ATTACHMENT—STATUTE.

Under Pol. Code, § 4166, providing that no direction or authority by a party or his attorney to a sheriff in respect to the execution of any process or return, or of any act or omission relating thereto, will discharge the sheriff from liability for neglect or misconduct, unless it is contained in writing signed by the party or by his attorney, a sheriff who levied a writ of attachment upon certain realty, and who without such written consent released such attachment and placed it upon money in escrow payable to the defendant in attachment, in consequence of which plaintiff's judgment was not satisfied, could not prove oral instructions to release the realty, and was liable for the amount of the judgment.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by Henry Robinson against T. A. Baker and others. Judgment for plaintiff, and, from an order denying a motion for a new trial, defendant Baker appeals. Order affirmed.

E. J. Emmons and R. J. Hudson, both of Bakersfield, for appellant. E. L. Foster and T. F. Allen, both of Bakersfield, for respondent.

JAMES, J. This appeal is taken from an order denying a motion made in the superior court by defendant T. A. Baker for a new trial, after an adverse judgment had been entered against him.

At the times material to this controversy Baker was sheriff of the county of Kern. As such sheriff there had been placed in his hands a writ of attachment in an action brought by this plaintiff, Robinson, against one Valentine. Acting under written direction of Robinson's attorney, Baker caused a levy to be made upon certain real estate standing in the name of Valentine. It appears that, at the time this attachment was levied, negotiations were pending for the sale of the same real estate, and money had been deposited in escrow to an amount more than equaling the demand of Robinson in his suit against Valentine. The agent of the proposed purchasers discovered the existence of the lien of the attachment and made effort to have the property cleared. They interviewed Baker, the sheriff, and it was suggested that the real estate be released and the attachment be placed upon the money which had been deposited as before mentioned. Baker, after some talk with the attorney for Robinson, the plaintiff in the attachment suit, and possibly also with the plaintiff himself, released the real estate and levied, or attempted to levy, upon the money. For some reason the attachment did not hold as against the fund, and Robinson's claim was not satisfied after judgment. This action was then brought against the sheriff to recover the amount of that judgment, the claim made being that Robinson was deprived of the security which he had obtained by reason of the levying of the writ of attachment upon the real estate. It was alleged that the act of the sheriff in releasing the real estate was without the authority of the plaintiff. At the trial the defendant sought to prove that oral authorization had been given to the sheriff to release the real estate, and that the sheriff had acted under such authorization, which authorization the appellant contends was sufficient in law to protect the sheriff against the liability here sought to be enforced. The trial judge, after hearing the testimony as to the alleged oral instructions, ordered all of that testimony stricken out, holding that under the provisions of section 4166 of the Political Code the sheriff could only be protected in releasing an attachment, under the facts exhibited here, by justifying under written direction so to do made by the plaintiff or his attorney. A part of the testimony stricken out was that given by appellant Baker, as follows:

> "Well, the day that the release was made, I interviewed Mr. Foster (the attorney for Robinson) and asked him if he had any objections to me releasing the real estate and serving the attachment on $2,000 in cash that had been placed in Mr. McDonald's hands in escrow to purchase this land, and he said that he considered the money better than the land, and so far as he was concerned, he had no objections to making the release, but he didn't care to give me any written instructions, but he was willing to have me release the real estate and attach the money."

Section 4166 of the Political Code provides that:

> "No direction or authority by a party or his attorney to a sheriff, in respect to the execution of process or return thereof, or to any act or omission relating thereto, is available to discharge or excuse the sheriff from a liability for neglect or misconduct, unless it is contained in a writing, signed by the attorney of the party, or by the party, if he has no attorney."

The provisions of this section seem to us to be very clear and not reasonably susceptible of misconstruction. The section plainly advises sheriffs that they must have written authority in relinquishing liens acquired under process. Respondent has cited us to a number of decisions from eastern states, where like provisions of a law were considered, and the expressions in the opinions are quite uniform to the effect that the purpose of the law is to prevent disputes and contradictory proof being made where an attaching officer is being charged with a negligent act of omission or commission in connection with the service or handling of court process. We find that this statute has had a place in the law of this state for a great many years. It is incorporated, in practically the exact text now found in the Political Code, in an act of the Legislature passed in 1851, defining the duties of sheriffs. Stats. 1851, p. 196. In the case of Sanford v. Boring, Sheriff, 12 Cal. 539, the court gave consideration to the statute and held that evidence of parol instructions given by a plaintiff to the sheriff is not admissible. The case there is parallel with this one on the question involved. We quote from that opinion:

> "Nor did the court err in refusing to permit evidence of parol instructions from the plaintiff in execution to the sheriff, to permit the defendant to take or keep possession. The statute is express, that no direction or authority by a party or his attorney to a sheriff in respect to the execution of process, or the return thereof, or to any act in relation thereto, shall be available to discharge or excuse the sheriff for a liability for neglect or misconduct unless it be contained in writing, etc. The construction of appellant's counsel of this act is too narrow and technical. The evident meaning of the language embraces all acts done by the sheriff in respect to the execution of process, including, of course, the care and disposition of the property levied on—the most important of these acts."

While it is no doubt true that a party may always ratify an unauthorized act, we find no evidence in the record sufficient to warrant the conclusion that Robinson in any such manner bound himself in affirmation of the sheriff's act in releasing the real estate attachment. It may be remarked that the record shows that the attorney for Robinson testified that he refused to consent to allow the sheriff to release the real estate. However, the question of preponderance of evidence is not one to be considered here, for if the directions to release could be shown by parol, then the appellant would be correct in his contention that the court erred in striking out the testimony of such intent. We think that the trial court was right in its ruling, and that the order refusing to grant a new trial was properly made.

The order is affirmed.

We concur: CONREY, P. J.; WORKS, Judge pro tem.

35 Cal. App. 292

BRANNIGAN v. MILLER. (Civ. 1949.)

(District Court of Appeal, Second District, California. Nov. 13, 1917.)

Costs 🔑260(4)—Appeal Taken to Delay—Damages.

An appeal in conversion action for insufficiency of evidence to support certain findings, where defendant appellant asked reversal merely because of claimed preponderance of the evidence in his favor, although the findings were directly and substantially supported by other evidence, could not be regarded as having been made in good faith, and $50 damages, in addition to costs, would be awarded respondent; it appearing that the appeal was taken for purposes of delay.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by Samuel Brannigan against F. B. Miller. From judgment for plaintiff, defendant appeals. Affirmed.

Cleveland Schultz, of Los Angeles, for appellant. Amend & Amend, of Los Angeles, for respondent.

CONREY, P. J. Plaintiff recovered judgment against the defendant on account of the unlawful conversion of personal property. The only foundation claimed for the appeal from the judgment is that the evidence is insufficient to sustain two of the findings made by the trial court. Both of these findings of fact are directly supported by the testimony of the plaintiff. Counsel for appellant asks us to take into consideration the fact that the testimony of the plaintiff was contradicted by the testimony of several witnesses introduced by the defendant. In other words, he asks us to reverse a judgment because of a claimed preponderance of the evidence in favor of the defendant, although the findings are directly and substantially supported by other evidence. The rulings against the contention of appellant are uniform and innumerable. Such an appeal cannot be regarded as having been made in good faith.

It appearing to the court that this appeal was taken for the purposes of delay, it is ordered that the judgment be affirmed, and that on account of such delay the respondent recover the sum of $50 damages, in addition to the costs.

We concur: JAMES, J.; WORKS, Judge pro tem.

35 Cal. App. 238

PEOPLE v. TAMINAGO. (Cr. 558.)

(District Court of Appeal, Second District, California. Nov. 8, 1917. Rehearing Denied by Supreme Court Jan. 7, 1918.)

1. Criminal Law 🔑938(3)—Newly Discovered Evidence—Time of Discovery.

In a trial for murder, where defendant's counsel addressed certain questions to a witness to show that defendant was weak-minded and simple-minded, but where no attempt was made to prove his insanity, evidence tending to establish his insanity was not newly discovered evidence within the meaning of that term.

2. Criminal Law 🔑1042—Appeal—Insanity—Action of Court Below.

In a trial for murder, where no attempt was made to prove defendant's insanity, but where between the verdict and the sentence defendant presented an affidavit of two examining physicians as to his sanity, and where defendant had said that he had no legal cause why judgment should not be pronounced, a claim of error in pronouncing judgment without having his sanity passed upon by the jury was not reviewable, as there was no action or order in the trial court presenting such question.

Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

T. Taminago was convicted of murder in the second degree, and from the judgment, and from an order denying his motion for a new trial, he appeals. Judgment and order affirmed.

Tom L. Johnston, of Los Angeles, for appellant. U. S. Webb, Atty. Gen., and Robert M. Clarke, Deputy Atty. Gen., for the People.

WORKS, Judge pro tem. The appellant was tried under an information charging him with the murder of one Watanabe, was convicted of murder in the second degree, and was sentenced to imprisonment for 20 years. The appeal is from the judgment and sentence, and from an order denying the appellant's motion for a new trial.

Both Taminago and Watanabe were Japanese, and were employed in the kitchen of a hospital in the city of Los Angeles. Under circumstances which need not now be detailed, the evidence shows, without dispute, that Taminago shot Watanabe to death at the place where they were employed. In support of appellant's motion for a new trial, which was made on the ground of newly discovered evidence, there was offered an affidavit made by two registered physicians of the state. The affidavit, which was uncontroverted, contained a lengthy statement of the symptoms and condition of Taminago, and also the following conclusions of the physicians:

> "We are unqualifiedly of the opinion that he is insane, and has been so for more than a year last past, that he is suffering from a prolonged state of depression, * * * and that he is in a condition of chronic melancholia and not responsible for his actions or statements."

[1] We cannot say there was error in denying the motion. Motions for a new trial on the ground of newly discovered evidence are looked upon by the courts with distrust

and disfavor, as public policy demands that a litigant should be compelled to exhaust every reasonable effort to produce all his evidence at his trial. People v. Byrne, 160 Cal. 217, 116 Pac. 521. That such an effort was not made in the present case is indicated by the fact that, at the trial, appellant's counsel addressed certain questions to witnesses "to show if there was any weakness of mind or anything of that sort" in the defendant and to show that he was "simpleminded." The questions were excluded by the court upon the statement of counsel that no attempt was being made to prove insanity. Appellant's counsel evidently knew, or believed, at the time of the trial, that appellant was not normally minded, to say the least; and that knowledge, or belief, should have been followed by an attempt to ascertain and present to the court evidence upon his condition of mind, if investigation in fact made it appear that he was insane. Under such circumstances it cannot be said that evidence tending to establish the insanity of the appellant was newly discovered, within the legal meaning of that term.

[2] The examination of the appellant by the two physicians was made, and their affidavit was presented to the trial court, between verdict and sentence. It is contended "that the court erred in pronouncing judgment and sentence upon this defendant without having his sanity passed upon by jury," in the face of the uncontroverted affidavit of the physicians; but there is nothing in the record upon which the presentation of the question can be predicated. The trial court was given no opportunity to pass upon the point. Before Taminago was sentenced, he was asked if he had any legal cause why judgment should not be pronounced against him, his counsel being present, and he responded that he had not. The purpose of an appeal from a trial court is to review some action of the court, and as there was no action in this instance, no order which involved the question now sought to be presented, there is nothing to review. If Taminago is in fact insane, the law furnishes ample opportunity for the determination of the question at any time, upon the taking of appropriate steps to that end.

The judgment and order are affirmed.

We concur: CONREY, P. J.; JAMES, J.

35 Cal. App. 241

PLATZ v. MARION. (Civ. 1750.)

(District Court of Appeal, Third District, California. Nov. 9, 1917. Rehearing Denied by Supreme Court Jan. 7, 1918.)

1. CRIMINAL LAW 🔑90(2)—JURISDICTION—BARRATRY—JUSTICE OF THE PEACE.

The crime of common barratry is a simple misdemeanor of which justices' courts have general jurisdiction.

2. FALSE IMPRISONMENT 🔑7(2) — ISSUING WARRANT ON DEFECTIVE COMPLAINT—LIABILITY OF JUSTICE OF PEACE.

A justice of the peace is not liable for damages for false imprisonment for in good faith issuing a warrant on a complaint which he believes to state an offense of which he has jurisdiction, although the complaint does not state the offense, under Pen. Code, §§ 1426, 1427, providing that a complaint must be filed, and that, if it states an offense, a warrant must issue; the determination of the sufficiency of the complaint being the exercise of judicial powers.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by Matthew S. Platz against A. W. Marion for false imprisonment. Judgment for defendant, and plaintiff appeals. Affirmed.

C. E. Arnold and Matthew S. Platz, both of Bakersfield, for appellant. Emmons & Johnstone and Foster & Barnhart, all of Bakersfield, for respondent.

HART, J. Plaintiff, an attorney at law, practicing in Kern county, brought the action against defendant, a justice of the peace in said county, to recover $25,300 for false imprisonment. A demurrer to the amended complaint was sustained, plaintiff failed further to amend, and judgment by default was entered against him, from which judgment he prosecutes this appeal.

It is alleged in the amended complaint that on or about March 9, 1915, defendant issued a warrant for the arrest of plaintiff for the crime of common barratry; that plaintiff was arrested under said warrant and was released upon bail; that on the 12th of March, 1915, plaintiff's bondsmen surrendered him into the custody of the sheriff, whereupon he secured another bail bond and was released; that on March 18th the bondsmen on said second bail bond surrendered plaintiff to the sheriff, and he was imprisoned in the county jail from that time until about noon of the 19th day of March, 1915; on said last-named date, plaintiff applied to the Supreme Court for a writ of habeas corpus, which was granted, and plaintiff was released upon giving bail; that on the 5th day of April, 1915, the Supreme Court ordered the release of plaintiff "by reason of there not having been filed with said justice of the peace any complaint setting forth any facts showing that this plaintiff had been guilty of any public offense." It is then alleged "that defendant was wholly without jurisdiction to issue said warrant of arrest or to order this plaintiff held to bail or to be committed," and that said arrest and imprisonment were "without any right or authority so to do."

Attached to the amended complaint and made part thereof is a copy of the complaint filed with defendant as justice of the peace upon which said warrant of arrest was issued, which complaint, after the entitlement thereof, reads as follows:

"Personally appeared before me this 9th day of March, 1915, W. C. Dorris, of Bakersfield, county of Kern, state of California, who, being first duly sworn, complains and accuses Matthew S. Platz of the crime of common barratry, committed as follows: That the said Matthew S. Platz, on the dates hereinafter mentioned, at Bakersfield, and in said county of Kern, state of California, did willfully, unlawfully, and maliciously engage in the practice of exciting and did excite groundless judicial proceedings in the following manner and instances:

"(1) Said Matthew S. Platz, on or about the 9th day of April, 1914, did institute and excite a certain attempted appeal from a judgment of the superior court of the state of California in and for the county of Kern, in an action entitled People of the State of California, on the relation of W. C. Dorris, Plaintiff, v. James McKamy, Defendant, being numbered therein as civil action No. 9036, which said appeal was attempted to be taken to the Supreme Court of the state of California, and was groundless and void, as the said Matthew S. Platz then and there well knew;

"(2) That thereafter, on or about the 7th day of October, 1914, the said Matthew S. Platz initiated and excited an attempted proceeding in the Supreme Court of the state of California against the state of California by James McKamy, petitioner, and against the superior court of the state of California, and sought to obtain in said proceeding last mentioned a writ of review of the proceedings and said action No. 9036 in the superior court of Kern county, which said application for said writ of review in said Supreme Court was then and there groundless, as the said Matthew S. Platz then and there well knew; that thereafter said writ of review was denied by an order of the Supreme Court of the state of California.

"(3) That thereafter, on or about the 14th day of February, 1915, the said Matthew S. Platz initiated and excited an attempted proceeding in the Supreme Court of the state of California, wherein and whereby the said Matthew S. Platz filed a petition to vacate the order entered by said Supreme Court refusing the writ of review, was then and there groundless, as the said Matthew S. Platz then and there well knew; that said petition was thereafter denied by said Supreme Court of the state of California.

"(4) That thereafter, on or about the 3d day of November, 1914, said Matthew S. Platz excited and caused to be instituted a certain proceeding in the District Court of Appeal of the State of California in and for the Second Appellate District, entitled, James McKamy v. W. V. Matlack et al., as Trustees of the City of Bakersfield, in which proceeding the said Matthew S. Platz sought to obtain and have issued out of said court a writ of prohibition directed to the defendants therein and prohibiting them from filling a vacancy in the office of the city marshal of the said city of Bakersfield, which said application was then and there groundless and void and vexatious, as the said Matthew S. Platz then and there well knew;

"And all of said proceedings above described were excited, instituted, and initiated with corrupt and malicious intent to vex and annoy the enforcement of the judgment in said action No. 9036 of said superior court of Kern county, and to vex and annoy the superior court of said county and the judges thereof and the city trustees of the city of Bakersfield; all of which said acts were instituted and commenced while the said Matthew S. Platz was an attorney at law duly and legally admitted to practice in the courts of the state of California—contrary," etc.

The demurrer interposed to said amended complaint was upon the general ground, and also upon the special ground that certain allegations thereof were uncertain.

The ruling of the court below on the demurrer raises the question whether an individual may maintain an action for damages against a public officer clothed with judicial powers when, in the purported exercise of such powers, such officer does or performs some act in excess thereof which results in injury to the complaining party.

As the complaint herein shows, an attempt was made to charge the plaintiff before the defendant, as a justice of the peace, with the crime of common barratry, as the same is defined by section 158 of the Penal Code. Said section reads:

> "Common barratry is the practice of exciting groundless judicial proceedings, and is punishable by imprisonment in the county jail not exceeding six months and by fine not exceeding five hundred dollars."

Section 159 of the said Code provides:

> "No person can be convicted of common barratry except upon proof that he has excited suits or proceedings at law in at least three instances, and with a corrupt or malicious intent to vex and annoy."

The alleged complaint filed before the defendant, as a justice, against the plaintiff, wholly and, to the legal mind, quite obviously failed to state the offense denounced by section 158 or any offense known to the laws of this state. It will be observed that the document upon which the warrant authorizing the arrest of the plaintiff was issued and upon which the latter was in fact placed under arrest merely sets forth that in four different instances the plaintiff, as an attorney at law, unavailingly sought as many different legal remedies in a judicial adjudication against a client of his as to the same subject-matter. Manifestly it is no crime, nor, indeed, is it in contravention of the common ethics of the profession, for a lawyer to resort to and exhaust every available remedy known to the law to relieve a client of the consequences of any judgment recovered in a court against him, and the complaint filed in the justice's court and purporting to charge him with the violation of sections 158 and 159 of the Penal Code clearly discloses that he did no more than this in the matter as to which it was therein alleged that his professional activities brought him within the ban of said sections. The complaint here states, as we have seen, that the Supreme Court, in a proceeding upon habeas corpus, held that the complaint filed before the justice of the peace (the defendant) utterly failed to state any public offense against the plaintiff, and so ordered his discharge from arrest under the process issued upon said complaint, and we find, from a certified copy of the proceedings in that case before the Supreme Court, that the allegation of the complaint in that regard is correct. But, while all that has been said of the complaint is true, may it be held that the defendant, in a legal sense, exceeded the jurisdiction or powers with which the law clothes justices of the peace when he issued the warrant of arrest against the plaintiff under the circumstances disclosed by the complaint herein?

[1] The crime of common barratry, by reason of the nature and extent of the punishment prescribed therefor, is what may be and often is termed, in contradistinction to indictable misdemeanors, a simple misdemeanor, of which, it will, of course, be conceded, justices' courts have general jurisdiction. Pen. Code, § 1425; People v. Sacramento Butchers' Ass'n, 12 Cal. App. 471, 485, 486, 107 Pac. 712.

[2] Section 1426 of the Penal Code provides:

> "All proceedings and actions before a justice's or police court, for a public offense of which such courts have jurisdiction, must be commenced by complaint under oath, setting forth the offense charged," etc.

When, therefore, a complaint is filed before a justice of the peace charging or purporting to charge a person with a public offense of which the justice's court has jurisdiction, it then becomes the duty of the justice, in the exercise of the judicial powers with which he is clothed, to determine, upon an examination of the complaint, whether a public offense is therein stated against the party so sought to be charged. Upon the determination of this question rests the determination of the further question whether the justice is legally authorized upon the document filed as such complaint to issue his warrant for the arrest of the person of the party so charged or attempted to be charged. Since, then, he must pass upon the sufficiency of the complaint to state a public offense of which his court has jurisdiction for the purpose of determining whether he is by said complaint given the authority to issue a warrant of arrest, in doing so, as well as when issuing the warrant, if he concludes that a public offense cognizable in his court has been committed by the person named in the document as the accused, he necessarily exercises the judicial powers with which the law invests his court as fully and completely as when, in presiding at the trial of a charge of misdemeanor of which his court has jurisdiction, he rules upon questions involving the admissibility of evidence. The acts referred to are as much and as clearly within his judicial functions or powers as any act which the law gives him the authority to perform as a judicial officer. As in ruling upon questions of the admissibility of evidence at a trial, so in the case of determining whether a complaint filed with him and purporting to charge against some one a public offense triable in his court does or does not state the offense so sought to be charged, he may fall into error or arrive at an erroneous conclusion upon the legal propositions involved. While, as in this case, the purported complaint upon which he issued his warrant of arrest might have been in law no complaint at all, because of its utter failure to charge the offense thus attempted to be preferred against the defendant, yet it would or could hardly be said that, his court having general jurisdiction of the crime which was thus attempted to be stated, he was not acting within his powers as a judicial officer when performing the act of issuing the warrant of arrest, notwithstanding it subsequently developed that, through error of judgment, he issued the warrant upon a foundation insufficient in law to justify such action.

Section 1427 of the Penal Code provides, inter alia, that:

> "If the justice of the peace * * * is satisfied therefrom [the complaint filed] that the offense complained of has been committed, he must issue a warrant of arrest," etc.

This means, and can only mean, that if the justice honestly and in good faith believes and concludes, from the complaint as filed, that the offense thus charged or attempted to be charged, being an offense of which his court has general jurisdiction, has been committed, he must thereupon issue a warrant of arrest for the party named in the complaint as the accused; and where the justice so satisfies himself that the offense "complained of" has been committed—that is, where he thus makes up his mind, and thereupon issues the warrant of arrest honestly and in good faith or without being actuated therein by malicious or corrupt motives (and there is no such showing or even such claim made here)—then, as a matter of public policy and in the interest of the public service, he should not be held to be liable in civil damages because it transpires that, through mere error of judgment, he based the issuance of the warrant of arrest upon a complaint insufficient, in law to charge the offense thereby sought to be stated. We base this conclusion upon the obvious proposition that, if a judicial officer, whether of high or low degree in point of jurisdiction and dignity, were to be subject to the harassment incident to a civil action for damages by every suitor appearing as a litigant or as an accused in a criminal proceeding in his court, who has been disappointed over some ruling or judgment made or entered against him, the just and orderly administration of perhaps the most important department of the public service might be greatly handicapped and impaired, if, indeed, the ends thereof not wholly frustrated, and that public policy requires that no proceeding in law which might lead to such a situation should be countenanced or upheld.

It is true that in some of the early cases it seems to have been laid down that, while a civil action for damages for a wrongful act by a judicial officer, when purporting to be exercising the lawful jurisdiction of the court or tribunal of which he is the presiding judge, will not lie against a judge of a court of superior or general jurisdiction, even though such act may be shown to have been in excess of the jurisdiction of such judge, or done with malicious or corrupt motives, yet such an action will lie against a judge of an inferior court possessing special or limited jurisdiction if, in doing the act, such judge exceeds the powers expressly conferred upon him by law as such judge or upon the court of which he is the judge. See cases cited in Wyatt v. Arnot, 7 Cal. App. 221, 94 Pac. 86.

There are other cases, however, that hold that, upon principles of sound public policy, and to the end that the independence of the judiciary as a system shall always be maintained, the rule applicable to judges of courts of superior and general jurisdiction exempting such judges from liability to an action for damages at the hands of a suitor claiming to have been injuriously affected by acts done in excess of their judicial powers should be alike applicable to all judicial officers or public officers clothed with and whose duties require the exercise of judicial powers, including justices of the peace and like inferior judicial officers whose jurisdiction, as established by law, is special and limited. The early case of Grove v. Van Duyn, 44 N. J. Law, 654, 42 Am. Rep. 648, holds to this view. In that case, which, in its general aspect, resembles the case at bar, a justice of the peace had authorized the arrest of the plaintiff and held him to bail for unlawfully carrying away bundles of cornstalks, "under a statute which came no nearer to specifying such an offense than carrying away a stack of corn." It was held that the justice was not civilly liable. So much is said in the opinion in that case that is instructive and enlightening upon the question involved in the case before us that we feel justified in quoting therefrom in extenso. The court said:

> "Most of the general principles of law pertaining to that branch of this controversy which relates to the alleged liability of the defendant in this suit, who was a justice of the peace, are so completely settled as not to be open to discussion. The doctrine that an action will not lie against a judge for wrongful commitment, or for an erroneous judgment, or for any other act, made or done by him in his judicial capacity, is as thoroughly established as are any other of the primary maxims of the law. Such an exemption is absolutely essential to the very existence, in any valuable form, of the judicial office itself; for a judge could not be either respected or independent if his motives for his official actions or his conclusions, no matter how erroneous, could be put in question at the instance of every malignant or disappointed suitor. Hence we find this judicial immunity has been conferred by the laws of every civilized people. That it exists in this state in its fullest extent has been repeatedly declared by our own courts. Such was pronounced by the Supreme Court to be the admitted principle in the cases of Little v. Moore [4 N. J. Law] 1 South. 75 [7 Am. Dec. 574]; Taylor v. Doremus [16 N. J. Law] 1 Harr. 473; Mangold v. Thorpe [33 N. J. Law] 4 Vr. 137; and by this court in Loftus v. Fraz [43 N. J. Law] 14 Vr. 667. To this extent there is no uncertainty or difficulty whatever in the subject.
>
> "But the embarrassment arises where an attempt is made to express, with perfect definiteness, when it is that acts done by a judge, and which purport to be judicial acts, are such within the meaning of the rule to which reference has just been made. It is said everywhere in the text-books and decisions that the officer, in order to entitle himself to claim the immunity that belongs to judicial conduct, must restrict his action within the bounds of his jurisdiction, and jurisdiction has been defined to be 'the authority of the law to act officially in the particular matter in hand.' Cooley on Torts, 417. But these maxims, although true in a general way, are not sufficiently broad to embrace the principle of immunity that appertains to a court or judge exercising a general authority. Their defect is that they leave out of the account all those cases in which the officer, in the discharge of his public duty, is bound to decide whether or not a particular case, under the circumstances as presented to him, is within his jurisdiction, and he falls into error in arriving at his conclusion. In such instance the judge, in point of fact and law, has no jurisdiction, according to the definition just given, over 'the particular matter in hand,' and yet, in my opinion, plainly he is not responsible for the results that wait upon his mistake. And it is upon this precise point that we find confusion in the decisions.
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> "There are certainly cases which hold that, if a magistrate, in the regular discharge of his functions, causes an arrest to be made under his warrant on a complaint which does not contain the charge of a crime cognizable by him, he is answerable in an action for the injury that has ensued. But I think these cases are deflections from the correct rule, [in that] they make no allowance for matters of doubt and difficulty. If the facts presented for the decision of the justice are of uncertain signification with respect to their legal effect, and he decides one way, and exercises a cognizance over the case, if the superior court in which the question arises in a suit against the justice differs with him on this close legal question, is he open by reason of his error to an attack by action? If the officer's exemption from liability is to depend on the question whether he had jurisdiction over the particular case, it is clear that such officer is often triable under such conditions, because the higher court, in deciding a doubtful point of law, may have declared that some element was wanting in the complaint which was essential to bring this case within the judicial competency of the magistrate."

In the case of Hayes v. Hutchinson & Shields et al., 81 Wash. 394, 142 Pac. 865, a justice of the peace was proceeded against in an action for damages for causing the arrest of the plaintiff on an alleged illegal warrant of arrest; the claim being that the complaint upon which said warrant was issued did not state a case against the plaintiff under the "arrest and bail" statute of the state of Washington. The Supreme Court of that state held that the action against the justice of the peace could not be maintained, and, in discussing the principles upon which cases of the character of the case at bar are to be decided and disposed of, uses the following language:

> "Public policy demands, and the better reasoned cases hold, that a judge of inferior and limited jurisdiction, such as a justice of the peace, is not liable in damages for an unlawful arrest upon process issued by him in the absence of malice—and no malice is alleged—in a case which is colorably though not really within his jurisdiction"—citing a large number of cases, among which is the Alabama case of Broom v.

Douglass, 175 Ala. 268, 57 South. 860, 44 L. R. A. (N. S.) p. 164, in which the syllabus states the rule as declared therein as follows: "A judge of limited jurisdiction is not personally liable for issuing a warrant of arrest which he had no authority to do, in a case of which he had jurisdiction of the subject-matter, if some one apparently qualified to do so appeared before him and made the requisite complaint, stating some facts which enter into and may under some conditions, or in co-operation with unstated facts, constitute a criminal offense, or stating some fact or facts which bear general similitude to a fact or facts designated by law as constituting an offense."

There are many other cases to the same effect as the above cases, and among these the following may be mentioned: Feld v. Loftis, 240 Ill. 105, 88 N. E. 281; Brooks v. Mangan, 86 Mich. 576, 49 N. W. 633, 24 Am. St. Rep. 137; Bohri v. Barnett, 144 Fed. 389, 75 C. C. A. 327; Robertson v. Parker, 99 Wis. 652, 75 N. W. 423, 67 Am. St. Rep. 889; McIntosh v. Bullard, 95 Ark. 227, 129 S. W. 85.

The case of De Courcey v. Cox, 94 Cal. 665, 30 Pac. 95, cited and relied upon by the appellant, is, in the facts, wholly unlike the case at bar, and is therefore not in point. It appears from the opinion in that case that a complaint was made before the defendant, as justice of the peace, charging the plaintiff in the action for damages against said justice with refusing to return the sum of $20, alleged to have been overpaid said plaintiff by the El Cajon Vineyard Company; that the justice, upon the complaint so made, issued a warrant of arrest upon which the plaintiff was arrested and taken before the said justice of the peace, and required to and did plead to said charge; that after trial the justice rendered judgment that plaintiff restore said amount of $20, or be committed to the county jail for 20 days; and that, pursuant to the judgment so rendered, the justice issued a commitment and delivered it to an officer, who executed it by imprisoning and confining the plaintiff in the county jail for the period of three days. The Supreme Court held that the complaint stated a cause of action in favor of the plaintiff and against the defendant (the justice of the peace) for damages for false imprisonment. But readily it will be observed that absolutely no public offense whatever under the law was stated in the so-called complaint filed with the justice against the plaintiff. The justice had no jurisdiction of the subject-matter of the complaint, so far as a criminal charge was concerned. The complaint merely alleged that the plaintiff, by a mistake, had been overpaid, and there was no pretense, so far as the complaint disclosed, that he obtained or even retained the amount overpaid through any criminal act on his part. If the so-called complaint disclosed anything at all, it was merely a civil action for money had and received, and obviously the proceeding taken by the justice under the complaint was wholly and entirely coram non judice. It was not a case which called for the arrest of the person of the plaintiff. It was, as before suggested, in no sense a criminal case or a proceeding in which the plaintiff was accused of committing a public offense. The facts pleaded by the plaintiff in his action against the justice of the peace might therefore be held sufficient to raise the implication that malice characterized the acts of the justice of the peace in issuing the warrant for the arrest of and in committing the plaintiff to imprisonment.

In the present case, as we have shown, the offense attempted to be charged against the plaintiff is within the general jurisdiction of the justice's court and of the defendant, as a judge of such court. The subject-matter of the complaint, though not well pleaded, the defendant, as a justice, had jurisdiction of. His failure to acquire jurisdiction of the person of the plaintiff lay entirely in the failure to state in the complaint facts sufficient to show that such an offense had been committed. There is, as seen, no charge of malice or corrupt motives in the act of the defendant in issuing the warrant. Obviously, an attempt—a very crude attempt, it is true—was made to charge the crime of common barratry, and it will be admitted that some facts were stated in the complaint which, co-operating with other conceivable facts not stated, would constitute the crime which it was attempted to charge. As above stated, in passing upon the question of the sufficiency of the complaint to state the offense named therein, the defendant was only exercising the powers with which he was invested as a judicial officer, and, although to a trained lawyer the insufficiency of the facts stated in the complaint to state the offense thus sought to be charged would readily appear, still we must assume, in the absence of a showing of malice or other bad motives in the act of the defendant in issuing the warrant, that in so doing he acted in good faith and in the honest belief that the document upon which he issued the warrant was sufficient in law as a complaint to justify that act. And it may with no impropriety be added that, while there is no legal presumption that the average person selected to fill the office and discharge the duties of a justice of the peace is not a lawyer, still, as a matter of very common knowledge, we know that, generally speaking, laymen, without any previous education in the law, and who are not conversant with the technical rules of procedure whereby justice is required to be administered, are called to fill judicial positions of inferior and limited jurisdiction, and therefore it is not to be taken as a matter of astonishment that the law, substantive as well as procedural or adjective, is often administered in the inferior tribunals in a very primitive and irregular manner. Hence it may readily be apprehended that it might, and perhaps would, prove to be destructive of an efficient branch of our judicial system, as it now exists, if it were found necessary to promulgate a rule whereby a justice of the peace may be subjected to a civil suit for damages for a mere error of judgment in the doing of some act or the issuance of some process which is within the general scope of his judicial powers, such act not having been prompted by an evil motive, but done in perfect good faith and in an honest belief that he was legally warranted in doing it. Indeed, it is very doubtful whether a lawyer, much less a layman, would be willing to accept the office of justice of the peace if it were true, as a legal proposition, that he would be required to discharge his judicial duties or examine every legal document or proceeding filed or brought before him at the peril of an action for damages in case he, through error of judgment, did some act which, though within his general jurisdiction, was not authorized in the particular case in hand. Of course, in all such cases some one may suffer injury, of a more or less aggravated nature, from the illegal act of the justice; but this result is only one of a number of inconveniencies which are necessarily incident to a system, the product of the imperfect human mind, which has not attained, and, in the very nature of things, cannot attain to that degree of perfection which admits of no mistakes and the inconveniences or injuries following therefrom. But we may repeat, as the cases above mentioned with gratifying perspicacity explain, that, upon the soundest principles of public policy, injuries resulting from errors so committed are without a legal or any remedy, a situation necessary to the preservation, in all its essential features, of the very system itself established for the administration of the law.

For the reasons herein given, the judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

(35 Cal. App. 283)

WEBSTER v. BARTLETT ESTATE CO. et al. (Civ. 2243.)

(District Court of Appeal, Second District, California. Nov. 12, 1917.)

1. CORPORATIONS 🔑181(1)—STOCKHOLDERS—INSPECTING BOOKS.
A stockholder has both a common law and statutory right to inspect the corporation's books.

2. MANDAMUS 🔑129—INSPECTING BOOKS—ENFORCEMENT.
A stockholder's right to inspect the corporate books may be enforced by a writ of mandate.

3. CORPORATIONS 🔑181(3)—INSPECTION OF BOOKS BY STOCKHOLDER—RETROACTIVE OPERATION OF STATUTE.
The 1917 amendment to Civ. Code, §§ 377, 378, restricting inspection of corporate books to bona fide stockholders, is inapplicable to a case arising before the amendment.

4. CORPORATIONS 🔑181(3)—STOCKHOLDERS—INSPECTION OF BOOKS—BENEFICIAL INTEREST.
A bona fide stockholder need not have a beneficial interest in the shares.

5. CORPORATIONS 🔑181(3), 282—STOCKHOLDERS—INSPECTION OF BOOKS—DIRECTORS.
Only corporate stockholders may be directors, and the fact that shares are transferred in order to qualify a person as a director fails to show that the holder is not a bona fide stockholder.

6. CORPORATIONS 🔑175—STOCKHOLDERS' LIABILITY.
A person holding corporate shares in his own name is personally liable for assessments, etc., although the stock is actually held in trust for other persons.

7. CORPORATIONS 🔑181(3)—STOCKHOLDERS—INSPECTING BOOKS.
Prior to its amendment in 1917, Civ. Code, §§ 377, 378, making corporate books subject to inspection by stockholders, authorized inspection by a person holding a share in her own name, though the share belonged to another and was transferred simply to qualify her as a director.

8. CORPORATIONS 🔑181(1)—STOCKHOLDERS—INSPECTING BOOKS.
Prior to 1917 amendment to Civ. Code, §§ 377, 378, authorizing an inspection of corporate books, and under Const. art. 12, § 14, requiring corporate books to be open for inspection, etc., inspection could not be denied because the stockholder intended to use the information to the corporation's injury.

Appeal from Superior Court; San Diego County; C. N. Andrews, Judge.

Petition for writ of mandate by Emily B. Webster against the Bartlett Estate Company, a corporation, and others. From a judgment denying her petition, she appeals. Reversed.

E. S. Torrance, Charles P. Pritchard, and Warren E. Libby, all of San Diego, for appellant. Sweet, Stearns & Forward, of San Diego, for respondents.

CONREY, P. J. The plaintiff appeals from a judgment denying her petition for a writ of mandate whereby it was sought to compel the defendants to permit the petitioner to inspect and examine the books, records, and journals of defendant corporation. The action was commenced on May 31, 1916, after demand for such inspection and examination, which demand was refused by the defendants. The judgment was entered on the 1st day of July, 1916, and appeal taken within 60 days thereafter.

On the 25th day of June, 1907, one share of stock of defendant corporation was issued to appellant, and at all times thereafter said share of stock was in her name on the books of the corporation. Said demand was made by appellant as a stockholder, and is based upon her alleged rights as a stockholder. The answer of defendants to the petition does not deny the facts above stated, but alleges that said share of stock, which was transferred to appellant by one E. Bartlett Webster, was transferred to and held by appellant solely for the purpose of qualifying her as a director of the corporation; that she paid no consideration therefor; and that she received said certificate upon the understanding and agreement between her and E. Bartlett Webster that the share of stock was the property of E. Bartlett Webster, and would be returned to him upon demand or upon her ceasing to be a director of defendant corporation. The answer further alleged that if petitioner had made her demand as director of the corporation and had claimed and admitted that she was such director, defendants would have accorded her such inspection and examination, and that her demand was refused because she based her claim of right solely upon the ground that she was a stockholder. The court in its findings of fact declared that said certificate of stock, although issued to and standing on the books of the corporation in the name of appellant, was in reality the property of E. Bartlett Webster, and was held by appellant for him upon the terms and conditions and for the purposes set out in the answer, as above stated; that appellant is not now and never has been, since on or about the 25th day of June, 1917, a bona fide stockholder or the owner or holder of any of the shares of the capital stock of the corporation, "and is not a stockholder of said defendant corporation, Bartlett Estate Company, so as to entitle her to demand or have the right to inspect and examine the books, records, and journals of said defendant corporation." No demand for the return or retransfer of the certificate was ever made by E. Bartlett Webster. At the trial the plaintiff duly made and preserved all legal objections to the evidence offered by the defendants and received by the court showing the conditions and circumstances under which the certificate of stock was issued to the plaintiff.

[1-4] It is not denied, and it may not successfully be denied, that a stockholder of a corporation has the right to inspect the books of the corporation. This is a common-law right which also is recognized by statute in this state and which may be enforced by writ of mandate. Hobbs v. Tom Reed Gold Min. Co., 164 Cal. 497, 129 Pac. 781, 43 L. R. A. (N. S.) 1112. The contention of respondents is that this right is confined to bona fide stockholders; that one who is not the real and beneficial owner of stock is not a bona fide stockholder, even though he holds certificates of stock duly registered in his name on the books of the corporation; and that the corporation has the right to go behind the fact of apparent ownership as shown by the books and may refuse inspection of its books, if the demanding stockholder is not in fact the real and beneficial owner of the shares. Counsel for respondents have quoted to us and used in their argument sections 377 and 378 of the Civil Code, as amended in the current year 1917, whereby the right of inspection of corporation records theretofore prescribed as the right of any stockholder, is now given to any bona fide stockholder. Whatever the effect of these amendments may be, they can have no bearing upon this case, for all rights to be determined herein depend upon the law as it was before these amendments were adopted. Moreover, it is well-settled law that one may be a bona fide stockholder without having any beneficial interest in the shares. Royal Consolidated Mining Co. v. Royal Consolidated Mines Co., Ltd., 157 Cal. 737, 110 Pac. 123, 137 Am. St. Rep. 165.

[5] Since the defendants by their answer claim that appellant when she made her demand was a director of the corporation, they necessarily admit her status as a stockholder, since only stockholders of corporations may be directors thereof. The mere fact that shares of stock are transferred to a person in order to qualify him to be a director of the corporation does not tend to prove that he is not a bona fide stockholder. In 7 Ruling Case Law, section 413 of the title on Corporations, authorities are cited supporting the rule as stated in the text, as follows:

> "As a general rule, however, the statutes, charter, or by-laws governing the corporation provide that the directors shall be stockholders, and where such is the requirement it is essential to render a person eligible to the office of director that he be an owner of stock in fact; and while the courts are not disposed to construe such requirement so strictly as to inhibit the transfer of stock for the express and avowed purpose of qualifying the transferee for election to the office of director or trustee, yet such rule is limited to a transfer in good faith and does not apply to render eligible one to whom stock is transferred solely for the purpose of qualifying him, the stock being immediately assigned back to the true owner in blank, though his name remains on the corporate books as a stockholder."

[6] A person who holds shares of stock actually issued to him and duly registered in his name on the books of the corporation incurs definite liabilities to the corporation, as well as to its creditors, even though he in fact holds such stock in trust for other persons. Such stockholder is personally liable to the corporation on account of assessments levied upon the stock. La Habra Oil Co. v. Francis, 169 Pac. 401, decided by this court October 29, 1917. In Market St. Ry. Co. v. Hellman, 109 Cal. 571, 42 Pac. 225, it was declared that a trustee must be deemed the legal owner of the stock and "as against the corporation and all the world, except his cestui que trust, no inquiry may be made touching his actions in the premises."

According to the provisions of section 322, Civil Code, the creditors of a corporation may not proceed to enforce (under circumstances therein stated) the statutory stockholders' liability against pledgees or trustee, but are limited to proceeding against the equitable owner. But the rule so provided does not apply in favor of one who takes the stock and holds it unqualifiedly in his own name. In Hurlburt v. Arthur, 140 Cal. 103, 73 Pac. 734, 98

Am. St. Rep. 17, where consideration was given to the terms of section 322, Civil Code, it was held that so long as a stockholder appears as such on the books of the corporation, there being nothing shown thereon to indicate that he does not hold as owner, he is subject to the stockholders' liability to the creditors of the corporation.

[7, 8] Obligations and liabilities carry with them concurrent rights. Since a stockholder who holds stock as, according to the findings of the court, the plaintiff held her stock in this case, is liable to pay assessments and is liable to creditors for a proportionate share of debts of the corporation, such stockholder is reasonably and legitimately entitled to the right of inspection and examination of its books and business. The appellant having established her status as a stockholder, defendants were not entitled to impose upon her a condition having reference to another matter, such as that she admit that she was a director of the corporation and make her demand as such director.

By their answer defendants alleged that the plaintiff's demand was not made in good faith, and was made solely for the purpose of harassing the defendant corporation and said defendant E. Bartlett Webster, and in the hope that she might discover evidence which would be of use and benefit to her in other actions against them. No finding of fact concerning these allegations was made by the court. Counsel for respondents in their brief refer to evidence showing the existence of such adverse litigation, and insist that it tends to show that appellant is seeking to obtain information which she intends to use to the injury of the corporation. They refer us again to the amendment to section 377 of the Civil Code as adopted in 1917, where some provision is made for denial of the right of inspection, upon a satisfactory showing that the stockholder demands the same with intent to use the information to the injury of the corporation. As we have said before, statutory amendments of 1917 are not available for the purpose of this case, and the amendment mentioned would not protect the respondents here, even if the court had found that such satisfactory showing of injurious intent had been made. The indicated evidence could not properly be received or considered in aid of the claimed purpose of defendants. In Johnson v. Langdon, 135 Cal. 624, 67 Pac. 1050, 87 Am. St. Rep. 156, which was a proceeding like that in the case at bar, a similar affirmative defense was offered and the court struck from the answer said affirmative portion thereof. This ruling was sustained. The Supreme Court said that:

> "The great weight of the American authorities is to the effect that where the right is statutory it is not necessary for the petition to aver or show the purposes or object of the inspection. Neither is it any defense to allege that the objects and purposes are improper, and that the petitioner desires to injure the business of the corporation. The clear legal right given by the Constitution and the statute cannot be defeated by stopping to inquire into motives."

That decision was followed by this court in Poor v. Yarnell, 28 Cal. App. 714, 153 Pac. 976. Article 12, § 14, of the state Constitution requires that the corporation books be kept "for inspection by every person having an interest therein." While we have based our discussion entirely upon the status of appellant as a stockholder, it may here be worthy of note that immediately prior to the transfer of appellant of said one share of stock she transferred to E. Bartlett Webster 400 shares of stock of the same corporation; that part of the consideration therefor was paid by giving her his promissory note for $71,200, pledging the 400 shares to her as security for said note; that there is no evidence that said note has been paid or said pledge released. It does not appear, however, that the facts concerning such pledge are shown upon the books of the corporation.

The judgment is reversed.

We concur: JAMES, J.; WORKS, Judge pro tem.

35 Cal. App. 302

HUFFAKER v. McVEY et al. (Civ. 2259.)

(District Court of Appeal, First District, California. Nov. 14, 1917. Rehearing Denied by Supreme Court Jan. 10, 1918.)

1. Appeal and Error 🔑757(2)—Review—Sufficiency of Complaint.

To warrant an opinion on the nature of the first or the amended complaint, it is necessary that the whole of the complaints be set forth in the briefs, and mere fragments are not sufficient.

2. Libel and Slander 🔑70—Bond—Statute.

Where the original complaint stated an action for libel and slander, and the amended complaint, though possibly stating an action for malicious prosecution, alleged facts sufficient to constitute an action for libel and slander, it was incumbent upon plaintiff to file the bond required by St. 1871–72, p. 533.

3. Pleading 🔑352 — Striking Amended Complaint—Order.

An order dismissing an action for libel and slander after plaintiff's failure to file the statutory bond was not an order striking the amended complaint from the files, though it rendered such complaint ineffectual.

Appeal from Superior Court, Alameda County; William H. Donahue, Judge.

Action by E. Huffaker against John L. McVey and others. From a judgment of dismissal, plaintiff appeals. Affirmed.

Rodolph Hatfield and E. Huffaker, both of Oakland, for appellant. John L. McVey, of Oakland, for respondents.

LENNON, P. J. This appeal is from a judgment of dismissal of an action after refusal of the plaintiff and appellant to file a bond as required by the provisions of the libel and slander act.

The case, as presented in appellant's briefs does not contain sufficient printed extracts from the record to enable this court to determine the character of either the first or the amended complaint.

> "While the alternative method of appeal permits parties to file typewritten transcripts in lieu of printed judgment-rolls and bills of exceptions, such permission casts no burden upon the appellate courts to examine the typewritten documents in deciding the appeal." California Sav. & Comm. Bank v. Canne, 169 Pac. 295; Beecham v. Burns, 168 Pac. 1058.

[1] To warrant an opinion on the nature of the complaints in this case it is necessary that the whole of the complaints be set forth, and mere fragments are not sufficient.

[2] However, a cursory examination of the typewritten transcript discloses the following facts: The original complaint, while not a model pleading, is an attempt to set forth an action for libel and slander. The lower court so construed it and ordered the plaintiff to file the statutory bond. Cal. Stats. 1871–72, p. 533. Plaintiff failed to file a bond within the time allowed by the court, but the day after the order plaintiff filed an amended complaint, and two days later filed a motion to vacate the order on the ground that plaintiff had the right under the law to amend his complaint to set forth the nature and purpose of his action, and that the complaint was not one for either libel or slander. On the hearing of the motion an order and judgment was made dismissing the action on the ground that plaintiff had not filed the requisite bond.

In our opinion, the original complaint states an action for libel and slander, and the amended complaint, while it perhaps states an action for malicious prosecution, certainly alleges facts sufficient to constitute an action for libel and slander. It was therefore incumbent upon the plaintiff to file the bond as ordered.

[3] The contention that the court erred in denying plaintiff the right to file an amended complaint is not supported by the record. The record shows that an amended complaint was filed, and it nowhere appears from the record that the court made any order striking such amended complaint from the files. The only reference to such amended complaint is found in the order dismissing the action after the failure of the plaintiff to file a bond. That order does not strike the amended complaint from the files, although the effect of the order was to render such amended complaint ineffectual for any purpose.

Judgment affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

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35 Cal. App. 304

FOLEY et al. v. HORNUNG. (Civ. 1744.)

(District Court of Appeal, Third District, California. Nov. 14, 1917.)

1. NEGLIGENCE ⇨32(2)—INVITEE ON PREMISES—CARE REQUIRED.

Where a merchant invites a customer to follow him to his workshop at the back of his store to look at goods stored there, such customer is not a mere licensee, but the merchant must use all reasonable means to make that part of the store safe for one visiting it.

2. APPEAL AND ERROR ⇨1048(1)—HARMLESS ERROR—EXAMINATION OF WITNESSES—REPETITION.

An objection to questions asked on rebuttal that had been answered on the direct should be sustained; but where the answers are mere repetitions, they are not seriously prejudicial.

3. TRIAL ⇨29(2)—COMMENTS ON EVIDENCE BY COURT.

A remark by the court on overruling an objection to question that the matter is "probably of some importance" could not result in having attached additional significance to the answers, and especially will it be so held where counsel did not see fit to call the matter to the court's attention at the time.

4. TRIAL ⇨295(9)—INSTRUCTIONS CONSTRUED AS A WHOLE—NUMBER OF WITNESSES.

Part of an instruction preceded by a proper instruction, that the number of witnesses should not be considered was cured by another clause that where the evidence is contradictory no testimony should be disregarded, but circumstances, as in cases where the number of witnesses on each side is unequal, should be considered.

5. TRIAL ⇨315—VERDICT—"CHANCE."

Where jurors disagreeing as to amount of verdict arrive at a sum by the quotient method without agreeing to be bound by the result, and then after considering the result adopt approximately the same sum, the verdict is not one arrived at by chance within Code Civ. Proc. § 657, making such verdicts grounds for new trial.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Chance.]

6. APPEAL AND ERROR ⇨1015(5)—FINDINGS OF FACT—CONTRADICTORY AFFIDAVITS.

Where affidavits of some jurors would show that a verdict was arrived at by chance, and affidavits by others denied such, the finding of the court to sustain the verdict will not be disturbed, though Code Civ. Proc. § 657, subd. 2, provides that such conduct may be proved by the affidavit of one juror.

Appeal from Superior Court, Kern County; M. L. Short, Judge.

Action by David Foley and Mary Foley against Paul Hornung. Judgment for plaintiffs, and defendant appeals. Affirmed.

Kaye & Siemon, of Bakersfield, for appellant. Thomas Scott and Rowen Irwin, both of Bakersfield, for respondents.

CHIPMAN, P. J. Plaintiffs are husband and wife, and the action is by plaintiff Mary Foley for injuries received by her through the alleged negligence of the defendant. It appears from the complaint that the defendant is a merchant conducting business in the city of Bakersfield in a building situated on Chester avenue. It is alleged that the place of defendant's business consisted of a building, on the ground floor of which his general merchandise business was conducted, and to which access was had at the entrance on Chester avenue; that there was a basement to the building about nine feet below the ground floor; that towards the rear of said ground floor there was a large hole or opening in which was an elevator used for the purpose of conveying goods to and from the basement to the ground floor, and was "so located that any one entering said store for the purpose of making a purchase therein would be liable to fall into said hole or opening, unless the same was properly provided with guards or the said opening was closed," and that the said hole was dangerous to persons trading in or walking in or about said store; that on June 3, 1912, the plaintiff Mary Foley entered said defendant's store for the purpose of purchasing a tent, and was met by defendant, "who directed her to the rear end of said store to look at some tents which defendants were offering for sale"; that while plaintiff was passing to the rear of said store for the purpose mentioned, and having no knowledge that there was an opening or trap in said floor, she stepped into and fell through said hole to the basement, thus receiving the injury complained of; that the said opening was by reason of the negligence of defendant wholly unprotected or closed. The complaint then set forth the nature of the injuries received, alleging that they "were not caused by reason of the negligence of the said plaintiff Mary Foley."

A general demurrer to the complaint was overruled, and defendant answered, denying specifically the averments of the complaint, except as to the general description of the building and the location of the opening mentioned in the complaint, and alleged "that the hole mentioned and described in said complaint was carefully guarded by a rope firmly suspended a distance of 2½ feet above the floor of the storeroom, and about 4 feet distant from the edge of the opening mentioned in the said complaint in a manner so that the same was plainly visible to the sight of any person proceeding towards the said opening, and that the same formed an effectual obstruction against a person attempting to proceed towards said hole or opening, and the said plaintiff entirely disregarded the said guard or rope and deliberately walked under or over the same, and through her own carelessness and negligence, caused herself to be precipitated into the basement of the said building"; that defendant's store mentioned in the complaint was divided into two departments, "the fore part of which was arranged for the reception of customers of said defendant and of displaying and dispensing merchandise to them, and the rear portion of the said store at said time was used by the said defendant for a workshop, in the manufacture and repair of harness and other leather goods, and also for storing merchandise of the said defendant in a loft suspended over said shop"; that the said opening mentioned in the complaint "was situated in the rear of said store and in that portion thereof so used by the said defendant as a workshop"; that on said date, defendant proceeded to the rear portion of the store for the purpose of procuring a tent to show to plaintiff "in the front portion of the said store, and before departing to procure the said tent, enjoined the said plaintiff to remain in the front portion of the said storeroom until the said defendant should return with the said tent," and that plaintiff disregarded the instructions of the defendant and "deliberately walked over or under the said rope and was proceeding toward that portion of the said storeroom used as a workshop by said defendant, when she precipitated herself into the said opening, and sustained the injuries alleged in her complaint." He alleged that at the said time, the said storeroom and that portion where the said opening was situated was well lighted, "and the said rope and opening were plainly visible to any person proceeding toward the same, and had the said plaintiff exercised ordinary care and caution she would have avoided falling into the said opening and sustaining the injury alleged in her complaint."

The cause was tried by the court with a jury, and plaintiffs had the verdict for damages in the sum of $2,000 on which judgment was accordingly entered. Defendant appeals from the judgment and from the order denying his motion for a new trial. A reversal of the judgment and the order is asked on the grounds: (1) The insufficiency of the evidence to justify the verdict; (2) errors of the court in admission of testimony and comment of the court upon such testimony; (3) the error of the court in refusing and giving instructions; (4) misconduct of the jury in reaching their verdict by resort to chance.

The account of the accident appears by the testimony of plaintiff Mary Foley, found in the record in narrative form. We quote as follows:

"On the 3d of June, 1912, I lived in Bealeville, Kern county. I came to Bakersfield the 3d of June to get a tent. I asked a gentleman where I could get a tent, and he says, 'Go over there, that store there; they have tents there.' I went over there, and he was standing at the door where I could see him before I went in, and the gentleman came out and says, 'What do you want?' I says, 'Do you sell tents here?' and he says, 'Yes, come in,' and I went right in. I went right after him, and I went in part way, and he went that way (pointing), and I went this way. I followed him up, and he went that way (pointing), and I went in the hole. I couldn't say how far I was behind him when following him. Both of us was walking; he was walking and I was walking after him. The distance between us, maybe two or three steps, I couldn't say. He walked in and I walked right after him. He went that way and I followed him. He turned that way, where the buggies were, the right hand. I couldn't tell you anything about what part of the store it was that he turned, only he turned that way, and the hole was right here, and the counter was right here, and when he went that way where the buggies was— The Court: What part of the store were you in when he turned? A. Just even with the counter, and he turned and it happened so quick—it happened so quick that I couldn't do any more. The hole was in the middle of the floor, quite a ways back in the building, near the counter. It was back near the end of the counter. It's quite a long store. I was about 3 or 4 feet from the counter when this man turned to the right. After he turned to the right I fell in the hole right there. The counter was on the left side of the building coming in. I couldn't tell where I fell, but it was a hole. That was all I know about it. It was a big dark place I fell in. I fell down and went to the bottom, wherever it was, about 10 or 12 feet, as far as I know. * * * There was no rope or guard or railing of any kind around this opening that I could see when I fell into it, and after I fell in it. There was nothing there to stop me from falling in there. I just stepped in there and went down. There was nothing there. I didn't see anything there. I had never been in the store before. I did not know there was an opening in the floor there. Nobody told me there was a hole there or said anything to me of any kind, to look out or be careful, or anything about it. I did not see any hole there. When I was brought up immediately after the fall and was sitting in the chair on the floor near the opening there was no rope there or guard around this hole to prevent me from falling into it. * * * A person coming along by the side of the counter, by the front counter towards the rear part of the store, would walk into the hole all right. The counter ended maybe 2, maybe a couple of feet from the hole. * * * It was about half past 8, or maybe quarter past 8, in the morning when I was hurt. Q. What was the condition of the light there, if you know, as to the place being light or dark? A. Well, it was so dark when I got back there, as far as that place—it was pretty dark when I got back there where I fell."

On her cross-examination, she testified:

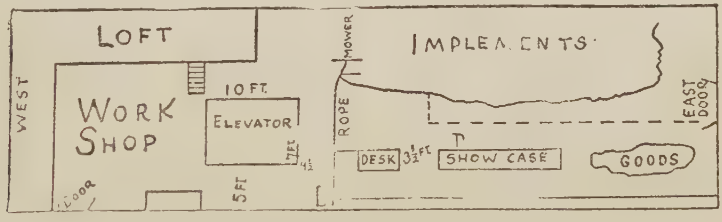
"I think I met Mr. Hornung. I thought it was the man that was running the place. I was looking in the door to see what I could see, to see if I could see what I wanted, and he came up and says, 'Is there anything you want?' and I says, 'Yes, I want a tent.' I met Mr. Hornung at the door; I am sure I met him at the door. I think it was Mr. Hornung; it was the front door of the store on Chester avenue. * * * I did not talk to him in the front of the store any time, only just that much. I went right in after talking to him. He says, 'Come right in.' I did not stop between the time I left the front door and the time I fell in the hole. I seen a counter in the store as I went along. He went in the store and I went in after him, and the counter was on the left side as you enter. * * * The man that met me turned to the right and I didn't turn at all. I followed him, and he went to the right, and I went into the hole. I didn't go to the left; I couldn't. I guess he knew the hole was there and he knew how to cross it. I don't know how close the buggies were to the hole. They were on the right side; I didn't pay much attention to them. * * * I didn't see any passage on the left side of the hole. I didn't see any before I fell on either side. I didn't know the hole was there at all. It wasn't dark altogether; it was sort of dark; it wasn't any way lightsome. I think there was some light in the back part of the store, a door or something. I couldn't tell you, to my best of belief there was. I walked in and he walked in before me. I walked in after him, and he went that way (pointing), and I was into the hole then. He turned to the right, and I went straight into the hole. It did not take half a second; I didn't take only one step, I guess."

Plaintiff David Foley testified that shortly after the injury he visited the store of defendant, and was asked to state what he observed in regard to the location of the said opening. He testified:

"Of course, when I went there, the hole was closed. I wanted them to open the hole so I could look down— Mr. Irwin: No, no; never mind that. Where was it? A. It was right at the end of the counter. You go right down along the counter, and it was right at the end of the counter. I should judge the edge of the hole was 2 or 3 feet from the end of the counter. It may be changed since. The size of the hole, when it took two men to lift the cover, it must be a pretty good size, maybe 2 or 3 or 4 feet."

The defendant Hornung testified to the circumstances attending the accident and submitted the following diagram which, he testified, illustrates the situation of the store interior and the arrangement on the ground floor of the building:

DEFENDANT'S EXHIBIT A



The evidence was that a counter extended from a point near the entrance on Chester avenue on the left hand in entering the store and continued back near the point where the diagram locates the rope. Defendant testified that he met the plaintiff at the door where the conversation took place substantially as testified to by plaintiff, and that defendant proceeded back towards the rear of the store, plaintiff following him to a point marked on the diagram as "P," near the showcase. He testified:

"I first had a conversation with her right there. I observed her coming into the store; she was alone when I first had a conversation with her; I was back of the counter and she was standing in front of the counter in the aisle. She wanted to know if I had tents. I asked her the question, I think, five or six times. I couldn't understand her, and walked around the showcase and stood close to her, and says, 'What is it you want?' and she says, 'I want a tent; you have got tents?' I says, 'Yes, ma'am.' I says, 'What size tent do you want?' She says, 'A pretty good size; 10x12 or 12x14.' I says, 'Stay right here, and I will get you one.' She was where this letter 'P' is on the plat. I then left the lady and walked back past the desk. I went through underneath, raised up the rope, went through the rope, walked around on the left side of the elevator and started up the stairway, about half way up, to get a tent for the lady. I did not go clear up into the gallery. Mr. Flack, a gentleman, happened to be there at the time, and he says, 'The lady fell in the elevator.' I then came down stairs, went down the stairway, and went right down in the basement. She was lying down in the southeast corner of the elevator, near the front. We picked the lady up and put her on a box, brought her up stairs, slid her through under the rope, and let her sit down on a chair outside of the office, a regular office chair. * * * This occurred, I should judge, about from a quarter after 8 to half past 8 in the morning, and at that time the sun was striking the front part of the building. The lights were burning in the basement because you can't work in the basement unless you have lights, and Mr. Mays was working there."

Defendant's statement of the facts was corroborated by the testimony of several witnesses, including employés of the defendant who were in the storeroom at the time. They stated in their testimony that they heard the defendant say to the plaintiff, "Stay right where you are," referring to the direction given by the defendant to plaintiff, and some of these witnesses, particularly employés of the defendant, testified that a rope was stretched across the room at the time substantially as shown on the diagram.

Conceding the rule where the evidence is conflicting, defendant urges that it would be unfair and unreasonable to apply the rule here in view of the fact, as is contended, that the implied findings of the jury must have rested alone upon the testimony of one witness, herself pecuniarily interested, whereas four or five witnesses corroborated portions of defendant's testimony—particularly as to whether the rope was in place when Mrs. Foley started to follow plaintiff, and whether or not he had told her to "stay right where you are" when he went back to get a tent. Three of these corroborating witnesses were working in and about the store. Two others were present who happened to be present and were apparently disinterested. Not all of these witnesses testified that the rope was in place, nor did all of them hear defendant say to plaintiff, "Stay right where you are and I will go out and get you a tent," or give similar directions. The jury were instructed in the language of the Code of Civil Procedure, § 2061, subd. 2, as to the number of witnesses.

[1] The conduct of Mrs. Foley on the occasion involved was not such as to suggest negligence on her part. It was the most natural thing for her to follow defendant, when told to do so, to the point where the tents were, thus avoiding the necessity of bringing forward for inspection a bulky and rather heavy article. She may not have heard defendant tell her to wait at the point "P" on the diagram; she testified she did not. Her testimony was that she followed close to defendant, passing along next to the counter, at the end of which was the elevator opening. She testified that defendant swerved to the right at this point and she took a step or two straight forward and went down into the hole. Defendant testified that he lifted up the rope and passed under. It was negligence on his part if the rope was in place to pass under it and give plaintiff no caution to avoid the elevator hole. He testified that he did not know whether she went under or over the rope. It seems to us he ought to have known her danger and should have cautioned her to avoid it. If the rope was stretched across the store as shown on the diagram, plaintiff could not have stepped over it or passed under it without stopping and noticing what was beyond. The more reasonable inference from the facts and circumstances as narrated by her is that she did precisely what she was invited to do and in the doing of which she, without fault or negligence on her part, fell into this hole in the floor.

We do not think it can reasonably be said, as is now urged, that plaintiff was a mere licensee in entering the back part of the store, "and as such licensee was bound to accept the premises in the condition in which she found them, and therefore took upon herself the peril and risk of approaching the elevator shaft." The jury accepted as true the testimony of plaintiff that she was invited by defendant to go to this part of the store, and it was clearly the defendant's duty to use all reasonable means to make that part of the store safe for one visiting it.

[2] At the close of defendant's evidence, plaintiff Mary Foley was recalled in rebuttal. The following took place:

"Mr. Scott: Q. Mrs. Foley, I will ask you to state whether at any time, on the 3d of June, last year, when you were in Mr. Hornung's store, that he told you to stay there, used the words to you, to 'Stay there,' that he would bring you, or show you the tent? Mr. Kaye: We object to that on the ground that it is leading, and on the ground that the conversation between the plaintiff and the defendant Hornung had been fully narrated by the plaintiff on her direct examination, in making out her case, and it is not rebuttal. The Court: The objection will be overruled. A. He didn't. He said, 'Come right along.' Mr. Scott: Q. Now, I will ask you to state whether or not on that morning, the 3d of June, 1912, you went under any rope stretched across the room, or over any rope? Mr. Kaye: We object to this on the ground that the same is not rebuttal; that the witness is sought by counsel to testify to matters that were fully answered by her in making out her case. The Court: I think she did testify to that upon the direct, but then I will overrule the objection. This is a matter that is probably of some importance. A. No, sir. Mr. Scott: Q. Did you come in contact with any rope at all, when you were going toward the rear end of the store that morning? A. No, sir."

It is urged that the court erred in making the remark:

"This is a matter that is probably of some importance."

[3] The objection that the question had been answered in making out the case in chief and hence was not proper rebuttal should have been sustained for the reason stated. The ruling can hardly be treated as seriously prejudicial. The answers were but repetitions of previous answers. It is, however, urged that the remark of the judge "constituted such grave error that the verdict should be set aside." We do not think that the remarks of the judge could have resulted in the jury's having attached additional significance to the answers by reason of such remarks. It seems to us if counsel had at the time regarded the remarks as prejudicial, they should, in fairness to the judge, have called attention thereto and asked to have the remarks stricken out. We doubt not the court would have granted such a motion.

The court gave the following instruction:

"That while in determining the preponderance of evidence you are not to take into consideration the number of witnesses produced by each party which testify to a particular fact, and while the evidence on an issue of fact is not necessarily balanced because the witnesses who testify on one side are directly contradicted by the same or a less number on the other side, yet in such a situation you are not authorized to arbitrarily disregard the testimony of any witness without some reason therefor, and other circumstances are to be considered, as in cases where the number of witnesses on each side is unequal. The intelligence, fairness, and means of observation and various other recognized factors in determining the weight of evidence should be taken into consideration, and also the reasonableness, truthfulness, disinterestedness, and credibility thereof."

[4] It is objected that the following part of the instruction is error:

"That while in determining the preponderance of evidence you are not to take into consideration the number of witnesses produced by each party which testify to a particular fact."

It is stated in the brief that:

"In giving this instruction the court modified instruction No. 6 requested by the defendant, and in so doing violated the well-established rule relating to disparity in the number of witnesses."

Literally read, the first part of the instruction would seem to be amenable to the objection for circumstances may exist under which the number of witnesses testifying to a particular fact or set of facts might determine where the preponderance of the evidence lay. Further along in the instruction, the court said that where there was a contradiction in the testimony, the jury "are not authorized to arbitrarily disregard the testimony of any witness without some reason therefor, and other circumstances are to be considered, as in cases where the number of witnesses on each side is unequal." The court then added that "the intelligence, fairness, and means of observation and various other recognized factors" should be taken into consideration.

The court instructed the jury, as indicated in another part of this opinion:

"That you are not bound to decide in conformity with the declarations of any number of witnesses, which do not produce conviction in your minds, against a less number or against a presumption or other evidence satisfying your minds."

The court also instructed the jury:

"That preponderance of evidence simply means the greater weight of evidence, or evidence which is more credible and convincing to the mind, or evidence of such character and weight as carries conviction to the mind of the juror of the existence of facts sought to be proved."

It was immediately following this instruction that the court gave the instruction now complained of. We do not think that the court could have had in its mind or that it meant to convey to the jury an impression that they could not take into consideration the number of witnesses produced by a party, but that the thought in his mind and the thought which was conveyed was that the number of witnesses would not necessarily be the determining factor.

[5, 6] In support of the ground for a new trial under misconduct of the jury, the defendant filed the affidavits of certain of the jurors. Plaintiff filed counter affidavits of certain other jurors. The jurors who made affidavits at the request of the defendant stated as follows:

"That when the jury were deliberating upon the verdict to be rendered in the said action, they were unable to agree upon the amount that should be awarded to the plaintiff as damages, whereupon it was agreed that each juryman should place the amount for which he believed the verdict should be rendered upon a slip of paper, and the same should be cast as a secret ballot, and the sum of the various amounts so voted by the twelve jurymen should be divided by 12, and they should be governed by the quotient obtained by such division; that this quotient was the sum of $2,104 or thereabouts; that when it was found that the quotient was not a round sum, it was suggested that it would be better, under the previous agreement, to insert an even sum, to wit, the sum of $2,000 as their verdict, instead of such quotient, whereupon said suggestion was, without further consideration or discussion of the case, adopted, and the verdict was so rendered; that all of the jurors agreed to said proposition and to accept and abide by the result so obtained as the verdict in said action, and at least four of the said jurors did not believe the said quotient or the said sum of $2,000 to be a proper sum to be awarded the plaintiff, but did think that the said sum was too large, and they assented to said verdict solely by reason of the said agreement."

The jurors who made affidavits in support of the verdict deposed that when they commenced to deliberate upon the verdict they found that they were unable to agree as to the amount which plaintiff was entitled to recover, "but that each and every juror believed that plaintiff was entitled to recover some amount from said defendant"; that in order to determine the amount, the jurors agreed among themselves that each one would write on a piece of paper secretly the amount which plaintiff was entitled to recover, and that they then would put all the several amounts together and divide the sum by 12, "which they did, but they did not agree to be bound by the result. After each juror had placed on a slip of paper the amount which he believed that the plaintiff was entitled to recover, the 12 amounts were added together and divided by 12 and the result or quotient was in excess of $2,100; that after such result was obtained and made known, the jury then further considered the amount which plaintiff should recover, and each juror then and there agreed, after consultation among themselves, that they would not adopt the quotient or result so obtained, but after such consideration and discussion among themselves, they did agree among themselves that the plaintiff be awarded as damages the sum of $2,000, and that thereupon the said jury unanimously returned a verdict in favor of the plaintiff for the said sum of $2,000." The contention of defendant is that the verdict was arrived at by chance and is forbidden by the provisions of section 657 of the Code of Civil Procedure, and that the misconduct of the jury calls for a new trial.

It will be noted that there is a very sharp conflict between the two sets of affidavits. The affidavit in support of the motion shows that the jury had not only agreed to the method by which the amount should be reached, but agreed to be governed by the quotient obtained by such a division. It also stated, after ascertaining the quotient, that they changed the amount to an even sum, and that they acted upon this suggestion and adopted said even sum of $2,000 without further consideration or discussion of the case. The other affidavits show that the jury, in order to determine the amount which the plaintiff should receive, agreed to write on a slip of paper, each one secretly, the amount, and these several amounts could be added together and divided by 12, but the affiants stated that the jurors did not agree to be bound by this result, and that after the result shown by such division was made known, they entered upon further deliberation of a verdict and finally reached a different conclusion from that shown by the division.

The question here then is, in view of the conflict, whether the order may be supported by the most favorable view of the facts presented to the court by the affidavits. The affidavits submitted in opposition to the motion for a new trial, when reduced to their essential and material elements, show that the jury agreed to the plan described for the purpose of ascertaining what an average amount would be when thus ascertained, but that there was no agreement to adopt this amount or to be governed by it, and that after having obtained this amount, they deliberated upon their verdict and finally reached the definite sum of $2,000, in which no element of chance can be said to have necessarily entered.

It is not unusual, nor is it objectionable, for each juryman to mark on a ballot the amount he thinks should be allowed, if any, and these ballots may subsequently be read by the jurymen. They thus get some idea of each other's views which may aid in reaching a concurrence of judgment. The misconduct of the jury for which a new trial may be granted arises "whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by resort to the determination of chance," and the statute provides that "such misconduct may be proved by the affidavit of any one of the jurors." Code Civ. Proc. § 657, subd. 2. It has been held that an average verdict arrived at by dividing the sum of the various amounts which each juror believed proper by the number of the jurors, under a prior agreement that such average verdict should be the verdict of the jury without further consultation, is a chance verdict and should be set aside. Dixon v. Pluns, 98 Cal. 384, 33 Pac. 268, 20 L. R. A. 698, 35 Am. St. Rep. 180; Weinburg v. Somps, 4 Cal. Unrep. Cas. 10, 33 Pac. 341. But the verdict is not a chance verdict where the jurors agreed to divide the aggregate amount by 12, and where it was understood that they were not to be bound by the result, and after the amount was so ascertained, the jurors unanimously agreed to adopt it as the sum to be returned. Hunt v. Elliott, 77 Cal. 588, 20 Pac. 132; McDonnell v. Pescadero & San Mateo Stage Co., 120 Cal. 476, 52 Pac. 725; Dixon v. Pluns, supra.

We must assume that the trial court accepted the statements in the counter affidavits as true, and upon that assumption we think the verdict cannot be said to have been assented to "by resort to the determination of chance."

The judgment and the order are affirmed.

We concur: BURNETT, J.; HART, J.

(35 Cal. App. 267)

WHITE v. HENDLEY. (Civ. 1440.)

(District Court of Appeal, Third District, California. Nov. 12, 1917.)

1. Appeal and Error ⚷607(1)—Record on Appeal—Requisites and Sufficiency.

Where appellant duly filed notice of intention and request for transcript as required by Code Civ. Proc. § 953a, and the transcript was prepared and duly certified by the judge, the failure of the judge to order its preparation as required by section 953a was cured by the certification.

2. Appeal and Error ⚷870(6)—Orders Appealable—New Trial.

Although Code Civ. Proc. § 963, as amended August 8, 1915, deprives a party of a separate appeal from an order denying a motion for new trial, section 956, amended at the same time, makes such order reviewable on appeal from the judgment.

3. TRIAL 🔑396(2) — FINDINGS — PLEADING AND PROOF—VARIANCE.

No issue of fraud being tendered by pleadings in an action to cancel a deed and contract, a finding that defendant never intended to carry out the contract must be disregarded.

4. MINES AND MINERALS 🔑54(2)—CONSTRUCTION—"CONDITIONS SUBSEQUENT."

A deed of a mining claim providing that "it is hereby mutually agreed" that the grantee will open and develop the property at his own expense, does not create a condition subsequent, but is a mere covenant.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Condition Subsequent.]

5. EVIDENCE 🔑448—ADMISSIBILITY—PAROL EVIDENCE—VARYING FINDINGS.

It was error to admit parol evidence in construing such clause whose language was plain and clear, being a matter of pure legal interpretation, whether it created a condition subsequent or a personal covenant.

6. CANCELLATION OF INSTRUMENTS 🔑43—ISSUES—DELIVERY OF DEED—"EXECUTION."

In suit to cancel deed which reserved possession in grantor for life, where the complaint alleged that plaintiff executed the deed, and no issue was tendered of grantor's intention that the deed should not take effect until his death, it could not be found that the deed was void as an ineffective testamentary disposition; the term "execution" including effective delivery.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Execution.]

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action by Richard White, as executor of Joseph Hendley, deceased, against Joseph W. Hendley. Judgment for plaintiff, and defendant appeals. Reversed.

George F. Jones, of Oroville, for appellant. W. K. Hays, of Chico, for respondent.

BURNETT, J. This appeal is from the judgment in favor of the plaintiff in an action for the cancellation of a deed and contract executed by Joseph Hendley, now deceased, to defendant.

Joseph Hendley, having apparently become attached to his nephew, the defendant, on April 26, 1910, did—

"grant, bargain, sell, convey and confirm unto the party of the second part, and to his heirs and assigns, forever, all his right, title, and interest in and to all that real property situate in the said county of Butte, state of California, bounded and described as follows, to wit: * * * Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof. To have and to hold all and singular the said premises together with the appurtenances unto the said party of the second part, and all his heirs and assigns forever. * * *"

It appears by the pleadings that the deed was properly executed, delivered, and recorded. On the same day the following contract was entered into between the parties:

"This agreement made and entered into this 26th day of April, 1910, by and between Joseph W. Hendley, of Peoria, state of Illinois, party of the first part, and Joseph Hendley, of the county of Butte, state of California, party of the second part, witnesseth:

"That whereas, the said party of the second part has this day granted and conveyed unto the said party of the first part by deed absolute and without condition all the real estate of said party of the second part situate in the county of Butte, state of California, consisting of all the right, title and interest of the party of the second part in and to that certain mining property situate in Morris ravine, in said Butte county, and commonly known as the 'Joe Hendley Mine and Mining Property'; and

"Whereas, it is understood that the said party of the second part shall during his lifetime occupy said premises as a place of residence, and shall obtain therefrom such income as may be necessary to afford him a comfortable livelihood and living in accordance with his desires and conditions in life, and that during his lifetime said property shall be advantageously developed in a proper and systematic manner as a mining claim for the benefit of said party of the first part, and also for the benefit of the party of the second part for the purposes hereinabove stated:

"Now, therefore, it is hereby mutually agreed that the party of the first part will undertake the opening up and developing of said property as a mining claim at his own expense and free of cost and expense to the party of the second part, and in case, either before or after the full development of said property as a mining claim, in the judgment of the party of the second part it shall be advantageous to sell and dispose of said property for a valuable consideration and at a sum in excess of the amount expended thereon by the party of the first part, then and in that event the party of the first part will consent to such sale and join in executing any conveyance necessary therefor, provided that in case of such sale said party of the first part shall be reimbursed from the proceeds thereof for all moneys expended by him or expenses which he may have incurred in connection with the development of said property and a reasonable rate of interest thereon, it being further understood and agreed that the party of the first part is to have and receive the whole of the proceeds from the sale of said property except such amount thereof as may be necessary to provide for the care and maintenance of said party of the second part during his lifetime.

"It is fully understood and agreed that the intention of the parties herein is to give to the party of the first part the full and entire benefit of all the property of the party of the second part this day conveyed, with the right to proceed with the opening up and development thereof, and to obtain the full benefit to be derived therefrom, save and except that the party of the second part is to be provided for during his lifetime.

"It is further understood and agreed that in case said party of the first part shall not survive the party of the second part, then and in that event the property described in said deed is to be reconveyed to the party of the second part, subject, however, to the reimbursement of the party of the first part for the amounts expended by him in the development of said property as hereinabove agreed. * * *

"Joseph W. Hendley. [Seal.]
"Joseph Hendley. [Seal.]"

The court found that the deed and contract constituted one instrument; that the intention of Joseph Hendley was to provide for the development of the mine, and that the development of the mine was the consideration for the grant; that Joseph W. Hendley failed to perform the conditions provided, and never intended to perform them, and hence, there being a failure of consideration and breach of condition subsequent, plaintiff was entitled to a cancellation of the deed. The court received in evidence the deposition of Joseph Hendley, in which is stated the intent with which he made the transfer, over the objection of defendant that it was parol evidence which tended to vary the terms of the written contract. Appellant contends that the court erred as a matter of law in construing the clauses in the contract as creating a condition subsequent, and in admitting evidence as to whether it was intended to create a mere covenant or condition subsequent.

[1] Before entering upon the discussion of these points we will briefly dispose of respondent's contention that there is no proper record on appeal before the court. It appears that in accordance with the provisions of section 953 (a) of the Code of Civil Procedure appellant filed, within the required time, a notice of intention and request for a transcript. The court, however, never ordered the reporter to prepare said transcript, as required by paragraph 2 of section 953 (a). Nevertheless the reporter and clerk did prepare a transcript which was presented to and properly certified by the judge. Respondent claims that this court cannot consider said record, since it was never directed to be prepared by the court. But it is apparent that the omission was cured by the due certification by the judge of the transcript which had been prepared.

[2] On August 6, 1915, appellant made his motion for a new trial, which was denied on August 30, 1915, and on September 1, 1915, appellant filed his notice of appeal from said order. On August 8, 1915, an order denying a motion for a new trial ceased to be an appealable order. Respondent, therefore, claims that the court cannot consider the record on such alleged appeal. But respondent overlooks section 956, Code Civ. Proc., which was amended at the same time, and which declares that any order on motion for a new trial may be reviewed on an appeal from a judgment. If the amendment to section 963 operated to deprive appellant of a separate appeal from the order denying his motion for a new trial, the amendment to section 956 operated equally to make such order reviewable on an appeal from the judgment, and as appellant appeals from the judgment, respondent's contention has little of merit to recommend it.

[3] The finding of the court that defendant never intended to carry out his contract, a finding virtually of fraud, must be disregarded, for no issue of fraud was tendered by the pleadings; the sole issue being the failure of consideration.

Appellant's contentions that the clause in the contract creates only a covenant and not a condition subsequent, and that parol evidence was improperly admitted, present a matter of considerably more difficulty. There is probably no subject of a legal nature involving more serious controversy than that of similar conditions in contracts. Though we find many distinctions drawn between conditions subsequent and covenants, and the rules for their distinction clearly stated, just whether the one or the other exists is a matter of construction in each particular case. We may notice certain positive rules of construction which have been laid down and established, and it is sufficient for this purpose to quote from Hawley v. Kafitz, 148 Cal. 393, 83 Pac. 248, 3 L. R. A. (N. S.) 741, 113 Am. St. Rep. 282, as follows:

> "Conditions subsequent are those which in terms operate upon an estate conveyed and render it liable to be defeated for breach of the conditions. Such conditions are not favored in law because they tend to destroy estates, and no provision in a deed relied on to create a condition subsequent will be so interpreted if the language of the provision will bear any other reasonable construction. While no precise form of words is necessary to create a condition subsequent, still it must be created by express terms or by clear implication. Merely reciting in a deed that it is in consideration of a certain sum, and that the grantee shall do other things specified therein, does not create an estate upon condition. There must be language used which is so clear as to leave no doubt that the grantor intended that an estate upon condition subsequent should be created—language which ex proprio vigore imports such a condition. Cullen v. Sprigg, 83 Cal. 64, 23 Pac. 222; Behlow v. Southern Pacific R. R. Co., 130 Cal. 19, 62 Pac. 295."

In that case the deed sought to be forfeited contained the following provision:

> "This deed is given by the parties of the first part, and accepted by the second party upon the express agreement of the second party to build, or cause to be built * * * within six (6) months * * * a dwelling house. * * *"

It was held, however, that said provision constituted a mere covenant, and not a condition subsequent. The same considerations are to be found reiterated in Womble v. Womble, 14 Cal. App. 739, 113 Pac. 353; Firth v. Los Angeles Pacific Land Co., 28 Cal. App. 399, 152 Pac. 935; Fitzgerald v. County of Modoc, 164 Cal. 493, 129 Pac. 794, 44 L. R. A. (N. S.) 1229; Schott v. Schott, 168 Cal. 342, 143 Pac. 595; Victoria Hospital Association v. All Persons, 169 Cal. 455, 147 Pac. 124.

[4] Turning now to the instrument in question, it is difficult to find anything to support the position that a condition subsequent was intended. The deed and contract were the voluntary act of the grantor. There is no charge of fraud or mistake or want of good faith at the time the deed was given. There is nothing in the language of either instrument to suggest a condition subsequent, with that degree of clarity required by the decisions. To the contrary, the language used indicates the opposite. There is nothing whatever in the deed proper to suggest the condition, and the language relied upon to constitute the condition is in the contract, as follows:

"Now, therefore, it is hereby mutually agreed that the party of the first part will undertake the opening up and development of said property as a mining claim at his own expense and free of cost and expense to the party of the second part. * * *"

It will be seen that the language here used is very much like that employed in the Kafitz Case, supra, and we may well employ the language of that case in this connection:

"In the case at bar the provision which, it is claimed, created a condition subsequent contains no language which in terms declares such a condition, or which by necessary implication imports one. There is an entire absence of any of those apt or appropriate words or expressions which are usually employed for the purpose of creating a condition subsequent—technical terms which, if the condition subsequent is intended to be created, generally follow the granting clause of the deed, and declare that the estate conveyed is upon 'express condition' that certain things shall be done, or 'provided, however,' or 'in the event that' certain terms imposed are or are not complied with, the deed shall be void, and the estate granted shall be terminated or forfeited. * * * Not only is there no language which would create a condition subsequent, but the language actually employed, 'This deed is * * * upon the express agreement,' implies a personal covenant, and not a condition."

But the other language of the instrument leaves no doubt in our minds as to the soundness of the position here taken. In the first paragraphs of the contract it is declared:

"Whereas the said party of the second part has this day granted and conveyed unto the said party of the first part by deed absolute and without condition, * * * and whereas it is understood * * * that during his [grantor's, party of the second part] lifetime said property shall be advantageously developed in a proper and systematic manner as a mining claim for the benefit of said party of the first part."

Then follows the mutual agreement quoted above, followed by a clause giving the grantor a right to make a sale if he shall find it advantageous, and the instrument proceeds:

"It being further understood and agreed that the party of the first part is to have and receive the whole of the proceeds from the sale of said property except such amount thereof as may be necessary to provide for the care and maintenance of said party of the second part, during his lifetime."

The language here quoted leaves little to be said. It indicates positively an intention to transfer to the defendant free from condition the full interest and benefit of the property. But lest some doubt should arise as to its meaning, the following was added:

"It is fully understood and agreed that the intention of the parties herein is to give to the party of the first part the full and entire benefit of all the property of the party of the second part this day conveyed, with the right to proceed with the opening up and development thereof, and to obtain the full benefit to be derived therefrom, save and except that the party of the second part is to be provided for during his lifetime."

The intention was not to give defendant the property on the condition that he "proceed with the opening up and development thereof," but to transfer to him the full and beneficial right to do so. As in Lawrence v. Gayetty, 78 Cal. 126, 20 Pac. 382, 12 Am. St. Rep. 29, a case very like this in its facts:

"The plaintiff saw proper to accept the * * * promise of the defendant to do certain things without any agreement or understanding that the failure to do the acts as promised should be a condition, or in any way affect the validity of the deed, or entitle him to a reconveyance."

The case of Downing v. Rademacher, 133 Cal. 220, 65 Pac. 385, 85 Am. St. Rep. 160, much relied upon by respondent, is clearly distinguishable from the present case. The Downing Case concerns a deed which contemplated the working of mines on shares, a recognized exception to the general rule controlling the construction of conditions subsequent. 8 R. C. L. 1105. But even were it not so, the absence of such positive language declaratory of the intent of the parties as is to be found in the present case would deprive it of any weight as an authority here.

[5] The court fell into error in admitting parol evidence to ascertain the meaning of the parties. "The clause in the deed was in no wise ambiguous or equivocal. Its language was plain and clear, and whether the clause created a condition subsequent, as contended by plaintiffs, or a mere personal covenant, as insisted by defendant, was a matter of pure legal interpretation for the court. That neither evidence of the understanding of the plaintiffs nor the interpretation they desired to place upon the unambiguous language of the clause in their deed was admissible is so elementary that it is disposed of merely by stating it." Hawley v. Kafitz, supra. The declaration of intention incorporated into the contract clearly constitutes a "term" of said contract, and having been thus incorporated was not subject to be varied or contradicted by evidence extrinsic in nature.

[6] Another consideration urged in the brief of respondent is that the evidence showed that the intention of the grantor was that the deed should not take effect until his death, and therefore it was void as an ineffectual attempt to make a testamentary disposition of his property. The rule is, no doubt, that if there is no intention to pass the title until after the death of the grantor, the mere manual tradition of the deed does not constitute such delivery as will vest the title in the grantee. The test is whether in parting with the possession of the conveyance the grantor intended thereby to divest himself of title. If he did, there was an effective delivery. If not, there was no delivery, and this matter of intention is a question of fact to be determined by the trial court from a consideration of all the evidence bearing upon the question. Williams v. Kidd, 170 Cal. 631, 151 Pac. 1, Ann. Cas. 1916E, 703. This intention may be shown by an express declaration to that effect or it may rest in a rational inference from the facts and circumstances of the case. It is further held in the Williams Case, supra, that "delivery" is a word of well-defined

meaning in the law, and means the act, however evidenced, by which the instrument takes effect and title thereby passes, while "execution" includes effective delivery.

We are not prepared to say as to this phase of the controversy that it might not be held that there was no effective delivery of the deed within the contemplation of the foregoing statement of the law. And the court below was undoubtedly of the opinion that it was the intention of the grantor that such deed should not become operative until the death of the grantor, for we have this finding:

"That the said Joseph Hendley never intended to convey the said mining property by said deed to his said nephew, but was under the impression up to the time of his death that he retained the ownership of said property, and that the title thereto was not to vest in Joseph W. Hendley until after his death."

This is not an explicit finding that it was his intention that the title should not vest until his death, but it might answer the purpose if it were permitted under the pleadings. No such issue, however, was tendered by the complaint. Indeed, plaintiff alleged that on or about the 26th day of April, 1910, he "did execute to defendant a deed of conveyance of said described real property, a copy of which said deed, marked 'Exhibit A,' is hereto annexed and made a part hereof." The term "execution," as we have seen, includes "effective delivery," so that said finding, in so far as it contemplates the intention to make the delivery operative only at the time of the death of the grantor, is directly opposed to the allegation of the complaint, which allegation, it may also be said, is not denied by the answer.

It may be that by amendment to the complaint the difficulty could be obviated, but as the case is presented here, we think the decision cannot be upheld, and the judgment is therefore reversed.

We concur: CHIPMAN, P. J.; HART, J.

(35 Cal. App. 276)

NEUGEBAUER v. GLADDING, McBEAN & CO. (Civ. 1732.)

(District Court of Appeal, Third District. California. Nov. 12, 1917. Rehearing Denied by Supreme Court Jan. 10, 1918.)

1. MASTER AND SERVANT 🔑278(14)—DANGEROUS WORK—SUFFICIENCY OF EVIDENCE.
In an action for damages by the widow of a deceased employé whose death was alleged to have resulted from his inhalation of the fumes of hydrofluoric acid which he was applying to the surface of terra cotta, evidence *held* to sustain a finding that his work was dangerous.

2. MASTER AND SERVANT 🔑276(2)—CAUSE OF DEATH—SUFFICIENCY OF EVIDENCE.
In such action evidence *held* sufficient to justify the conclusion that the use of such acid in the course of his employment caused the employé's death.

3. MASTER AND SERVANT 🔑278(3, 20)—FATAL INJURY TO SERVANT—NEGLIGENCE—SUFFICIENCY OF EVIDENCE.
In such case evidence *held* sufficient to show the master's negligence in not warning deceased of his danger or in not furnishing him with proper appliances to protect him from breathing the noxious acid fumes.

4. MASTER AND SERVANT 🔑264(1) — ACTION FOR DAMAGES—WANTON NEGLIGENCE—ALLEGATION AND PROOF.
In such action the allegation of negligence was sufficient, and the additional allegation of wanton negligence might or might not be proved, and the failure to prove it would not affect the result of the proof of the master's negligence.

Appeal from Superior Court, Placer County; J. E. Prewett, Judge.

Action by Mary Neugebauer, as administratrix of the estate of Frank Neugebauer, deceased, against Gladding, McBean & Co. Judgment for plaintiff, and from the judgment and from an order denying a motion for a new trial defendant appeals. Judgment and order affirmed.

John M. Fulweiler, of Auburn, and Lilienthal, McKinstry & Raymond, of San Francisco, for appellant. Braynard & Kimball, of Redding, for respondent.

BURNETT, J. Appellant was engaged at Lincoln, Placer county, in the manufacture of architectural terra cotta and fire brick, terra cotta pipe, and roof tile. For about six years prior to May, 1913, Frank Neugebauer was employed as a laborer in the fitting department of appellant's factory, and in the work of cementing broken terra cotta. Until May, 1913, the corporation used a sand blast for the purpose of dulling the surface of the terra cotta which came from kilns too bright or lustrous to match other ware ordered for certain buildings. At the time just mentioned the corporation abandoned the use of the sand blast, and to accomplish said purpose introduced the use of hydrofluoric acid, and selected to apply the acid to the surface of the terra cotta, said Neugebauer, a Hungarian who could not read nor write the English language, and who spoke it imperfectly. At this time he was 39 years of age, and there is evidence that he was in good health. Hydrofluoric acid is composed of two elements, hydrogen and fluorine, and is next to prussic acid in its dangerous effects upon human life, and it appears that a few deep inhalations of the fumes of the acid 48 per cent. strong would be fatal. This was its strength as it was received by the corporation. The method pursued by Neugebauer in diluting the acid exposed him to this danger. It came in bottles about three and a half inches in diameter and five or six inches deep. Into a receptacle made of one of these bottles he would pour the acid, and then add the portion of water for dilution. Sometimes he put in the acid first, and sometimes the water. This dilution was usually accomplished by him in what was known as the south shed, which was a two-story building inclosed by walls and having a ground floor but no upper story, and there was no electric fan or other device provided in any of the rooms where he worked with the acid for the creation of an artificial draft to blow away any fumes that might arise from the acid. In applying the acid to the terra cotta he was also exposed to the danger of inhaling the fumes. He used a brush and applied the acid as though he were painting. The diluted acid, as used on the terra cotta, was so strong that it would burn a man's finger and would blacken wood, and its effect on the terra cotta could be observed with the naked eye. During all the time that Neugebauer was working with the acid he never wore a mask, sponge, respirator, or anything over his nose or mouth. He was put at this work May 23, 1913, and continued at it until about eight days before his death, which occurred October 25, 1913.

The action for damages instituted by the widow was grounded upon the position that said employment was an extremely dangerous one, as was well known to the defendant, and that it "negligently, recklessly, and wantonly failed at the time it so employed Frank Neugebauer to warn him or inform him in any way of the danger of said employment, and said defendant at all the times herein mentioned negligently omitted to warn the said Frank Neugebauer of said danger and carelessly and wantonly allowed him to remain in ignorance of the same. And during all of said last-mentioned employment of said Frank Neugebauer by said defendant the said defendant negligently, recklessly, and wantonly failed to provide the said Frank Neugebauer with any muzzle or device to prevent the fumes arising from the use of said hydrofluoric acid in washing said terra cotta from entering the nostrils and mouth of said Frank Neugebauer, or to prevent the said hydrofluoric acid from destroying the tissue and life of Frank Neugebauer as it was the duty of the said defendant to do." There is no controversy as to the legal principles involved in the case. The action of the court is not assailed except as to two rulings on the admissibility of evidence, and these are not insisted upon in the closing brief. They are, indeed, so manifestly free from error as not to require attention.

The questions in dispute are those of fact, and are presented by the denials of the answer that said acid "is a deadly poison destructive of human life or tissue"; that the death of Neugebauer was caused by the use of said acid; that his employment was a dangerous one, or that it was known to defendant or its superintendent to be dangerous; that it failed to warn or inform him of any danger, or allowed him to remain in ignorance of the same; that defendant failed to provide him with any muzzle or device to prevent the fumes from entering the mouth or nostrils, or to prevent the acid from destroying the tissue or life of said Frank Neugebauer. Contributory negligence was not pleaded, nor is there any discussion of the doctrine of "assumption of risk."

[1] Among the contentions of appellant as to the insufficiency of the evidence to support the implied findings of the jury we think the least meritorious is the claim that it was not shown that the work in which deceased was engaged was a dangerous one.

Joseph B. De Gaylor, appellant's superintendent, testified:

> "I realized there was danger when handling this acid and applying it on terra cotta, and that there was danger from the inhalation of fumes arising from the application of the acid to the terra cotta, the same as any acid. I did not suppose that Neugebauer knew anything about the dangers of the use of the acid. I assumed right off that he knew nothing about its use. I did not discharge Neugebauer when I heard that he was using the acid without any mask or gloves, because I was not absolutely certain that he was not using the gloves or muzzle."

William Cox, who worked in the factory as a fitter, testified:

> "Between May and October, 1913, I would ordinarily see Neugebauer every day. * * * After he started to use the acid I noticed a change in his appearance with reference to health, and he looked like he was feeling kind of weakening."

Witness Thomas Ragle, who also worked as a fitter, testified:

> "Neugebauer started to use this acid on the Seattle job. Before the Seattle job I never knew anything of the use of this acid. Neugebauer seemed in normal health. No particular complaint. After he used this acid Neugebauer complained to me of a heavy nausea in the stomach, and pains in his back and along his loins, and used to say it bothered him getting up; he could not rest and could not eat anything."

Bryant S. Drake, a chemical engineer, who is a graduate of the University of California, and an expert, testified that hydrofluoric acid is a deadly poison, and that in the laboratory they use a hood in dealing with the acid, to prevent any possible danger.

Dr. John Manson, a physician of many years standing, testified that:

> "The death of Frank Neugebauer was caused by hydrofluoric acid poisoning induced by breathing the fumes of such acid. I went to the United States Dispensary, and I found that the breathing of fumes of the hydrofluoric acid produces all kinds of serious trouble—serious trouble in the lungs, liver, spleen, and terrible destruction of the red corpuscles. So that after he died I had no hesitation in signing the death certificate as I signed it."

The widow, Mrs. Mary Neugebauer, testified:

> "He was not sick at all before he started to work with the hydrofluoric acid. About a month thereafter he feel sick, he says, 'Too heavy here on breast'—all the time doing that way, with back sore, and he get yellow and skinny. He lost his appetite and no could sleep. He stopped work and came home at dinner time on October 18, 1913. I ask, 'How you feel?' Neugebauer answered, 'I feel very badly, I feel badly, burning inside, all same fire inside.' He feel that way all eight days until he die; nighttime and day-

time. He said, 'All burn inside; all the same he burns with fire.'"

F. O. Andreas, an expert in the use of said acid, said he knew that it gives off a fume, and the acid as it is purchased is dangerous, and if the fumes are inhaled in the inside of a building there would be deleterious effects. There is other testimony to the same effect, but the foregoing should be sufficient to justify the inference that it was a dangerous business in which the deceased was employed. Indeed, it is rather strange that any contention to the contrary should be made, and this must have been the view of appellant on second thought since in the answer was set up the defense that appellant's superintendent and foreman warned deceased of the danger, and furnished him appliances for protection against injury from such use of the acid.

[2] There is scarcely more merit in the contention that the evidence is insufficient to justify the conclusion that the use of said acid in the course of his employment caused the death of Frank Neugebauer. From the testimony already detailed herein, it is a fair inference that the fumes from said acid were a contributory cause of such death. A careful reading of the testimony can hardly fail to produce the conviction in a disinterested mind not only that such finding is legally supported, but that there can hardly be any doubt that the death of Neugebauer was due to the manner in which he handled the acid. It may be unfortunate that no post mortem examination was had, as that probably would have clinched the matter, but the circumstance that no such examination was had does not derogate from the weight of the evidence which was introduced, nor does it affect our conviction that the verdict of the jury as to the cause of death finds ample support in the record. We are not concerned here with the testimony of certain witnesses that the deceased was in poor health at the time he began to work with the acid, as it was contradicted by the testimony of others, and the question of fact thereby controverted, together with the weight to be accorded to it, presented a consideration for the determination of the jury. Pigeon v. W. P. Fuller & Co., 156 Cal. 691, 105 Pac. 976.

[3] There is more room for argument as to the contention of appellant that the evidence is insufficient to show negligence on its part in either aspect claimed, namely, that it failed to warn deceased of his danger, or failed to furnish him with the proper appliances to protect him from breathing the noxious fumes of the acid.

We think, however, that it cannot be said, as a matter of law, that there is an entire absence of substantial support for the conclusion of the jury in that respect. In the first place, appellant denied under oath that the business in which Neugebauer was engaged was an extremely dangerous one, or that it was so known to the defendant or to its factory superintendent, and also denied that said use of the acid was liable to poison or kill said Neugebauer. We must assume that appellant made said denials in good faith. Thus believing, it would be unreasonable to suppose that appellant would perform the idle act of warning deceased, or of supplying him with a contrivance that was believed to be an incumbrance and not a protection.

Again, the fact that deceased did not use any shield is a circumstance of some moment in support of the theory that he was ignorant of the danger incident to the employment. The average man is supposed to have greater regard for his health and for his life than to recklessly expose himself thus to imminent danger. This circumstance involved, no doubt, one of the reasons that moved the jury to conclude that Neugebauer did not understand the situation, and that his ignorance of it was directly chargeable to his employer.

Again, the superintendent and foreman knew that Neugebauer was doing the work without using any mask or muzzle, and it seems improbable that they would not insist at the peril of losing his job that he should follow their direction as to protecting himself. Also, two of the employés who worked in the same room with deceased "never saw or heard of a mask or sponge or other device for covering the mouth or nose of the workmen in that department." They saw the superintendent and foreman pass through the room frequently, and heard the latter talking to Neugebauer about the extent to which the acid should be diluted, and heard the superintendent and foreman tell him to look out for burning, but nothing was said about any protection from the fumes. It is true that this evidence was of a negative character somewhat, but it was entitled to consideration.

Furthermore, the mask which it is claimed was furnished for the purpose was introduced in evidence, and there may have been something in its appearance that led the jury to discredit the testimony of the witnesses for appellant in reference to it. One of them said "it was not a new nozzle"; the superintendent testified that he "did not order any particular mask for the use of this acid because we had a mask in stock we have been using for years before we ever used the acid"; and it is suggested by respondent that "the fresh and very new appearance of the mask which was admitted in evidence may well have convinced the jury that all of defendant's testimony about supplying Neugebauer with a mask to protect him from the fumes of the acid was false and untrue." As to that, of course, we cannot say, as the record does not disclose the appearance of the mask. But it may have been so. It may be true also that there was something in the manner and appearance of the witnesses for appellant who testified as to the mask that furnished a reason for disbelieving their statements. Some other circumstances worthy of attention in this connection might be mentioned, but we think the foregoing is sufficient.

[4] There is no merit in the contention that it was incumbent upon respondent to prove that the conduct of appellant was wantonly negligent in order to justify a recovery. The allegation of negligence was sufficient, but the pleader introduced an additional element which might or might not be proved. The failure to prove it, however, would not affect the significance or result of the proof of negligence on the part of the defendant. Kramm v. Stockton Electric R. R. Co., 3 Cal. App. 606, 86 Pac. 738, 903.

We can perceive no legal ground for disturbing the action of the court below, and the judgment and order are therefore affirmed.

We concur: CHIPMAN, P. J.; HART, J.

(35 Cal. App. 109)

SONOMA VALLEY WATER, LIGHT & POWER CO. v. O'BRIEN et al.

(Civ. 2231.)

(District Court of Appeal, First District, California. October 23, 1917.)

New Trial 🔑71—Verdict—Conflicting Evidence.

In action to enjoin the taking of all the water in a creek, the issues arising over the amount of water defendants were entitled to divert, where the findings of the jury and the judgment of the court gave defendants all the waters, the court was justified in granting motion for new trial, where, the evidence being conflicting, he was not satisfied that the proofs showed that all of the water was necessary for the purposes to which it was applied.

Appeal from Superior Court, Sonoma County; Emmet Seawell, Judge.

Action by the Sonoma Valley Water, Light & Power Company against Nellie O'Brien and others. From an order granting a new trial after judgments for defendants, they appeal. Affirmed.

J. T. Campbell and Ross Campbell, both of Santa Rosa, for appellants.

PER CURIAM. This is an appeal on the part of the defendants from an order granting a motion for a new trial after a verdict and judgment in their favor. The verdict of the jury was rendered upon special issues, and its findings thereon were adopted by the court as the basis of its judgment.

The action was instituted by the plaintiff, a corporation owning lands adjoining the lands of the defendants, to enjoin the latter from taking and using the whole of the water from a creek known as Lenox creek, which rose upon and flowed through their lands, emptying into Carriger creek, and thence over and across the lands of the plaintiff. The evidence showed that the defendants had appropriated all of the water of Lenox creek for their own uses, and in addition to using the same for irrigation, household and domestic purposes, ran the residue of its waters after these uses had been satisfied into a pool or lake near their residence. The issues in the case arose over the amount of water which the defendants were entitled to divert into this pool or lake. The findings of the jury and the judgment of the court gave the defendants all of these waters, but upon motion for a new trial the court granted the motion solely upon the ground that the defendants took more water from said Lenox creek than was necessary for the uses to which it was applied. The language of the court in its order granting the new trial was as follows:

> "The court has made a careful examination of the evidence, and it is not satisfied that there is not a useless waste of water. Indisputably the defendants are entitled to a sufficient quantity to answer every reasonable convenience or necessity, but it is not the law that water may be wasted while it may serve others. On this issue alone the court grants the motion for a new trial."

The contention of the appellants upon this appeal is that the evidence was insufficient to justify the court in granting the motion for a new trial upon this ground. We have examined the record with some degree of care, and are of the opinion that the evidence was sufficiently conflicting to have justified the court in granting the motion for a new trial if, as he stated, he was not satisfied that the proofs showed that all of the water was necessary for the purposes to which it was applied.

That being so, we think that the order of the trial court should be affirmed, and that will be the order.

(35 Cal. App. 324)

BELL DEVELOPMENT CO. v. MARSHALL.

(Civ. 1958.)

(District Court of Appeal, Second District, California. Nov. 16, 1917.)

Corporations 🔑90(5)—Unpaid Stock Subscriptions—Complaint.

A corporation's complaint in action on unpaid stock subscription alleging demand, *held* insufficient for failing to allege that the remedies given by Civ. Code, § 331 et seq., authorizing sale of stock, etc., have been exhausted.

Appeal from Superior Court, Imperial County; W. H. Thomas, Judge.

Action by the Bell Development Company against W. A. Marshall. Judgment for plaintiff, and defendant appeals. Reversed with directions.

Childers & Bruce, of El Centro, for appellant. Herbert L. Iasigi, of El Centro, for respondent.

WORKS, Judge pro tem. This is an action for an unpaid subscription to the capital stock of respondent corporation. The appellant interposed a general demurrer to the second amended complaint, the demurrer was overruled, and, the appellant standing on the issue of law and refusing to answer, the respondent had judgment.

The pleading of the respondent alleges an ordinary demand for the payment of the subscription and the appellant's refusal to comply with the demand; but there is no allegation that the respondent has attempted to follow the provisions of section 331 of the Civil Code and those coming after it. In this state, where the contract of subscription for stock is silent as to the time and manner of payment, calls for unpaid subscriptions are placed in the same class with assessments upon paid-up shares, and the above-mentioned sections of the Code provide a complete scheme for the making of collections of each of the two kinds of obligations. Suits cannot be commenced until the procedure there laid down has been exhausted, and in such a suit, the complaint must show that the procedure has been followed. Los Angeles Athletic Club v. Spires, 166 Cal. 173, 135 Pac. 298; Imperial L. & S. Co. v. Oster, 168 Pac. 1159.

The judgment is reversed, with directions to the trial court to sustain the demurrer.

We concur: CONREY, P. J.; JAMES, J.

(35 Cal. App. 231)

RAYHILL v. SOUTHERN PAC. CO. et al. (Civ. 1960.)

(District Court of Appeal, Second District, California. Nov. 8, 1917.)

RAILROADS ⚷328(7)—CROSSING ACCIDENT—CONTRIBUTORY NEGLIGENCE.

That an automobile driver, familiar with a railroad crossing where the view was somewhat obstructed, could have stopped a safe distance from the track, stilled the noise of the automobile engine, and listened for an approaching train, but failed to do so, was, as matter of law, contributory negligence barring recovery for injury to the automobile.

Appeal from Superior Court, San Bernardino County; J. W. Curtis, Judge.

Action by Bessie C. Rayhill against the Southern Pacific Company and another. From judgment for plaintiff and order denying new trial, defendants appeal. Reversed.

Henry T. Gage and W. I. Gilbert, both of Los Angeles, for appellants. George L. Greer, of Los Angeles, and Daley & Byrne, of San Bernardino (John W. Summerfield, of Los Angeles, of counsel), for respondent.

JAMES, J. Defendant appealed from a judgment awarding damages to the plaintiff on account of the loss of an automobile which was struck by a train of the defendant. Appeal is also taken from an order denying defendant's motion for a new trial. The evidence is presented by bill of exceptions, and it is claimed that the proof was insufficient to justify the verdict of the jury, and that the court should have granted the motion of defendant for judgment of nonsuit. The questions so presented depend for solution upon the proposition as to whether upon the evidence introduced on behalf of the plaintiff or upon the whole evidence it should be concluded that the plaintiff was guilty of contributory negligence. In our opinion, the case presented is one where the plaintiff, measuring her acts by all of the testimony favorable to her case, failed to use such precautions for the safety of her property as is required of a reasonably prudent person under the circumstances shown. The plaintiff's automobile was wrecked at a point near the town of Claremont and while upon a roadway known as Ramona avenue which crosses the tracks of the defendant at right angles. These tracks at that point run in an easterly and westerly direction and in a straight line for several miles on either side of the point of accident. Plaintiff testified that about 1:15 in the afternoon on a "still" day she drove southerly along Ramona avenue and approached the crossing; that she was driving a four-cylinder automobile and traveling at the rate of approximately 10 miles per hour; that she could not see the railroad tracks to the eastward of the crossing, by reason of an orange orchard aligning the right of way and brush, cornstalks, and sunflowers upon the right of way, until she reached a point about opposite a crossing sign, which was there for the purpose of advising users of the highway of the proximity of the railroad, which signpost, she testified, was "about 12 or 13 feet from the crossing." She testified that from the place where she sat in her automobile the front of the machine would project about 7 feet ahead of her; that the engine of her automobile made some noise, and that she did not at any point, while coming down Ramona avenue, stop the automobile to listen for the approach of trains, and that she heard no train approaching, nor did she hear a whistle sounded or bell rung; that when she reached the crossing post she threw on her emergency brake, without stopping the engine of the automobile, and that she and two young lady passengers who were with her all jumped from the machine and were not injured; that the "overhang" of one of the engines of the heavy freight train caught the automobile and demolished it. She testified that this was a very long train of freight cars; that it was coming on a down grade at the rate of from 50 to 60 miles an hour, without using steam; that after striking the automobile the train ran by 20 or 30 car lengths before it stopped; that when she started to stop her automobile the car was about 13 feet from the track and the front engine about 200 feet away from her; that the train was about 60 cars long, having attached to it one engine in front and two engines on the rear. As to the ability of a person to see eastward along the track of the railway for a considerable distance while traveling along Ramona avenue and before the limits of the right of way were reached, there was testimony flatly contradictory to that given by the plaintiff, and there was also testimony that the bell on the engine had been ringing continuously from the time the train had left the last station up to the time the accident occurred. Considering the contentions, however, made by appellant as we have before stated them, we have recited the evidence of the plaintiff in its strongest aspect, realizing that wherever a conflict occurred the jury was entitled to give the greater credit and weight, if it so determined, to the evidence introduced by the plaintiff. As to its salient points, the evidence of the plaintiff was corroborated by that of the two ladies who were passengers in the automobile at the time of the accident. The amount of overhang of the engine was given without dispute by one of the engineers as being from 28 to 30 inches. It may be added that the plaintiff also testified that she was very familiar with the location of the crossing and its surroundings. She also knew that the track was being constantly used for the operation of trains by defendant company. It then appears that the plaintiff approached a dangerous railroad crossing where the conditions were such as to prevent persons from seeing an approaching train before it had arrived in close proximity to the junction with the highway; that she was driving an automobile in which was a moving engine which made some noise; and that she at no time took the precaution to stop and listen until it was too late to avoid injury. Upon her own testimony (and the fact was not disputed) the train which collided with the automobile was a long, heavy freight train, one which, while "coasting" or traveling without the use of steam, was bound to make a noise that would give notice of its approach for a considerable distance; especially on a "still" day, as the plaintiff testified the day in question was. The plaintiff having shown by her testimony that she could not be advised of the approach of a train until within about 13 feet of the track, by looking, on account of the obstructions which stood in the way, she shows a situation to have existed which would require of her more diligence in the use of her remaining faculties in order to act as a reasonably prudent person should. It seems to us that the inevitable conclusion must be drawn that, had the plaintiff, at a safe distance from the track, stopped her automobile, stilled the noise of its engine, and listened for the approach of a train, she could not have failed to have been warned of the danger; that under such facts it must be said as a matter of law that she was guilty of contributory negligence.

> "The railroad track of a steam railway must itself be regarded as a sign of danger, and one intending to cross must avail himself of every opportunity to look and to listen for approaching trains. What he must do in such a case will depend upon circumstances. If the view of the track is obstructed he should take greater pains to listen. If, taking these precautions, he would have seen or heard the approaching train, the very fact of injury will raise a presumption that he did not take the required precautions." Herbert v. Southern Pacific Co., 121 Cal. 227, 53 Pac. 651.

As is said in the case of Chrissinger v. Southern Pacific Co., 169 Cal. 619, 149 Pac. 175:

> "Undoubtedly the question of contributory negligence or freedom from it is ordinarily one for the jury, but * * * the standard of conduct is so obvious as to be applicable to all persons, and the plaintiff has failed to measure up to that standard under the circumstances shown, he is not entitled to have his case go to the jury."

We cite further as applicable to the proposition the cases of Zibbell v. Southern Pacific Co., 160 Cal. 237, 116 Pac. 513; Martin v. Southern Pacific Co., 150 Cal. 124, 88 Pac. 701.

For the reasons stated, the judgment and order must be reversed.

The judgment and order are reversed.

We concur: CONREY, P. J.; WORKS, Judge pro tem.

(35 Cal. App. 234)

PEOPLE v. HUDSON. (Cr. 552.)

(District Court of Appeal, Second District, California. Nov. 8, 1917.)

1. INDICTMENT AND INFORMATION ⟹122(2)—VARIANCE BETWEEN COMPLAINT AND INFORMATION.

An information should not charge accused with an offense with which he was not charged in the complaint upon which he was examined by the committing magistrate; accused not being legally committed for such offense.

2. INDICTMENT AND INFORMATION ⟹144—MOTION TO DISMISS.

Upon motion to dismiss an information as charging an offense for which accused had not been legally committed, the information may be set aside only in part, such as a single count, although Pen. Code, § 995, as to setting aside, does not expressly so provide.

3. INDICTMENT AND INFORMATION ⟹122(2)—VARIANCE BETWEEN COMPLAINT AND INFORMATION.

Since, under Pen. Code, § 459, the intent with which a burglarious act is done is an essential part of the offense, an information charging burglarious entry with intent to rape did not charge the same offense as the complaint before the committing magistrate, which charged burglarious entry with intent to steal and murder.

Appeal from Superior Court, Kern County; Milton T. Farmer, Judge.

Frank W. Hudson was prosecuted for burglary. From an order dismissing the information, the People appeal. Reversed, with direction.

U. S. Webb, Atty. Gen., Robert M. Clarke, Deputy Atty. Gen., and J. R. Dorsey, Dist. Atty., and Wesley P. Grijalva, Deputy Dist. Atty., both of Bakersfield, for the People. Emmons & Johnstone, of Bakersfield, for respondent.

CONREY, P. J. The plaintiff appeals from an order dismissing an information which, in three counts, charged the defendant with the commission of the crime of burglary. The several counts refer to the same acts, differing only in the intent with which they were done. The intent described in the first count was to commit the crime of larceny; the second, murder; the third, rape. The complaint before the committing magistrate charged that the defendant entered the apartment of one Irma V. Meyer with intent "to commit the crime of larceny and then and there to kill and murder the said Irma V. Meyer." The defendant's motion to set aside the information was based upon the ground "that before the filing of said information said defendant has not been legally committed by a magistrate for the offenses set forth in the information." At the hearing of said motion on May 26, 1917, the superior court entered in its minutes an order "that the said motion to set aside the information be and the same is hereby denied. * * * It is now by the court ordered that the within matter be and the same is hereby continued for further discussion" until May 28, 1917.

The foregoing facts appear from the information and from the clerk's transcript, supplemented by the reporter's transcript of the proceedings of the hearing on the motion to dismiss. In the brief of counsel for the people statements are made purporting to show the order of commitment made by the committing magistrate. In the brief of counsel for defendant it is asserted that in the evidence taken at the preliminary examination there was no evidence that defendant entered said apartment with intent to commit the crime of rape. The transcripts give us no direct information concerning the contents of the commitment order, or concerning the evidence received at the preliminary examination. For the purpose of learning to what extent the proceedings before the magistrate were presented to the superior court, we may perhaps take cognizance of some of the statements made by the judge at the hearing of the motion and in ruling thereon. He said that he had read the information and the complaint on which the hearing was had in the magistrate's court, and the commitment; that the defendant was charged in the justice's court with burglary committed with two intents, whereas the information charged him in three counts with three separate intents. At the hearing on May 28th the judge announced his opinion that the count charging an intent not included in the charge before the committing magistrate should not have been in the information; that he would deny the motion, because the motion as made was directed generally to the entire information. Thereupon the defendant moved that the information as to the third count thereof be set aside, "upon the ground that before the information was filed the defendant had not been legally committed by a magistrate for the offense named therein, to wit, the offense of burglary and unlawfully entering the building with intent to commit rape." The district attorney objected to the consideration of this motion. This objection was based upon the ground that there is no provision of law for setting aside part of an information. Thereupon, after discussion by counsel, the court granted "the motion to dismiss the information on the ground that the defendant has never been legally committed by a magistrate on the charges embraced in the information." It is from this order that the people have appealed.

[1] It is contended by counsel for the people that it was the duty of the district attorney to draw the information in such form as would embrace the offense or offenses disclosed by the testimony taken before the magistrate, that no transcript of the testimony received by the committing magistrate was brought before the superior court, and that under the presumption that official duty was performed it must be assumed that the evidence before the committing magistrate tended to show that the crime of burglary, with intent to commit rape, had been committed by the defendant. In support of the rule thus invoked the attorney-general quotes the decision of the Supreme Court in People v. Vierra, 67 Cal. 231, 7 Pac. 640, and it must be admitted that that decision supports his contention. But the decision itself has been directly overruled in People v. Nogiri, 142 Cal. 596, 76 Pac. 490, where it is said that in the case of an examination held before a committing magistrate "it is not in contemplation of the law that the district attorney may substitute his judgment for that of the judicial officer and lay another charge against an offender other than that for which the magistrate * * * has decided that he should be put upon trial." In People v. Christian, 101 Cal. 471, 35 Pac. 1043, it is said that "whenever a defendant is informed against for an offense different from that charged in the complaint upon which he was examined, or not included therein, he has had no examination for that offense, and is entitled to have the information set aside upon the ground that he has not been legally committed."

[2] Appellant next suggests that, since the first and second counts of the information complied with all legal requirements, the order should have been at most only an order setting aside the third count. The only re-

ply offered to this suggestion is that the law only provides for setting aside the information, and that no provision is made for setting aside a part of an information. Section 995 of the Penal Code provides that an information must be set aside if "before the filing thereof the defendant had not been legally committed by a magistrate." We find no valid reason why an order to set aside a separate count of the information may not be made. In People v. Danford, 14 Cal. App. 442, 112 Pac. 474, this court discussed the same matter and stated that "to be effective the motion should, in our judgment, have been directed to the second count alone, and not to the entire information."

[3] The intent with which a burglarious act was done is an essential part of the offense. Pen. Code, § 459. Where the averment of ownership of the property as stated in the information was not the same as the averment of such ownership as stated in the complaint before the magistrate, it was held that there was such a variance between the two described offenses that the one could not be deemed the same as the other. People v. Wallace, 94 Cal. 497, 29 Pac. 950. In the present case the information charging entry of the defendant upon the described premises with intent to commit rape does not describe the same offense as does the complaint, which omitted the statement of any intent to commit rape.

The order is reversed, with the direction that the lower court set aside the information as to the third count thereof and refuse to dismiss the other counts thereof.

We concur: JAMES, J.; WORKS, Judge pro tem.

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35 Cal. App. 264

MAZITELLI v. CRANE et al. (Civ. 2234.)

(District Court of Appeal, First District, California. Nov. 12, 1917.)

1. CONTINUANCE 🔑12 — GROUNDS — SUFFICIENCY.

Where a case was called five years after defendant had filed his answer, it was no abuse of discretion to refuse a continuance at defendant's request, in the absence of an affidavit therefor, and at the request of a person not an attorney of record, who merely stated that continuance was desired because of illness of attorney of record.

2. DISMISSAL AND NONSUIT 🔑60(2) — GROUND.

Under Code Civ. Proc. § 583, providing that the court may on its own motion dismiss an action if not brought to trial within five years after defendant has filed his answer, plaintiff, when he has moved the case upon the calendar and caused it to be set for trial, has performed his duty, and is not in default if the case is not actually tried within five years after issue joined.

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by V. Gamboni Mazitelli against Dennis F. Crane and others. Judgment for plaintiff. From an order refusing to set aside a default, defendants Sears appeal. Affirmed.

M. H. Hernan, of San Francisco, for appellants. H. M. Anthony, of San Francisco, for respondent.

PER CURIAM. This is an appeal from the order denying the application of the defendants to set aside and vacate a judgment entered against them. The application was made under the provisions of section 473 of the Code of Civil Procedure, and is based upon certain affidavits. The application was denied, and the appeal is taken from the order of the court denying the application of the defendants for relief under that section.

The action was one to quiet title. The complaint was filed on May 9, 1908, and the answer of the defendants was filed on the 14th of November of that year. Some five years later the cause was upon the calendar of the superior court of the city and county of San Francisco, department 1. When called, an individual present, who was not the attorney of record in the case, arose and stated that Mr. Hernan, the attorney of record, was ill and unable to be present, and requested the trial of the case to be continued until a later day. He stated that he was unacquainted with the facts of the case and could not take up the trial. No affidavit for a continuance was filed. The court denied the application and ordered that the trial proceed. The cause was then tried in the absence of said defendants and their attorney, and a judgment rendered in favor of the plaintiff in the action. This was in the month of December, 1914. Several months thereafter the motion for relief from that judgment was made and denied.

The contention here is, first, that the court abused its discretion in the first place in denying the motion for a continuance; and the second point is made that it was the duty of the court of its own motion to dismiss the action, for the reason that the cause was not brought on for trial within five years after issue joined, and that the court abused its discretion in not dismissing the action.

In answer to the motion for relief under said section 473, affidavits were filed on behalf of the plaintiff in the action, to the effect that after the cause had come to an issue by the filing of the answer it had been set for trial upon plaintiff's motion at least three different times, and that upon each occasion the defendants had procured a continuance of the trial upon one ground or another; and it is urged that these facts were within the knowledge of the judge of said department of the court at the time the cause came on for trial on December 14,

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

1914, and influenced the court in refusing to grant a further continuance of the cause.

[1] We think it must be obvious that there was no abuse of discretion in refusing to grant a continuance of the cause, in the absence of any affidavit or other showing for a continuance than that which was presented by the person applying therefor, who was not the attorney of record, and who merely made his statement in court asking for a continuance on the ground of the illness of the attorney of record in the case.

[2] As to the second contention above stated, it is the rule in this state that while it is the duty of the plaintiff, under section 583 of the Code of Civil Procedure, to bring the cause on for trial within five years after it is at issue, under penalty of having it dismissed for a failure to do so, the plaintiff has fully performed his duty to the court when he has moved the case upon the calendar and caused it to be set for trial, and is in court and ready to proceed to trial at the appointed time; and thereafter he is not in default if the case is not actually tried within the five years after issue joined. Section 583 of the Code of Civil Procedure and the cases cited by appellant have no application to cases which have been moved upon the calendar and set for trial at the plaintiff's instance, and have thereafter been continued upon such calendar for trial from time to time by the court upon the defendant's motion and over the plaintiff's objection to such continuances.

The order appealed from is affirmed.

(35 Cal. App. 253)

CAULFIELD et al. v. GUGLIELMETTI et al. (Civ. 1691.)

(District Court of Appeal, Third District, California. Nov. 10, 1917.)

1. TRIAL 🔑396(3)—FINDINGS — CONFORMITY TO PLEADINGS.

Where complaint alleged a contract, mutual rescission, and partial repayment, and sought recovery of the balance due, and the answer denied such contract, the court's finding that the sum due was less than alleged in complaint was not a departure.

2. TRIAL 🔑388(1)—FINDINGS—SUFFICIENCY.

It is the duty of the court to make findings on all material issues upon which testimony was given regardless of how or by whom such issues were introduced.

3. TRIAL 🔑396(4)—FINDINGS—EVIDENCE TO SUPPORT.

Evidence *held* to support findings responding to issues raised by original pleadings in action for balance due under agreement for rescission of contract.

4. TRIAL 🔑388(1) — FINDINGS — NECESSITY —EVIDENCE.

In an action for balance due under agreement for rescission of contract, evidence *held* so to support averments of cross-complaint as to require findings on the issues raised therein.

5. APPEAL AND ERROR 🔑1071(1)—REVIEW—HARMLESS ERROR—FINDINGS.

In action for balance due under agreement for rescission of contract, error, if any, in finding amount due to be less than as alleged in complaint was without prejudice to defendants.

Appeal from Superior Court, Sonoma County; Thomas C. Denny, Judge.

Action by William and Thomas Caulfield against W. Guglielmetti and another, copartners doing business under the firm name of W. & R. Guglielmetti. Judgment for plaintiffs, and defendants appeal. Affirmed.

W. H. Early, of Petaluma, and A. H. Crook, of San Francisco, for appellants. Gil P. Hall and E. J. Dole, both of Petaluma, for respondents.

HART, J. The first four paragraphs of the complaint in the action are also alleged, in practically the same language, in the cross-complaint of defendants. They are:

(1) That defendants are copartners, doing business as dairymen in the county of Sonoma, under the firm name and style of W. & R. Guglielmetti.

(2) "That on the 14th day of September, 1914, defendants and William Caulfield, for the benefit of himself and Thomas Caulfield, made their agreement in writing, in the words and figures as follows, to wit:

" 'Petaluma, Cal., Sept. 14/14.

" 'We agree to sell to Will Caulfield 71 cows, 18 heifers, 40 calves, for the sum of $6,300.00, and reserve the right to pick out any of the above stock, and either replace them with other as good cows or whatever they may be or pay cows that are short of the above number $59.14 each, heifers, $50.00 each, and calves, $30.00 each.

" '[Signed] Wm. Caulfield,
" 'W. and R. Guglielmetti,
" 'Per W. J. Guglielmetti.' "

(3) That at the time of the execution of the above agreement said William Caulfield, on behalf of himself and the said Thomas Caulfield, "and in pursuance to the provisions of said agreement, paid defendants the sum of $1,000."

(4) That the said Thomas Caulfield then and there became, and ever since has been, and is now the owner of an undivided one-half interest in and to said agreement (in the cross-complaint, "and the personalty therein described") "and all rights accruing therefrom, and in and to all claims mentioned in this complaint" (in the cross-complaint, "in and to all claims arising thereon").

Paragraph 5 of the complaint reads:

"That on or about October 1, 1914, defendants agreed to pay to plaintiffs the sum of $20 in lawful money and to return to plaintiffs all sums theretofore paid on account of said agreement, by plaintiffs, provided plaintiffs would surrender, release, and rescind said agreement; and said plaintiffs accepted said promise on the part of defendants as aforesaid, and pursuant thereto, and in consideration thereof, did surrender, release, and rescind said agreement, and thereafter defendants paid to plaintiffs the said sum of $20 and $580, and no more, and there now remains due and unpaid from defendants the sum of $420, no part of which has ever been paid, although demand therefor has been made."

In the answer the allegations of said paragraph 5 are denied, and it is alleged that on September 30, 1914, defendants were ready and willing to perform said contract, and tendered to plaintiffs said stock in pursuance of the terms of said contract; that plaintiffs unqualifiedly refused to accept said stock, "and did offer to said defendants the sum of $20 to rescind and cancel and annul said agreement," which was refused by defendants; "that pursuant to the terms of said agreement said plaintiffs were obligated to pay to said defendants for and on account of said stock the sum of $6,300, and by reason of the said refusal of said plaintiffs to comply with the terms of said agreement said defendants, in order to mitigate the damages they had sustained by reason thereof, were compelled to and did, after having notified said plaintiffs of their intention to so do, sell said stock for the sum of $5,900," the highest price they could receive; that defendants paid to plaintiffs $400, the difference between $6,300, which plaintiffs were obligated to pay, and $5,900, the sum defendants received.

The cross-complaint alleges the tender and refusal to accept said stock, as above set forth, and proceeds:

> "That said plaintiffs did refuse to pay the balance of the purchase price due, and for the period of 30 days thereafter continued to refuse to comply with the provisions of said agreement; that by reason of said refusal, defendants were compelled to and did furnish and provide for, for 30 days, the feed, keep, pasturage and care of said stock," the reasonable value of which was alleged to be $500.

The allegations of the cross-complaint are denied by plaintiffs.

The judgment was:

> That plaintiffs do have and recover from defendants "the sum of $400, the balance due on the purchase price of the stock mentioned in plaintiffs' complaint, together with interest on the sum of $1,000 from October 1, 1914, to April 26, 1915, and interest on the sum of $400 from April 26, 1915," together with costs.

The appeal is by the defendants from said judgment.

Appellants specify alleged errors of the court in rulings upon the admission of evidence and in failing to determine certain issues. Insufficiency of the evidence to support the judgment in several designated particulars is also relied upon.

The court found as follows: That the written agreement of September 14, 1914, was made and entered into by the parties; that on said date, and on said agreement, the plaintiffs paid to the defendants the sum of $1,000; that on October 1, 1914, the defendants agreed to return to the plaintiffs "all sums theretofore paid on account of said agreement by plaintiffs, provided plaintiffs would surrender, release, and rescind said agreement," and that the plaintiffs thereupon accepted that proposition, and, pursuant to said agreement of rescission, release, and surrender, the defendants paid to the plaintiffs the sum of $600, and no more, "and there now remains due and unpaid from the defendants to plaintiffs the sum of $400, no part of which has ever been paid," etc. No finding was made as to the bonus of $20 which the complaint alleges the defendants agreed to pay the plaintiffs as a part of the consideration for the rescission; but the court did make findings upon the issues, above briefly recapitulated, made by the cross-complaint of the defendants.

The appellants contend that the findings and conclusions of law are at variance with the issues raised by the pleadings and the essential theory of the case following the issues so made. In support of this position counsel say:

> "The complaint set up an express contract of surrender, release, and rescission based upon a consideration of $20, and the answer denies the same. The court finds that no such contract existed, and, although it is not alleged in the complaint that appellants violated their contract, nor that they agreed to sell to respondents a straight dairy (without the right to pick) for $6,300, and although in the trial of the case no such contention was made, and the case was not tried on any such issue, the court found contrary to the terms of the agreement, and without any evidence thereof: (1) That appellants agreed to sell a straight dairy for $6,300, without a right to pick; (2) that the appellants violated their agreement by demanding $6,500 for a straight dairy, without the right to pick; (3) that there was a rescission by mutual assent of the parties, although appellants did not agree to pay the respondents the sum of $20."

It is true, as counsel for the defendants assert, that the issues, and the only issues, tendered by the complaint of the plaintiffs and accepted by the answer were: (1) Whether the agreement of September 14, 1914, was, on the 1st day of October, 1914, rescinded by the mutual consent of the parties, and the plaintiffs thereby released from the obligations thereof; (2) whether there was still due the plaintiffs, under the agreement of rescission, the sum of $420. And, upon the issues so raised, it is clear that the findings (the first above referred to) support the conclusions of law and the judgment.

As seen, the court found substantially, that the parties agreed to rescind the agreement of September 14, 1914, upon the consideration that the defendants would take back the stock sold and would return to the plaintiffs all sums theretofore paid by them to the defendants on said contract of sale, and that in pursuance of the last-made agreement (the agreement to rescind) the defendants paid to the plaintiffs, of the sum of $1,000 found by the court to have been paid by the plaintiffs to the defendants at the time of the execution of the agreement of sale, the sum of $600, leaving as a balance due the plaintiffs from the defendants under the agreement of rescission the sum of $400.

[1] These findings clearly coincide with the issues as tendered by the complaint, save as to the averment that the defendants agreed to pay the plaintiffs for a rescission and surrender of the contract of sale a bonus of $20, that is, a sum in that amount in excess of the amount paid by the plaintiffs on the contract of sale; and it is equally clear

that the conclusions of law and the judgment follow those findings. But it appears to be the theory of counsel for the appellants that, because the court failed to make any finding as to the allegation in the complaint that the defendants agreed to pay the plaintiffs for a rescission and surrender of the contract of sale the sum of $20 over and above "all sums theretofore paid" by the plaintiffs to the defendants under the contract of sale, the agreement of rescission found by the court is not the agreement of rescission set out in the complaint. In other words, as we understand counsel, the claim is that for the reason stated the cause of action stated in the complaint is wholly at variance with the cause of action on which the court has framed its findings; that is to say, that the finding as to the agreement of rescission made by the parties is so far different from the one pleaded by the plaintiffs that it involves a departure from the cause of action stated in the complaint. There is no force in this contention. The complaint declares upon a contract whereby (it is alleged) the defendants agreed to pay the plaintiffs a certain sum of money, and the action is no different from the ordinary suit upon a contract to recover money due thereunder. The answer denies that any such contract was made. There was, therefore, a clear and direct issue tendered and accepted upon these questions: Did the parties enter into such a contract as is described in the complaint, and, if so, is the amount alleged to be due the plaintiffs from the defendants or any sum under said contract still due, owing, and unpaid to the former? It was, of course, for the court to determine these questions from the evidence, and, if finding that such an agreement was entered into between the parties, how much, if anything, the evidence showed that the plaintiffs were entitled to recover thereunder; and the fact that the court found that the evidence disclosed that the sum due the plaintiffs from the defendants on the agreement was less than the sum alleged to be due could not have the effect of so varying or modifying or changing the agreement as pleaded as to constitute the finding as so made a departure from the cause of action stated in the complaint.

The criticism that the court made a number of findings which were wholly outside the issues raised by the complaint of the plaintiffs and the answer thereto is aimed at a number of findings which appear to have been made in response to issues raised by the cross-complaint of the defendants and the answer thereto by the plaintiffs. The case sought to be made by the cross-complaint was, as above shown, briefly this: That the contract of sale having been entered into between the parties and a payment of $1,000 thereon made by the plaintiffs, the latter thereafter, and for a period of 30 days, refused further to carry out their part of the contract, and that the defendants were therefore "compelled to and did furnish and provide for the period of, to wit, 30 days, feed, keep, pasturage, and care for said stock, that the reasonable value of said feed, keep, pasturage, and care of said stock is the sum of $500," and that the defendants have been damaged in said sum by reason of the refusal of the plaintiffs to comply with the terms and conditions of the said contract of sale.

The court made several distinct findings specifically finding that said allegations of the cross-complaint were untrue, and, as stated, it appears to be those findings that counsel claim were beyond the issues in the case.

[2] It was the duty of the court to make findings upon all the material issues raised in the case and upon which testimony was given, regardless of how or by whom those issues were introduced therein. And there was testimony introduced in support of the issues tendered by the cross-complaint, as we shall presently show. But, conceding for the purposes of the argument that the findings referred to involved matters entirely foreign to the issue, still the proposition remains that the findings first above referred to and which respond to the issues raised by the complaint of the plaintiffs and the answer thereto of the defendants are sufficient to support the judgment, and the findings criticized by counsel may therefore be wholly eliminated, without disturbing or affecting the stability of the judgment in the slightest degree.

There is no ground apparent from the record before us upon which the contention may be maintained that the findings responding to the issues made by the complaint and the answer thereto do not derive sufficient support from the evidence. In support of this statement we may here refer briefly to some of the testimony introduced by the plaintiffs, following which will likewise be presented the testimony given by the defendants, whereby they sought to sustain the allegations of their cross-complaint.

Thomas Caulfield (one of the plaintiffs), who had lived in Petaluma for about 37 years, and was associated with his son, William, in the cattle business, testified:

> "On September 14, 1914, my son agreed to purchase from Guglielmetti Bros. certain stock for the sum of $6,300, on which we paid on account $1,000. On or about October 1, 1914, we went for the cattle and to pay the balance of the money. We met William Guglielmetti and Robert Guglielmetti there. Mr. Maggetti came up there and wanted to buy the cattle, and I wanted the cattle to all go together; I would be willing to give a little bit to get them all; it was a good pick. I asked Guglielmetti to let them all go, the ones he had picked out, and he said 'No,' but he would for a certain sum of money, and I said 'No,' I would take $100 profit for the whole thing, if I had any. To that he said, 'Well, you will get $200, and more.' I said, 'No; I'll take $100;' and he said, 'You won't take $100;' and I said, 'Yes; I'll take

> half of that;' and he said, 'You won't do anything of the kind;' and I says, 'I will, I'll take $20, but I don't want to take it from you boys, because that would look like backing out, but I'll take $20;' and he says, 'I will take them;' and I says, 'All right, they are yours; get your horses and pick them out.' We went home and left the stock there. Mr. Guglielmetti afterwards paid me $600. I did not read the contract signed by my son and Mr. Guglielmetti; the boy just told me what it was. I have been engaged in the cattle business about 30 years, and my son has been in business with me ever since he has been able to walk around."

The witness said that Mr. Maggetti was out there to buy the stock, but "when he looked over this stock he turned them down."

William Caulfield testified:

> "On the 14th of October, in company with my father and another man, I visited the Guglielmetti ranch to take away the cattle we bought there. When we reached the ranch we got into a little argument over some cows that were picked out, and my father said he would not stand for picking out that many cows, topping them off; and they said, 'Well, that will be all right; you will make $300 or $400 on them, anyhow;' and he said, 'No; I won't.' He says, 'I will take $100 for them.' Then he said, 'I will take $50;' and then he said, 'I will go better than that; I will take $20;' and Bob says, 'We will give you $20 on the deal;' and Father said, 'No; I wouldn't like to sell them to you; that would be too much like backing out;' and he said, 'No; it will not; we will give you that;' and he insisted on it, and my father said, 'All right, the cattle is yours,' and we went back to town. I paid $1,000 on the deal, and they returned $600 in April. I had made a demand for the return of the $1,000."

On cross-examination, the witness said:

> "I did not offer to sell the cattle back, nor did my father. He did not want to sell them back to him at all. Q. What did you do? A. We sold them back to him. Q. And when you sold them back you sold them back for $1,020, didn't you? A. Yes, sir. That was not in writing; it was an oral agreement. Mr. Maggetti came out there at our request to look at the cattle. He looked at them and refused to take them. It was then that I went back to give Mr. Guglielmetti a check for the balance and take the cattle, and he wanted $200 more. He topped off the top cows, picked the tops off, he picked them over and picked out the best stock. I prepared to sign a check at that time, and my father spoke and said something about straight dairy stock. He said he wanted them all straight; he did not want so many of them picked out. The Guglielmettis said they would turn them in straight for $6,500, and we told them to turn them in straight for $6,300, and we would give them a check and take them along, but the Guglielmettis would not accept that. My father told them, 'I could not get out at that price, with these cattle all topped off.' I do not know how many were picked out. We had a little kind of oral agreement that he would pick out five or six cows, and put in five or six more out of the dairy that looked just as good."

The witness was asked to explain what he meant by "straight dairy stock" and said:

> "Well, you know, when you pick cattle out, and put out all of the best lookers and your best cows, you know what you have got left; that is not straight dairy stock; straight dairy stock is where you leave the best lookers in. My father wanted straight dairy stock for $6,300."

C. J. Caulfield, a son of Thomas Caulfield, testified to making demand upon one of the Guglielmettis for the return of $1,020, and plaintiffs thereupon rested their case.

W. J. Guglielmetti testified that all the terms of the contract with plaintiffs were not contained in the written agreement; that the $1,000 payment and the time for removal of the cattle from the ranch were not in the contract; that the cattle were to be delivered not later than October 1st. Referring to the conversation on October 1st, the witness said that William Caulfield drove up and said, "Don't mix those cows before my father gets here; he wants a straight dairy;" that, when the father came along, he said he wanted a straight dairy, and the witness told him, "If you want straight dairy you will have to pay $6,500, or take them as the contract for $6,300." He said that the father replied: "I will pay $6,500; I will take straight dairy;" to which the witness said, "Very well." He continued:

> "And what brought about the $20 is, when I told Mr. Caulfield that he asked Mr. Maggetti too much money, he said something about $20, that he was willing to make a profit of $20, and that's about all that was said. There was no offer made to or accepted by us, and we didn't agree to pay him for that stock, or anything of the kind. I explained to Mr. Caulfield why they had to be delivered not later than October 1, 1914; that our lease was up on the last day of September; that on the 1st day of October Mr. Lanzi would take possession of the ranch, and we would have no more pasture for the cattle. No demand was made upon us for the payment of any money that day, and there was no suggestion made to us on that day to return to the Caulfields $1,000. It is not true that on or about the 1st day of October we entered into an agreement to pay the plaintiffs the sum of $20 in lawful money and return to them all sums of money theretofore paid on account of said agreement, provided they would surrender, release, and rescind our agreement."

The witness testified as to feeding the stock from the 1st of October to the 17th of November and as to the cost of such feed. On cross-examination the witness said that on the 1st of October he had taken 27 or 28 head from the herd and had put in an equal number of other stock, and that William Caulfield had agreed that that might be done.

R. P. Guglielmetti testified that he showed Will Caulfield the stock some time in September, and that he was present on October 1, 1914, and heard the conversation between the Caulfields and his brother. He said:

> "He said he would pay $6,500 for a straight dairy, or $6,300, take them the way the agreement called for. The old gentleman, Mr. Caulfield, said that."

On cross-examination the witness seemed somewhat confused as to the exact conversation on October 1st, but what he finally said was that his brother said he wanted $6,500 for a straight dairy stock, and that Thomas Caulfield said he would not pay it.

S. J. Guglielmetti, a brother of the defendants, testified that he was present and heard the conversation on October 1st. His version of it was as follows:

> "William Caulfield started to do some figuring, and he put down $6,300, or mentioned $6,-

300, that is, for the cows as they stood in the corral, and my brother says, 'No; the agreement was $6,500;' and Mr. Caulfield, the old man, says, 'I offered $6,500 if Maggetti would buy the cattle;' and then my brother Bill says, 'You probably held the price a little too high on Maggetti, or you would have sold the cattle;' and Mr. Caulfield said, 'No; I would be willing to sell those cattle at a profit of $20.' My brother told him $6,500 for straight dairy, or $6,300 for what they called the picked dairy. The plaintiffs would not pay $6,300 for the dairy as picked, and my brother insisted upon picking for the $6,300, or $6,500 for the straight dairy. There was no offer made by either of my brothers to purchase this stock for $20. My brothers did not say anything when Mr. Caulfield said that he would take $20 for his bargain on the cattle. Mr. Caulfield says to his father, 'You can't do that; you give the boys $100 for their trouble.'"

On rebuttal William Caulfield said that he did not make the remark last testified to.

[3, 4] It cannot be doubted that the foregoing shows: (1) That there is sufficient support to the findings responding to the issues raised by the original pleadings of the parties; (2) that there is some testimony addressed to the support of the averments of the cross-complaint, and that therefore the court was obliged to make findings as to the issues thus raised.

[5] If it may be said that the court erred by its failure to find as to that part of the agreement of rescission as it is alleged in the complaint to the effect that the defendants agreed to pay the plaintiff the sum of $20, in addition to making a return of the money theretofore paid on the contract of sale by the plaintiffs, the reply is that the error, if error it is, is obviously without prejudice to the appellants.

There is no substantial merit in this appeal. The judgment is therefore affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

35 Cal. App. 325

DUNN v. BARRY et al. (Civ. 1741.)

(District Court of Appeal, Third District, California. Nov. 19, 1917.)

1. Mortgages 🔑408—Foreclosure—Conditions—Estoppel.

Under a note and mortgage providing that on default in any installment of interest both principal and interest should become immediately due and payable at the option of the holder of the note, where the holder accepted the first two installments of interest only after protest against delay he would not be estopped for default in payment of third installment to advance the maturity of the principal without prior notice of his intention so to do; the true rule being that the holder has the right where he acts promptly to exercise his option upon default in any installment.

2. Mortgages 🔑401(2)—Foreclosure—Default—Options in Mortgage.

A provision in a mortgage giving the mortgagee the option to declare the entire amount due upon default in payment of any installment of interest will not be construed a penalty.

3. Mortgages 🔑408 — Foreclosure — Default—Estoppel.

In an action to foreclose a mortgage after exercise of option to declare entire amount due for failure to pay installments, *held*, under evidence, that the mortgagee had not lulled the mortgagor into security, but had acted in good faith in exercising his option.

4. Mortgages 🔑415(1) — Foreclosure—Default—Excuse.

That the mortgagor did not know the mortgagee's address would not excuse payment of installments when due in view of Civ. Code, § 1500, declaring that an obligation may be extinguished by a deposit in the name of a creditor.

5. Mortgages 🔑401(5)—Foreclosure—Tender After Default.

After the mortgagee had exercised his option to declare the whole amount due and payable, his right of foreclosure could not be defeated by a tender of all interest due; a tender of the full amount of the note being essential.

6. Costs 🔑260(4)—Frivolous Appeal—Imposition of Penalty.

Where some of the appellant's specifications as to the insufficiency of the evidence to support the court's findings are contrary to the express stipulations of the parties, or are addressed to matter entirely immaterial, while as to others respondent points out portions of the record justifying the court's conclusions, and answers every contention of appellant, who has failed to file a reply brief, and made no oral argument, a penalty will be imposed.

Appeal from Superior Court, Kings County; M. L. Short, Judge.

Action by James L. Dunn against Robert Barry and others. From a decree for plaintiff, and from an order denying motion for new trial, defendant named and Ida M. Barry appeal. Affirmed, with $100 damages for frivolous appeal.

W. A. Martin, of Los Angeles, for appellants. C. W. Pendleton, Jr., and John W. Rankin, both of Los Angeles, for respondent.

BURNETT, J. The action was for the foreclosure of a mortgage given to secure the payment of a promissory note for $10,000. The note and mortgage called for the payment of the interest quarterly, and provided that should default be made in the payment of any installment of interest when due, then the whole sum of principal and interest shall become immediately due and payable at the option of the holder of the note. The first quarterly installment of interest became due on June 23, 1914, but was not paid when due; $120 of such interest being paid by appellants on July 1, 1914, and the balance of said installment, to wit, $105, was paid about two weeks after said July 1st. The second quarterly installment of interest fell due on September 23, 1914, and was paid by appellants on October 16th, following. The third payment was due on December 23, 1914, and it not being paid, respondent on January 12, 1915, served upon appellants and each of them a notice of election, declaring the whole of said $10,000 note due and payable for the nonpayment of the quarterly installment of interest due December 23, 1914, and on January 18th following the complaint in foreclosure was filed. On January 22, 1915, appellant tendered to respondent in gold coin the sum of $225 in payment of the interest that was due on said December 23, 1914, and $5 additional, being the interest on said interest of $225 from December 23d to January 22d, and then and there offered to pay all costs incurred in said action by respondent and an attorney's fee of $50, which offer and tender was by respondent refused. The case went to judgment, and the court found that there was due plaintiff, in the aggregate, the sum of $11,024.71, and decreed a foreclosure in the usual form. From the judgment and the order denying a motion for a new trial, the appeal is taken.

[1] The first point made by appellants is:

> "The respondent accepted all prior payments from appellants after such payments were due, and he did so voluntarily without protest; therefore he is estopped to elect to advance the maturity of the principal, he not having served upon appellants any prior notice of his intention so to do."

But appellants are mistaken as to the fact and the principle of law or equity embodied in said proposition. As to the acceptance of said payments the court found:

> "That said Dunn accepted each of such payments only after protest at the delay, and that said plaintiff at all times prior to the commencement of this action urged and demanded that said defendants pay the interest due promptly when the same should become due, and never at any time consented to the same being paid tardily, but on the contrary on former occasions, when said defendants Barry did not pay to plaintiff interest due from them to him promptly when the same became due, that said plaintiff informed said defendants Barry that unless the same was paid promptly, he would foreclose his said mortgage."

We have examined the record, and ascertained that there is sufficient evidence to support said finding.

Moreover, it is not a proper case to invoke the principle of estoppel, as claimed by appellants. It does not follow that because the holder of the note after default in the payment of an installment of interest has elected to waive immediate payment and accept the compounding of interest as provided for, or has accepted the tardy payment of the same, and has failed to exercise his option to declare the whole amount of the claim due, he is bound to waive its exercise at all subsequent defaults, unless he give prior notice of his intention to make his election. The true and just rule is that while he exercises his option promptly he may do it at the maturity and upon default of any installment of the interest. Campbell v. West, 86 Cal. 197, 24 Pac. 1000; O'Connor v. Meskill (N. J. Ch.) 39 Atl. 1061.

[2] The mistake of appellants is, in the assumption that herein is involved a forfeiture, as did the cases cited by them. "Such a provision in a mortgage (i. e., a provision giving the mortgagee option to declare the entire amount due upon default in the payment of any installment of interest) is not construed a penalty, but an agreement as to the time when a debt shall become due, and enforceable according to its terms." Jones on Mortgages (7th Ed.) § 1181; Whitcher v. Webb, 44 Cal. 127; Bank, etc., et al. v. Mundy, 162 Ill. App. 138; Curran v. Houston, 201 Ill. 442, 66 N. E. 228. As said in the Whitcher Case, supra:

> "The contract was fair in its terms. There is certainly nothing contrary to equity or good conscience for parties to provide that interest as such shall be payable at stated periods of time, or to stipulate that a default in its payment at the day shall leave it optional with the creditor to insist upon the payment of the whole debt. * * * Nor do we see that the case presents any element of a forfeiture sought to be enforced, or falls within the application of any principle of equity upon which relief against a forfeiture is sometimes extended. The promise is an absolute one in the first instance to pay the interest when due, and conditional in the second instance that, failing in the first, the obligor will at once be bound, at the option of the creditor, to pay a larger sum, which larger sum is, however, nothing more than he really owes already, and must, under any circumstances, sooner or later be called on to pay."

[3] Nor is there any more merit in the contention of appellants that:

> "The respondent, as to the default in interest upon which the present foreclosure is predicated,

expressly and specifically lulled appellants into a sense of security."

The finding as to that being adverse to the claim of appellants was to the effect that they were not lulled into security by any act or declaration of respondent, nor were they misled or deceived by anything done or said by respondent. In support of this finding it is sufficient to quote the following testimony of respondent:

> "When I saw Mr. Barry on December 23, 1914, and he said he would pay the interest in a few days, I did not say that was all right. I did not say anything at all similar to that. I said nothing to him about being willing to give him any additional time in which to pay his interest. I never intended to convey to Mr. Barry the belief that as a result of my failing to insist that he pay punctually the installment of interest which fell due December 23, 1914, I would not foreclose. On every occasion when the interest was falling due, I notified Mr. Barry ten days or so previous to it falling due asking that the interest be paid when it was due, and I often threatened Mr. Barry with foreclosure if he did not pay it promptly in the future. And I saw Mr. Barry, one of the defendants in this action, in Los Angeles on December 23, 1914. At that time I demanded payment of the interest due on the $10,000 mortgage."

Other circumstances are detailed by the witnesses that fortify the conclusion that he acted in perfect good faith, and that there existed no ground for just complaint on the part of appellants. The fact that he was quite indulgent in reference to the prior payments does not, of course, militate in the least against his right to foreclose for the third default.

[4] The third contention that appellants did not know where to send the interest, since respondent's letters came from different points in Northern California, is entirely destitute of merit. As to this the court found:

> "That it is true that at the time of the filing of the amended answer of the defendants Barry herein plaintiff was a resident of the city of Alameda. * * * That it is not true that the particular or specific address of said plaintiff in said city of Alameda was unknown to said defendants or to either of them, * * * but that it is on the contrary true that at all times subsequent to several months prior to the institution of this action said defendants Barry and each of them were informed by plaintiff and knew the exact and specific address of said plaintiff in the said city of Alameda and the number of the street of such address."

Dunn so testified, and there is circumstantial evidence to the same effect. But even if appellants had not known the specific address they could have made the payment as provided in section 1500 of the Civil Code.

[5] Manifestly the tender of all the interest due after plaintiff had exercised his option to advance the maturity of the note could not affect the right of respondent to bring suit, which right had already vested. If appellants had tendered the full amount due on the note, including the principal, they would then have met the obligation which they had incurred. In other words, when appellants, 15 days after receiving notice of respondent's election, made the tender they actually owed, according to their agreement, the sum of $10,000, with interest, and, of course, they could not by tendering $200 or $300 impair the right of respondent to maintain an action for the full amount due. The proposition is too plain for argument.

[6] There are many specifications of the insufficiency of the evidence to support certain findings. Some of these specifications are contrary to the express stipulation of the parties, some of them are addressed to matters entirely immaterial, and as to the others, respondent points out portions of the record which entirely justify the court's conclusions. We can see no earthly good in noticing them specifically. Indeed, respondent has clearly and conclusively answered every contention of appellants, and the latter must have concluded that no plausible reply could be made as they filed no closing brief, nor have they made any oral argument. The fact is that one can hardly resist the conclusion that this appeal was taken for the purpose of delay. There is certainly less merit in the various contentions than usually characterizes the position of an appellant. We consider it a proper case to impose a penalty.

The judgment and order are therefore affirmed, with $100 damages for a frivolous appeal.

We concur: CHIPMAN, P. J.; HART, J.

35 Cal. App. 321

JONES v. MANNING et al. (Civ. 1913.)

(District Court of Appeal, Second District, California. Nov. 15, 1917. Rehearing Denied by Supreme Court Jan. 14, 1918.)

1. ELECTIONS ⚿53—ELECTION OFFICERS.
Election officers cannot recover more than $10 for services at an election either from the county or the supervisors, under Pol. Code, § 1072, so providing, even though the precincts contained more than 200 voters in violation of Pol. Code, § 1127, and the work required four days and nights.

2. ASSIGNMENTS ⚿24(2)—CAUSES OF ACTION—PERSONAL INJURIES.
Causes of action for damages for having to work without sleep for four nights and days, suffering mental and physical anguish and loss by absence from business, are not assignable.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by M. C. Jones against C. D. Manning, Richard H. Norton, F. E. Woodley, W. E. Hinshaw, and R. W. Pridham. Judgment for defendants, and plaintiff appeals. Affirmed.

P. S. McNutt, of Los Angeles, for appellant. A. J. Hill, County Counsel, and David R. Faries, Deputy County Counsel, both of Los Angeles, for respondents.

WORKS, Judge pro tem. This action was commenced against the respondents, who

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were members of the board of supervisors of Los Angeles county, to recover against them as individuals for certain alleged omissions on their part to perform duties which the appellant contends were enjoined upon them, as supervisors, by law. The appellant sued as assignor of several other persons. Demurrers to the amended complaint on behalf of each of the respondents were sustained without leave to amend, and judgment went accordingly. The appeal is from the judgment.

We learn from the amended complaint that appellant's assignors were appointed by the supervisors to serve as election officers in certain precincts in the city of Glendale, at the general election of November, 1914; that they served as such election officers, the period of service of each, including the time expended in the counting of the ballots cast at the election, being more than four days and nights; that each of the assignors presented his claim against the county at the rate of $3 for each eight hours of service; that the supervisors allowed each claim to the extent of $10, but rejected each for the excess; that there is due appellant certain specific amounts on the claim of each of his assignors, the amount alleged to be due in each instance being $10 less than the amount for which the claim was presented, thus showing the collection and acceptance from the county of the amount allowed each assignor by the supervisors; that all the claims were assigned to appellant before the complaint was filed; that the supervisors did not, before the election, as required by section 1127 of the Political Code, as in force at that time, divide Glendale into voting precincts containing not more than 200 voters; that in the precincts in which appellant's assignors served as election officers there were registered, at the time of the election, respectively, 1,029, 965, 1,099, and 873 voters, and the respondents knew the number in each precinct; that the votes actually cast in the same precincts were, respectively, 782, 774, 839, and 715; that, by reason of the failure of the respondents to establish precincts containing less than 200 voters each, the appellant's assignors were compelled to serve as election officers for the periods of time above mentioned; that by reason of this service, "and the consequent loss of sleep and the nervous strain," the plaintiff's assignors "suffered greatly both from mental and bodily fatigue, besides being deprived from pursuing their ordinary calling for a period of four days"; that each of the respondents is indebted to the appellant in the sum of $371.27, that being the total of the amounts previously alleged to be due each of the assignors, after deducting $10 from the amount originally charged at the rate of $3 for each eight hours of service. Judgment for $371.25 against each of the respondents is then prayed for.

There are several manifest uncertainties in the amended complaint, going to its very substance; but the demurrers were all general only, and they need not have been more to be effective.

[1] If we view the action as one for the services of appellant's assignors, the amended complaint is insufficient because it shows that they have been paid in full. Election officers, by express limitation contained in the statute, cannot be paid a greater compensation than $10 for each election during which they serve. Pol. Code, § 1072. The fact that the enactment applies to claims against the county treasury, while this action is against the supervisors as individuals, can make no difference. There was no contract, either express or implied, between the respondents and appellant's assignors. The latter have been paid the amount due them from the county treasury, the only source from which they could demand payment under the law.

[2] If the action be regarded as one to recover damages, the amended complaint is equally defective. The action cannot be maintained by the appellant for the reason that the claims, being strictly personal and unconnected with any injury to property, are not assignable. The demands arise from an alleged omission tortious in character, and the rule just stated is the general rule as to such demands. 4 Cyc. 24; Lawrence v. Martin, 22 Cal. 173; Archer v. Freeman, 124 Cal. 528, 532, 57 Pac. 474.

We need not take the time nor the space to mention other objections which respondents make to the sufficiency of appellant's pleading. It is enough to say that it appears not to present the semblance of an actionable controversy.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

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35 Cal. App. 345

BAILEY v. MOSHIER. (Civ. 1745.)

(District Court of Appeal, Third District, California. Nov. 20, 1917.)

1. BILLS AND NOTES 🔑527(1) — PAYMENT — EVIDENCE—SUFFICIENCY.

Evidence *held* to sustain finding that certain special payments were made as alleged on a promissory note.

2. COSTS 🔑42(8)—EFFECT OF TENDER—APPROXIMATE AMOUNT.

Where there was a trifling balance due on a note and mortgage securing it, of the amount of which defendant was uncertain, his tender and deposit of the approximate amount to plaintiff's credit authorized award of costs to defendant.

3. WITNESSES 🔑159(2)—TRANSACTIONS WITH DECEDENTS—CROSS-EXAMINATION.

In an action for balance due on note, where a payment had been made to plaintiff, which defendant claimed was to be applied on the note, and which plaintiff denied, it was proper on cross-examination to ask plaintiff from whom he received a check for the amount of such alleged part payment, although such check was made prior to his ownership of the note; such matter not being objectionable as relating to a transaction between defendant and the payee since deceased.

4. EVIDENCE ⚷271(4)—SELF-SERVING DECLARATIONS—PAYMENT.

In an action for balance due on note, defendant's testimony as to payments on the note before the original payee's death was not objectionable as a self-serving declaration under Code Civ. Proc. §§ 1850–1853, 1870.

5. WITNESSES ⚷159(13) — TRANSACTIONS WITH DECEDENT—PAYMENT.

Nor was such evidence inadmissible under Code Civ. Proc. § 1880, subd. 3, prohibiting testimony of parties to action or proceeding against an executor on a claim or demand against the estate of the deceased, since such testimony did not relate to a claim or demand against the estate.

6. EVIDENCE ⚷450(10) — ADMISSIBILITY — PAROL EVIDENCE—EXPLAINING WRITINGS.

Defendant in action for balance due on note was properly allowed to explain instrument in terms: "Bakersfield, 14th Nov., 1911. Received from D. B. Moshier on account of note of $1500 made March, 1911, fifteen hundred. Received on the above note, one thousand dollars. John E. Bailey."

7. APPEAL AND ERROR ⚷1051(6)—HARMLESS ERROR.

Error in permitting secondary evidence of contents of check was harmless, where counsel stipulated that it should be considered only to fix the date when the check was returned, which was shown by other evidence.

8. TRIAL ⚷62(2)—REBUTTAL EVIDENCE—ADMISSIBILITY.

In action for balance due on note, where defendant had made payments to the payee before the latter's death, and had testified that the note represented his only indebtedness to the payee, it was proper rebuttal to ask plaintiff what he knew of other indebtedness from the defendant to the payee; plaintiff claiming that the payments were on other indebtedness.

9. APPEAL AND ERROR ⚷1058(2)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

Error in excluding proper rebuttal of defendant's evidence that the note was his only indebtedness to the payee was without prejudice, where the witness had already testified that there was another indebtedness on which the payments were made.

Appeal from Superior Court, Kern County; K. S. Mahon, Judge.

Action by Joseph L. Bailey against D. B. Moshier. Judgment for defendant, and plaintiff appeals. Affirmed.

E. L. Foster and Chas. A. Barnhart, both of Bakersfield, for appellant. S. Wyman Smith, of Bakersfield, for respondent.

BURNETT, J. The action is for the balance due on a promissory note and to foreclose a chattel mortgage given to secure the payment of the same.

The note and mortgage were executed by the defendant on March 21, 1911, to one J. E. Bailey for the sum of $2,500, with interest at 1 per cent. a month. J. E. Bailey died, and all his property was regularly distributed to one William Bailey, who assigned the note and mortgage in controversy to plaintiff, who is the nephew of said decedent. The complaint alleges that no part of said note was paid except the sum of $1,000, which was paid thereon on November 13, 1911, and that $1,500 and interest was still due. The answer sets up that in addition to said payment, in the month of October, 1911, the sum of $1,072.40 was paid on said note by the Western Water Company to John E. Bailey for and on behalf of the defendant, and that on or about the 17th day of November, 1911, the sum of $585 was paid to the said John E. Bailey by the Kern County Land Company for and on behalf of the defendant, and that on said last-mentioned date the sum of $35 was due, and that the defendant has tendered plaintiff the sum of $45, and that he has at all times been willing and able to pay plaintiff whatever sum might be found to be due.

[1] The principal controversy is as to the two additional payments claimed to have been made by respondent. It is contended that the evidence is insufficient to support the finding of the court in accordance with the averments of the answer. We are at a loss to understand, however, why such contention should be made. It might be said, possibly, that a contrary finding would be supported, but to declare that there is no legal basis in the evidence for the court's conclusion as to these payments is to ignore the positive and unequivocal testimony of the defendant himself and others in whose statements we find nothing improbable or even suspicious. The plaintiff testified that on October 21, 1911, he received for his uncle a check from the Western Water Company for the sum of $1,072, that he took the check to his uncle John E. Bailey, who was sick at the time, that the latter indorsed it and plaintiff "turned it in to Mr. Mack at the Bank of Bakersfield and he turned it in on" the note held by one W. G. Collier against the said John E. Bailey, and said note was thereupon delivered to plaintiff. It may be said that it was a promissory note bearing 10 per cent. interest per annum. The defendant testified that on October 20, 1911, he gave this order to said Western Water Company:

> "Gentlemen: Pay J. E. Bailey the amount found to be due me from my September account and charge same to my account."

It appears without controversy that this order was made and honored, and that in accordance therewith said sum was paid as testified by plaintiff on October 21st. Thus far the situation is not open to dispute. The defendant testified further that the next payment was made by him in cash personally to John E. Bailey on November 12th or 13th at the First National Bank of Bakersfield and that the amount was $1,000 and as to this it may be said the defendant produced a receipt signed by the payee. We have then positive proof of the payment of $2,072.

On November 17th the defendant says he

instructed the Kern County Land Company to make a payment to John E. Bailey of $585, and "I know of my own knowledge that the sum of $585 was paid to John E. Bailey through the Kern County Land Company." There can be no doubt about this as the receipt was introduced in evidence, and he was corroborated by the testimony of William Eardley, the superintendent of the milling department of said company, who said:

> "John E. Bailey came to my office in the milling department in the month of November, 1911, for the purpose of collecting some money which I had been authorized to pay him on account of D. B. Moshier. I paid John E. Bailey money at that time, to wit, $585. It was paid in a draft on the Kern County Land Company. John E. Bailey gave me a receipt at that time. He signed it in my presence and the receipt was made out November 16, 1911. That is the date on which the payment of $585 was made."

We have thus the evidence of the payment of $2,657 to John E. Bailey for and on account of respondent, and that these payments were made on the indebtedness evidenced by said note is the testimony of Moshier. Indeed, he testified that there was no other indebtedness from him to Bailey. Appellant calls attention to some apparent inconsistency in the statements of respondent, but it was explained, and no doubt to the satisfaction of the court, and we cannot say that he was not entitled to the fullest credit in his testimony that he had made these payments.

[2] There was a trifling balance due which the court was justified in believing that the defendant was willing to pay. It seems that he was uncertain as to the exact amount, and the tender and deposit were not made until after the complaint was filed. The deposit of the money to the credit of the plaintiff rendered a judgment for that amount unnecessary, and it was proper to award respondent his costs in view of the trivial sum.

Certain rulings are specified as erroneous, of which brief mention may be made.

[3] On cross-examination plaintiff was asked: "From whom did you receive that check for $1,072?" To which the objection was made: "It is prior to the time this witness became the owner of the note; that the transaction attempted to be proven is a transaction between Mr. Moshier and the late John E. Bailey." It is apparent that the objection was properly overruled. It is a fair inference from his testimony on the direct examination that no such payment had been made on the note, and the obvious purpose was to show that this payment was made on behalf of the defendant, and should have been credited upon the note. Besides he virtually answered it without objection, as shown by the following statement just preceding the question: "I received a check from the Western Water Company for $1,072 in October, 1911."

[4, 5] To this question asked of the defendant: "What was the first payment made by you on account of the note and mortgage in this case?" counsel for appellant made this objection: "To which I object on the ground that the defendant cannot testify to transactions with deceased persons, or make any declaration in his own favor, under the sections of the Code from 1850 to 1853 and 1870, Code of Civil Procedure. He cannot make any declaration or self-serving statement in his own favor." It is quite obvious that appellant's position in that respect is entirely untenable. The question did not call for any self-serving declaration, but for a fact, namely, the payment of a sum of money on a certain indebtedness. And it is no less admissible because the payee of the note was not living. None of the said sections of the Code precludes such testimony, nor did the question call for an answer within the inhibition of subdivision 3 of section 1880 of said Code. The testimony did not relate to a "claim or demand against the estate of a deceased person" within the contemplation of said language. The situation is covered and controlled by the decision in Stoddard v. Newhall, 1 Cal. App. 111, 81 Pac. 666. It is true that the death of the payee may place his successor in interest at a disadvantage, and it may even happen that the maker of the note may hesitate less to commit perjury, but such possibility cannot operate to change the established rules of evidence. It is to be presumed, moreover, that under such circumstances the trial court will scrutinize with even greater care the testimony of the payor.

[6, 7] There was no error in permitting the defendant to explain the receipt he received from Mr. Bailey on the payment of the $1,000. The receipt was in form as follows:

> "Bakersfield, 14th Nov., 1911. Received from D. B. Moshier on account of note of $1500 made March, 1911, fifteen hundred. Received on the above note, one thousand dollars. John E. Bailey."

The only intelligible statement therein contained is the recital of the receipt of $1,000. The other portion of the instrument was not understandable without explanation, which the witness was properly allowed to make. Besides, as we have already seen, the witness stated that he owed no other amount to Bailey, and to the force of this statement nothing was added by his explanation of the receipt. The court was probably in error in its rulings in relation to a certain check that was returned to the defendant by the clerk of the board of supervisors of Kern county. Secondary evidence of its contents was permitted without accounting for the loss of the instrument, but it was rendered harmless by the stipulation of counsel for respondent that it should be considered only to fix the date when said check was returned, and as to this fact the clerk referred to the minutes of said board kept by him. This circumstance was important to fix the time when respondent said he paid Bailey the $1,000.

[8, 9] Appellant in rebuttal was asked by his counsel this question: "Do you know whether or not Mr. Moshier had received any cash money from Mr. Bailey in his lifetime as a loan which was not evidenced by any promissory note, for the purpose of buying feed for taking care of the mules?" The other side objected on the general ground, and that "no proper foundation was laid for it." The court, in sustaining the objection, said: "That is not in rebuttal. I am not going into that anyhow." It clearly was in rebuttal. The defendant had testified that the promissory note represented his only indebtedness to Bailey, and this was a material circumstance in view of the controversy as to how the last payment of $585 should be applied; it being the contention of appellant that it was intended to repay money that was loaned for the feed of the mules. If it was so intended then manifestly it was improper to reduce by that sum the amount due on said note. Nor can it be said that "no foundation" was laid for it. An attempt was being made to lay the foundation by asking the witness whether he knew of such loan. But the ruling was absolutely without prejudice, for the reason that the witness had already testified that his uncle took that $585, but that it was "John E. Bailey's money. It was money John E. Bailey had advanced him for feed for the mules." The court, though, undoubtedly did not believe him, and it may be said that his testimony as a whole does not appear very consistent or persuasive. At any rate, the court had the legal right to accept and act upon the testimony to the contrary effect of the defendant and other witnesses.

There are some other minor points, but we do not deem it necessary to notice them specifically.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

(35 Cal. App. 330)

WAIT v. SUPERIOR COURT IN AND FOR SACRAMENTO COUNTY et al.

(Civ. 1759.)

(District Court of Appeal, Third District, California. Nov. 19, 1917.)

MANDAMUS ⚷16(1)—MOOT QUESTION—PETITION FOR MANDAMUS—DISMISSAL.

On petition for a writ of mandate to compel the superior court to grant petitioner's application to be allowed to prosecute his action in forma pauperis, where it appears that since the proceeding was commenced the lower court had granted a jury to petitioner in accordance with his application, the question is moot, and the petition will be dismissed.

Petition for writ of mandate by Charles T. Wait against the Superior Court of the State of California in and for the County of Sacramento and Hon. Chas. O. Busick, Judge. Petition dismissed.

G. H. P. Lichthardt, and Chester F. Gannon of Sacramento, for petitioner. Lester J. Hindale, of Sacramento, for respondents.

PER CURIAM. Petitioner, Charles T. Wait, commenced an action in the superior court of the county of Sacramento against the Western Pacific Railroad Company for personal injuries received by him while in its employ.

After the commencement of said action petitioner sought leave of the court, by filing the proper affidavit, to be allowed to prosecute his action in forma pauperis. The court denied the application upon the ground that it knew of no method provided by law for the payment of the jury fees except by the party demanding said jury. Thereupon petitioner filed his petition in this court seeking by mandate to compel the superior court to grant his application.

Since the filing of this petition the precise question has been decided in accord with petitioner's contention by our Supreme Court in the case of Martin v. Superior Court, 168 Pac. 135. It is only necessary, therefore, to refer to that decision.

Since this proceeding was commenced in this court, it has been brought to our attention that the lower court has granted a jury to petitioner here in accordance with his application. The matter therefore becomes a moot question merely, and in view of this status of the case, it becomes proper to dismiss the petition.

The petition for the writ of mandate is therefore dismissed.

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35 Cal. App. 344

Ex parte BERNSON. (Cr. 580.)

(District Court of Appeal, Second District, California. Nov. 19, 1917.)

HABEAS CORPUS ⚷11—VOLUNTARY SUBMISSION TO IMPRISONMENT.

Where petitioner voluntarily submitted to imprisonment from which he seeks to be discharged for the purpose of presenting in the habeas corpus proceeding the question of the validity of an order holding him to answer, the petition will be dismissed.

In the matter of the application of B. Bernson for a writ of habeas corpus. Denied.

H. E. Johnstone and Emmons & Johnstone, all of Bakersfield, for petitioner. J. R. Dorsey, Dist. Atty., and W. P. Grijalva, Deputy Dist. Atty., both of Bakersfield, for respondent.

PER CURIAM. It appearing to the court that the imprisonment of the petitioner from which he seeks to be discharged was voluntarily submitted to by him for the purpose of presenting in this proceeding the question as to the validity of the order holding him to answer to the superior court for trial, and for that reason, the remedy by habeas corpus should not be available to him.

Upon the authority of In re Gow, 139 Cal. 242, 73 Pac. 145, Ex parte Schmitz, 150 Cal. 663, 89 Pac. 438, and Ex parte Ford, 160 Cal.

334, 116 Pac. 757, 35 L. R. A. (N. S.) 882, Ann. Cas. 1912D, 1267, it is ordered that the proceeding be, and it is hereby, dismissed, and petitioner is remanded to the custody of the sheriff.

35 Cal. App. 337

MACHADO v. ELLISON et al. (Civ. 2090.)

(District Court of Appeal, First District, California. Nov. 19, 1917. Rehearing Denied by Supreme Court Jan. 17, 1918.)

1. CONSTITUTIONAL LAW 🔑154(3)—OBLIGATION OF CONTRACTS—RIGHT TO NAME BENEFICIARIES.

Fraternal Act 1911 (St. 1911, p. 1320), limiting the class who may be beneficiaries under insurance policies, does not violate the Constitution, prohibiting laws impairing the obligation of contracts, though it regulates future designations of beneficiaries under certificates previously issued.

2. INSURANCE 🔑587 — BENEFIT SOCIETIES — BENEFICIARIES.

Fraternal Act 1911, limiting the class who may be beneficiaries, is constitutional, and applies to a designation, after it became effective, of a successor to a deceased beneficiary under a certificate issued before the enactment.

Appeal from Superior Court, Alameda County; William M. Finch, Judge.

Action by Antone Manuel Machado against the Conselho Supremo da Unuias Portugeza do Estado da California, in which W. H. Ellison and another were interpleaded. From a judgment for said Ellison, plaintiff appeals. Reversed.

Louis Gonsalves, of Oakland, and J. E. Pemberton, of San Francisco, for appellant. T. P. Wittschen, of Oakland, for respondent.

KERRIGAN, J. This action was originally brought by the sole heir at law of one Theodore Silveira to recover from the Conselho Supremo da Unuias Portugeza do Estado da California, a fraternal and benefit society, the amount due under a certificate of insurance issued by it. The society admitted liability, but, being in doubt as to the person to whom the fund belonged, respondent and his codefendants were interpleaded, and on payment into court by the society of the sum of $1,200, the net amount due on said policy, it was discharged from liability as to all parties to the action.

The conflicting claims to the fund arose in the following manner: In November, 1894, Theodore Silveira became a member of the above-named society, and designated as his beneficiary one J. S. Neto. At that time there was no restriction upon the rights of a member to make such designation; there being no limitation, statutory or otherwise, as to the class of persons who could become beneficiaries under the policies issued by the society. In 1911 the Legislature passed an act for the regulation and control of fraternal benefit societies which, among other things, limited the class of persons who might be named as beneficiaries under a policy of insurance issued by them. Subsequent to the passage of this act, and on the 17th day of July, 1912, the beneficiary named in the policy died, and Silveira thereafter designated Jose R. Neto, a son of the original beneficiary, and the assignor of the respondent herein, as the beneficiary in said policy. In May, 1914, Silveira, the insured, died, and this action was brought by plaintiff as the sole heir at law of Silveira, claiming title as such to the proceeds of the policy.

Judgment was rendered in favor of the assignee of the beneficiary named, and from this judgment plaintiff appeals.

[1] The main question presented by the appeal is the effect of the Fraternal Act of 1911 upon the rights of a member of a benefit society whose policy was issued prior to the time the statute went into effect, to change his beneficiary after such time, contrary to and in contravention of the terms of the statute.

The contention of appellant is that, as the act limits the class of persons who can legally be designated, and the selected beneficiary having been nominated after the act became operative and admittedly one not within such class, that there was no legal designation by the insured, and the proceeds of the policy should be paid to plaintiff as the next of kin and only heir at law of the insured.

As opposed to this contention respondent argues in support of the judgment that, as there is no language in the act showing that it was intended to have a retroactive effect or operation, it should be construed prospectively so as not to restrict the vested right of unlimited selection possessed and enjoyed by members who had contracted with the society prior to its passage; that such right of unrestricted selection in the beneficiary that might be made in the future was one of the considerations entering into the contract; that it was a material and vested one, valid at its inception, and one that could not be destroyed or taken away by the Legislature, and any attempt so to do makes it violative of those sections both of the state and federal Constitutions, providing that the Legislature or Congress shall pass no laws impairing the obligations of a contract.

We do not think that the application of the statute to the contract of the insured has the effect claimed for it by the respondent. The principle involved is not an entirely new one in this state. In the case of Caldwell v. Grand Lodge, 148 Cal. 195, 82 Pac. 781, 2 L. R. A. (N. S.) 653, 113 Am. St. Rep. 219, 7 Ann. Cas. 356, it was held that, where an insured, on joining a beneficial society, agrees specifically to abide by and conform to the by-laws in force at the time, and also to those that might be subsequently enacted, upon the adoption of a by-law limiting his selection to a beneficiary of a designated class he was bound by the change, and had no right to name one other than in the class designated. See, also, Wist v. Grand Lodge, 22 Or. 271, 29 Pac. 610, 29 Am. St. Rep. 603. Here the insured agreed at the time he joined the society to so conform to its laws. True, the society did not by an express bylaw at any time impose any limitation or restriction upon the insured in the selection of his beneficiary. It is not contended, however, by respondent, nor could it be, that if the society had adopted a by-law in conformity with the statute the rule laid down in the Caldwell Case would not apply. The only distinction, therefore, between the case last cited and the instant one is that here the insured was restricted by the terms of a statute, whereas in the Caldwell Case he was limited by the adoption of a by-law.

Upon principle we see no difference between the two cases. If an insured is bound in the manner indicated in the Caldwell Case by reason of his express agreement, he is at least equally bound by a statutory enactment he is required to obey. The by-laws of a fraternal organization must conform to the Constitution and statutes of the state, and when the statute changes the by-laws must change with them. The statutes, of course, must be reasonable and within the law; but the statute here involved is beyond all question one of that nature, and its character is so declared to be in the Caldwell Case. The contract entered into by the insured was made up of his benefit certificate, the by-laws of the society, and the laws of the state. The statute became an integral part of the charter of the society, and was at least as binding upon the insured and other members when they attempted to change their beneficiaries after its passage as any by-laws that could have been adopted by the order. The fact that there was no limiting statute in existence at the time the insured joined the order can make no difference. The statute does not attempt to disturb members in their original selections; it only affects the issuing of certificates after its passage, and all designations so made must conform to it.

The conclusion we have reached finds support in authority of other jurisdictions. In Grand Lodge of McKinstry, 67 Mo. App. 82, under similar facts it was held that all changes in selection of beneficiaries must conform to a new law, as such change must be considered as an amendment to the charter of every such corporation, and that the right to take must be governed by it. To the same effect is Bush v. Modern Woodmen (Iowa) 152 N. W. 31, where it was contended, as here, that the law in force at the time the insured became a member, and at the time his first certificate was issued, governed the case, and that the right to freely name and change a beneficiary was a vested right of which he could not be deprived by the Legislature; and it was there held, citing the Caldwell Case, that the insured had no such vested right under his original contract which could not be affected by limitations imposed by a statute subsequently enacted requiring designations made thereafter to conform to its terms. And it is there further held that such a statute is not retroactive in its operation, but rather relates to and controls the action of the insured at the time of its exercise. We are aware that cases may be found holding a contrary doctrine, but they are not in harmony with the reasoning in the Caldwell Case.

[2] We conclude, therefore, that the act in question applies to all designations made after it went into effect, and that, the beneficiary here named by the insured not being one of the class named in the act, his selection was in contravention thereof, and therefore void, and that appellant, being the only heir at law of the insured, is entitled to the amount due under the policy.

In view of the conclusion we have reached, it becomes unnecessary to discuss other questions relied on for a reversal of the judgment.

The judgment is reversed.

We concur: LENNON, P. J.; RICHARDS, J.

35 Cal. App. 357

PEOPLE v. BUTLER et al. (Cr. 401.)

(District Court of Appeal, Third District, California. Nov. 21, 1917.)

1. INDICTMENT AND INFORMATION 🔑110(15)—CHARGING IN WORDS OF STATUTES—FRAUD.

To charge in the words of the statute is insufficient for an indictment under Pen. Code, § 72, making it an offense for one, with intent to defraud, to present for allowance or payment to a state, county, or municipal board or officer authorized to allow or pay it, if genuine, a false or fraudulent claim; but the circumstances of the offense must be set out.

2. FALSE PRETENSES 🔑30—INDICTMENT—FRAUDULENT CLAIM TO OFFICERS—KNOWLEDGE.

It is not enough for an indictment under Pen. Code, § 72, for presenting to county supervisors a claim with intent to defraud, to allege the claim was fraudulent, but it must allege or show defendants knew it was fraudulent.

3. FALSE PRETENSES 🔑29—INDICTMENT—FRAUDULENT CLAIM TO OFFICERS—AUTHORITY TO ALLOW.

An indictment under Pen. Code, § 72, for presenting for allowance and payment to county supervisors, with intent to defraud, a claim for roadwork, fraudulent in that it claimed for more work than was done, should allege authority to do work on the road was given by one authorized to incur a claim against a county, to show that the claim, if genuine, was one the supervisors would be authorized to allow.

4. FALSE PRETENSES 🔑30—INDICTMENT—FALSE CLAIM—PARTIAL INVALIDITY.

An indictment under Pen. Code, § 72, for presenting to county supervisors with intent to defraud a claim for roadwork containing two items, one for work by defendant, the other for work by another, each for more days work than either had performed, is bad in toto, being bad as to the item of work by the other; defendant's knowledge of the falsity thereof not being alleged.

Appeal from Superior Court, Sonoma County; Emmet Seawell, Judge.

Charles H. Butler and C. L. Patteson were indicted. Demurrer to the indictment was sustained, and the People appeal. Affirmed.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People. J. R. Leppo, of Santa Rosa, for respondents.

CHIPMAN, P. J. Defendants were jointly indicted by the grand jury of Sonoma county for the violation of section 72 of the Penal Code. There are four separate counts in the indictment, and the charging matter or body of the indictment is substantially identical in each count, excepting the amounts therein named. The charging part of the indictment, as set forth in the first count, is as follows:

"That the said Charles H. Butler and C. L. Patteson on or about the 4th day of May, 1916, and in the said county of Sonoma, state of California, did willfully and unlawfully and feloniously, with intent to defraud, and with the intent to defraud Sonoma county, present for allowance and payment to the board of supervisors of Sonoma county, who were then and there duly authorized to allow and pay the same, if genuine, a false and fraudulent claim, bill, account, voucher, and writing, and which said claim was in writing, and was a demand of Charles H. Butler on the treasury of the county of Sonoma, state of California, for the sum of $124.50 for roadwork performed on the public roads in Mendocino road district in said Sonoma county during the month of April, 1916, and which said demand purported to be for roadwork upon the public roads in said road district performed at the request and pursuant to the direction therefor by Charles H. Butler, who was then and there, and at all times herein mentioned, the roadmaster of said road district and the employé, agent, and servant of said C. L. Patteson, as supervisor, and said Patteson was then and there and at all times herein mentioned the duly elected, qualified, and acting supervisor of the fourth supervisorial district of Sonoma county, in which said road district was and is located; that said claim and demand was itemized and gave names, dates, and services rendered, and character of work done, number of days engaged, and price per day of the services of each man employed in the performance of said roadwork for which said demand and bill was presented, and that said claim was duly verified to be correct by the affidavit of Charles H. Butler, and annexed thereto in writing, in and by which said oath said Charles H. Butler, after being first duly sworn, deposed and said that the work mentioned in said claim was of the nature and was performed by the persons and at the time specified therein in each case, and no part thereof had been paid, and that said labor was performed under his direction as timekeeper, and that the report thereof covered all work performed under his direction for the time covered by the said claim, and that each of the claims within said demand and claim was presented within one year after the last item thereof accrued, and which said oath was on the 4th day of May, 1916, duly subscribed and taken before the said C. L. Patteson, as such supervisor, who then and there attached his name thereto as said supervisor together with a statement that the said oath was subscribed and sworn to before him, the said C. L. Patteson, the 4th day of May, 1914.

"That in truth and in fact said claim which was then and there so presented to said board of supervisors was false and fraudulent in this, that it contained an item for nine days' labor by said Charles H. Butler with a team and wagon at the rate of $4.50 per day, at the price of $2.50 a day for the labor of said Charles H. Butler, and at the price of $2 a day for his team and wagon, when in truth and in fact said team and wagon were not, during the said month of April, employed in roadwork, and did not, during said time, perform any roadwork in said district as set forth in said claim or at all, and the charge of $2 a day for nine days for said team amounting to $18, and being a part of the total sum of $124.50 for which said claim was presented, was false and fraudulent, and, that said demand and claim also contained an item for six days' labor by L. Kelley and a wagon at the rate of $4 per day, amounting to $24, and which said item was false and fraudulent, in this, that in fact said L. Kelley was so employed by himself and team and wagon for four days only during the month of April. 1916, and that the said charge on account of the services of L. Kelley was for two days in excess of the amount of labor so performed by him and for the sum of $8 in excess of the amount due on account of labor and services performed by said L. Kelley.

"That said claim so made out was filed with the clerk of the board of supervisors three days prior to the time of the meeting of said board of supervisors, at which said board of supervisors was asked to allow the said claim, and the said claim was allowed by the said board of supervisors on the 9th day of May, 1916, at a regular meeting of said board, and ordered to be paid out of the road fund of the said Mendocino road district, and all work for which said demand and claim purported to be presented, purported to have been performed under the direction and supervision of the said Charles H. Butler, who was then and there the timekeeper and roadmaster of said road district; that said L. Kelley before the presentation and filing of said claim as aforesaid by an instrument in writing duly transferred and assigned and delivered to said Charles H. Butler his claim against Sonoma county for all services performed in Mendocino road district by him between the 1st day of April, 1916, and the 1st day of May, 1916, and appointed said Charles H. Butler as his attorney in fact to present his claim and to collect and receipt for the same—contrary to the form," etc.

Section 72 of the Penal Code is as follows:

"Every person who, with intent to defraud, presents for allowance or for payment to any state board or officer, or to any county, town, city, ward, or village board or officer, authorized to allow or pay the same if genuine, any false or fraudulent claim, bill, account, voucher, or writing, is guilty of felony."

The defendants interposed a demurrer to each count of the indictment on various grounds, general and specific, and on which it was alleged in the demurrer that the indictment does not specifically conform to the requirements of sections 950, 951, 952, and 954 of the Penal Code, or to either of said sections; that the facts stated in said indictment do not constitute a public offense; that neither of said counts contains a statement of the acts constituting the alleged offense in ordinary and concise language or in such manner as to enable a person of common understanding to know what is intended thereby; nor is either of said counts direct or certain in its terms regarding the offense; nor is either of said counts certain or direct "as regards the particular circumstances of the offense." The demurrer also sets forth a number of matters alleged to be essential to a good indictment which are not stated or alleged in any of said counts. The demurrer also sets forth a number of matters and things as to which each count of the indictment is uncertain.

After argument and submission of the demurrer, the court made the following order:

> "It is the order of the court that the demurrer be sustained to each and every count of the indictment. The court directs the case to be submitted to the present grand jury. This matter has been a long drawn out affair, brought about by events over which no one had control. The court suggests that the grand jury be convened at once, and this matter presented to them in order that it may be determined."

[1-3] The district attorney took exception to the ruling of the court sustaining the demurrer "and the ruling made by the court in connection therewith," and gave notice of appeal therefrom. By request of the district attorney and order of the court, the phonographic reporter transcribed, among other documents, those portions of the notes taken of the oral opinion pronounced by the court "embodying the decision and opinion of said court sustaining the demurrer of defendants to the indictment." As we find ourselves in agreement with the learned trial judge, we take the liberty of quoting certain parts of his opinion:

> "The claim has been made that the indictment does not state a criminal offense. That is one matter that attracted my attention upon the first reading of the indictment, and that has been with the court a very grave question for consideration. Whatever ruling the court makes upon this indictment is not made upon technical grounds. It is based on what I understand to be broad and substantial grounds, as defined by the courts of California and of all of the states of the Union.
>
> "It is established beyond controversy, in the case of People against Mahony, 145 Cal. 104 [78 Pac. 354], that in an attempt to charge an offense under section 72 of the Penal Code of this state, it is not sufficient that you allege it in the language of the statute. Being in line with all cases in which fraud and deceit is involved, there must be a statement of the facts, and from such statement of facts an inference or a conclusion must be reached which is, of course, a question of law. In the case of People v. Carolan, 71 Cal. 195 [12 Pac. 52], our Supreme Court held it was sufficient to charge the offense in the language of the statute. In the later Mahony Case Justice Angellotti, writing the opinion, held that it was not sufficient to charge in the language of the statute, but that the circumstances of the offense must be set out. That, of course, has been the law ever since, and it is the law to-day.
>
> "The particular matter that suggested itself to the court as possibly being sufficient is this: 'That the said Charles H. Butler and C. L. Patteson on or about the 4th day of May, 1916, and in the said county of Sonoma, state of California, did willfully and unlawfully and feloniously, with intent to defraud, and with the intent to defraud Sonoma county'— To stop there would be pleading the offense in the language of the statute, but the pleader goes on and undertakes to set up the particular acts which constitute the crime. In the transaction is brought a man by the name of Kelley, and who, I presume or assume, was acting under authority of Mr. Patteson, the supervisor, although that is not positively alleged, that he was acting under authority and by direction of either Butler or Patteson, as supervisors. There is no allegation that Patteson or Butler knew the claims presented to the board of supervisors were false and fraudulent. That, in my judgment, is absolutely essential. I have taken notice of all of the indictments of all the states that I have examined where the language is very much like ours. In some states the statute includes the word 'knowingly.' In our statute the word 'knowingly' is not set out. In this indictment it is simply alleged that Patteson and Butler both presented a claim to the board of supervisors, which claim was fraudulent. That would not be an offense. They must have the knowledge of the fraudulency of the claim or demand. That is elementary, and that is the matter that has been uppermost in my mind since I first heard this indictment read about two weeks ago. I think that is fatal. I am satisfied it is fatal.
>
> "The next defect in the indictment is that this work was done on the public highway. Of course, it would not be any crime for a man to do work on the public highway in front of his house and present a claim to the board of supervisors and ask for the payment of that claim. The decisions have repeatedly held, and the statute itself is sufficient on the subject, that the claim must be such a claim as, if genuine, would be authorized to be paid under the law and be such a claim as the board of supervisors could pay. In other words, if I were to present a claim for bounty on squirrels, and there is no ordinance of the board of supervisors authorizing the payment of such bounty, that would not be a criminal offense under the statute. Some of these questions have been passed on so often that it is hardly necessary to enumerate them, but I do so in going through this matter briefly, if not as thoroughly as I would like to.
>
> "There should be an allegation in the indictment that Butler and Kelley, who also, it would seem, did work upon the highway, were acting under the authority of Patteson, who is the supervisor, and were authorized to incur a claim against the county. In my judgment, those two points are unanswerable and controlling in this case.
>
> "In reference to section 72 of the Penal Code, there have been but three cases that have gone to the Supreme Court of our state. One is The People against Carolan, in the 71st California. The next is People against Mahony, in the 145th California; and the next is People against Lantorman, 9th California Appellate, 675 [100 Pac. 720]. Dr. Lantorman was the coroner of the county of Los Angeles. That case was reversed after conviction. It was reversed on the ground of failure to state an offense. It was permissible under the law of the state for the coroner to collect his necessary traveling expenses when traveling without the county. He filed his claim for $8.40, which, I infer from the decision, was perhaps morally an illegal claim, and should have been disallowed. Whatever that particular fact may be, it is not important here. This was the point: He filed, as a private citizen, a claim for necessary traveling expenses without the county. He did not state, nor was it shown in the indictment, that he was the coroner of Los Angeles county. Justice Shaw, writing the deci-

sion for the Second Appellate District, held that that was a necessary allegation, and the board of supervisors could not legally pay the claim unless it was presented in the name of Dr. Lantorman as coroner of Los Angeles county, and the case was reversed after conviction.

"In the Mahony Case, the court sustained the demurrer to an indictment similar to this, and the people appealed. Justice Angellotti, writing the opinion of the court, affirmed the decision of the lower court, and held that the indictment did not conform to the rules, as they conceived them to be, governing questions of fraud. The Carolan decision was reversed; the court simply remarking that it was decided without full consideration."

[4] The court then takes up the question whether, under existing statutes, the indictment was amendable, and reaches the conclusion that it is not, and hence ordered the matter resubmitted to the grand jury. The court then renews the discussion of the subject as follows:

"There are other objections made to the indictment. I assume that the indictment was prepared, as many of them are, in haste. There are a number of allegations in the indictment that are stated rather by way of recital which should be positively averred. The clearest language should be selected. It should appear beyond question that an offense has been committed, and that the acts upon which the prosecution rely are clearly and positively stated. Otherwise they amount to nothing more than recitals. I appreciate that it is no easy matter to draw an indictment under section 72 of the Penal Code of this state. It is the most difficult section to comply with that can be found in all the Code. There cannot be any doubt about that. It is not so difficult to draw an indictment involving ordinary allegations of fraud, but to meet the objections and the rules and the decisions that we find flying in our faces, under this section, it is not an easy undertaking.

"There is a decision in which this section of the Code was discussed found in People v. Howard, 135 Cal. 266 [67 Pac. 148]. Instead of proceeding under section 72, the people there proceeded under the section defining false pretenses, section 532. It was a case of bounty on squirrels killed in Tulare county. The board of supervisors of Tulare county in the presentation of claims by its ordinance required that the claimant accompany his claim with the squirrels' tails. The defendant in that case, with another, presented a claim of 12,000 squirrels killed in Alameda county. Before the board paid the claim, the fraud was discovered. The point was made that the ordinance under which the board acted in authorizing the payment of a bounty on squirrels' tails was invalid. The same authorities here cited were invoked by the defendant in the bounty case, and it was insisted that those authorities applied to false pretenses. Justice Chipman distinguished the two, and said 'No.' He said the defendant, if he did present the squirrels' tails, was guilty of the offense with which he was charged. Why? Because it was an attempt to commit a fraud; it did not matter whether the ordinance was valid or not, if a man attempted to get money by a fraudulent transaction. He decided that the section was broad enough to cover the question of fraud, and the judgment was affirmed.

"But, when we come to section 72, then a different question arises, as is very evident from a reading of the section: 'Every person who, with intent to defraud, presents for allowance or for payment to any state board or officer, or to any county, town, city, ward, or village board or officer, authorized to allow or pay the same if genuine'—'to pay the same if genuine.' If the squirrel tail man had been arrested and proceeded against under section 72, he would have been acquitted because the ordinance was invalid; the board of supervisors would have been charged with the knowledge of its invalidity, and it would have been held to have been an improper claim in that case. Therefore he could not have been held under that section. The defendant was properly held under section 532, because he attempted to get money by fraud as defined by section 532, Penal Code.

"It will be noted, upon a reading of the indictment, so far as Kelley is concerned, that there is no allegation that Butler, under whom, presumably, he was working, knew that the claim handed to him (Butler) or made out by Kelley was false. For instance, I am working on the road; I go to the roadmaster, as we commonly call him—he is no longer roadmaster, however, but that is immaterial—and say, 'I have worked seven days;' I make affidavit to it, and do whatever else is necessary to collect the money; he takes it and he says, 'All right;' and he presents it to the county. As a matter of fact, I have only worked two days. He cannot be convicted, of course, without knowledge of such fraud; no one will contend otherwise; he is guilty of no offense unless he knew that I only worked two ways. It does not require a citation of authorities to establish such an elementary principle of law. It is but common sense.

"There is an allegation in the indictment that Butler himself put in a false claim, claiming to have worked more days than he actually worked. I think that would be a good allegation against Butler if the Kelley allegation was not there, for this reason: We are confronted with the well-recognized rule that, while Butler may be prosecuted for what he did, could you say under such an indictment, in the event of conviction, whether the conviction was had under the claim that he presented and which he knew was false because he presented it, or whether he was convicted for the presentation of the Kelley claim, of which he had no knowledge as to its falsity? This rule has been enunciated in this one case I have already cited as the leading case, in the 121 U. S. Supreme Court Reports, written by Justice Miller. That was a case where the Revised Statutes of the United States made it a high misdemeanor for any bank officer to make or cause to be made to the bank officers any false report, and so on and so forth, of its finances and standing, etc. The cashier of that bank made a false report. The very next section of the Revised Statutes required the officer of the bank, or the bank itself, to make a report to the Comptroller of Currency. It was made no crime to make a false report to the Comptroller of Currency. The indictment charged that the bank cashier made a false report to the officers and to the Comptroller of Currency. The court amended the indictment by striking out 'to the Comptroller of Currency,' and let it stand so far as the bank was concerned. The Supreme Court of the United States said the lower court could not do it. Of course, the United States procedure is by indictment only. The court said it could not tell which act he was convicted for; he was just as likely to have been convicted for making a false report to the Comptroller of Currency, which was not an offense, as for the commission of the actual offense."

In his points and authorities the Attorney General insists that he is supported by People v. Carolan, 71 Cal. 196, 12 Pac. 52, in his contention that an indictment charging the offense in the language of the statute is sufficient. In People v. Mahony, 145 Cal. 108, 78 Pac. 354, the court said:

"The Attorney General, in support of this indictment, relies almost entirely upon the decision of this court in department in People v. Carolan.

71 Cal. 195, 12 Pac. 52. The question here involved received little consideration in the opinion in that case, being disposed of by the simple statement that the indictment was sufficient, charging the offense, as it did, in the language of section 72 of the Penal Code. No authority was cited in support of this conclusion, and so much of the record of that case as is now accessible indicates that no authorities therein were cited to the court. The conclusion therein reached is so opposed to later decisions rendered by this court in bank, and also to fundamental principles recognized by the decisions generally, that it cannot be now accepted as authority."

The point urged by respondents is not that the indictment should charge that the claim was "knowingly" presented, but—

"that in pleading or charging actionable or criminal fraud it must appear that the accused knew that the alleged act or misrepresentation was false or fraudulent. This knowledge is always the very gist and essence of the crime charged, unless in those cases where the act or statement was done or made recklessly, and without any knowledge of its truth or falsity."

As to the necessity to good pleading to allege the facts constituting the fraud, the Supreme Court, in People v. McKenna, 81 Cal. 158, 22 Pac. 488, had this to say:

"In civil cases the rule is, as stated by Mr. Justice Temple, that the plaintiff is not required 'to allege with minuteness all the particulars and circumstances which constitute the evidence of the alleged fraud, but he must make the charge with sufficient distinctness to enable his adversary to come prepared with his evidence upon the general questions of fraud which will be raised.' * * * The question whether a thing has been done fraudulently is a matter of law, and an allegation of fraud in general terms presents no issuable fact. * * * Where no facts are averred, no facts are admitted. * * *

"It is said by Mr. Bishop that 'to charge simply in the statutory words that the thing was obtained by fraud and pretense is not adequate.' * * *

"Mr. Wharton says an information charging simply that the defendant obtained goods by false pretenses 'would be scouted out of court.' * * *

"As said in United States v. Watkins, 3 Cranch, C. C. 441 [Fed. Cas. No. 16,649]: 'Fraud is an inference of law from certain facts, and the indictment must aver all the facts which constitute the fraud; * * * to aver that an act was fraudulently done is, therefore, to aver a matter of law, and not * * * of fact.'

"It is a sound principle that an indictment charging fraud of any kind should aver with particularity the facts relied upon to show fraud."

Touching the argument of the Attorney General that the indictment sufficiently charges an offense in presenting a false claim, as distinguished from a "false and fraudulent claim," the Supreme Court, in People v. Mahony, supra, said:

"It is unnecessary to determine whether the allegation that the claim was 'false' as well as fraudulent adds anything to the indictment. The particular objection that we are considering is not that the indictment does not state facts constituting a public offense, but that it does not conform to the requirements of sections 950, 951, and 952 of the Penal Code, in that it does not sufficiently set forth 'the acts constituting the offense,' and 'the particular circumstances of the offense charged,' so as to enable the defendant to know what was the precise charge against him and to prepare his defense thereto.

"Being advised by the indictment that the people charge that the claim was fraudulent as well as false, even if there be any distinction between these terms as used in connection with a claim such as is set forth in such indictment, he is certainly entitled upon objection made by demurrer to know with reasonable certainty the facts relied upon by the people as constituting the alleged fraud."

In reply to the contention of the Attorney General that it was sufficient to charge that the defendant presented the claim "with intent to defraud," since, as is contended, the clause "with intent to defraud" is the equivalent of the omitted necessary allegation that the defendants had knowledge that the claims were false and fraudulent, respondents make what we regard as sufficient answer to this contention. Says the brief:

"There are two answers to this contention. The first is that in order to constitute fraud there must be both an intent to defraud and a knowledge of the false and fraudulent character of the act or statement, and the allegation of one will not supply the other. The second answer is that the Supreme Court held in the Mahony Case, in accordance with the general rule, that the presence of the 'intent to defraud' was not sufficient, and that the facts constituting the false and fraudulent character of the act charged must be alleged. It will be remembered that in the Mahony indictment it was charged that the defendants committed the act with 'intent to defraud,' and yet the indictment was held fatally defective. If the mere allegation that the alleged act was done with 'intent to defraud' was sufficient, it would be equivalent to holding that an indictment in the language of the statute is sufficient; and this our Supreme Court has declared is not sufficient."

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

35 Cal. App. 350

PEOPLE v. BOJORQUEZ. (Cr. 392.)

(District Court of Appeal, Third District, California. Nov. 21, 1917.)

1. Criminal Law 🔑1159(2)—Verdict—Conclusiveness.

In a prosecution for embezzlement, the jury were not bound to believe the testimony of defendant as to his intent to steal a horse and rig at the time he hired it; and where there was sufficient evidence to justify a finding that his intention to embezzle the property was formed after it came into his possession as bailee, the finding was conclusive.

2. Criminal Law 🔑1186(4) — Appeal — Harmless Error—Instructions.

In a prosecution for embezzlement, an instruction that, if defendant testified, his credibility was subject to the same test as that applied to other witnesses, and that in determining the credibility of a witness' testimony the jury might consider his interest in the result of prosecution, his demeanor and conduct while testifying, and that he had been contradicted, and might entirely disregard his testimony if he had testified falsely to any material fact, was not prejudicial, in view of Const. art. 6, § 4½, forbidding new trials, except for prejudicial error.

3. Criminal Law 🔑811(6)—Instruction—Consequences of Verdict.

An instruction that the jury should not be guided by the consequences of their verdict, but were to determine defendant's guilt or innocence according to the law and the evidence, was not objectionable as directing the jury's attention to the testimony of defendant, or requiring the jury to view it with caution.

4. Criminal Law 🔑782(1) — Instruction — Sympathy.

An instruction that, although the jury might sympathize with those who suffered, they were bound by oath to administer judgment according to the law and the evidence, and should not act upon their sympathies or sentiment, was not objectionable.

5. Criminal Law 🔑815(5) — Instruction — Intent.

In a prosecution for embezzlement, wherein defendant testified that he had formed the intent to steal the horse and rig before he hired it, instructions distinguishing between larceny and embezzlement were not objectionable as ignoring such defense.

6. Criminal Law 🔑1172(6)—Instruction—Effect of Intoxication.

Where there was some testimony as to defendant's sobriety at the time, an instruction upon intoxication as being no defense to the commission of crime, though not called for, was harmless.

7. Criminal Law 🔑829(1)—Requested Instruction—Given Instruction.

The striking out of parts of defendant's requested instruction was not error, where the court in a previous instruction had substantially covered the matter stricken.

8. Criminal Law 🔑1130(3) — Appeal — Assignment of Error—Sufficiency.

A brief calling attention to the cross-examination of defendant, and to the objections thereto contained on "pages 53," etc., mentioning consecutively the pages to 79, inclusive, was not sufficient to require consideration.

9. Witnesses 🔑337(1) — Impeachment — Predicate.

In a prosecution for embezzlement, wherein defendant testified that he intended to steal the horse and rig when he hired it, which, if believed, would have required an acquittal, it was proper for the prosecuting attorney to impeach defendant.

10. Criminal Law 🔑1137(5) — Evidence — Former Conviction.

Defendant, having invited proof as to whether he had been previously convicted of a felony, had no cause to complain of a question by the district attorney as to a former conviction.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

William Bojorquez was convicted of embezzlement, and from the judgment of conviction, and from an order denying his motion for a new trial, he appeals. Judgment and order affirmed.

Terry W. Ward and L. J. Schino, both of Merced, for appellant. U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

CHIPMAN, P. J. Defendant was convicted of the crime of embezzlement. He appeals from the judgment of conviction and from the order denying his motion for a new trial. There is no dispute as to the principal facts in the case. The sole question presented as to the evidence is: Did it establish the crime of larceny and not that of embezzlement?

[1] Briefly, the evidence was that on the afternoon of December 14, 1916, defendant went to the livery stable of the prosecuting witness, one Silverose, in the city of Merced, and stated to him that his name was Miles and that he wanted to hire a horse and buggy to go to Atwater, a short distance from Merced. Silverose rented the rig to defendant, upon defendant's promise to return the property that evening, for the charge of $1.50. Not having returned the property as promised, Silverose began inquiry the next day, and on December 26, 1916, located it at the livery stable of one Watson, at Livingston, in the county of Merced, to whom defendant had sold it. Defendant testified that he conceived the intention of stealing the property before he went to Silverose's stable. It is stated in his brief:

> "He practically admitted the taking and carrying away of the outfit and the sale and disposition of the same to Watson, but contended exclusively that he had formed this original intent to secure the possession of the personal property prior and at the time of the removal of the same from the barn at Merced."

The jury were not bound to believe the testimony of defendant as to his intent at the time he rented the property. There was sufficient evidence from which the jury were justified in finding that defendant's intention was to embezzle the property, and was formed after it came into his possession under the agreement that it was rented, thereby making him simply a bailee. The implied finding of the jury upon this point is conclusive. People v. Crane, 168 Pac. 377.

[2] Prejudicial error is claimed of the following instruction:

> "You are instructed as a matter of law that when the defendant testifies as a witness in the case he becomes the same as any witness, and his credibility is to be tested by and subjected to the same test which legally applies to any other witness; and in determining the degree of credibility that shall be accorded to the testimony of any witness, you have a right to take into consideration the fact that he is interested in the result of the prosecution, as well as his demeanor and conduct upon the witness stand, and during the trial, and you may also take into consideration the fact, if such is the fact, that he has been contradicted by other witnesses; and if you find after considering all the evidence in this case that any witness has willfully and corruptly testified falsely to any material fact, you have a right to entirely disregard his testimony, excepting so far as his testimony is corroborated by other credible evidence."

An instruction of this character is commented upon in People v. Bartol, 24 Cal. App. 659, 666, 142 Pac. 510, and was held not prejudicial. We think the opinion in that case sufficiently disposes of the objection now urged. Section 4½, article 6, of the constitution, has materially restricted the power of the court to grant new trials since the decision in People v. Maughs, 149 Cal. 262, 86 Pac. 187.

[3] An instruction was given which, in effect, told the jury that they were not to be guided in arriving at a verdict by "the consequences to ensue, should you arrive at a particular conclusion. You are to determine the fact of the guilt or innocence of the accused according to your deliberate conviction and the law has settled what the effect of that fact shall be." We do not think this instruction "directs the jury's attention to the testimony of the defendant * * * and to view his evidence with caution," etc., as is urged. The instruction bears no such construction.

[4] We discover no objection to the following instruction:

> "You are further instructed that, although as men you may sympathize with those who suffer, yet as honest men, bound by oath to administer judgment according to law and evidence, you should not act upon your sympathies without any proof; mercy does not belong to you. No question of mercy, sentiment, or anything else resides with you, except the question of whether or not you believe from the evidence, and beyond a reasonable doubt, that the defendant is guilty."

[5] The court gave the following instructions:

> "I instruct you that in the state of California embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted; also every person intrusted with property as a bailee who fraudulently converts the same or the proceeds thereof to his own use is guilty of embezzlement. I instruct you that if you find from all the evidence that the defendant hired the personal property described in the information from J. V. Silverose, that he thereupon became a bailee of the property thus hired.
>
> "The distinction between larceny and embezzlement is that in larceny the guilty party does not have the lawful possession of the property and in embezzlement the guilty party has the lawful possession of the property."

It is urged that these instructions do not correctly state the law as applicable to the evidence in this case, as they ignore the defense that defendant formed the intent to steal the property before he hired it or became bailee. Had the court failed to instruct the jury further upon the distinction between larceny and embezzlement as applicable to the evidence, and particularly the testimony of defendant that he intended to steal the property at the time when it was placed in his custody, the instruction would be open to criticism. A person may hire a horse and become a bailee, and at the same time all the facts taken into consideration, a case of larceny might be made out. People v. Smith, 23 Cal. 280. But the court, at defendant's request, we think made the point quite clear to the jury by the following instruction:

> "There is a crime known to the law as larceny. It is a crime very similar to embezzlement, yet it is entirely distinct and different from embezzlement. Larceny is the felonious stealing, taking, carrying, leading, or driving away the personal property of another. Embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted. The difference between the crime of larceny and the crime of embezzlement is this: In larceny the person taking and driving away the property of another must have, at the time he takes and drives away such property, the intent then and there to steal such property. In embezzlement there must be no intent to steal at the time the person takes and drives away the property, but the person must have come into lawful possession of such property and thereafter formed the intent to fraudulently convert it to his own use. When a person intends from the beginning to steal, and does steal, the crime is larceny, and not embezzlement. Therefore I instruct you that if, in this case, the defendant had, at the very time he took and drove away the property described in the information, an intent to steal and did steal it, that he is not guilty of embezzlement, and your verdict in that event, and if you should find the fact so to be, should be not guilty."

[6] The court gave an instruction upon intoxication or drunkenness as forming no defense for the commission of crime. The objection seems to be that it was wholly unnecessary. There was some testimony as to defendant's condition in respect of sobriety at the time. We do not think that this feature of the case became material or called for an instruction. However, the instruction was harmless.

[7] At defendant's request, the court instructed the jury as follows:

> "A person accused of a crime is not compelled to testify at the trial of the case. The law permits him to remain silent, and if he does elect to remain silent, that circumstance cannot be used against him, nor alluded to upon the trial. However, in this case, the defendant has voluntarily gone upon the witness stand and has testified in his own behalf."

The court struck out what followed. This was not error, for the court had in a previous instruction substantially given an instruction covering the matter stricken out.

[8] Attention is called in defendant's brief to the cross-examination of defendant, and "to the several objections made to the questions propounded by the district attorney to the defendant while upon the witness stand in his own defense. They are contained," says the brief, "on pages 53," etc., mentioning consecutively the pages to page 79, inclusive. Such designation of alleged errors is not sufficient to require the reviewing court to consider them.

[9, 10] It is stated in the brief that:

> "The questions propounded by the district attorney as to whether or not the defendant had theretofore been convicted of a felony were highly improper and prejudicial to his substantial rights."

It is further suggested that the testimony given by the defendant was substantially the same as that given by the prosecuting witness, and, as there was no conflict, "there was no necessity for the impeachment of the defendant." As to this latter statement, defendant overlooks the fact that he testified to his intention to steal the property at the time he received it. If the jury had believed him, the verdict must have been not guilty. It was quite within the right, if it was not the duty, of the prosecuting attorney to meet this statement by the impeachment of the defendant. An examination of the record shows that most of the matters complained of in the pages mentioned are recorded on pages 63 to 69, and occurred out of the hearing of the jury and while they were temporarily excused. The jury being called into court, the defendant was asked as to whether or not he had been previously convicted of a felony, and admitted it to be a fact. It was also brought out upon the challenge of defendant's counsel that defendant had been convicted of a felony on more than one occasion. Defendant having invited the proof of a second felony, he has no cause for complaint. Besides, we see no reason why, for purposes of impeachment, the prosecuting attorney should be limited to inquiry as to one felony.

The judgment and the order are affirmed.

I concur: BURNETT, J.

HART, J. (concurring). I concur in the judgment and in all that is said in the opinion of the Presiding Justice, but I desire to reiterate disapproval of the instruction first considered, in which the court told the jury that, when a defendant testifies as a witness, the jury may, in determining the weight to be attached to his testimony take into consideration "the fact that he is interested in the result of the prosecution," etc. A similar instruction has been severely condemned by the courts of this state, and I think justly so. See People v. Maughs, 149 Cal. 253, 262, 86 Pac. 187; People v. Bartol, 24 Cal. App. 659, 666, 142 Pac. 510; People v. Borrego, 7 Cal. App. 613, 95 Pac. 381. And the instruction is no less objectionable now than prior to the adoption into the Constitution of the provision (section 4½, art. 6) that no judgment shall be set aside, or new trial granted, in any case, on any of certain indicated grounds, "unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." While the instruction in this case is not quite as objectionable as the one denounced in the Maughs Case, its vice, as is pointed out in the Bartol Case, is "in calling particular attention to the testimony of the defendant," whose interest in the result of the prosecution is obviously more deep-seated than could be that of any ordinary witness. The danger lurking in such an instruction lies in the probability that the jury may infer that the judge, having, out of all the testimony received in the case, selected that of the defendant for such special consideration in his statement of the law to them, is of the opinion that whatever the defendant may testify to in support of his defense should, because of his position in the case, be viewed with suspicion. The instruction should never be given in any case.

The section of the Constitution above referred to has, since its adoption, rescued many cases from reversal; but it clearly never was designed to change or modify the rules of evidence, or to make good that which has always properly been held to be bad in instructions to juries as to the principles of law which are intended for their guidance in deciding questions of fact. There is, therefore, no less reason now for the strict observance of the rules of pleading, evidence, or instructions, or of any other of the requisites of procedural law in the trial of cases, than there was before the introduction of the provision mentioned into the organic law. Indeed, it is by no means inconceivable that criminal cases may arise which are found to be beyond the reach of the saving grace—the broad and comprehensive mercy—of section 4½ of article 6 of the Constitution, for the sole reason that such an instruction as the one under consideration is given. In a very close case upon the facts, a reversal for the reason stated might be required.

Thus I have written, not so much because of the present case, which appears to have been, generally speaking, well and fairly tried, but mainly because I believe that, at least so far as criminal cases are concerned, the proposition cannot be too often stated that, while no case should be reversed for trivial, unsubstantial, technical errors, still the legal rights of an accused should be, in the trial, just as carefully guarded and preserved now (as the law intends they shall be) as they were prior to the adoption of the section of the Constitution above named, and that, therefore, the condemnation of instructions or rulings upon evidence by the courts of last resort should in the trial of such cases be no less heeded now than before said provision was adopted by the people.

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35 Cal. App. 341

Ex parte GOLDIE. (Cr. 417.)

(District Court of Appeal, Third District, California. Nov. 19, 1917.)

HABEAS CORPUS 🔑38—USERS OF DRUGS—RELEASE FROM HOSPITAL—REMEDIES.

Pol. Code, § 2185c, relating to commitments of persons so far addicted to the intemperate use of narcotics as to have lost the power of self-control, provides that the court shall commit such person for a definite period, not to exceed two years, but provided that he may be paroled by the medical superintendent under the same rules and conditions that the insane are paroled, and that the state commission in lunacy shall be given the same power to discharge any person committed under this act as contained in section 2189 of the Political Code, upon the recommendation of the hospital superintendent, when satisfied that such person will not receive substantial benefit from further hospital treatment. Section 2189, as amended by St. 1915, p. 568, provides for discharge of insane persons whether the superintendent of the hospital so recommends or not, and authorizes, when he does not recommend, that insane person have a hearing before a jury as to the fact of his recovery. *Held* that, as section 2185c provides for release only on parol by the medical superintendent or by the lunacy commission on recommendation of the superintendent, no specific remedy is provided for one committed for excessive use of drugs when the superintendent does not recommend release, and therefore the writ of habeas corpus is open to such a person.

Habeas corpus on the application of Esther Goldie, wherein the Attorney General imposed a demurrer. Demurrer overruled.

E. L. Webber, of Napa, for petitioner. U. S. Webb, Atty. Gen., and Robt. T. McKisick, Deputy Atty. Gen., for respondent.

CHIPMAN, P. J. It appears from the petition that petitioner was on June 21, 1917, committed to the Napa State Hospital for the insane for the term of one year upon the charge laid under section 2185c of the Political Code that she was at that time addicted to the use of narcotics and drugs. It is alleged that petitioner "has entirely recovered and been cured of the use of narcotics and drugs," and that she is now being held in said institution "because of the fact that she is suffering from some blood trouble which, even if true, would not entitle the said medical superintendent to detain or restrain said Esther Goldie of her liberty."

A general demurrer was filed by the Attorney General, as also a return to the petition. The point raised by the demurrer is that petitioner has failed to pursue the proper remedy provided by law, that the statute relating to matters of this kind provides a special procedure for the patient, which is the only remedy permitted her by statute to gain her freedom, and, not having followed those provisions, she is not entitled at this time to be heard in this court upon the petition now pending, and that petitioner must first exhaust the specific remedy prescribed by law before she can invoke the assistance of habeas corpus. Reliance is placed upon section 2189 of the Political Code as amended in 1915 (Stats. 1915, p. 568).

Section 2189 deals exclusively with the insane, and provides the method by which persons committed for insanity may be discharged. Section 2185c relates entirely "to persons so far addicted to the intemperate use of narcotics or stimulants as to have lost the power of self-control or is subject to dipsomania or inebriety," etc. The concluding paragraph of section 2185c reads as follows:

> "The court shall commit such person for a definite period, not to exceed two years, but provided that he may be paroled by the medical superintendent under the same rules and conditions that the insane are paroled; and provided, further, that the state commission in lunacy shall be given the same power to discharge any person committed under this act as contained in section 2189 of the Political Code, upon the recommendation of the hospital superintendent, when satisfied that such person will not receive substantial benefit from further hospital treatment."

Turning to section 2189, we find provisions for the discharge of insane persons as well when the superintendent of the hospital is unwilling as when willing. When unwilling, the person insane may have a hearing before a jury as to the fact of his recovery. It provides for no other class of patients. It will be observed that the provisions of section 2189 are made applicable to cases arising under section 2185c only in two instances specifically mentioned: First, the person committed may be paroled by the medical superintendent under the same rules that the insane are paroled; second, the state lunacy commission is given the same power to discharge any person "committed under this act as contained in section 2189 of the Political Code, upon recommendation of the hospital superintendent."

Where, however, the patient claims to have recovered from his malady, and the superintendent is unwilling and refuses to discharge him, section 2185c does not specifically or by implication provide that he may proceed in the manner provided as in the case of an insane person claiming recovery under section 2189. The Legislature has either intentionally or inadvertently failed to provide that a person committed for excessive use of narcotics, when claiming to be recovered and is refused a discharge by the superintendent of the hospital, may have this question of fact determined by the method prescribed for the insane in section 2189. Because section 2185c refers to section 2189, and so to say carries the latter section into the former for certain specifically mentioned purposes, it by no means follows that all the provisions of section 2189 are carried into section 2185c, or that the method of procedure provided in section 2189 where an insane person, claiming to have recovered, may have the issue determined by a court sitting with a jury, is made applicable to persons mentioned in section 2185c. It seems to us quite clear that the court cannot extend the meaning of section 2185c beyond its express terms and read into it a method of procedure applicable only to persons committed under the charge of insanity.

It follows that, as the statute has given the petitioner no specific remedy for having the question of her recovery determined, the writ of habeas corpus is open to her. The demurrer therefore is overruled.

It is ordered that Thursday, at 11 o'clock a. m., on the 22d day of November, 1917, at the courtroom of this court be, and the same are, fixed as the time and place for the hearing of said matter on the issues of fact presented by the petition and return.

We concur: HART, J.; BURNETT, J.

35 Cal. App. 332

BEARD v. WEBB, County School Superintendent. (Civ. 1762.)

(District Court of Appeal, Third District, California. Nov. 19, 1917. Rehearing Denied by Supreme Court Jan. 17, 1918.)

MUNICIPAL CORPORATIONS 🔑211—AUTHORITY OF SCHOOL BOARD—HEALTH OF PUPILS.

Under St. 1909, p. 908, § 1, authorizing a board of education to establish health and development supervision in the public schools, and to employ an examining staff and other employés necessary to carry on the work, and Pol. Code, § 1617, subd. 21, authorizing the board to give diligent care to the health and physical education of pupils, and to employ properly certified persons for such work, the board is not limited to employing an examining staff, with the qualifications prescribed for such staff, but may employ an optometrist, without adopting the entire scheme, keeping in view the necessities of the situation and the district's finances.

Petition by George F. Beard for writ of mandate to Caroline M. Webb, County Superintendent of Schools of Sacramento County. Writ issued.

Sheridan Downey and Arthur M. Seymour, both of Sacramento, for petitioner. Lee Gebhart, of Sacramento, for respondent.

BURNETT, J. It appears that petitioner is an optometrist duly qualified and licensed to practice as such under the laws of the state of California; that on March 17, 1916, the board of education of the city of Sacramento employed petitioner as such optometrist, at a salary of $1,600 a year, to examine pupils of the public schools of said city in order to discover any visual defects of said pupils in order that such defects, if existing, might be corrected; that petitioner ever since has been and now is so employed and has fully performed all services required of him by reason of such employment; that respondent during all of said time has been and is now the county superintendent of schools of Sacramento county; that on or about the 28th day of July, 1917, said board of education of the city of Sacramento made its order upon said Caroline M. Webb as such county superintendent to draw her requisition upon the county auditor of said county for the payment of the salary due petitioner for the month of July, 1917, for services performed under said employment, but respondent refused and ever since has refused to draw said requisition; that similar action was taken by said city board of education on August 30th, and September 30, 1917, but respondent likewise refused and still refuses to honor either of said orders for requisitions. The prayer is therefore for a writ of mandate to direct respondent to forthwith draw her requisition on the county auditor for the sum of $399.99 for payment of the salary due petitioner for services performed as such optometrist for the months of July, August, and September, 1917.

The facts are not in dispute. The whole controversy is as to the authority of the city board of education to employ an optometrist to perform such services. The solution of the question depends upon the construction of chapter 598 of the Statutes of 1909 (Stats. 1909, p. 908), being "An act to provide for health and development supervision in the public schools of the state of California" considered in connection with subdivision 21 of section 1617 of the Political Code approved subsequent to the approval of said chapter 598. Section 1 of said act provides:

> "Boards of school trustees and city boards of education are hereby authorized to establish health and development supervision in the public schools of this state, and to employ an examining staff and other employés necessary to carry on said work and to fix the compensation for the same. Whenever practicable the examining staff for health and development supervision in the public schools of the state shall consist of both educators and physicians."

Section 2 enumerates the purposes of supervision, one of them being:

> "To secure the correction of developmental and acquired defects of both pupils and teachers which interfere with health, growth and efficiency, by complete physical examination. Said examinations shall occur annually or as often as may be determined by the board of school trustees or city board of education."

Section 3 provides for the qualifications of the examining staff. The said subdivision of the Political Code authorizes the boards of education "to give diligent care to the health and physical education of pupils and where sufficient funds are provided by district taxation, to employ properly certified persons for such work."

The contention of respondent seems to be: (1) That under said act of 1909 the board of education is empowered to employ only an examining staff consisting of educators and physicians and employés thereof, and that the board has no authority to employ any one else, independently of an educator or physician, to contribute to the health and development of the pupils and teachers of the public schools, although the special work for which such person is employed may be foreign to the services usually and properly performed by an educator or physician; and (2) that a board of education must carry out and execute all the purposes of health work as defined in said act or be precluded from doing any such work at the expense of the district.

In considering the first of these propositions it is to be observed that the statute provides not that "the board is hereby authorized to employ an examining staff and employés," but the adjective "other" precedes the word "employés." According to the established and accepted meaning of the word "other," used as an adjective, we must reach the conclusion that the "examining staff" are employés of the board in the same class as are the other employés contemplated by the statute. In other words, the board of education is not limited to the employment of an examining staff with the authority in that staff to employ assistants to aid in the work, but unless we are to depart from the plain significance of the language employed we must hold that the Legislature has authorized the board to employ an examining staff, and the same authority is conferred to employ other suitable persons to carry out the purposes of the statute. Discretion is vested in the board—and wisely so—to employ an examining staff and other suitable persons if needed or to employ simply an "examining staff" or other persons qualified to contribute to the health and development of the pupils. There is no language in the act, as we understand it, which compels the conclusion that no one can be employed by the board for such purpose except the examining staff. Nor is the employment of such staff an essential prerequisite to the employment of some other person for work which does not naturally fall within the province of an educator or physician. The Legislature has seen fit, it is true, to prescribe the qualifications of the examining board and has omitted to specify the qualifications of "other" persons who may be employed for health supervision. That circumstance, however, does not, we think, militate against the position of petitioner herein. It can readily be understood why some special qualifications might be required of an examining staff having general supervision of the whole range of physical and mental activity and development, and none be prescribed for other employés such as dentists and optometrists whose license under state authority and reputation in their profession would afford sufficient guarantee for faithful and efficient service.

The language of said section of the Political Code also favors the contention of petitioner herein. These acts of the Legislature must, of course, be construed together so as to give effect if possible to both. It was clearly the intention of the Legislature in the enactment of the later statute to provide for the employment of any professional man whose services might be needed to promote the health of the pupils. This statute certainly contemplates the employment of specialists such as dentists and optometrists. But if the qualifications of an examining staff as provided in the other act are to be required, it is easy to be seen that the primary purpose of the law might be defeated, for physicians and educators would not be qualified to do the particular work required for the health of the pupil. Petitioner quite aptly puts it this way:

> "Under respondent's contention if the board of education desires to employ a chemist to determine the purity of the water used in the public schools, a gymnasium instructor to oversee the exercises of the children, an architect to secure healthful ventilation, a janitor to attach a filter to a hydrant in the public school, a dentist to do dental work, or an optometrist to perform his duties, such board of education must restrict itself in choosing the individuals to perform such duties to those possessing the qualifications of an educator or physician as defined in said act."

We think the law is not subject to such reproach as thus indicated. The special statute and the general law may be completely harmonized if we keep in mind the purpose of the Legislature, and then there is no difficulty in reaching the conclusion that the board of education when deemed advisable or necessary for the well-being of the school may employ suitable persons holding proper licenses from the state to do special work that may be required, as in the case before us. There may not be sufficient funds for the employment of an examining staff, or there may be no necessity for such outlay while the demand for dental or optometric attention may be quite urgent, and we think there is no good reason why the law may not be so construed as to meet such situation.

Probably what has been said is a sufficient answer to the second contention, which is closely allied to the first. That the board of education must engage in the whole scheme of health supervision and endeavor to carry out the entire purpose of health activity contemplated by the law or else be precluded from engaging in any health conservation whatever seems quite unreasonable, if not absurd. Of course, there is no provision in the law which requires the board of education to exercise all or none of the power thereby conferred. It must be true that where power is bestowed to perform certain enumerated acts for a certain purpose, and there is no clear intention to restrict the discretion of the agency intrusted with the authority, any of those acts may be performed with equal sanction of the law if it be properly related to the accomplishment of the purpose of the Legislature. It may be said, we think, that the Legislature has defined the limits within which the board of education must exercise authority for the promotion of the health and mental development of the pupils in the public schools, but it has not attempted the vain and foolish thing of providing that if the board is willing or able to do a portion of the work only it is powerless to act at all. The absurd results to which respondent's construction of the law would lead furnish a persuasive reason for rejecting it and adopting the rational view advocated by petitioner.

We think it may be epitomized in conclusion that while the law provides for the employment of an examining board and defines the qualifications of its members, it also authorizes the board of education to employ suitable persons licensed by the state to do special work for the purpose of promoting the health and efficiency of the pupils, that discretion is vested in the board of education to adopt the entire scheme provided in said law or only a portion of it, keeping in view the necessities of the situation and the financial ability of the district and the commendable and useful purpose of the law, and that nothing has been shown in the case at bar to indicate a violation by the board of education of any provision of the statute. We therefore conclude that respondent has refused to perform a plain ministerial duty, and the writ of mandate will issue requiring her to draw her requisition on the county auditor in favor of petitioner for the sum of $399.99.

It is so ordered.

We concur: CHIPMAN, P. J.; HART, J.

177 Cal. 86

LAUGHLIN v. PACIFIC COAST MOTOR CAR CO. (L. A. 4070.)

(Supreme Court of California. Dec. 28, 1917.)

1. Exchange of Property 🔑13(1) — Complaint—Defect.

Complaint in an action on a contract for the exchange of automobiles *held* not defective because it stated the purchase price to have been $2,300 instead of $2,200.

2. Appeal and Error 🔑193(1)—Reservation of Exceptions—Demurrer.

Defects in a complaint as to the manner and form of the statement of facts, being susceptible to objection only by special demurrer, will not be considered on appeal, in the absence of such a demurrer.

3. Trial 🔑405(½) — Findings — Sufficiency.

Where the essential facts are incorporated in findings, such findings are not open to an objection that they do not sustain the judgment.

4. Trial 🔑396(1)—Findings—Sufficiency.

Where, to establish a counterclaim, it was necessary to make a tender of an automobile, a finding that no such tender was made is the only finding necessary in regard to the counterclaim.

5. Costs 🔑263 — Grounds for Appeal — Penalties.

Where an appeal is taken without cause, for the mere purpose of delay, the appellant may be fined under the express provisions of Code Civ. Proc. § 957, and such fine added to the damages.

Department 1. Appeal from Superior Court, Los Angeles County; Willis T. Morrison, Judge.

Action by Homer Laughlin, Jr., against Pacific Coast Motor Car Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Stuart M. Salisbury, of Los Angeles, for appellant. E. E. Rogers, of Los Angeles, for respondent.

SHAW, J. The defendant appeals from the judgment.

The plaintiff and defendant made a contract whereby the defendant agreed to sell and deliver to the plaintiff, for a price stated, a Fiat automobile of a kind and style particularly described, and the plaintiff agreed to sell and deliver to the defendant a Mercer automobile at the price of $2,200, which was to be by the defendant credited upon the price of the said Fiat automobile sold by defendant to plaintiff. In pursuance of this contract, the plaintiff delivered the Mercer automobile to the defendant, who accepted the same, sold it, and converted the proceeds to its own use. The defendant failed to deliver to plaintiff the Fiat automobile as it agreed to do. Thereupon the plaintiff began this action to recover the sum of $2,200, fixed as the price of the Mercer machine he had delivered to the defendant.

[1-3] The complaint, while not well drawn, states, in substance, the facts essential to plaintiff's right to recover $2,200. The sum is erroneously stated therein to be $2,300, but this does not vitiate it as a statement of the cause of action. The defects pointed out by the appellant relate merely to the form and manner of the statement of the facts. They are objections which can be raised to a complaint only by a special demurrer. There was no demurrer to the complaint, general or special. Similar defects in the findings are not sufficient to support the claim that the findings do not sustain the judgment, where, as here, the essential facts are found.

[4] The answer, by way of counterclaim, alleged performance by defendant, and asked judgment for the balance of the price of the Fiat automobile. The counterclaim rested on the allegation that defendant had tendered to plaintiff a Fiat automobile of the kind and style it agreed to sell to him. The finding was that this was not true. No other finding regarding the defense was necessary, since, without such tender, the counterclaim could not have been established.

[5] These principles are well settled, and the appeal was without cause, unless for delay. It is a case for the imposition of damages under section 957 of the Code of Civil Procedure, which are fixed at $50.

It is therefore considered by the court that the judgment be affirmed, and that plaintiff recover of defendant the sum of $50 as damages.

We concur: SLOSS, J.; LAWLOR, J.

(177 Cal. 74)

WHITNEY v. WEST COAST LIFE INS. CO.

(S. F. 7553.)

(Supreme Court of California. Dec. 28, 1917. Rehearing Denied Jan. 24, 1918.)

1. INSURANCE 🔑646(3) — LIFE INSURANCE — INTENT TO DECEIVE—PRESUMPTION.

A presumption of applicant's intent to deceive is only raised when his statements are made with knowledge of their falsity.

2. INSURANCE 🔑292 — LIFE INSURANCE — STATEMENTS IN APPLICATION—FRAUD.

Where an applicant for life insurance answered in the negative the questions as to whether he had ever had shortness of breath or disease or palpitation of the heart, and stated that the only injury or illness or attendance of a physician within the past seven years was occasioned by a burn and named the physician consulted, and withheld information that he had consulted a physician who had diagnosed his trouble as myocarditis, of which he died, and that he had a few months before his application consulted another physician, which information would have probably prevented the issuance of the policy, he was guilty of fraud invalidating the policy.

Department 2. Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Anna St. John Whitney against the West Coast Life Insurance Company. From a judgment in favor of plaintiff and from an order denying its motion for a new trial, defendant appeals. Judgment and order reversed.

Myrick & Deering, of San Francisco, (James Walter Scott, of San Francisco, of counsel), for appellant. Norman A. Eisner and T. C. Van Ness, Jr., both of San Francisco, for respondent.

MELVIN, J. Defendant appeals from a judgment for $10,000 on a policy of life insurance and from an order denying a motion for a new trial. The defense was that Arthur L. Whitney, the assured, had made false representations in his application for the policy. The application was signed on the last day of the year 1913. By the terms of the policy all insurance thereunder was based upon the written and printed application therefor which by attached copy was made a part of the contract. Mr. Whitney died June 10, 1914, of acute myocarditis, a disease of the heart.

By his answers to questions contained in the application for insurance Mr. Whitney made, among others, the following representations:

> "Have you now or have you ever had * * * asthma or shortness of breath? Answer: No. Disease or palpitation of the heart? No. * * * Give particulars of any injury or illness or attendance of physician that may have occurred during the past seven years. Burn of arm and chest. Date 1911. Duration, one week. Physician consulted, Dr. Chidester."

The defendant introduced Dr. Cheney as a witness. He testified that Mr. Whitney had called upon him at his office about two years before the application for insurance was made. At the time of that visit Mr. Whitney had complained of a pain in his chest when he walked rapidly. He had noticed such pain under like circumstances about two years before he visited the doctor, but it had been growing more severe so that on walking a short distance the distress would come on. The patient said that the pain was always worse after eating. Dr. Cheney said, among other things:

> "After this physical examination that I gave Mr. Whitney and after his statement to me of his past history of his case, and of the symptoms, I came to the conclusion that he was suffering from myocarditis. That is weakness of the heart, degeneration of this muscle of the heart. I did tell that to Mr. Whitney at that time. I told him that he had, in my opinion, a weakness which we call myocarditis."

The doctor was testifying largely from his notes made at the time of Mr. Whitney's visit. Regarding the patient's reception of the physician's diagnosis, he said:

"I cannot tell you from my notes what Mr. Whitney replied. From my memory he told me that he had suspected that, because of the pain running down his arm, he knew the meaning of that symptom. That is my recollection of the conversation, although it is not so set down here. Other discussion upon this subject was simply the directions that followed for him to observe. I did give him directions. I advised him to curtail his diet, to curtail his tobacco, to exercise moderately, and to avoid extremely hot and cold baths, and I gave him a medicine to take containing digitalis, a heart stimulant. This was partly on the 22d and the 23d; I saw him two days in succeession. I saw him next on the 25th. These interviews took place in my office in the Shreve building. Mr. Whitney called there. I prescribed the digitalis for Mr. Whitney on the 25th. I next saw Mr. Whitney on February 9th, at my office. Mr. Whitney called there. He reported that he had had no appearance of his distress since. I made an examination of him on the 9th of February, 1912, merely to take his weight and to count his pulse. His pulse at that time was 76. His weight 159 pounds. I do not know what Mr. Whitney's height was; my notes do not show."

Dr. Cheney also testified:

"That condition which I found in Mr. Whitney in January and February, and June, that disintegration of his heart, was of such a character that it would be likely to continue up until June, 1914, if the diagnosis was correct; it is an incurable condition; it would persist as long as he lived. If Mr. Whitney died of myocarditis on June 10, 1914, that would convince me of the correctness of my diagnosis of January, 1912, and that it had never been cured."

It was also shown that Mr. Whitney had consulted his nephew, Dr. A. W. Hewlett of Michigan, who was visiting in San Francisco. Dr. Hewlett testified, in part, as follows:

"I told him that his physical condition, his general condition, was good, but nevertheless in my opinion he probably had weakness of his heart muscles. I gave him that as an opinion. Q. Did you explain to him the nature of any heart disorder that might not be visible by examination? A. No, I did not. Q. Did you say to him that his disorder was serious at all? Did you lay any serious stress upon it? A. I did not lay any serious stress, no. Q. Did you treat the matter lightly? A. I treated it quietly. I did not tell him there was nothing the matter with him, but I tried not to alarm him in any way, because I thought that would be bad for him. Q. Was he in any manner alarmed? A. He was not, no."

Dr. Hewlett's examination of Mr. Whitney was either in August or September of 1913, three or four months before the latter made application for insurance. Describing his visit to Mr. Whitney's office, Dr. Hewlett said:

"He asked me to come down and look him over. At that time he said that he had been told, or had reason to think, that he might possibly have some trouble with his heart, and he asked me to examine his heart. I don't remember any part of what was said in regard to what he had to state in regard to the reason for calling me down, but on questioning him I found that he said that he had become somewhat short of breath when he exerted himself, and that he noticed this particularly if he had been eating a large meal, and particularly that his stomach seemed full, and that by dieting—he had been placed on a diet by Dr. Cheney—by dieting he was more or less able to avoid this distress that he had."

In view of this evidence appellant insists that, as matter of law, Mr. Whitney was guilty of fraud in securing the policy of insurance in that he concealed from Dr. Hill, the defendant's medical examiner, the fact that he had consulted Drs. Cheney and Hewlett and the results of their examinations as reported to him. Appellant insists that in view of his false answers and the fraud thereby perpetrated the jury should have been instructed to find for the defendant, citing Westphall v. Metropolitan Life Insurance Co., 27 Cal. App. 734, 151 Pac. 159; Madsen v. Maryland Casualty Co., 168 Cal. 204, 142 Pac. 51; Iverson v. Metropolitan Life Insurance Co., 151 Cal. 746, 91 Pac. 609, 13 L. R. A. (N. S.) 866; McEwen v. New York Life Insurance Co., 23 Cal. App. 694, 139 Pac. 242; and John Hancock Mutual Life Insurance Co. v. Houpt (C. C.) 113 Fed. 572.

Respondent calls attention to the fact that the applicant for insurance was a man of active habits and athletic accomplishments. He was a manufacturer of salt, having his factory and his home in San Mateo county and his office in San Francisco. Up to a time within a month of his death it was his habit to arise at 5 o'clock in the morning, to walk about a mile to the salt works, and after spending half an hour there to take the train for San Francisco, arriving at his office before half past 8. He exercised much and was especially fond of walking. Up to ten days before his death he practiced that form of strenuous calisthenics known as "setting up exercises." None of the people who had most abundant opportunities to observe him—his wife, his son, his stenographer, nor his closest friends—had ever observed any abnormal shortness of breath nor had heard him complain of any ailment. Mrs. Whitney had been spending half a year in Europe, and her husband crossed the continent to meet her. Reaching Chicago on the return journey on May 28, 1914, Mr. Whitney had an attack of acute dysentery which continued, from time to time, until his death on June 10, 1914. On reaching San Francisco he consulted Dr. Chidester regarding dysentery and tonsilitis. The cause of death, as given by Dr. Chidester's certificate, was acute myocarditis and acute dilations of the heart. The certificate gave the date of the first symptoms of the fatal disease as about June 3d.

Under these circumstances, according to respondent's argument, the jurors were justified in concluding that any concealments or omissions to disclose facts about his past were made by Mr. Whitney without evil intention and were devoid of fraud. The burden was upon the defendant, says respondent, to show not only error in the applicant's statement, but willful error. O'Connor v. Grand Lodge A. O. U. W., 146 Cal. 494, 80 Pac. 688. This burden, it is argued, was not met, and the evidence taken as a whole failed to show fraud on the part of the applicant for defendant's policy of insurance. Appellant bases its contentions largely upon the conclusion that Mr. Whitney was suffering from chronic myocarditis and that he knew it when he applied for insurance. It is true that Dr. Cheney diagnosed his case as one of chronic myocarditis, but it was in evidence that that disease is accompanied by sclerosis—hardening—of the arteries. Dr. Hill, who examined the applicant, found no sclerosis in the palpable arteries; nor had Dr. Cheney nor Dr. Hewlett discovered any. Dr. Charles Minor Cooper, the eminent specialist, who testified as an expert, said that it was very rare for one to have sclerosis of the internal arteries without the diagnostician being able to find some evidence of sclerosis in the palpable arteries. But there was testimony that sclerosis may exist altogether in the arteries inside the body.

It is suggested that, as the question answered by the applicant for insurance was whether or not he had suffered from "asthma or shortness of breath," it would be a natural conclusion by a person to whom such an interrogatory was propounded that the questioner meant shortness of breath of an asthmatic nature. In an answer to such a question, says respondent, failure to recall and confess shortness of breath following violent exercise or overeating or excitement would by no means be a conclusive evidence of fraud (citing Rupert v. Supreme Court U. O. F., 94 Minn. 293, 102 N. W. 715). So with the question, "Have you ever had disease or palpitation of the heart?" the argument is that the applicant might well have construed the examiner's question to mean, "Have you ever had disease involving palpitation of the heart?"

Respondent calls attention to the form of the question, which was, "Give particulars of any injury or illness or attendance of physician that may have occurred during the past seven years," and insists that there is a distinction, particularly to the understanding of a layman, between "consultation" and "attendance," that Mr. Whitney may well have apprehended the interrogatory as relating to those occasions when he had been confined to his home by illness or injury and had been there visited by a doctor or a surgeon. He had consulted Dr. Cheney at the physician's office, and his nephew had examined him at his own office in San Francisco. It is true that in Billings v. Metropolitan Life Insurance Co., 70 Vt. 482, 41 Atl. 517, the court said:

> "A mere temporary indisposition, not serious in its nature, such as indicated by the evidence on the part of the defendant, other than measles, cannot be considered an illness, and the mere calling into a doctor's office for some medicine to relieve such temporary indisposition, or the calling at the home of the insured by the doctor for the same purpose, cannot be considered an attendance by a physician nor a consultation of a physician, within the meaning of the questions 3 and 7. 'Illness,' as used, means a disease or ailment of such a character as to affect the general soundness and healthfulness of the system seriously, and not a mere temporary indisposition which does not tend to undermine and weaken the constitution of the insured."

Commenting on a similar question similarly answered, the Illinois Appellate Court, said, in Federal Life Association v. Smith, 86 Ill. App. 431:

> "She was not asked whether she had consulted a physician or received treatment from one. Doubtless she understood the question as inquiring how long since a physician had waited on her in sickness at her home, and we think such understanding accords with the popular meaning of the expression."

[1, 2] But, having in mind all of these liberal rules which properly favor the upholding of verdicts of this sort, the fact remains that by the uncontradicted testimony of two physicians of standing Mr. Whitney is shown to have concealed facts about his condition and his consultations with medical men which could not have been unconsciously withheld. It is true that a presumption of intent to deceive, on the part of the applicant, is only raised when the statements are made with knowledge of their falsity. Ætna Life Insurance Co. v. Rehlaender, 68 Neb. 284, 94 N. W. 129, 4 Ann. Cas. 251; Metropolitan Life Insurance Co. v. Larson, 85 Ill. App. 143; Dolan v. Mutual Reserve Fund Life Association, 173 Mass. 197, 53 N. E. 398; Royal Neighbors of America v. Wallace, 73 Neb. 409, 102 N. W. 1020. But there are cases where the knowledge suppressed is so important and obviously so well in the recollection of the applicant that merely withholding it clearly amounts to fraud, such as the failure to disclose deafness (Madsen v. Maryland Casualty Co., supra), or epilepsy (Westphall v. Metropolitan Life Insurance Co., supra), or a stroke of apoplexy (Iverson v. Metropolitan Life Insurance Co., supra), or a serious accident from the kick of an animal (McElwen v. New York Life Insurance Co., supra), or disease of the throat (John Hancock v. Mutual Life Insurance Co., supra). This is such a case.

It is impossible that Mr. Whitney could have forgotten so important an occasion as that on which he consulted his kinsman, Dr. Hewlett, a few months before he applied for insurance. Nor may we with reason believe that he could have lost all memory of his talks with Dr. Cheney and the course of diet and the medicine prescribed by that physician. To say that he might have understood the questions regarding medical attendance as having reference to visits to his home is to doubt the intelligence of a business man accustomed to accurate methods. To decide that he might have apprehended the interrogatory about "shortness of breath" as having relation to an asthmatic affection is to credit him with a guilelessness which is the possession of no man of his age and experience. He had been afflicted with a shortness of breath which seemed to him so alarming as to cause him to seek the advice of a physician. This had happened not more than four months prior to the time when he sought life insurance. One of his physicians had told him that he was suffering from "myocarditis," and, while this portentous polysyllable may mean nothing to the average person who sees it in print, it is safe to say that the doctor also told him in plain English that there was some sort of trouble with his heart. We are therefore forced to the conclusion that he consciously and intentionally withheld from the examining physician information which might have prevented, nay, probably would have prevented, the issuance to him of a policy of insurance.

Of course, we cannot tell what new evidence may be forthcoming if the cause be retried; but, unless some very positive proof be available to overcome the necessary deductions arising from the conduct of the assured, it would be the duty of the trial court to decline to submit the question of fact to a jury.

The judgment and order are reversed.

We concur: HENSHAW, J.; SLOSS, J.

(177 Cal. 43)

HOLLAND v. KELLY. (S. F. 7571.)

(Supreme Court of California. Dec. 24, 1917. Rehearing Denied Jan. 21, 1918.)

1. Jury 🔑14(9)—Trial 🔑374(2)—Right to Trial by Jury—Action to Quiet Title Involving Issues of Fraud.

In an action to set aside a deed declared to be fraudulent and to quiet plaintiff's title to the property, defendant was not entitled of right to a trial by jury, and the court was not bound by the jury's verdict.

2. Appeal and Error 🔑219(2)—Reservation of Grounds for Review—Estoppel to Raise Objections to Verdict—Failure to Object Below.

In an action to set aside a deed declared to be fraudulent, and to quiet plaintiff's title, though defendant made no special objection to the form of the jury's verdict, he was not estopped to raise the points, that there were no findings, and that no special issues were presented.

3. Trial 🔑388(2)—Equity Case—Necessity for Findings.

Unless waived, findings must be made in an equity case, whether tried with the aid of a jury or not, and whether or not either party specifically demands findings.

4. Trial 🔑388(2)—Failure to Find on Issues in Equity—Verdict by Jury.

In an equity case, a general verdict rendered by a jury is not determinative of the pleaded issues, and a failure to find upon them is error requiring reversal.

Department 2. Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by Patrick Holland against William A. Kelly, as executor of the last will and testament of Julia McCarthy, deceased. From a judgment for defendant's testate, plaintiff appeals. Judgment reversed.

See, also, 158 Pac. 1045; 171 Pac. 421.

W. E. Cashman, of San Francisco, for appellant. William A. Kelly, of San Francisco, for respondent.

MELVIN, J. Plaintiff appeals from a judgment in favor of Julia McCarthy, defendant's testate.

The suit was brought to obtain a judgment declaring a certain deed null and void, and decreeing that it be canceled. Plaintiff also asked that the court should make a decree declaring him to be the owner of the property described in the deed, quieting his title as against Julia McCarthy, and enjoining the latter from asserting any estate, right, or title to the land. There was also a prayer for general relief.

The deed in question was made by Mary Anne Holland, Patrick Holland's intestate, to Julia McCarthy, respondent herein. The complaint attacked this deed under four counts, declaring that it was void: (1) Because of the incompetency of the grantor; (2) because the deed was without consideration and not signed by the grantor; (3) because of the alleged nondelivery of the instrument; and (4) because of the asserted undue influence exerted by Julia McCarthy over the mind and volition of Mary Anne Holland, producing the execution of the alleged deed. Julia McCarthy answered denying the allegations of the complaint, and averring her own title to the property by virtue of the deed from Mrs. Holland. The cause was tried and submitted upon all of the alleged causes of action except the third. As to that count the court ordered a nonsuit. By their verdict the jury found a verdict "in favor of defendant and against the plaintiff upon counts 1, 2, and 4," and "in favor of plaintiff and against defendant upon counts none." Judgment was thereupon entered in favor of the defendant.

Appellant contends that this is a suit of which a court of equity has exclusive jurisdiction; that in such an action the verdict of the jury is merely advisory and intended to enlighten the conscience of the chancellor; that a trial by jury in chancery may only be had upon issues specially framed under the court's direction; that therefore the general verdict cannot support the judgment; and, finally, that the absence of findings necessitates a reversal. This matter has been before the court in an application for mandate to require the settling of a bill of exceptions. Holland v. Superior Court, 169 Cal. 361, 146 Pac. 878. In the opinion in that proceeding we said:

> "Apparently the judge of the trial court has acted in the matter of settling a bill of exceptions to be used on the plaintiff's appeal from the purported judgment of December 19, 1913, and has settled such a bill. We are of the opinion that the judge erred in allowing to be inserted therein the matters occurring subsequent to the date of such judgment, which are hereinbefore specified, viz.: An order made April 1, 1914, by the court, purporting to vacate and set aside the judgment of December 19, 1913, etc.; findings of fact and conclusions of law signed April 1, 1914; and a judgment made April 2, 1914, based on such findings. These things have nothing to do with the question of the correctness of the clerk's attempted judgment of December 19, 1913, and are absolutely immaterial considerations on the appeal therefrom. Being immaterial, their recital in the bill of exceptions cannot prejudice plaintiff, for they will be disregarded in the disposition of the appeal, and therefore plaintiff needs no relief in regard thereto. If on the appeal the clerk's judgment is determined to have been invalid, it will be reversed."

This is an appeal from the judgment entered on verdict.

[1] Respondent contends that the issues were of legal cognizance, and that in any view of the matter appellant is estopped to contend otherwise. In support of this theory respondent cites Reiner v. Schroeder, 146 Cal. 411, 80 Pac. 517. In that case it was held that where a plaintiff has been ousted from possession, and the question of ownership is in issue, the parties are entitled to a jury trial upon that issue, and no findings are required thereon. But in that case the only essential controversy was whether or not defendant had wrongfully ousted plaintiff from possession of certain mining property, and therefore the action was one for the recovery of specific real property. Section 592, Code Civ. Proc. The action at bar was very different. It was based upon matters of equitable cognizance. It was an action to set aside a deed declared to be fraudulent and to quiet plaintiff's title to the property described in such deed. In an action to quiet title a defendant is not entitled of right to a trial by jury, and a court is not bound by the verdict of a jury, even where issues of fraud are involved. Moore v. Copp, 119 Cal. 429, 51 Pac. 630; Angus v. Craven, 132 Cal. 691-696, 64 Pac. 1091; Davis v. Judson, 159 Cal. 121, 113 Pac. 147; Cobe v. Crane, 173 Cal. 116, 159 Pac. 587.

[2-4] Equally untenable is respondent's assumed position that appellant is estopped to raise the points that there were no findings, and that no special issues were presented to the jury. It is true that appellant made no specific objection to the form of the verdict, but it does not follow that thereby he assented to the theory that the cause on trial was a "law case." Even conceding that by his conduct he waived the absence of special interrogatories, there is nothing to indicate in any way that he consented to have judgment entered without findings by the court. Unless waived, findings must be made in an equity case whether it be tried with the aid of a jury or not, and whether either party specifically demands findings or is silent upon the subject. Haight v. Tryon, 112 Cal. 4, 44 Pac. 318. In an equity case a general verdict rendered by the jury is not determinative of the pleaded issues, and a failure to find upon such issues is error requiring reversal of the judgment. Learned v. Castle, 67 Cal. 41, 7 Pac. 34; Moore v. Copp, supra; Warring v. Freear, 64 Cal. 54, 28 Pac. 115; Vallejo, etc., R. R. v. Reed Orchard Co. et al., 169 Cal. 558, 147 Pac. 238.

Accordingly, the judgment is reversed.

We concur: HENSHAW, J.; SHAW, J.

(177 Cal. 46)

EMPLOYÉ'S CREDIT CO. et al. v. INDUSTRIAL ACC. COMMISSION et al.

(S. F. 8406.)

(Supreme Court of California. Dec. 24, 1917.)

1. MASTER AND SERVANT 🔑382—WORKMEN'S COMPENSATION ACT — RELEASE — SUFFICIENCY.

A release not providing for full compensation, and which was not approved by the Industrial Accident Commission, was invalid, and no bar to an action by the employé for additional compensation, in view of Workmen's Compensation Act (St. 1913, p. 279) § 32, subd. "b," as amended by St. 1915, p. 1093, providing that no release shall be valid, unless it provides for payment of full compensation in accordance with the act.

2. MASTER AND SERVANT 🔑419—WORKMEN'S COMPENSATION ACT—NOTICE OF ACCIDENT—FURTHER DISABILITY.

Workmen's Compensation Act, § 20, as amended by St. 1915, p. 1089, requiring written notice of the accident within 30 days, does not apply to claims for further disability, under section 16, subd. "c," as amended by St. 1915, p. 1085, where compensation has been made for the original injury.

3. MASTER AND SERVANT 🔑419 — WORKMEN'S COMPENSATION ACT—FURTHER DISABILITY—TIME FOR FILING CLAIM.

In a proceeding under the Workmen's Compensation Act, § 16, subd. "c," as amended by St. 1915, p. 1085, for compensation for further disability, evidence *held* sufficient to justify a finding of the commission that claimant's "further disability" had not existed for so long a time that a claim therefor was barred.

In Bank. Proceedings before the Industrial Accident Commission for compensation under the Workmen's Compensation Act by R. M. Rea, claimant, against the Employé's Credit Company, employer, and the United States Fidelity & Guaranty Company, insurance carrier. Award for claimant, and the employer and insurance carrier file an application for a writ of review. Award affirmed.

Lloyd S. Ackerman, of San Francisco, for petitioners. Chris. M. Bradley, of San Francisco, for respondents.

SHAW, J. This is a petition for the review of an award made by the Industrial Accident Commission in favor of Rose M. Rea.

On January 8, 1916, the applicant, while in the service of the Employé's Credit Company as assistant bookkeeper, received a gunshot wound through her right arm, inflicted by two negroes who were robbing her employer's place of business. Due notice thereof was given to the employer, and the other petitioner, as insurance carrier, paid her the sums required for disability indemnity and medical treatment by the Workmen's Compensation Act, from that time until February 17, 1916, at which time, the wound having healed, she was discharged from treatment and the payment of compensation ceased. Thereafter, on January 23, 1917, she applied to the Industrial Accident Commission for an award, on the ground that the injury received, as aforesaid, had caused a further disability entitling her to further compensation under the provisions of subdivision "c" of section 16 of the Workmen's Compensation Act. A hearing was had at which the defendants appeared and presented two defenses; first, that the applicant had released the employer and insurance carrier from all liability on account of the injury; second, that the application on January 23, 1917, was more than six months after the happening of the original injury, and more than six months from the time the further disability complained of was produced from the effects of that injury.

[1] It is sufficient to say with respect to this release that there was no evidence thereof given at the hearing before the commission. Our knowledge of it is derived solely from the allegations of the petition to this court for a review. It is to be added that it does not provide for payment of full compensation in accordance with the provisions of the act, and it has not been approved by the Industrial Accident Commission, and, consequently, that it would be invalid under the provisions of subdivision "b," § 32, of the act, and would have been unavailing even if it had been offered in evidence.

With regard to the defense that the application was made too late, the evidence is not conflicting, but the facts are somewhat peculiar. According to the testimony of the applicant, she felt that after giving the release referred to she had no right to further compensation, although she continued thereafter to have some pain in her arm and increasing nervousness. After she was discharged from treatment by the insurance carrier, she felt that she would be unable to keep a position if she should get one, and did not attempt to get work except on two occasions, and she was then so nervous that she was not accepted. Even a little housework affected her arm. The pains in her right arm grew more severe in character as time passed, after the treatment ceased in February, 1916. She consulted a physician in July, and received medical treatment for a short time, and again in September, on which occasion she was given a nerve sedative prescription. In October, 1916, her nervousness had increased to such an extent that she took advice about the matter of obtaining further compensation, and applied to the respondent insurance carrier therefor and was refused assistance. From about the 1st of October until the time of making the application in January she was wholly unable to do any work. By stipulation at the hearing a physician was appointed to make an examination of her condition. He reported that the only direct consequences of the wound were numbness and heaviness in the arm, with occasional pain in the wrist, elbow, and shoulder; that the principal ailment of the applicant was an extreme nervousness amounting to prostration, and apparently the result of the fright she received at the time of her injury from the robbers. All the evidence shows that her condition and disability is the direct result of the physical injury and of the mental shock she received at the time.

The commission found that the applicant was injured on January 8, 1916; that said injury caused a temporary total disability from that time until February 19, 1916, for which compensation had been paid in full, and that beginning on October 1, 1916, the applicant became afflicted with neurasthenia, arising from said injury, which constituted a further disability under section 16, subdivision "c," of the act. The award is for this further disability.

[2] Subdivision "c," above cited, provides that the injured employé may institute proceedings to collect compensation within 245 weeks after the date of the injury, upon the ground that the original injury has caused further disability. The first part of section 16 provides that proceedings for the collection of disability indemnity to an employé, under the act, must be begun within six months from the date of the injury, except as otherwise provided in the act. The provision referred to in subdivision "c" is one of the exceptions. The notice in writing which is required to be given to the employer by section 20 of the act is a notice of the original injury, and the section does not apply to the case of a further disability under subdivision "c," where compensation has been made for the original disability. On behalf of the commission it is conceded that the application, under subdivision "c," must be begun within six months after the occurrence of the further disability. Upon this theory the further disability must have occurred not earlier than

July 23, 1916, in order to bring the application within the period of six months.

[3] The term "further disability" is of somewhat indefinite meaning, especially as applied to a case such as this, where nervous prostration gradually increases to a positive disability. The question of the time when it reaches the state of disability is a question of fact for the commission to decide from the evidence. Miss Rea suffered from nervousness continuously from the time of signing the release mentioned, but the evidence justified the inference that she hoped and expected that it would disappear. Apparently she was not confined to her room or to her bed, or prevented from going about, and it was not until in the latter part of July, or later, that she began to fear that she was not improving, and that the nervousness was more serious than she had believed it to be; and it was not until some time about the 1st of October that it increased to such a degree as to disable her entirely from doing any work. While the proof of some of these statements is not direct, it is not unreasonable to infer them all from the testimony given. Under these circumstances, we cannot say that the commission was not justified in finding that the disability occurred on the 1st of October, 1916, and that her right was not barred at the time she filed her application.

The award is affirmed.

We concur: ANGELLOTTI, C. J.; MELVIN, J.; HENSHAW, J.

177 Cal. 88

GRAHAM v. MIXON et al. (Sac. 2460.)

(Supreme Court of California. Dec. 28, 1917.)

VENUE ⟹14—PLACE OF TRIAL—"INJURY TO PERSON."

Code Civ. Proc. § 395, providing that actions for injury to person must be tried in the county where the injury occurs or in the county wherein defendants reside, does not give to a person against whom an alleged libel is published in a newspaper a right to maintain his action against defendants' protest in any county in which the newspaper may circulate; a libel not being an "injury to person" contemplated by the statute.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Personal Injury.]

Department 2. Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Action by Charles Graham against W. F. Mixon and others. Judgment for plaintiff, and defendant Mixon appeals from an order denying his motion for a change of venue. Order reversed, and cause remanded.

Arthur C. Huston and Hurst & Hurst, all of Woodland, for appellant. J. M. Inman and Ralph W. Smith, both of Sacramento, for respondent.

MELVIN, J. Plaintiff, who resides in Sacramento county, brought an action for libel against defendants, who live in Yolo county and there publish the Mail of Woodland. This newspaper, in which, according to the complaint, the alleged libel was published, is circulated and read in Sacramento county, according to the averments of said complaint. Defendants moved for a change of the place of trial to the county of their residence which, they say, is the only proper place of trial. If this contention be correct, they were entitled to the order which they sought. Section 397, Code Civ. Proc. The motion was denied upon the sole ground that an action for libel is one "for injury to person," and therefore, under the provisions of section 395 of the Code of Civil Procedure as such section has stood since 1911, is triable in the county "where the injury occurs." The appeal is from the order denying defendants' motion.

In considering the meaning which the Legislature intended to impart to the words "injury to person," it is legitimate and proper for us to contemplate the consequences which would follow any certain construction of those words. If the legislators intended to include "libel" under the general designation "injury to person," it would follow that a man of state-wide reputation for good citizenship would be injured in his person in each county in which a libelous article regarding him would be circulated and might select any one of such counties as the place for the commencement of his action against the publisher. Each county would be, as to him, "the county where the injury occurs" within the purview of section 395 of the Code of Civil Procedure. On the other hand, the man of local reputation might suffer detriment only in the county or counties in which the attack upon his character would amount to an injury. There can be little doubt that the Legislature contemplated no such result when using the expressions, "if it be an action for injury to person" and "in the county where the injury occurs."

Even if we say that the presumption of injury arises from the libelous publication and that therefore there is no difference between the man of local and the one of general reputation in the matter of available places for libel suits, we are confronted with another inequality in the operation of the statute which surely was not intended by the lawmakers. If libel be an "injury to person," the victim has a broader field of action against the owner of a newspaper of general circulation publishing the libel than would be available to him if he should receive serious bodily hurt from the negligent operation of an automobile owned by a resident of a county other than the one in which the accident might occur. In the former case he might have as many places for the com-

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⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

mencement of his action as there are counties in the state, while in the latter he would be limited to the county in which the accident occurred or that in which the owner of the motor car resided at the time of the infliction of the injury. We can think of no good reason why the Legislature should so broaden the venue of civil actions for libel while the Constitution makes indictments found or informations laid for publications in newspapers triable only in the counties where the publication offices of the newspapers are situated or in the counties where the parties libeled reside. Article 1, § 9, Const. The purpose of this constitutional provision, as revealed by the debates of the constitutional convention, was, on the one hand, to prevent the dragging of a publisher the length of the state for trial on a charge of misdemeanor at the whim of the prosecutor, and, on the other, to permit a citizen who had been unjustly attacked by a newspaper to gain vindication in his own home. Older v. Superior Court, 157 Cal. 770, 109 Pac. 478. The same reasons apply with only slightly diminished force to the proper venue of civil actions for damages on account of libel. Therefore we ought to hesitate, unless compelled by the unequivocal force and significance of the language used, to attribute to the Legislature the meaning for which respondent contends.

It is conceded by appellant (as indeed it must be) that an action such as the one prosecuted by plaintiff is one growing out of a violation of personal rights as distinguished from rights of property. Civil actions arise out of obligations or injuries. Section 25, Code Civ. Proc. An obligation is due to a contract or to operation of law. Section 26, Code Civ. Proc. Section 27, Code of Civil Procedure, describes injuries as of two kinds, to the person and to property. Section 28 defines injury to property, and section 29 classifies every other injury as "an injury to the person." This is a very concise and convenient classification and one conforming to our simplified form of action, but because it exists in one part of one of the Codes we are not therefore bound to say that wherever employed in any law the expression "injury to person" must be interpreted to mean every invasion of personal rights. In drawing statutes, legislators are sometimes unconsciously influenced by distinctions which prevailed under the highly technical practice of the common law; and at the common law, actions in tort were classified with reference to the physical or to the merely consequential injury to person or property. Prof. William Carey Jones, in volume 2 of Modern American Law, at page 10, uses the following language:

> "Modern procedure has abolished forms of action, and technical questions of procedure have lost their importance. Nevertheless the language of the old forms of action is still used, and the distinctions made therein are often useful, if not necessary, in determining the basis of liability in tort. It is therefore advisable to understand the distinction between the action of trespass and the action of trespass on the case, or, as it is more commonly called, case. Trespass was the action used for any wrongful and direct application of force, whether to the person or property. Case was a supplementary form of action, provided for all kinds of injury which did not amount to a trespass."

He also quotes a passage, to the same effect, from Leame v. Bray, 3 East, 593, and concludes the introduction to his article on torts with the following sentences:

> "Where there is no physical interference with the person or property, then the action in tort is not trespass but case. For example, in deceit, malicious prosecution, or libel, the action employed is case."

To the lawyer trained in the common law, therefore, there exists a distinction between actions for libel and those arising out of physical interference with the person. Perhaps this distinction was in the mind of the draughtsman of the statute before us, and perhaps for this reason he and his colleagues who voted for its adoption had no thought of including libel within the category of actions for injuries to persons to which it was intended that section 395, Code of Civil Procedure, should apply. Or it may be that the lawmakers employed the words "injury to person" according to the general and approved usage (section 13, Civ. Code), and not in a special and technical sense, and by that expression intended the ordinary meaning, namely "bodily injury." In either event, the true significance of the section would support appellant's contention. In discussing section 395, Code of Civil Procedure, this court has held it to be constitutional although it applied to bodily injuries and not to other invasions of personal rights, such as slander and libel. Gridley v. Fellows, 166 Cal. 765, 138 Pac. 355. The following quotations from the opinion prepared by Mr. Justice Shaw clearly indicate the views of the court in this regard. At page 769 of 166 Cal., at page 357 of 138 Pac., the following language is used:

> "The sole question for consideration is whether causes of actions for bodily injury or for injuries to property are so like in all respects to other causes of action, such as actions for slander or libel or actions on contract at law or in equity, that no reasonable basis can be found for a provision allowing the former to be tried in the county where the injury occurred, which is not the residence of the defendant, which does not apply with equal force to the latter actions mentioned."

On the same page we find this language:

> "Actions to recover damages caused by bodily injuries, or by injuries to property, are well known as distinct classes of actions. They are each separately treated in the text-books of law. Each forms a distinct and well-known class, with attributes and qualities of its own, and each is or has been affected and controlled to some extent by distinct and different rules of law, evidence, and procedure. They are so clearly distinguished from other actions that there is no difficulty in recognizing and classifying them. We think they are sufficiently dis-

tinguished by the probable interests and convenience of the parties and by considerations of public convenience and policy, not applying so strongly to other actions, to justify the Legislature in providing, as it has, that the defendant shall not have the absolute right to demand that the cause be removed for trial to the county of his residence, in case it is not the county in which the injury occurred."

This decision strongly supports appellant's position, because, as his counsel contend in their brief, if respondent's view were the correct one this court would have held that the section did not violate the rule against special legislation because it embraced all personal actions, including libel. Instead, the holding was that it excluded libel and certain other actions, but was founded, nevertheless, upon a proper classification.

In the later case of Rains v. Diamond Match Co., 171 Cal. 326-328, 153 Pac. 239, 240, Mr. Justice Sloss, who wrote the opinion, said, regarding the amendment to section 395, Code of Civil Procedure, enacted in 1911:

> "The change in the law was designed to enlarge the rights of plaintiffs by giving them a choice of two counties, where theretofore the defendant had enjoyed the right of trial in the county of his residence."

It will thus be seen that this court has never regarded the section as one which applies, so far as actions for personal injuries are concerned, to any but those based upon physical lesions. It is also to be remembered that, although injuries are classified as injuries to property and injuries to the person (sections 28 and 29, Code Civ. Proc.), causes are more elaborately differentiated in designating the classes of actions which may be united. Those for "injuries to character" and "injuries to person" are separately enumerated. Section 427, Code Civ. Proc. It will thus be seen that in the Code itself the expression "injuries to person" is not always used with the same broad significance as respondent would have us give to it, following section 29 of the Code of Civil Procedure.

We conclude that section 395 of the Code of Civil Procedure must be interpreted as not giving to a person against whom an alleged libel is published in a newspaper the right to maintain his action, against the defendant's protest, in any county in which the newspaper may circulate.

The order is reversed and the cause remanded for action by the superior court in accordance with the views expressed above.

We concur: HENSHAW, J.; VICTOR E. SHAW, Judge Pro Tem.

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177 Cal. 82

CLARK v. CASSELMAN et al. (L. A. 4085.)

(Supreme Court of California. Dec. 28, 1917.)

1. APPEAL AND ERROR 🔑724(2)—SPECIFICATION OF ERRORS—SUFFICIENCY.

Specifications of error which, though not very elaborate, were sufficient to clearly raise the points involved and advise respondents of the errors which appellant believed to have been committed, were sufficient.

2. INSURANCE 🔑665(3) — WEIGHT OF EVIDENCE—FORFEITURE.

In an action on a mortgage which had been assigned to insurance company which paid the mortgagee the amount of a loss under a policy on the mortgaged property, a finding that the mortgagors had not prior to the fire conveyed their right, title, and interest in the property without the consent of the insured, *held* contrary to the evidence.

3. INSURANCE 🔑399 — WAIVER OF FORFEITURE—PAYMENT OF LOSS.

Insured's failure to give notice or proof of loss as required by the contract were not waived by the insurance company's payment of the loss to a mortgagee, for whose benefit the insurance was taken.

Department 2. Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by D. W. Clark against Frederick Casselman and others. From a judgment for defendants, plaintiff appeals. Reversed.

Hindman & Yakey, of Los Angeles, for appellant. A. W. Sorenson, of Los Angeles, for respondents.

MELVIN, J. This is an appeal by plaintiff from the judgment. The action was prosecuted by plaintiff as the representative and trustee of the Northwestern National Insurance Company of Milwaukee, that corporation being the real party in interest, seeking foreclosure in an action on a note and mortgage. By the amended complaint it was alleged that Frederick A. and Lucile R. Casselman on March 17, 1911, executed a note for $1,200 payable to Lucien T. Swall three years after date, and that said note was supported by a mortgage on certain described real property. It was also averred that upon breach of conditions of the note or mortgage the mortgagee under the terms of the contract might elect to declare due and payable the whole sum specified in the note; that the buildings on the mortgaged premises were required to be kept insured for $1,200 at the mortgagor's expense; and that Frederick A. Casselman, on the 6th of May, 1911, delivered to Lucien Swall, the mortgagee, such a policy of the Northwestern National Insurance Company of Milwaukee. The terms of the policy are pleaded in the complaint, among them being the following paragraph:

> "Whenever this company shall pay the mortgagee (or trustee) any sum for loss or damage under this policy and shall claim that, as to the mortgagor or owner, no liability therefor existed, this company shall, to the extent of such payment, be thereupon legally subrogated to all the rights of the party to whom such payment shall be made, under all securities held as collateral to the mortgage debt, or may at its option, pay to the mortgagee (or trustee) the whole principal due or to grow due on the mortgage with interest, and shall thereupon receive a full assignment and transfer of the mortgage and of all such other securities; but no subrogation shall

impair the right of the mortgagee (or trustee) to recover the full amount of his claim."

It was further set forth in the complaint that on February 27, 1912, a fire occurred which damaged a portion of the insured property; that prior to the fire the Casselmans had, without consent of the insurance company, bargained, sold, and conveyed their interest in said property to Walcott Earle Hill; that no proof of loss was made at any time as by the terms of the policy required; that on April 4, 1913, the Northwestern National Insurance Company claimed that as to the mortgagors or owners of the property insured no liability existed; that thereupon said corporation paid to Lucien Swall the full amount of the mortgage taking from him assignment of the mortgage and note in the name of plaintiff as its trustee; that no part of the note or interest had been paid save the interest due March 17, 1913; and that on January 23, 1914, plaintiff elected to declare the whole of the note due and notified defendants of said election.

The court found the execution of the note and mortgage by the Casselmans as pleaded; the procuring in accordance with the provisions of the mortgage of the policy in favor of the mortgagee (the policy with certain assignments being set forth in the findings); that on February 27, 1912, the buildings insured were totally destroyed, the loss amounting to $1,200; that no proof of loss was made as required by said policy; and that on April 4, 1913, the corporation paid Swall $1,200 in full satisfaction of the mortgage and took assignment of the note and mortgage to plaintiff for collection. There are further findings that there was no consideration paid for the assignment of the mortgage; that the note and mortgage had been fully paid and that there was nothing due from defendants to plaintiff; that plaintiff, as alleged in his complaint, elected to and did declare the whole of the note due and payable, but that it was not true "that the defendants, or either of them, failed to comply with the terms and conditions * * * of the note and mortgage"; and that none of the premiums on the insurance policy had been returned to Swall or to the defendants. Among the conclusions of law the court declared:

> "That the plaintiff having come into a court of equity for the purpose of enforcing its demands against the defendants herein must do equity, and it is not equitable for the plaintiff herein to claim a forfeiture on a fully paid policy of insurance and not having offered to return the premiums fully paid, and that it is not equitable for the plaintiff to refuse to waive forfeitures and limitations of time and under the facts as hereinabove found by this court, it is not equitable that plaintiff should recover herein."

Other conclusions were to the effect that the payment of $1,200 to Swall was in full satisfaction of the note and mortgage; that there was no consideration for the assignment of the said note and mortgage to the insurance company; that the debt evidenced by these documents was entirely extinguished by said payment; and that defendants were entitled to a decree that the note and mortgage be canceled and satisfied of record.

[1] Respondents insisted in their initial brief, and still insist, that the appellant's specifications were so vague as to put them upon no notice of any asserted errors. They called attention in their first brief to the fact that the specifications of insufficiency of evidence had been ordered stricken from the record by the trial court. Subsequently this court made an order reinserting the matters sought to be stricken out by the trial court. While these specifications are not very elaborate, they are sufficient clearly to raise the points involved and to advise respondents of the errors which appellant believed to have been committed. Owen v. Pomona Land & Water Co., 131 Cal. 530, 63 Pac. 850, 64 Pac. 253; Bell v. Staacke, 141 Cal. 186–191, 74 Pac. 774.

[2] It will not be necessary to review all of the specifications of error. It is the theory of the appellant that the Casselmans had no rights under the policy for two reasons: First, because they had parted with their interest in the property; and, second, because as no proofs of loss were furnished to the insurance company the policy was void as to them. Taking the second contention first, we read in the record a finding that no proof of loss was made to the insurance company at any time under the policy of insurance. By the terms of the policy such proof of loss was essential to the maintenance of any claim. The court did find that it was not true that prior to the fire the Casselmans without the consent of the insurance company conveyed their right, title, and interest in the property to Walcott Earle Hill. This finding is attacked as being contrary to the evidence, and we must sustain appellant in his contention in this behalf. Plaintiff introduced in evidence a deed by the Casselmans to Hill duly executed, which had been acknowledged October 19, 1911, and recorded on the 31st of the same month. Mr. Casselman testified that he conveyed the property to Walcott Earle Hill at the date indicated by the deed. The fire, as found by the court under the undisputed proof, occurred on or about the 27th day of February, 1912. On May 13, 1912, after more than the 60 days allowed under the policy for proofs of loss, the corporation denied its liability to the Casselmans under its policy of insurance, and more than a year after the fire it paid the mortgagee, Swall, the amount of the policy and took an assignment of the note and mortgage under the subrogation clause. The policy was not assigned until long after the fire, when on March 10, 1913, it was assigned to Hill, who assigned it to Ida Wildey; but appellant contends that this was because it covered and was in force as to other property not burned.

[3] It is apparent therefore that the judgment must be reversed because of the erroneous finding discussed above. As was held in the case of Hare v. Headley, 54 N. J. Eq. 545, 35 Atl. 445, forfeiture of the rights of the insured by reason of his failure to give notice or proofs of loss as required by the contract cannot be considered waived by the payment of loss to the mortgagee. And it was also held in that case that the insurer might be entitled to subrogation to the mortgagee's rights under a mortgage clause, although the contract between the insurance company and the mortgagee was an independent agreement and not, as in this case, part of the original policy.

The judgment is reversed.

We concur: HENSHAW, J.; VICTOR E. SHAW, Judge pro tem.

177 Cal. 68

PAYNE v. COMMERCIAL NAT. BANK OF LOS ANGELES. (L. A. 5290.)

(Supreme Court of California. Dec. 27, 1917.)

1. EVIDENCE 🔑451 — AMBIGUITIES — EXTRINSIC EVIDENCE.

A check drawn for "$500.00 Five and no/100 dollars" is patently ambiguous, and evidence is not admissible to prove that $500 was intended, even if considered under Civ. Code, §§ 1635–1637, 1640, 1641, 1643, 1647, 1654, giving rules of construction of contracts, which rules apply only to "language used" and do not authorize evidence to clear up two different and entirely inconsistent statements.

2. PLEADING 🔑35—DENIAL OF SURPLUSAGE—ISSUES—STATUTES.

Where a complaint against a bank stated that defendant paid out $500 on a check reading "$500.00 Five and no/100 dollars," an allegation that the check was intended to be for $5 was mere surplusage, and an answer denying the same and setting up as additional such matter was immaterial, and did not make a material issue of fact, and Code Civ. Proc. § 1856, relating to mistakes or imperfection of the writings put in issue by the pleadings, does not apply.

3. PLEADING 🔑381(2)—ISSUES—SURPLUSAGE.

Where an allegation in a complaint is immaterial and surplusage, and no evidence is introduced to support it, the fact of its denial in the answer does not make a material issue of fact, and testimony in refutation was inadmissible.

4. APPEAL AND ERROR 🔑1033(9) — HARMLESS ERROR—ERRORS FAVORING APPELLANT.

An appellant cannot complain that a judgment against him is for less than the other party was entitled to.

In Bank. Appeal from Superior Court, Los Angeles County; Sidney N. Reeve, Judge.

Action by D. C. Payne against the Commercial National Bank of Los Angeles. Judgment for plaintiff, and defendant appeals. Affirmed.

Paul Burks and F. J. Heid, Jr., both of Los Angeles, for appellant. Kemp, Mitchell & Silberberg, of Los Angeles, for respondent.

ANGELLOTTI, C. J. This is an action by a depositor against a bank in which he had a commercial account to recover money claimed to have been improperly paid by the bank on a purported check drawn by him against the bank, in favor of one Russell, and improperly charged to his account. Russell was not made a party to the action. Plaintiff obtained judgment for the amount claimed ($495). This is an appeal by defendant from the judgment and from an order denying its motion for a new trial. The appeal is in this court by transfer hereto after decision of the district court of appeal of the second appellate district.

On May 7, 1914, the plaintiff drew and delivered to D. W. Russell, the payee therein named, the check here involved. It was in the following form:

Los Angeles, Cal., May 7, 1914. No. 379
Commercial National Bank of Los Angeles: 16–17
Pay to the order of D. W. Russell $500.00
Five and no/100 dollars. D. C. Payne.

On May 9, 1914, the check was presented to defendant bank for payment, and the bank, with full notice and knowledge of the variance in the check between the written and "marginal figures," refused to pay the same. On May 13, 1914, the check was again presented for payment, and the bank thereupon paid the sum of $500 thereon and charged plaintiff's account in said sum. At the time of said payment plaintiff had on deposit a sum exceeding $500. Upon these facts, alleged in the complaint, established by the evidence without conflict, and found by the trial court, judgment was given for plaintiff for $495.

Of course, the bank was authorized to pay out money on plaintiff's account only upon authorization from plaintiff so to do. Janin v. London & S. F. Bank, 92 Cal. 22, 27 Pac. 1100, 14 L. R. A. 320, 27 Am. St. Rep. 82. The check hereinbefore set forth is the only authorization relied on.

Clearly there is no rule of construction which would warrant this check being read as one for $500, rather than as one for only $5.

It might well be argued that it must be construed as a check for only $5. This argument might not be sustainable under the rule of such cases as Poorman v. Mills, 39 Cal. 345, 350, 2 Am. Rep. 451, to the effect that, if there is a difference in the sum stated in the body of the check or bill and that stated in figures in the margin or superscription, the words written in the body must control without regard to the figures in the margin or superscription. The idea underlying this rule appears to be that such a marginal note or superscription is but a memorandum, constituting no part of the body of the bill or check, and that what is clearly specified in the body must control. It is said with much force that this rule can have no application here for the reason that the figures "500.00" in this check do not constitute a marginal note or superscription, but are equally with the written words and figures "Five and no/100 dollars," a part of the body of the check. But there is a general rule of construction recognized by some of the authorities to the effect that where both written words and figures are used in a contract to express the same number, and there is a discrepancy between the two, the written words must prevail over the figures. See 2 Elliott on Contracts, § 1527; Bradshaw v. Bradbury, 64 Mo. 334; Gran v. Spangenburg, 53 Minn. 42, 54 N. W. 933; United Surety Co. v. Summers, 110 Md. 95, 72 Atl. 775. The theory is that a man is more apt to commit an error with his pen in writing a figure than in writing a word, and that the words ought to be deemed the better and more solemn statement, and therefore should govern. It is unnecessary to determine here whether such a rule obtains in this state. If such should be held to be our rule, the check would have to be construed as one for $5 only, and parol evidence would not be admissible to make it otherwise. This would necessarily compel an affirmance of the judgment and order. In passing it may be noted that the Legislature, at its last session, enacted certain rules of construction for negotiable instruments, one of which is that:

> "Where the sum payable is expressed in words and also in figures and there is a discrepancy between the two, the sum denoted by the words is the sum payable." Subdivision 1, § 3098, Civ. Code.

Purely for the purposes of this decision we shall assume that no such rule can be applied here, and that the case is as stated by learned counsel for defendant in the following language:

> "In the instant case, the written instrument set out in the complaint as constituting the basis of a recovery shows upon its face that there were incorporated therein with equal prominence two different and entirely inconsistent statements, as to the amount of money which appellant was thereby directed to pay."

The result, of course, would be that we have an instrument which, on its face, is apparently void for uncertainty. Unless the uncertainty could properly be removed by evidence aliunde, the judgment of the trial court cannot be disturbed.

[1] The principal claim of appellant bank is that the trial court erred in refusing to receive parol evidence of the transaction between the plaintiff and the payee named in the check, culminating in the giving of the check, for the purpose of showing the intention of plaintiff to give a check for $500 to the payee. It seems to be the theory of learned counsel for defendant that under various sections of our Civil Code (1635, 1636, 1637, 1640, 1641, 1643, 1647, 1654), which simply lay down well-settled rules for the construction of the language used in a contract, the ambiguity may be removed and the check treated as one for $500. This theory is without any support in the authorities. Rules provided for the construction of contracts are simply for the purpose of ascertaining the true intent and meaning of the language used therein. Under these rules parol evidence is admissible where it tends to show the correct interpretation of the language used, the purpose being to enable the court or jury to understand, in the light of the circumstances shown, what the words employed really mean, and to interpret those words, in so far as this can reasonably be done, in accord with the intention of the parties as the same may be shown by such circumstances. But no authority sustains the proposition that under the guise of construction or explanation a meaning can be given to the instrument which is not to be found in the instrument itself, but is based entirely upon direct evidence of intention independent of the instrument. It has been well said that in the admission of extrinsic evidence the line which separates evidence which aids the interpretation of what is in the instrument from direct evidence of intention independent of the instrument must be kept steadily in view, the duty of the court being to declare the meaning of what is written in the instrument, and not what was intended to be written. See 17 Cyc. 675. It is well settled that parol evidence is not admissible to explain such a patent ambiguity as we have in this case. It may not be correct to say that a prima facie patent ambiguity can never be explained by evidence aliunde, for it may be that such evidence will sometimes show that the apparent uncertainty in the language used does not in truth exist. But this cannot be true of such an ambiguity as we have here. Whatever parol evidence might be introduced in this case, we would still have the "two different and entirely inconsistent statements," each statement absolutely clear and unambiguous and capable of meaning only one thing. So far as the language of the instrument is concerned, the uncertainty would be just as hopeless as it was without the evidence, and the true intent could not be ascertained from the language of the instrument. No authority to which we have been referred or that we have found sustains the proposition that evidence aliunde is admissible to explain such an ambiguity. All appear to be directly opposed to any such view. See in this connection Brown on Parol Evidence, pp. 116–120; 2 Elliott on Contracts, §§ 1655–1658; 1 Beach on Modern Law of Contracts, § 742. This was recognized in the opinion of Poorman v. Mills, supra, where it was said by this court:

> "The most that can be claimed for this memorandum, in figures, is that its presence on the face of the certificate serves to create a patent ambiguity; but this cannot be helped by averment, or evidence aliunde."

See, also, Hall v. Bartlett, 158 Cal. 641, 112 Pac. 176; Brandon v. Leddy, 67 Cal. 43, 7 Pac. 33.

In the case at bar the proposed evidence was at best but mere evidence of intention in no degree assisting in the construction of the language used.

[2, 3] The complaint in this action contained an allegation as follows:

> "That by inadvertence and mistake of plaintiff herein plaintiff wrote the figures $500.00 on the margin of said check; that said marginal figure was intended to be the sum of $5.00."

This was in addition to the other allegations which, in accord with the views we have expressed, stated a complete cause of action against the bank. This allegation was denied by the answer, wherein the bank also set up the facts it relied on to show that the check should have been for $500. Plaintiff tendered no proof in support of this allegation, and the court made no finding thereon. It is claimed that, in view of the presence of this allegation and the attempted issue made thereon, the proposed evidence was admissible. In view of what we have said, it is clear that the allegation was altogether immaterial in so far as plaintiff's right to recover was concerned. His cause of action was complete without this allegation, which was mere surplusage, and the denial did not make a material issue of fact. Code Civ. Proc. § 590. "The fact that the answer alleged facts which were irrelevant, immaterial, or incompetent as a defense, gave no right to establish them by proof." Braun v. Woollacott, 129 Cal. 113, 61 Pac. 801.

What we have said makes it apparent that section 1856, Code of Civil Procedure, cannot be held to have application here. The case is not one in which "a mistake or imperfection of the writing is put in issue by the pleadings."

We are satisfied that the trial court did not err in excluding the proffered evidence.

[4] Of course, defendant is not in a position to complain that the judgment against it is for $5 less than the amount to which, it may be assumed, plaintiff was entitled.

The judgment and order denying a new trial are affirmed.

We concur: SLOSS, J.; SHAW, J.; MELVIN, J.; HENSHAW, J.; VICTOR E. SHAW, Judge pro tem.

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177 Cal. 56

LYNN v. KNOB HILL IMPROVEMENT CO.

(L. A. 4105.)

(Supreme Court of California. Dec. 26, 1917.)

1. Vendor and Purchaser 🔑349 — Action for Breach — Recovery of Increase in Value—Complaint.

Under Civ. Code, § 3306, declaring that the measure of damages for breach of contract to convey realty is the price paid and the expense of examining title, adding, in case of bad faith, the difference between the price agreed to be paid and the value of the estate agreed to be conveyed at the time of the breach, and expenses properly incurred in preparing to enter on the land, where a purchaser's complaint did not allege the value of the land at the time of the breach, but alleged only that it had increased in value to the amount of $200 since the breach, the time of which was not alleged, the allegations were not sufficient to entitle him to judgment for the $200 increase in value, there being no foundation laid by which to compute the measure of damages.

2. Judgment 🔑101(1)—Judgment by Default—Support by Pleadings.

To support a judgment by default, the allegations of the complaint must state the facts necessary to entitle plaintiff to recover the sums included in the judgment.

3. Vendor and Purchaser 🔑349 — Recovery of Expenses in Preparing to Enter —Complaint—Statute.

Under Civ. Code, § 3306, declaring the measure of damages for breach of contract to convey realty is the price paid, etc., plus expenses properly incurred in preparing to enter, to entitle purchaser to such expenses his complaint must allege that they were properly made.

4. Specific Performance 🔑114(1) — General Allegation of Performance of Conditions Precedent—Statute.

Under Code Civ. Proc. § 457, as to the pleading of conditions precedent, the general allegation that plaintiff, purchaser of realty, seeking specific performance, had duly and fully performed all the conditions of the contract devolving upon him, was a sufficient allegation of the performance of conditions precedent, and relieved the complaint of the defect that the payments alleged to have been indorsed on the contract amounted to $17 less than the balance of principal and interest due on the price at the time of last payment.

5. Specific Performance 🔑114(2) — Complaint — Showing of Just and Reasonable Character of Contract—Statute.

Under Civ. Code, § 3391, providing when specific performance cannot be enforced, a complaint for specific performance of a contract to convey realty must show that the price was in fair proportion to the value of the land, or was an adequate consideration for the contract, which was just and reasonable.

6. Vendor and Purchaser 🔑341(2) — Breach by Vendor—Recovery of Price by Purchaser—Pleading.

It is sufficient if the purchaser of land, seeking, after the vendor's breach, to recover payments made by him, alleges an offer by him to perform by paying the balance of the purchase money in full, a demand for deed upon such payment, and the refusal by the vendor to accept the price and to execute deed.

7. Appeal and Error 🔑1039(4)—Harmless Error—Immaterial Defects in Pleading.

Where judgment against the vendor of land, in favor of the purchaser, included no other relief than the recovery of the purchase money paid and damages, it cannot be held erroneous, as to the purchase money, because the complaint failed to allege, in so far as it attempted to declare for specific performance, that the contract was just and reasonable and the consideration adequate.

8. Action 🔑45(4)—Inconsistent Causes of Action — Specific Performance and Recovery of Purchase Money.

A complaint, by the purchaser of realty against his vendor, which alleges two causes of action, one for specific performance, the other for repayment of the purchase money paid, is defective in that the causes of action are inconsistent.

9. Pleading 🔑193(6) — Separate Statement of Causes of Action—Statute.

By Code Civ. Proc. § 430, subdiv. 5, providing when defendant may demur, the purchaser's two causes of action in the same complaint for specific performance and for repayment of the purchase money, not separated into paragraphs, were subject to demurrer, as not separately stated.

10. Appeal and Error 🔑193(3) — Reservation of Grounds of Review — Judgment by Default—Demurrer to Complaint.

On appeal from judgment by default, where there was no demurrer or answer filed, defendant cannot object that the complaint was subject to demurrer, as stating two causes of action together in one paragraph and not separately.

11. Appeal and Error 🔑957(1)—Judgment 🔑139 — Relief from Default — Discretion of Trial Court—Review.

Whether defendant shall be relieved from its default is a matter of discretion in the trial court, and its action will be sustained on appeal, unless the discretion is abused.

12. Judgment 🔑138(2)—Default—Opening —Denial of Motion.

Where the secretary of defendant corporation was negligent in failing sooner to inform its attorney of service of summons, and the attorney was negligent in failing to advise himself as to just how much time the corporation had to appear and demur or answer, the trial court's decision denying defendant corporation's motion to be relieved from default was within its discretion.

Department 1. Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by S. H. Lynn against the Knob Hill Improvement Company. From a judgment for plaintiff and an order denying defendant's motion to set aside default, defendant appeals. Order refusing to open default affirmed, and judgment reversed.

Eugene C. Campbell, of Long Beach, for appellant. S. G. Barker, of Long Beach, for respondent.

SHAW, J. The default of the defendant for failing to answer or demur to the complaint within the time prescribed by law was duly entered on May 19, 1914. On the following day the defendant served on the plaintiff a notice of motion to be relieved from said default, on the ground that it was taken through his mistake, inadvertence, and excusable neglect. This motion was denied on October 1, 1914. On October 29, 1914, at the instance of plaintiff, the court entered judgment against said defendant for $678 and costs. The defendant appeals from the judgment, and also from the order denying its motion to set aside the default.

In support of the appeal from the judgment, the defendant claims that the complaint does not state facts sufficient to constitute a cause of action. The complaint alleges that on November 15, 1910, the plaintiff and defendant made an agreement in writing, whereby the defendant agreed to sell and convey to the plaintiff certain real property for the sum of $400, of which $50 was then paid, and the balance was to be paid in monthly payments of $10 a month, with interest at 7 per cent. per annum, payable quarterly, as evidenced by a certain note, a copy of which was incorporated into the contract. The note purports to be signed by the plaintiff, is dated December 15, 1910, and is for the sum of $350, with 7 per cent. interest from date, payable quarterly, and providing that, if the interest was not so paid, the whole sum should immediately become due and payable. It was not declared to be payable upon any date, but merely "after date." The complaint further alleged that—

"the following additional payments have been indorsed upon the back of said contract:

December 15, 1910	$ 10 00
December 29, 1910	200 00
August 27, 1913	140 00
November, 1913	10 00"

There is the further allegation that the plaintiff "has always been ready and willing to perform" and "has duly and fully performed all the conditions of the said contract devolving upon him to be performed," and has demanded performance thereof by the defendant, but that the defendant refused to comply with the contract or to execute to plaintiff a deed for the property, and that the defendant "never intended to convey said property to plaintiff, but used said contract for the purpose to cheat and defraud the plaintiff out of the money heretofore paid, as above set out, and then sell and again convey or have said property conveyed to other parties than the plaintiff herein"; and that "said property has increased in value in the sum of two hundred dollars since the breach of said contract by defendants herein"; and that plaintiff has paid out eighteen dollars in taxes on the land, and "has incurred expenses in preparing to enter said land in the sum of fifty dollars."

The prayer was for judgment requiring the defendant to execute a deed to the plaintiff and—

"(2) that in case defendants do not so convey said property as aforesaid, that the plaintiff be awarded damages as follows, to wit:

$ 410.00	for money paid out on said contract and interest thereon,
18.00	for taxes paid on said real property,
200.00	increase in value of said real estate,
600.00	punitive damages, and
50.00	expenses.
$1,278.00	total."

The judgment was for $678, and it included all of the above sums, except the item of $600 for punitive damages.

[1] The allegations of the complaint were not sufficient to entitle the plaintiff to judgment for the $200 alleged to have been the increase in the value of the real estate, or for the $50 for expenses in preparing to enter said land. Sections 3306 of the Civil Code declares that the measure of damages for breach of contract to convey real estate is the price paid, and the expenses of examining title, "but adding thereto, in case of bad faith, the difference between the price agreed to be paid and the value of the es-

tate agreed to be conveyed, at the time of the breach, and the expenses properly incurred in preparing to enter upon the land."

The complaint does not allege the value of the land "at the time of the breach," but alleges only that it has increased in value to the amount of $200 "since the breach." The time of the breach is not alleged. There is no presumption that there was an increase in value before the breach. It must be alleged. There is therefore no foundation laid by which to compute the measure of damages on this ground, and the complaint fails to show such damage.

[2, 3] With respect to the expenses aforesaid, the provision of the Code is that recovery may be had for the "expenses properly" incurred in preparing to enter the land. There is no allegation that any expenses were properly incurred. The allegation is merely that $18 was expended in preparing to enter the land. Whether it was properly expended or not does not appear. Upon appeal from a judgment taken by default, the allegations of the complaint must state the facts necessary to entitle the plaintiff to recover the sums included in the judgment. In order to entitle the plaintiff to the expenses, the complaint must allege that the expenses were properly made. It may be that this must be shown by setting forth the things for which the expenses were incurred, so that the propriety of the expenses will appear from the facts, but, whether this be so or not, a complaint is insufficient, on appeal, to justify such recovery, where it does not appear that such expenses were properly incurred.

[4] The defendant further claims that the complaint does not state facts sufficient to constitute a cause of action for specific performance, and in particular that it does not allege that the plaintiff, before beginning the action, tendered payment in full of the purchase price. The payments alleged to have been indorsed on the contract amount to some $17 less than the balance of principal and interest due upon the price at the time of the last payment. There is no direct allegation that these sums, or any part thereof, have ever been paid on the contract. There is no specific allegation of a tender of the balance, assuming that the allegations as to payment would be sufficient in the absence of a demurrer, but the general allegation that the plaintiff "has duly and fully performed all the conditions of the said contract devolving upon him to be performed" is a sufficient allegation of the performance of the conditions precedent, and relieves the complaint of this particular defect. Code Civ. Proc. § 457.

[5] As a complaint for specific performance it is defective in another particular, which the appellant does not mention. There is no allegation as to the value of the land, or of any facts showing that the price is in fair proportion to the value, or that it was an adequate consideration for the contract, or that the contract is just and reasonable, as required by section 3391 of the Civil Code. This is necessary to constitute a good cause of action for specific performance. White v. Sage, 149 Cal. 614, 87 Pac. 193; Herzog v. Atchison, etc., Co., 153 Cal. 501, 95 Pac. 898, 17 L. R. A. (N. S.) 428; Estate of Wickersham, 153 Cal. 607, 96 Pac. 311; Kaiser v. Barron, 153 Cal. 790, 96 Pac. 806. So far as the prayer for specific performance is concerned, the complaint is insufficient.

[6-10] But with respect to the prayer for recovery of the purchase money, a different rule prevails. In order to obtain that relief a resort to equity is not necessary. Such payments may be recovered by action for money had and received, if the facts justify such recovery. It is sufficient if the plaintiff alleges an offer by him to perform by paying the balance of the purchase money in full, a demand for a deed upon such payment, and a refusal by the vendor to accept the balance of the purchase price, and execute the deed required by the contract. Where this appears the plaintiff has laid a sufficient foundation for the recovery of the purchase money already paid upon the sale. As the judgment included no other relief except the recovery of purchase money and damages, it cannot be held erroneous as to the purchase money, because of the failure of the complaint to allege that the contract was just and reasonable and the consideration adequate. The complaint is defective, in that it alleges two causes of action—one for specific performance by a conveyance of property; the other for the payment of the purchase money. These causes of action are inconsistent with each other; the plaintiff could not prevail on both. Furthermore, they are not separated into paragraphs and would have been subject to demurrer on the ground that the two causes of action were not separately stated. Code Civ. Proc. § 430, subd. 5. But these objections cannot be made on appeal from a judgment by default where there was no demurrer or answer filed. It is enough if there are allegations in the complaint which support the judgment given.

[11-12] We perceive no error in the ruling of the court denying the motion of the defendant to be relieved from its default. The giving of relief of this kind is a matter of discretion in the trial court, and unless the discretion is abused its action will be sustained on appeal. The appellant makes the common mistake of citing to us cases where orders granting such motion have been sustained on appeal, and endeavoring to apply those precedents to the present case, where the relief is denied. The matter being discretionary and reviewable only for abuse, it may well be that this court would sustain an order denying such relief in one case and deny it in another, where the facts presented

to the lower court were precisely the same in both, because this court could not say there was an abuse of discretion in either event. The summons was served on the secretary of the defendant on May 8, 1914. The attorney for the defendant and the secretary both resided and had their offices in the city of Long Beach. From that time until May 18 the secretary several times endeavored to communicate with said attorney by telephone, but could not reach him in that way. On May 18 he again endeavored several times to speak to him by telephone, but again failed because of the absence of the attorney from that city, until 5:30 o'clock in the afternoon. The attorney then informed the secretary that service on May 8 entitled the defendant to the whole of May 19 within which to appear and demur or answer. Believing this to be the case himself, the attorney made no effort to appear in the case or serve or file a demurrer until the following day, when he was informed by the plaintiff's attorney that the default was already taken, it having been taken on the morning of May 19. It cannot be disputed that these facts show great neglect, both on the part of the secretary in failing sooner to inform the attorney, and on the part of the attorney in failing to advise himself, as he could readily have done from numerous decisions on the subject, that 10 days do not mean 11 days. Under these circumstances we cannot interfere with the discretion of the court below in denying the motion.

The order refusing to open the default is affirmed and the judgment is reversed.

We concur: SLOSS, J.; LAWLOR, J.

(177 Cal. 63)

LAUX et al. v. BEKINS VAN & STORAGE CO. (L. A. 4088.)

(Supreme Court of California. Dec. 26, 1917.)

1. Warehousemen 🔑34(9) — Burning of Goods—Actions—Question for Jury.

Evidence that defendant warehouseman advertised and represented its storage facilities to be fireproof, that plaintiff relied thereon, that goods were burned, etc., *held* to sustain a denial of defendant's motion for a nonsuit.

2. Warehousemen 🔑34(4) — Burning of Goods — Actions — Admissibility of Evidence.

Defendant warehouseman's advertisements regarding its fireproof building *held* properly admitted in an action for the burning of goods, where the advertisement raised the inference that the warehouse belonged to defendant and no motion to strike was made after contrary evidence was introduced.

3. Appeal and Error 🔑1056(2)—Harmless Error—Excluding Evidence.

In an action against a warehouseman, erroneously excluding evidence regarding a conversation between plaintiff and defendant's employé was not prejudicial, where it would have proved no disputed issue.

4. Evidence 🔑354(18) — Book Entries — Persons Bound by.

In an action against a warehouseman for the burning of goods, excluding evidence of entries by defendant alleged to be inconsistent with a fireproof storage agreement was not erroneous, where plaintiff did not claim the agreement was made until after and without knowledge of, such entries.

5. Evidence 🔑111 — Customary Conduct of Business.

In an action against a warehouseman for burning of goods, testimony regarding defendant's customary answers to prospective customers *held* inadmissible when not connected with plaintiff.

6. Appeal and Error 🔑1056(4)—Harmless Error—Excluding Evidence.

In an action against a warehouseman for burning of goods, the excluding of defendant's evidence on negligence issue is harmless, where such issue was determined in its favor.

7. Appeal and Error 🔑692(1)—Record—Inclusion of Evidence Excluded.

In an action against a warehouseman for burning of goods, excluding the warehouse receipt cannot be declared error, where not contained in the record and there was no dispute over the fact that the storage was for hire.

8. Witnesses 🔑245—Examination—Repetition.

In an action against a warehouseman for burning of goods, the sustaining of an objection to a question whether defendant's employé had any conversation with plaintiff agreeing to furnish fireproof storage is proper, where the witness had previously testified that he had had no conversation whatever with plaintiff.

Department 1. Appeal from Superior Court, Los Angeles County; Stanley A. Smith, Judge.

Action by Richard Laux and Blanche G. Laux against the Bekins Van & Storage Company. From a judgment for plaintiffs and an order denying a new trial, defendant appeals. Affirmed.

Richard T. Lightfoot, of Los Angeles, for appellant. T. R. Archer, of Los Angeles, for respondents.

SHAW, J. The defendant appeals from the judgment and from an order denying its motion for a new trial. The plaintiffs delivered to defendant for storage certain household goods, to be stored in defendant's warehouse. A fire occurred in the warehouse while the goods were stored there and the goods were destroyed thereby. This action is for the recovery from the defendant of the value of the goods.

The complaint is in three counts. On the third count, charging negligence of defendant in failing to keep a watchman in the warehouse at night, the court below decided for the defendant, and that point is therefore not involved. The first count alleges that the plaintiffs and defendant made an agreement, by which the defendant was to store the goods in a fireproof depository; that the goods were delivered to defendant for storage in pursuance of said agreement, and were stored by it in a warehouse not fireproof; and that while there stored they were totally destroyed by fire, by reason of the neglect of defendant to store them in a warehouse that was fireproof. The second count is the same as the first, excepting that, instead of alleging a positive agreement that defendant should store the goods in a fireproof depository, it is alleged that, in order to induce the plaintiffs to intrust the goods to the defendant for storage, the defendant represented to plaintiff that the warehouse of defendant, wherein the goods would be stored, if intrusted to it for storage, was fireproof; that plaintiffs, relying on said representations, and induced solely thereby, delivered the goods to defendant for storage. The court found in favor of plaintiffs on both of these counts.

[1] The motion for a nonsuit was properly denied. There was evidence to the effect that the defendant was in the business of storing household goods for hire; that it had extensively and conspicuously advertised that it furnished "fireproof storage"; that the plaintiff Blanche G. Laux, who acted for the plaintiffs in the matter, had seen these advertisements and was induced thereby to apply to the defendant for storage of the goods; that for that purpose she went to the main office of the defendant and said to the man at the desk therein that she wanted to store these goods and to be sure that they were absolutely safe; that they would be ready in a few days, and asked him the question, "Is your warehouse absolutely fireproof?" to which he answered, "Oh, certainly"; that she thereupon gave him the address where the goods could be had; that he directed her to telephone to the office when they were ready, and defendant would then send a wagon, get the goods, and store them for her as requested; that in a few days she telephoned accordingly, and defendant got the goods, stored them in one of its warehouses that was not fireproof; and that thereafter the goods were destroyed by a fire which occurred in said warehouse. There was proof of the value of the goods. This evidence was sufficient proof of the agreement to store the goods in a fireproof warehouse, and also of the representations alleged, the reliance of the plaintiffs thereon, and of the placing of the goods in storage upon that reliance. It was not necessary that such an agreement should have been proven to have been made by express words or declarations. Actions and words from which it could reasonably be implied will suffice.

[2] The court ruled correctly in admitting in evidence the advertisements above referred to. They had been seen by Mrs. Laux before she applied for the storage, she relied on them, they were issued by the defendant, and the inference is clear that they were made in order to attract custom, and with the intent by the defendant that such customers should see and believe the statements therein, and, relying thereon, apply for the storage of goods, upon the understanding that they would be stored in a place that was fireproof. They had therefore a direct tendency to prove the contract, as well as the representations alleged. On one of them, a six-page folder, there was a city map on one side, and on the other several advertisements of Bekins Van & Storage Company, and on one page a picture of a large building showing the words "Bekins Fireproof Storage," in huge letters painted on it, and vans backed up on the street in front of it bearing the words "Bekins Van & Storage Company," and immediately below it the words "Bekins Fireproof Storage, 1335 So. Figueroa St." After the plaintiffs had rested their case, evidence was given on behalf of the defendants tending to show that the warehouse on Figueroa street did not belong to the defendant company, but was the property of another company known as "Bekins Fireproof Storage Company." The defendant now makes the objection that the folder, so far as it shows this building, was incompetent and inadmissible to show representations by the defendant to the effect that it owned this warehouse. The objection made to the introduction of the folder in evidence at the time it was admitted did not include any statement that this warehouse did not belong to the defendant. The point was not mentioned. Upon its face the matter in the folder would raise the inference that the warehouse pictured was the property of the defendant. Nothing appearing to the contrary, the court ruled properly in admitting the folder without any limitation regarding this particular part of it. No motion was made, upon the proof of the defendant coming in, to strike it out or to limit its effect. Furthermore, it clearly appears that it was an advertisement of the defendant and that its contents would lead any one to believe that the defendant did own the said warehouse. This being the case, the defendant is responsible for the belief thus produced by its own advertisement, whether the statements therein are true or not, and the same would be evidence against it.

[3] The testimony for the plaintiff showed that Mrs. Laux telephoned to the office of the defendant and informed the shipping clerk that the goods were ready, and asked that they be taken away on the following Thursday. The defendant called the shipping clerk as its witness, and asked her to testify to the conversation over the telephone with Mrs. Laux. She said that she was able to refresh her memory from the memorandum of the transaction made in the books of the company at the time by another employé. The court apparently understood her to say that she had no recollection of the transaction and knew only what the books disclosed, and thereupon it excluded her testimony as to the conversation. This ruling was erroneous, but

we do not think it was prejudicial. It was not claimed by the plaintiff that any conversation with her over the telephone related to an agreement to store the goods in a fireproof warehouse, but merely that information was given of the time when the goods would be ready. It was not claimed by the defendant that the shipping clerk would testify that anything was said in her conversation with Mrs. Laux about the character of storage, whether in a fireproof place or not. There was no dispute over the fact that the information was given that the goods were ready, and that in consequence of that information the defendant sent out its van, got the goods, and took them to its warehouse. It is obvious that the mere repetition by the defendant's witness of the notification which led the company to get the goods would add nothing to the defense. As there was no proposal to prove anything by that witness contrary to the statements of the plaintiff, the exclusion of her testimony was harmless.

[4-6] The court excluded evidence of the entries made in the books of the company at the time of the telephone conversation aforesaid. It was proposed to show thereby that the words "pack and store" were inserted in the memorandum on the books, and that if the order had been for fireproof storage a different entry would have been made. There was no error in this ruling. It is not contended that any conversation took place between the plaintiffs and the shipping clerk at the time of the telephone order, regarding the character of the storage, or that any entry was made in its books except at that time, nor did the defendant propose to show that the plaintiffs, or either of them, had any knowledge whatever of the entries made in the defendant's books. This being so, evidence of such entries would be inadmissible against the plaintiffs. In another ruling the court excluded testimony concerning the answers that the defendant's employés customarily gave to persons who made inquiries concerning the storage, packing, or shipping of goods. We cannot perceive that this evidence was admissible for any purpose unless brought home to the plaintiffs. The defendant did not offer to connect it with the plaintiffs in any manner. Inasmuch as the court found in favor of the defendant on the charge of negligence, the exclusion of evidence relating to that issue, even if erroneous, would not injure the defendant in any respect.

[7, 8] The defendant offered in evidence the warehouse receipt issued by the defendant after the goods had been received for storage. The court excluded the evidence. The receipt is not set forth in the record, and we have no means of knowing its contents, or determining whether it would have been material to any issue or not. It is not claimed in the argument that it contained anything to the effect that the goods were not to be stored in a fireproof warehouse, or anything whatever on the subject of the character of the storage. Hence we cannot say that the ruling was erroneous. There was no issue or dispute over the proposition that the storage was for hire and that the defendant was to be paid reasonable charges therefor. If the receipt was intended to prove that fact it was unnecessary. The defendant's order clerk was asked the question whether he ever had any conversation in which he agreed to store any property of the plaintiffs in fireproof storage, or accepted an order from plaintiffs to store their goods in a fireproof warehouse. The objection to the question was sustained. It would have been proper, of course, to have allowed the employés of the defendant in charge of its office at the time the contract was made, to testify in contradiction of the evidence of Mrs. Laux on the subject. This witness, however, immediately prior to the asking of the question aforesaid, testified, in answer to other questions on the subject, that he never had any conversation with the plaintiff. It was useless, after this statement, to ask him to state that he had not had a particular conversation with the plaintiff. The general statement covered the whole subject. These comprise all the points urged in the briefs as cause for reversal.

As we find no prejudicial error in the record, the judgment and order are affirmed.

We concur: SLOSS, J.; LAWLOR, J.

(177 Cal. 50)

HENSHALL v. COBURN et al. (S. F. 7555.)

(Supreme Court of California. Dec. 24, 1917.)

1. ATTORNEY AND CLIENT 🔑166(2) — EVIDENCE OF EMPLOYMENT—SUFFICIENCY.

In a suit by plaintiff attorney for the value of professional services, evidence *held* to show an employment of plaintiff by defendants.

2. EVIDENCE 🔑220(5) — ADMISSIONS — ACQUIESCENCE IN ORAL STATEMENTS.

In a suit for services rendered by an attorney in proceedings to restore defendant to capacity, evidence of declarations of defendant, while being cross-examined in such proceeding, to the effect that a Mr. T. was his only lawyer, was inadmissible, though made in presence of plaintiff and not disputed by him at the time; the obvious purpose of the cross-examination being to show that defendant's memory was so weak that he did not recognize his own counsel.

3. ATTORNEY AND CLIENT 🔑166(2)—TERMS OF EMPLOYMENT—ADMISSION BY AGENT.

Where a witness had testified that he had been authorized to employ plaintiff as attorney for defendants, it was proper for the purpose of bringing out the terms of the employment to ask plaintiff what such witness said to him on the occasion of the employment.

4. PRINCIPAL AND AGENT 🔑194(3)—RATIFICATION—INSTRUCTIONS.

An instruction that, if an alleged agent, assuming authority as defendants' agent, employed plaintiff, attorney, and defendants accepted and retained the benefits of plaintiff's services, the jury could find for plaintiff on the principle of ratification, clearly stated the general rule, and, when read together with other instructions, to the effect that mere acceptance of services would not amount to ratification of an unauthorized employment, fairly set forth the principles applicable to the case.

5. WITNESSES 🔑201(1) — PRIVILEGED COMMUNICATION—ATTORNEY AND CLIENT.

In suit by an attorney for professional services, the attorney who employed plaintiff for defendants could testify as to declarations made by defendants concerning employment of plaintiff.

Department 2. Appeal from Superior Court, San Mateo County; Geo. H. Buck, Judge.

Action by Richard P. Henshall against Loren Coburn and another. From the original judgment for plaintiff and from a modified judgment and motion denying new trial, defendants appeal. Appeal from original judgment dismissed, and modified judgment and order denying new trial affirmed.

See, also, 165 Cal. 202, 131 Pac. 352.

Sullivan & Sullivan, Theo. J. Roche, and Cullinan & Hickey, all of San Francisco, for appellants. Richard P. Henshall and Bert Schlesinger, both of San Francisco, for respondent.

MELVIN, J. Defendants, Loren Coburn and Sarah Satira Coburn, his wife, appeal from a judgment against them, from a modified judgment, and from an order denying their motion for a new trial.

Plaintiff, an attorney and counselor at law, sued for $19,450 alleged to be due for the value of professional services performed by him for defendants jointly. After issue joined the case was tried before a jury, and a verdict for $10,450 was returned. Defendants moved for a new trial, and the court made a conditional order that, if within 20 days plaintiff should consent to remit all over $5,000, the motion would be denied. Within the indicated period plaintiff filed his consent to the suggested modification of the judgment, after which the court made and entered a modified judgment in plaintiff's favor for $5,000 and costs.

The services of Mr. Henshall were performed in an effort to secure a writ of error to the Supreme Court of the United States in the proceeding by which Mr. Coburn had been declared an incompetent person (In the Matter of Coburn, 165 Cal. 202, 131 Pac. 352), and he also appeared in the trials of two proceedings for the restoration of Loren Coburn to capacity, in the second of which the petitioner was successful. There is no contention that the award for the value of services is exorbitant, but appellants insist that the evidence fails to show an employment of plaintiff by them. Their contention is that the evidence, properly considered, proves that Mr. Archibald J. Treat, senior counsel for Mr. Coburn, employed Mr. Henshall to assist him, with the understanding that plaintiff was to be compensated, not by the Coburns, or either of them, but by Mr. Treat himself. Appellants insist that there is no real conflict of testimony, and that there is an entire absence of evidence to support any verdict against them, or either of them.

[1] Without reviewing the testimony at length, it is sufficient to say that the record furnishes abundant support for the verdict. Mr. Treat testified that both Mr. and Mrs. Coburn authorized him to employ Mr. Henshall. The plaintiff testified that he was employed by both defendants, and his statement was corroborated by those of Mr. Treat and Mr. J. Early Craig. Mrs. Coburn stated under oath that she had, she thought, first heard of Mr. Henshall in connection with her husband's business after his return from Washington, where he had gone to ask for a writ to the Supreme Court of the United States, but a letter written by her to Mr. Treat before Mr. Henshall's departure contained this sentence:

> "You are to have Mr. Henshall as you told us, and we thought he would be away by this time, as it was arranged to that effect."

The letter admittedly was signed by Mrs. Coburn, and was entirely in her own handwriting. Plaintiff also introduced in evidence a notice signed by Mrs. Coburn and directed to Mr. Hynes, who was at the time guardian of Mr. Coburn's person and estate. In it she referred to Messrs. A. J. Treat, Gavin McNab, and R. P. Henshall "as her attorneys," and the notice specified that they were thereby "authorized and empowered to appear for her in all matters and things referred to in said notice." At the hearings of the proceedings for restoration Mr. Henshall was in constant attendance and was in frequent consultation with Mr. and Mrs. Coburn. It is suggested that Mrs. Coburn had no personal interest in the litigation, and therefore could not be charged with responsibility for the payment of Mr. Henshall's fee, but as a matter of fact she was a party to the petition for restoration. However, that is immaterial. Whether her interest was monetary or merely sentimental, she had an undoubted right to join with her husband in a contract for the employment of counsel. The same witnesses who described Mrs. Coburn's participation in the employment of Mr. Henshall also positively stated that Mr. Coburn had joined in the contract of employment and had accepted the services of the plaintiff.

[2] The court properly refused to admit in evidence a transcript of part of the proceedings in the trial of the application for restoration wherein it was shown that Mr. Coburn when on the witness stand stated that Mr. Treat was the only lawyer who had been employed by him. The theory upon which this testimony was offered was that the declaration of Mr. Coburn made in the presence of Mr. Henshall called for a denial from the latter of his alleged client's statement. But

Mr. Henshall was under no obligation to assert his right to compensation as one of Mr. Coburn's counsel when the testimony of the latter was given in the other proceeding. The obvious purpose of the examination of Mr. Coburn was to test the memory of the witness, and the cross-examiner was trying to show that Mr. Coburn's memory was so weak that he was unable to recognize his own counsel. The matter then at bar did not involve the exact status of Mr. Henshall nor his right to compensation. There was nothing which called for a denial on his part. In order that one may be affected by conversations or declarations held in his presence, they must be made to him in such manner as requires him to deny or by his acquiescence to admit them. Wilkins v. Stidger, 22 Cal. 231, 83 Am. Dec. 64; Porter v. Elizalde, 125 Cal. 204, 57 Pac. 899.

[3] Mr. Henshall was asked, while on the witness stand, what Mr. Treat said to him on an occasion when in company with Mr. Craig Mr. Treat visited him. Counsel for defendants objected on the ground that agency could not be shown by Mr. Treat's declarations. The objection was properly overruled. The evident purpose of the question was to bring out the terms of the contract of employment. Mr. Treat had positively testified that he had been authorized to employ Mr. Henshall. Therefore there was direct testimony of Mr. Treat's authority to hire respondent.

[4] One of the instructions was to the effect that if, assuming an authority as agent for the defendants, which in fact he did not have, Mr. Treat employed plaintiff, and defendants accepted and retained the benefits of plaintiff's professional services, then the duty of the jury would be to find in favor of plaintiff on the principle of ratification. This instruction is attacked as being opposed to the principles announced in Porter v. Elizalde, 125 Cal. 204, 57 Pac. 899, but in reality it is not in conflict with that authority. The rule of the Elizalde Case may be summarized in one sentence of the opinion, which is as follows:

> "The mere silence of the party will not be held to constitute such assent or acquiescence in the acts of the agent as to amount to a ratification or adoption of these acts, without also considering the circumstances under which the silence existed."

By the instruction here attacked the court did not tell the jury that mere silence on the part of the Coburns would amount to ratification of any unauthorized contract made by Mr. Treat. But the jurors were told that, if the services were rendered and the defendants "accepted and retained the benefit of said services," they thereby ratified the employment. Undoubtedly that is the general rule. Instructions must be read together, and the jurors were told in other instructions that mere acceptance of services would not amount to ratification of an unauthorized contract of employment. Taken together, the instructions fairly set forth the principles applicable to the case presented.

[5] Appellants make the further objection that Mr. Treat was bound by his obligation as an attorney not to testify to declarations made by the Coburns concerning the employment of Mr. Henshall. There is no merit in this point.

> "The rule as to privileged communications does not exclude evidence as to the instructions or authority given by the client to his attorney to be acted upon by the latter." 40 Cyc. 2374.

This is the rule in California. Ruiz v. Dow, 113 Cal. 490, 45 Pac. 867; Hager v. Shindler, 29 Cal. 47–63. In discussing the reason for the rule the Supreme Court of Wisconsin, in Koeber v. Somers, 108 Wis. 497, 84 N. W. 991, 52 L. R. A. 513, said:

> "The proposition advanced by respondent and adopted by the trial court, that one, after fully authorizing his attorney, as his agent, to enter into a contract with a third party, and after such authority has been executed and relied on, may effectively nullify his own and his duly authorized agent's act by closing the attorney's mouth as to the giving of such authority, is most startling. A perilous facility of fraud and wrong, both upon the attorney and the third party, would result. The attorney who, on his client's authority, contracts in his behalf, pledges his reputation and integrity that he binds his client. The third party may well rely on the assurance of a reputable lawyer that he has authority in fact, though such assurance be given only by implication from the doing of the act itself. It is with gratification, therefore, that we find overwhelming weight of authority against the position assumed by the court below, both in states where the privilege protecting communications with attorneys is still regulated by the common law and in those where it is controlled by statute."

Finally it is contended that there was a variance between the contract as pleaded and that which respondent endeavored to prove. Appellants insist that, instead of one joint contract, the evidence, if it tends to support any meeting of minds, establishes separate contracts with the two defendants made at different times. The evidence, however, fairly supports the pleading of respondent. He declared on a contract between him and both defendants made within two years whereby he was retained as their legal adviser, and he asked for the reasonable value of the services rendered pursuant to that agreement. The evidence tended to show that the contract of employment was made April 23, 1913, at a conference held at Mr. Craig's office, and that both Loren Coburn and his wife participated in the transaction.

The modified judgment for $5,000 and costs and the order denying a new trial are affirmed. As the original judgment, or rather verdict, for $10,450 and costs, was merged in the judgment as finally given, the attempted appeal from it is dismissed.

I concur: **HENSHAW, J.**

SHAW, J. I concur. I wish to add, however, that nothing in the opinion is to be taken as an intimation that one who is present in the courtroom when another person is testifying as a witness must deny statements made by such witness in his testimony, at the peril of having his silence taken as an admission that such statements of the witness are true, or that such statements can ever be given in evidence against the person so standing silent.

(176 Cal. 787)

WOLF et al. v. GALL et al. (two cases). (S. F. 7592.)

(Supreme Court of California. Dec. 18, 1917. Rehearing Denied Jan. 17, 1918.)

1. Quieting Title 🔑43—Issues.
In an action to quiet title, plaintiffs must show in the action itself, the invalidity of a deed presented by defendants, and cannot sue in another action to set aside the deed.

2. Appeal and Error 🔑1071(6)—Harmless Error—Immaterial Findings.
In an action to quiet title, where the court found that defendants had the record title, plaintiff cannot complain that the court did not make a finding as to a defense of prescription set up by defendants.

3. Appeal and Error 🔑1011(1)—Conflicting Evidence—Findings by the Court.
Where there is clear and substantial evidence to support a finding by the court, the Supreme Court cannot interfere because the evidence is conflicting.

4. Deeds 🔑211(4)—Undue Influence—Sufficiency of Evidence.
In an action to quiet title, evidence *held* sufficient to support a finding that a deed was executed and delivered without fraud or undue influence by plaintiffs' ancestor to defendants.

5. Evidence 🔑511 — Writing Experts — Marks.
It was not error to refuse to allow a writing expert to testify as to whether a mark was made by a certain person who could not write.

6. Evidence 🔑511 — "Handwriting" — Typewriting—Statutes.
Typewriting is not "handwriting" within Code Civ. Proc. § 1870, subd. 9, allowing experts' opinions as to who executed a writing.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Handwriting.]

7. Deeds 🔑203—Fraud—Drawing up Deed —Admissibility of Evidence.
Where fraud was claimed in the execution of a deed, it was not error to exclude evidence to show that one of the defendants, a son of the grantor, had typewritten the deed.

Department 2. Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action to quiet title by Arturo Wolf and Maria Julia Wolf against Charles Funkenstein Gall, Rebecca Funkenstein Gall, Edward Funkenstein, and Sarah Funkenstein. From a judgment for defendants and an order denying a motion for a new trial, the plaintiffs respectively appeal. Affirmed.

See, also, 170 Cal. 594, 150 Pac. 987, 162 Pac. 115; 32 Cal. App. 286, 163 Pac. 346, 350.

Denson, Cooley & Denson, of San Francisco (Theodore A. Bell, George Lezinsky, and Richard T. Harding, all of San Francisco, of counsel), for appellants. J. R. Pringle, Edgar D. Peixotto, and Leon Samuels, all of San Francisco, for respondents.

HENSHAW, J. Plaintiffs brought their action to quiet title to one undivided tenth each in certain real property in the city and county of San Francisco. Their asserted title rested upon their claim of heirship as children of a deceased child of Tobe Funkenstein, their paternal grandmother, their father being Newman Wolf, a son of the said Tobe, who predeceased her. The defendants are the four surviving children of Tobe Funkenstein, issue of her second marriage. They answered to the same effect. They asserted prior ownership in the property in their mother, and alleged that on December 21, 1907, she made and executed to them her deed of grant, conveying the property in question to them, her four children, as tenants in common. They denied the asserted ownership of the plaintiffs in and to any part of the realty, and finally pleaded prescriptive title. Trial was had, resulting in findings and judgment in favor of the defendants. Plaintiff Arturo Wolf appeals from the judgment (S. F. No. 7592). Plaintiff Maria Julia Wolf appeals from the order denying her motion for a new trial (S. F. No. 7617). In its findings the court declared that prior to, at the time of, and subsequent to the making of the deed to her four children, respondents herein, Tobe Funkenstein, though aged in years, possessed all her mental faculties, and was at all times mentally competent, and that at the time of and in the making of the deed she "was of sound mind and memory, and not acting under mistake, duress, fraud, menace, or undue influence of any kind." The principal grievance urged upon our attention on the appeal from the judgment is over the findings above quoted, and this means simply that these appellants are unwilling to be foreclosed by the judgment in this action which they brought from further litigating issues of fraud presented by them and determined against them in the action. Nor yet are they willing that the judgment restraining and enjoining them from further litigation against these defendants over the titles to these properties should be allowed to stand.

[1] Yet what are the facts? The defendants set forth their title by deed from their mother. The law gave the plaintiffs a replication without pleading to this asserted title. They were before the court. To prevail, they must establish the infirmity and insufficiency of this written instrument. It was not only their right, but it was their duty, so to do. In evidence and in argument they attack the deed in every conceivable way—nonexecution, nondelivery, fraud in its procurement,

forgery by implication, undue influence. Under what circumstances was this evidence addressed to and admitted by the trial court? It is shown by the record as follows:

> "Mr. Lezinsky: In order to get this record straight, your honor, I think if your honor please, we are entitled to introduce now in evidence in this cause any evidence which will show that this deed was not signed, any evidence which will show that this deed was procured by fraud, any evidence which will show that this deed was procured by menace, undue influence or misrepresentation.
>
> "The Court: Unquestionably so—granted.
>
> "Mr. Lezinsky: Also any evidence which would show what the intention was, or if there was any intention whatever on the part of Tobe Funkenstein to make any deed to these defendants at any time whatever.
>
> "The Court: Granted."

There is scarcely a page of the voluminous brief presented to this court on the appeal from the order refusing to grant a new trial that does not contain either some direct argument as to the fraud of these defendants and their witnesses in procuring the deed, or some innuendo to the same effect.

In another branch of this litigation where, notwithstanding the injunctive order against so doing, Arturo Wolf attempted by a new action to litigate the questions of fraud, and was cited, therefore, in contempt of the injunction in this case, this court said in relation thereto:

> "Furthermore, the injunction here granted was not in fact incidental to the main relief sought. It was a substantial and inherent part of the relief. The plaintiffs and defendants were seeking to have title quieted against each other." Wolf v. Gall, 162 Pac. 115.

At that hearing the same contention was made as is here advanced, that the findings of the court were without the issues, and the decision is determinative against the contention. It is abundantly settled that under issues framed as here the plaintiffs could, as their attorney represented to the court, overcome the effect of the deed, and so destroy its validity upon either equitable or legal ground. Moore v. Copp, 119 Cal. 436, 51 Pac. 630; Johnson v. Taylor, 150 Cal. 201, 88 Pac. 903, 10 L. R. A. (N. S.) 818, 119 Am. St. Rep. 181; Hermosa Beach, etc., Co. v. Law Credit Co., 166 Pac. 22. Here, as in those cases, these defendants sought a decree determining that the plaintiffs had no right or claim in or to the property or any part thereof, establishing full and complete title in themselves, and enjoining the plaintiffs from ever asserting any further claim thereto.

[2] It is finally urged that the court fell into error in failing to find upon the question of title by prescription tendered by defendants' answer. Manifestly that failure in no wise injures this appellant if the finding of record title in the defendants and the decree establishing the same are good. Smith v. Smith, 173 Cal. 725, 161 Pac. 495. To this consideration we pass in the appeal No. 7592.

Tobe Funkenstein, a widow, and the mother of plaintiffs' father, married Julius Funkenstein, and the four defendants are the issues of that marriage. The Funkensteins lived in San Francisco, where the father and his eldest son, Edward, engaged in the real estate business under the firm name of J. Funkenstein & Son. Tobe Funkenstein brought no property to the matrimonial community. The firm of Funkenstein & Son prospered. The father bought real property, and when he died this property had been conveyed to his widow. The four children were adults and were all living under the parental roof. They continued so to live after the death of their father. Mrs. Funkenstein was uneducated and unversed in business. Her activities were in the home. During her husband's life he and his son Edward had managed all of the business affairs. After her husband's death her son Edward continued to do so and to conduct business under the original firm name. The bank account in the name of J. Funkenstein & Son was the only bank account which was ever maintained in the lifetime of the father, and was the only one maintained after the father's death. The son attended to all of the business affairs—renting, leasing, insurance, mortgages, etc. About two months after the father's death the mother executed the deed in controversy to the four children, resident under her roof. The circumstances of its execution are in brief as follows: William H. Sharp and his son, William B. Sharp, attorneys at law, had been the attorneys of the father in his lifetime. William H. Sharp had died. William B. Sharp continued in the practice of the law. Mrs. Funkenstein knew him and his father before him. She sent for him and told him what disposition she desired to make of her property; that she desired to give it to her four children, respondents herein. Under her instructions he prepared the deed. She had known him from childhood and called him "Willie"; trusted him as the family had trusted his father before him. He prepared the deed expressly as she directed. The nature of this deed of gift was fully explained to her by Mr. Sharp, that to make it effective she must part with title by delivery of the deed, and that in so parting with title she would lose ownership, management, and control of the property, and would have nothing further to say in regard thereto, and Mrs. Funkenstein replied that her husband was dead, she knew nothing about business matters, and did not care to have any bother with the management and control of the property. Mrs. Funkenstein could not write. She made her mark, a court commissioner, Judge Joachimsen, also a personal friend, taking her acknowledgment and writing her name, to which she affixed her mark. Judge Joachimsen bears testimony to Mrs. Funkenstein's full understanding of her act. The deed thus signed and acknowledged was handed to her, and she in turn gave it to her son Edward, saying to him, "Now, Ed, the property is yours." Newman Wolf, her son by the former marriage, had proved at least improvident, if not dissolute. In reference to that son Mrs. Funkenstein said to Mr. Sharp that she proposed to continue to supply her son Newman's wants, but, if she should die before he did, to impress upon her son Edward that he should carry out the same arrangements for Newman's support. The son Edward took and kept possession of the deed and continued in the management and control of the properties. The family lived as before. Mrs. Funkenstein's monetary needs were not large. They embraced her charitable donations, her gifts to her son Newman, and a small amount for pin money, all of which she received. While the deed was not placed of record, no concealment of its existence was made, and in some instances the children joined in the mortgage or mortgage notes given on the property.

It would unduly and uselessly prolong this discussion, it would extend this opinion into the lengths of the briefs, to discuss as appellant seeks to have us do, the asserted conflicts in the evidence, to analyze the inferences of unfair dealings, fraud, and forgery which we are asked to draw.

[3, 4] Our province as a court of review is ended when it is shown that there is clear and substantial evidence to support a finding which the trial judge has made, and such evidence, as has been indicated in the foregoing outline, is abundantly present in this case. Giving the utmost weight to all that can be justly claimed touching the acts, disclosures, or nondisclosures of these defendants, and in especial to the argument that the course of conduct of these defendants in relation to the property was at variance with their contention that they were the owners thereof, all this, at most, raises but a conflict in the evidence, and is not sufficient to overcome the finding of due execution, transfer, and delivery of the deed by which Mrs. Funkenstein conveyed to her children all of her title in her property. Follmer v. Rohrer, 158 Cal. 757, 112 Pac. 544; Smith v. Smith, 173 Cal. 730, 161 Pac. 495; Gernon v. Sisson, 21 Cal. App. 123, 131 Pac. 85. The record is replete with exceptions to the rulings of the court upon evidentiary matters. It would be a fruitless labor to review them all. But few of these matters call for specific attention.

[5] A writing expert was being interrogated in the apparent effort to bring forth from his examination of the cross made by Mrs. Funkenstein in attestation of the genuiness of her signature that the mark was made by somebody else, or that somebody else directed the pen. We do not perceive, nor are we told, how an expert in handwriting could bear evidence upon the matter, and can quite understand the court's remark in ruling upon it:

> "Whether or no somebody else held the pen, I draw the line there; I can't stand for it."

[6, 7] An effort was directed to show by expert testimony that one of the defendants, Charles F. Gall, had prepared the deed, which was typewritten, and it was sought to show by a purported expert on typewriting, not that the deed had been typed on a particular kind of machine, but that it had been typed upon a particular kind of machine by the defendant Charles F. Gall. Of course, typewriting is not handwriting. Estate of Dreyfus, 165 Pac. 941. Expert testimony is allowed under our Code concerning the handwriting of a person. Code Civ. Proc. § 1870, subd. 9. But in addition to this it was immaterial whether or not Charles F. Gall did type the deed, and, assuming for the moment that there are characteristics in typewriting which would enable an expert to say who had or had not done a given piece of work, the inquiry was unimportant to the case. A great number of these objections are based upon the court's asserted refusal to admit evidence declared to be admissible in Williams v. Kidd, 170 Cal. 631, 151 Pac. 1, Ann. Cas. 1916E, 703. The complaint is not well founded. The trial court opened the door wide to all legitimate evidence bearing upon the declarations and conduct of Mrs. Funkenstein in reference to the properties before and after the making of the deed, and also to the acts, conduct, and declarations of the respondents in relation thereto.

The judgment and order appealed from are therefore affirmed.

We concur: MELVIN, J.; LORIGAN, J.

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177 Cal. 154

CROUCH et al. v. SHAFER et al. (L. A. 3960.)

(Supreme Court of California. Dec. 31, 1917. Rehearing Denied Jan. 28, 1918.)

1. JUDGMENT ⟹470—COLLATERAL ATTACK.

A judgment by a court having jurisdiction of the person and subject-matter, not void or invalid on its face, cannot be collaterally attacked.

2. TAXATION ⟹661—NOTICE OF TAX SALE—POSTING.

Under Pol. Code, § 3897, requiring published or posted notice of tax sale, the notice which is to be kept conspicuously posted upon the land is required only when the method of notice by posting is adopted.

3. JUDGMENT ⟹707 — CONCLUSIVENESS — PARTIES.

A judgment does not affect a subsequent action between different parties and involving different facts.

4. TAXATION ⟹659—NOTICE OF TAX SALE—MAILING.

Under Pol. Code, § 3897, requiring, in addition to published or posted notice of tax sale, mailing of copy of the notice to the party to whom the land was last assessed, and section

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⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

3650, requiring the address if known to be entered on the assessment roll, evidence establishing a residence of the last-assessed owner, apart from any knowledge officially chargeable upon the tax collector, will not be permitted to establish illegal failure to mail the notice.

5. Taxation 🔑659—Notice of Tax Sale—Mailing.

Under such statute, the tax collector is not required to resort to any other source of information to learn the address of the last-assessed owner than that given by the assessment book.

6. Taxation 🔑734(9) — Notice of Tax Sale—Mailing.

Pol. Code, § 3897, requires published or posted notice of tax sale, and mailing by the tax collector of a copy of the notice, by registered mail, to the party to whom the land was last assessed next before the sale, at his last known post office address. Section 3650 requires the address, if known, to be entered on the assessment roll. Section 3651 requires the keeping of an index, showing the name of the taxpayer, but does not require the index to show the address. On an assessment roll there appeared, with reference to certain property, a name with an address "687 Burlington avenue." Under the index appeared in reference to the same property the same name with same address "687 Burlington street, L. A." The tax collector sent no notice to the person named in the assessment roll and index. It appeared that the Los Angeles post office would not have received for registration a letter with the address "687 Burlington avenue," no city or town of destination being thereon given. *Held* that, since the tax collector could not have registered and mailed the notice, his failure to do so for lack of official knowledge of the residence was justifiable in point of law and did not invalidate the tax deed of the property.

7. Taxation 🔑773 — Conclusiveness of Recitals in Tax Deed.

Where recitals in tax deed to the state are sufficient, they are conclusive.

In Bank. Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by George W. Crouch and another against Sevelin E. Shafer and others. From order denying new trial, defendants appeal. Affirmed as to named defendant, and reversed as to certain other defendants.

Walter J. Horgan and Sam B. Dannis, both of Los Angeles, for appellants. Crouch & Crouch, of Los Angeles, for respondents. U. S. Webb, Atty. Gen., amicus curiæ.

HENSHAW, J. Defendant Shafer held the record title to the real property, ownership of which is here in controversy. Plaintiffs' title rests upon a sheriff's deed made after foreclosure of the lien of a street assessment upon this property, in which action the predecessor in interest of defendant Shafer was impleaded and served as a party defendant, suffered default and an adverse judgment. Defendants Campbell and Smith deraign title through a tax deed from the state antedating the lien of the street assessment.

[1] Appellant Shafer's contentions may be disposed of with brevity. His attack upon plaintiff's title, in which he is joined by his fellow defendants, amounts to but a collateral attack upon a judgment rendered by a court having jurisdiction of the person of the defendant and the subject-matter of the action. The judgment is neither void nor invalid upon its face, and such a collateral attack will not be listened to. Wood v. Jordan, 125 Cal. 261, 57 Pac. 997; Brush v. Smith, 141 Cal. 466, 75 Pac. 55; Emery v. Kipp, 154 Cal. 83, 97 Pac. 17, 19 L. R. A. (N. S.) 983, 129 Am. St. Rep. 141, 16 Ann. Cas. 792; Crouch v. Miller, 169 Cal. 341, 146 Pac. 880.

[2] As between plaintiffs and defendants Campbell and Smith, the controversy is over the validity of the tax deed through which the latter deraign title. The court found with the contentions of the plaintiffs that it was invalid. The principal irregularities amounting to illegalities urged against the validity of the tax deed are two. Section 3897 of the Political Code at the time of the proceedings required the tax collector about to sell the property to "give notice of such sale by first publishing a notice for at least three successive weeks in some newspaper published in the county, or city and county, or if there be no newspaper published therein, then by posting a notice in three conspicuous places in the county, * * * one of which shall be at the United States post office nearest the land, in addition to a notice conspicuously posted on the land itself for the same period." Still further, that "it shall be the duty of the tax collector to mail * * * a copy of said notice, postage thereon prepaid and registered, to the party to whom the land was last assessed next before the sale, at his last known post office address." Pol. Code, § 3897. The notice in this instance was by publication, but in addition to publication the tax collector did not post a notice conspicuously on the land. Smith v. Furlong, 160 Cal. 522, 117 Pac. 527, upon which reliance is placed to support the holding that the posting of such notice upon the land is required, even when publication is had, has been misunderstood in this respect. The language quoted and relied upon from page 524 of 160 Cal., 117 Pac. 527, of the decision in Smith v. Furlong, was not addressed to an analysis of the section touching the requirements of the posting of notices. It was a mere skeletonized summarization of the section, designed only to illustrate the proposition which this court then had under consideration, which was the requirement as to the mailing of the notice, and this is clearly established by the context. However inartificial it may be thought that the language of section 3897 is, nevertheless it clearly ap-

pears that the notice which is to be kept conspicuously posted upon the land is required only when the method of notice by posting is adopted.

[3-6] Section 3650 of the Political Code requires that the address, if known, shall be entered on the assessment roll. In this case it is shown that on the assessment roll appeared the name of "Mary B. Scott, 687 Burlington Avenue." Under the index required to be kept by law (section 3651) appeared in reference to the same property "Mary B. Scott, 687 Burlington Street, L. A." The law does not require the index to show the address. Mary B. Scott was the person to whom the land was last assessed and to whom notice should have been sent, if her address was known to the tax collector. He sent no notice, and the question is whether the information before him was such as to call for the mailing of the notice as matter of law. This consideration is not at all affected by the decision of this court in Campbell v. Shafer, 162 Cal. 206, 121 Pac. 737, though in that case the same tax title to the same land was involved. These plaintiffs were not parties to that action, nor, as manifestly appears from the opinion, were the facts there before this court the same as the admitted facts here presented. In the former case all that was shown as to the residence of the defendant was from evidence resting in parol that Mary B. Scott had in fact resided in Los Angeles for a number of years, and of course evidence establishing a residence apart from any knowledge officially chargeable upon the tax collector will not be permitted to establish an illegal failure to mail the notice. Krotzer v. Douglas, 163 Cal. 49, 124 Pac. 722. Nor yet was it the legal duty of the tax collector to resort to any other source of information to learn this address than that given by the assessment book. Kehlet v. Bergman, 162 Cal. 217, 121 Pac. 918; Krotzer v. Douglas, supra. Our law touching the mailing of these notices is peculiar, in that it requires that the notice mailed shall be registered. It might well be held, without this requirement of registration, that the information contained upon the assessment book "Mary B. Scott, 687 Burlington Avenue" made it the duty of the tax collector to send out his notice by mail to that address, whether complete or incomplete, whether or not the mailed notice would reach its destination. But a different element is imported into the case by the requirement of registration, and it is in evidence from the deputy postmaster of Los Angeles that his office would not have received for registration a letter with the address as above indicated, no city or town of destination being thereon given. The unescapable conclusion is that the tax collector could not have registered and mailed the notice, and his failure to do so for lack of official knowledge of residence was therefore a justifiable failure in point of law.

[7] The further objections of respondents to the deed of the tax collector to the state are without force. The recitals in that deed are made conclusive. Krotzer v. Douglas, supra. Those recitals are sufficient, and respondents' attempts to show certain technical informalities in the recitals are without avail. It follows herefrom that defendant Shafer is without title in that his predecessor in interest, while the owner of the property, was divested of ownership by virtue of the tax deed; second, that the tax deed to defendant from the state was sufficient to vest title of the property in Campbell and his successors in interest; third, that, the title by tax deed being good, it admittedly follows that plaintiffs' title, resting upon a sheriff's deed under foreclosure against Shafer, at a time when Campbell held title, is invalid.

Wherefore the order denying a new trial is affirmed as to appellant Shafer, and reversed as to appellants Campbell and Smith.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOSS, J.; VICTOR E. SHAW, Judge pro tem.

(177 Cal. 140)

HAACK et al. v. SAN FERNANDO MISSION LAND CO. et al. (L. A. 4123.)

(Supreme Court of California. Dec. 31, 1917. Rehearing Denied Jan. 28, 1918.)

1. Waters and Water Courses 🔑89 — "Wash" of Stream.

The "wash" of a stream is that part of its cone, formed where a mountain stream debouches onto the level lands, which has remained desert.

2. Waters and Water Courses 🔑89—Bed of Stream—Construction of Call—Center Line of Creek or Wash.

The call of a deed, "the center line of said P. creek or wash," calls for the center line of the creek channel where the creek had a defined channel, and for the center line of the wash if a well-defined channel did not exist.

3. Appeal and Error 🔑1011(1)—Review—Finding of Fact.

Finding on conflicting evidence, as to location at a prior time, of a creek channel, is not reviewable.

Department 2. Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by Peter Haack and others against the San Fernando Mission Land Company and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Tanner, O'Dell & O'Dell & Taft, of Los Angeles, for appellants. Avery & French and R. M. Widney, all of Los Angeles, for respondents.

HENSHAW, J. In an action to quiet title brought by plaintiffs against defendants the real controversy was over the boundary line between their respective land holdings. Plaintiffs prevailed in their contention as to the location of this boundary line, and defendants have appealed. The call in the deed to plaintiffs' land which gives rise to this controversy is "the center line of said Pacoima creek or wash as the same existed on the 14th day of June, 1882." It is conceded that plaintiffs own the land to the east of that line wherever it may be located.

[1] The word "wash" employed in the description belongs neither to the terminology of geology nor of law. It is, however, a word in popular usage in the southern part of the state, and as used is quite capable of definition. The streams in the southern part of the state rising in the mountains flow through narrow and often deep channels with sharp grades until they debouch onto the level lands below. They are torrential in character, carrying great quantities of water during the heavy rains in winter and becoming partially or wholly dry during the rainless season. At times, cloud-bursts or long-continued heavy rains in the mountains cause these streams to overflow their banks in the valley lands below and flood the neighboring country. In the torrential season these streams bring down from the mountains, and for centuries have brought down, boulders, smaller stones, gravel, and sand, and as the velocity of the waters so moving and carrying these earthy matters is arrested upon entering the plains, they begin, under familiar laws, to deposit, first, the heavy boulders at and near the mouth of the canyon, or mountain passes, down which they have descended; next the smaller rocks, next the gravel, and finally the sands. Naturally, the greatest of these deposits is below and near to the canyon mouth, and they spread out fanwise, lessening in depth and thickness until finally they feather out into nothingness. Geologically, the whole area of land thus affected, being built up of these deposits, is known as the "cone" of the stream. The "wash," though bearing relation to the cone, is not synonymous with it. As these conditions of increased winter flow occur every year, and as each year is brought down and deposited débris of the character described, it results in creating upon the lower reaches of the stream, always at the point where the waters first flow onto the level land, and at times in other parts of the river bottom, rocky, gravelly, and sandy stretches of waste lands, desolate to the eye and nourishing little or no vegetation; in brief, a tiny desert. It is this sandy, rocky, gravelly, boulder-bestrewn part of the river bottom which is known as the wash. The wash is not, of course, conterminous with the cone. It frequently happens that in the lapse of centuries the outer portions of the cone have accumulated sufficient humus to create a fertile and fruitful soil raised above the danger of ordinary flooding. Through the wash the waters of the stream find their way. Under the conditions outlined it is quite apparent that the channel of the stream will move about in this wash. An impediment at the head of the old channel may cause a diversion; an obstruction at the lower part of the old channel will cause its rapid filling with débris, and so in time force the stream to leave it and make for itself a new way. Frequently then, the channel of the stream shifts in the wash, and sometimes for no small distances a well-defined channel is entirely lost, the waters wandering over the surface of the wash in small rivulets, seeping through the gravels, and coming together within banks and boundaries at some lower point. Usually, however, somewhere through the wash runs a well-defined channel.

[2, 3] The court construed the language of the deed above quoted as calling for the center line of the creek channel where the creek had a defined channel and for the center line of the wash if a well-defined channel did not exist. In this the trial court was unquestionably right, and under this construction evidence was adduced by the plaintiffs to show, first, that this creek had a well-defined channel through the wash, and, second, the location of this well-defined channel at the time called for in the deed. Of course, their evidence in this behalf was met by counter and conflicting evidence upon the part of the defendants and appellants. The creek channel as fixed by plaintiffs and respondents was much further to the west, and therefore gave them more land than the channel as the defendants and appellants would have the court declare it to have existed, for the channel of 1882 is not at all the present day channel. The court's finding thus made cannot here be disturbed.

Another contention of appellants is that in 1882 Pacoima creek had no well-defined channel through the wash, and therefore the center line of the wash should have been fixed by the court as the true line. But we think the construction put upon the call was the true one and as Pacoima creek, so the court found, did have a channel through the wash, the center line of that channel fixed and controlled the question of the boundary. Another contention of appellants is that a line substantially the center line of the wash had been accepted as the true boundary line by all the litigants either in person or by their predecessors in interest. But touching this matter it is sufficient to refer to the testimony of but one witness, himself one of the plaintiffs, Mr. Widney. This testimony is to the effect that Mr. Porter, one of the predecessors in interest of the defendants, employed an engineer to survey and delimit the boundary line, instructing him to fix the boundary line as the center line of the wash; that the surveyor so advised Mr. Widney and said that he would give him a copy of the map when completed if he desired it. Mr. Widney declined even to see the map, saying that surveys of that kind were worthless, did not interest him, and he did not care to be bothered with it.

This appeal is based wholly upon the contention of the insufficiency of the evidence to support the findings. We have sufficiently indicated what the supporting evidence is, and that it is ample to uphold the findings which the court made.

The judgment and order appealed from are therefore affirmed.

We concur: MELVIN, J.; VICTOR E. SHAW, Judge pro tem.

177 Cal. 147

McCALEB v. McCALEB. (L. A. 3977.)

(Supreme Court of California. Dec. 31, 1917. Rehearing Denied Jan. 28, 1918.)

1. DIVORCE 🔑219—ALIMONY—FINAL JUDGMENTS—MATTERS ADJUDICATED.

A final judgment on the merits in a divorce action terminates alimony granted pendente lite; hence the inclusion in a judgment of an order discontinuing such alimony is without effect, and the striking of such matter on motion does not revive the alimony, but on proceedings for a new trial a new application for alimony must be made.

2. CONTEMPT 🔑20—ORDERS TO PAY MONEY—CLARITY OF ORDER.

One who is ordered by a court to pay money to another, on pain of imprisonment if he fails, is entitled to a formal expression by the court of such order, stated clearly enough to enable a person of ordinary intelligence to know what he is to do, and he should not be obliged to resort to inferences or implication to ascertain a duty or obligation of that character.

In Bank. Appeal from Superior Court, Santa Barbara County; Leslie R. Hewitt, Judge.

Action by Effie G. McCaleb against William H. McCaleb. Judgment for defendant. From an order denying a motion for an order directing the issuance of an execution for alleged delinquent alimony, plaintiff appeals. Affirmed.

See, also (App.) 163 Pac. 1045.

Canfield & Starbuck and Eugene W. Squier, all of Santa Barbara, for appellant. Benjamin F. Thomas, of Santa Barbara, for respondent.

SHAW, J. On September 29, 1910, the court below duly made an order in this action requiring the defendant to pay to the plaintiff "in advance, as alimony while this action is pending, the sum of $10 a week commencing on the date hereof, to enable said plaintiff to support herself."

The cause was tried in November, 1910, and on December 27, 1910, the court rendered its judgment denying the plaintiff's prayer for divorce and for the custody of the children and declaring "that the allowance of $10 per week to said plaintiff for alimony pendente lite be, and the same is hereby, discontinued from the date of the announcement of this decision from the bench, to wit, December 27, 1910."

For some unexplained reason this judgment was not entered until January 27, 1912. Proceedings by motion were then immediately begun by the plaintiff, apparently under section 663 of the Code of Civil Procedure, to vacate this judgment and enter upon the findings another and different judgment, particularly a different judgment regarding the custody of the children and discontinuance of the alimony. This motion was denied as to the custody of the children and granted as to the discontinuance of the alimony, and thereupon the previous judgment was set aside, and another judgment was entered precisely in the words of the first judgment, except that the above-quoted passage declaring that the allowance for alimony be discontinued was entirely omitted. This second judgment was entered on March 27, 1912. Thus, as finally entered, the judgment was silent on the subject of alimony and maintenance.

Plaintiff then instituted proceedings for a new trial of the cause, in pursuance whereof, on March 26, 1913, her motion for new trial was granted. No new or additional order relating to alimony was made. There was another trial in July or August, 1913, upon which another judgment against the plaintiff was made and entered. Thereupon she moved the court for an order directing the issuance of an execution for the collection of the alimony which she claimed had accrued under the original order from January 22, 1912, to July 21, 1913, a period of 79 weeks, including the week beginning on the last-named date, and amounting to $790. It is not claimed that any payments were made thereon during that period. This motion was denied on April 18, 1914, whereupon the present appeal was taken from the order denying the same.

The plaintiff contends that the order for alimony, by its terms, was to continue in force after the judgment on the merits until all proceedings for new trial or appeal were disposed of by a final decision on appeal, or by the expiration of the time for appeal or motion, if no appeal were taken and no proceeding for such motion were instituted. This, it is claimed, is the effect of the words "while this action is pending," inserted in the order.

[1] The usual purpose of an order of this character is to make provision for the wife's support until the decision of the cause on the merits. Upon the trial on the merits the court will receive full knowledge of the condition, abilities, and circumstances of the respective parties, and may then advisedly

adjudge what is lawful and just to each of them with respect to the right to the divorce and the right of the wife to alimony, if a divorce is granted, or to maintenance if a divorce is denied. Such final adjudication is the ultimate object of the action and it is for that purpose that the trial is had. It is therefore to be presumed that the court will terminate the case and the litigation, after hearing the evidence, by the proper judgment disposing of all matters in controversy and directly or indirectly put in issue. It is within the power of the court to reserve the question of property and alimony for further consideration after the entry of a judgment for divorce, and if it orders the payment at stated periods of sums of money as permanent alimony to the wife, it may thereafter, under the Code, modify such order. Civ. Code, §§ 137, 139. But, if no express reservation of the question of alimony is made, and the judgment is silent on the subject, it will be presumed that the matter has been determined and, in legal effect, it will be a judgment denying the wife's application for alimony and terminating all right thereto. In Howell v. Howell, 104 Cal. 47, 37 Pac. 770, 43 Am. St. Rep. 70, a decree of divorce was made in favor of the wife and giving to her the community property, but not mentioning alimony. The complaint contained no allegations concerning alimony and no prayer therefor. Thereafter she applied for an order in the action requiring the husband to pay her alimony. This court decided that this could not be allowed, saying that section 139 of the Civil Code "clearly contemplates that the right to alimony, as well as other financial and property rights, shall have been presented and litigated in the action for divorce and established by the judgment." It was therefore held that the court had no jurisdiction to entertain such subsequent application for alimony, and that the right to alimony was litigated and concluded by the judgment. If this would be true where the complaint did not ask for alimony, the presumption would be stronger in a case like the present, where alimony was asked and the judgment does not award any, nor reserve the question, but is silent on the subject.

The judgment of January 27, 1912, declared that the divorce should be denied, and that the allowance for alimony pendente lite should be discontinued. It made no provision for maintenance, as might have been done under section 136 of the Civil Code. Under the rule above stated, this ended the right of the wife to maintenance, by reason of its silence on the subject. In express terms it ended all right under the order for temporary alimony, and by its legal effect it concluded the plaintiff with regard to any claim for permanent alimony.

Plaintiff claims that the vacation of that judgment and the entry of the second judgment on the same findings, which judgment omitted the statement that the alimony pendente lite be discontinued, leaving the judgment wholly silent both as to alimony and maintenance, constituted an implied revivor of the alimony order. The argument is that the court struck out the order discontinuing the alimony because it was of the opinion that the plaintiff should continue to receive alimony notwithstanding the final judgment against her on the merits, believing that the original order would remain in force after the final judgment. But, if the court was so minded, its opinion to that effect was not expressed, and the imputed intent is inconsistent with the judgment as entered, which, as we have shown, constituted a final determination of all rights in controversy, including the right of the plaintiff to alimony or maintenance. The judgment is presumed to be intended to end the controversy in that court, and to speak with reference to that object; it is no part of the function of an ordinary judgment to make provision for a continuation of the litigation. If that is within the contemplation of the nisi prius court, it should give voice to its design by express words on the subject. It is as reasonable an interpretation of the court's action to conclude that it was advised of the effect of the doctrine followed in Howell v. Howell, supra, and concluded that the judgment on the merits would terminate the right of the wife to alimony without any express language to that effect, and that the order for temporary alimony would be merged in the final judgment on the merits.

Under a proper method of entering the proceedings, orders, and judgments of a court of record, the order discontinuing the order for alimony pendente lite should not have been a part of the judgment of January 27, 1912. That order was made, as the judgment as first entered shows, on December 27, 1910, at the time the decision was announced from the bench. It was then intended as an order to take effect at once and before the entry of judgment. The proper place for the entry of such an order was on the minutes of the court, not in the judgment. As we have seen, the mere silence of the judgment would in effect thenceforth terminate the original order for alimony. A previous termination thereof should regularly have been shown by entry on the minutes. The record before us does not include the minutes of the proceedings at the time the decision was announced, and hence we are not advised whether they contain such order or not. The entry thereof in the judgment, being in terms retroactive, operated to discontinue the order from and after December 27, 1910, in the same manner as if a minute order had been made at that date. It was equivalent to a vacation of the original order, which neither the amended judgment nor the order for a new trial would, by implication, revive.

The conclusions heretofore stated need cause no hardship to the wife. If she desires to press her cause further by motion for a new trial, or by appeal, she alone will know it, and the court will be open to her to apply at once for a new order for alimony for her support during the subsequent proceedings. The court cannot foresee the future course of the parties. If alimony for her support during such continuation of the litigation by her, or expense money therefor, is necessary, the better policy would be to require her to ask for orders requiring the husband to furnish her with the money required for such purposes.

On the other hand, if we should hold that a temporary order of that nature continues in force after a final judgment which is silent on the subject, until the action is finally determined as provided in section 1049 of the Code of Civil Procedure, by a final decision on appeal or the expiration of the time therefor, complications would necessarily arise. The court, as we have stated, could not foresee that the defeated wife or a defeated husband would pursue the action further. The right to an appeal does not expire, under the present statute, for 60 days. Under the statute as it existed at the time the provisions concerning temporary and permanent alimony were enacted, the period of appeal was one year. The intention of the lawmakers must be considered upon the theory that this prolonged time for appeal was in existence and in their minds when framing the provisions for temporary alimony. It is unreasonable to suppose that it was intended that a husband should continue to pay temporary alimony upon an order of this character for one year after a final judgment had been rendered in his favor denying all relief to the wife, upon the theory that she may, before the end of that period, take an appeal, or that the design was that she should have the right to temporary alimony for one year after final judgment if she failed to appeal and after all her rights were adjudicated. The general theory of the law is that the rights of the parties are determined with the final judgment, and that all preliminary proceedings are merged therein, unless expressly reserved by some provision in the judgment itself. Interlocutory injunctions cease upon the entry of the judgment on the merits. No one would suppose that a right of this character would continue during the period of appeal from the judgment on the merits deciding that no basis for such right existed. If the theory of the plaintiff is correct, defendant would be subject to punishment for contempt if, after judgment on the merits, he failed to make the payments provided for in an order for temporary alimony made at the beginning of the action. The pendency of the action provided for in section 1049 is not for all purposes. For the purpose of execution it is final at once, and the judgment may at once be enforced, unless stayed by special order or by appeal. It is not pending for the purpose of continuing in force provisional orders pendente lite.

The same reasons of policy apply to such a case where the wife, after judgment against her, succeeds in obtaining an order from the trial court granting her a new trial. The court will generally be more fully advised then as to the needs and abilities of the parties than it could have been at the time of making the original order at the beginning of the action. In the interval between the judgment and the order granting a new trial, no alimony will be payable under the original order. If the order for a new trial revives it, the result, unless some special order to the contrary is made, will be that it will have been in force during the interval, and the husband will have been delinquent without being aware of it, which may cause hardship to him. A new application should therefore be required in such a case, and the court may then adjust the matter in the light of its added knowledge on the subject. Thus hardship or injustice to either party will be the better avoided.

[2] One who is ordered by a court to pay money to another, on pain of imprisonment if he fails, is entitled to a formal expression by the court of such order, stated clearly enough to enable a person of ordinary intelligence to know what he is to do. He should not be obliged to resort to inferences or implication to ascertain a duty or obligation of that character.

Our conclusion is that the judgment of March 27, 1912, determining the rights of the parties under the pleadings in the case without mentioning the subject of maintenance or alimony or reserving the same for further disposition, terminated the life of the original order for temporary alimony and justified the court in denying the plaintiff's motion. If the plaintiff desired or needed further support, she should have renewed her application therefor by notice and motion.

The order is affirmed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; MELVIN, J.; HENSHAW, J.

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177 Cal. 114

SANTA BARBARA COUNTY v. JANSSENS et al. (L. A. 5217.)

(Supreme Court of California. Dec. 31, 1917.)

1. OFFICERS 🔑100(1) — COMPENSATION —INCREASE DURING TERM—"DESIGNATE"—"APPOINT."

Pol. Code, § 4246, subd. 2, as amended in 1909 (St. 1909, p. 462), fixed the salary of the sheriff of Santa Barbara county at $6,000 a year. Section 4290 provides that the salary and fees provided in that title shall be in full for all services rendered by the officers named, their deputies, and assistants, and that all deputies employed shall be paid by their principals out of the salaries therein provided, unless otherwise provided therein. Section 4157, subd. 6, requires the sheriff to take charge of and keep the county jail and the prisoners therein; and section 4163 makes him liable for the escape of prisoners in his charge. Pen. Code, § 1598, subd. 4, and section 1599, provides for the separation of male and female prisoners in the county jail. Section 1616, as added by Act April 15, 1911 (St. 1911, p. 924), provides that when any female prisoners are confined in any county jail, and no regular jail matron has been appointed, the sheriff shall designate some suitable woman to have immediate care of such prisoners, and that it shall be unlawful for any male officer or jailer to search such prisoners or enter the room or cell occupied by them except in the company of such matron. *Held*, that this last-mentioned section, if construed as placing on the county the burden of paying the woman so designated by a sheriff in office at the time that section was enacted, would increase his compensation during his term of office in violation of Const. art. 11, § 9; since while the duties of an office may be transferred to another officer the statute does not create an independent office, and the woman so designated is an assistant of the sheriff performing a part of the duties imposed by law upon him, as the word "designate" gives the statute no different meaning than it would have had if the word "appoint" had been used.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series Appoint; Designate.]

2. Sheriffs and Constables 🔑65—Compensation — Services of Deputies and Assistants.

As Pen. Code, § 1616, as added by Act April 15, 1911 (St. 1911, p. 924), made no provision respecting the compensation of the person whom sheriffs are thereby directed to designate to have charge of female prisoners, it could not be assumed that the Legislature intended, even if it had constitutional power to do so, to take the case out of the operation of Pol. Code, § 4290, providing that a sheriff's salary shall be in full compensation for all services rendered by him, his deputies, and assistants.

3. Sheriffs and Constables 🔑76—Compensation—Recovery of Money Paid.

Pol. Code, § 4005b, provides that when any board of supervisors shall, without authority, order any money paid and it shall have been actually paid, or whenever any county officer has drawn any warrant in favor of any person without authority and it shall have been paid, the district attorney shall institute suit against such person or persons to recover the money so paid. *Held*, that where a woman designated by a sheriff to have charge of female prisoners was paid out of the county treasury, though the sheriff approved her claim and requested the board of supervisors to allow it, the money so paid could only be recovered from her and not from the sheriff, to whom it was not paid.

In Bank. Appeal from Superior Court, Santa Barbara County; Samuel E. Crow, Judge.

Action by the County of Santa Barbara against Domenica L. Janssens and others. From a judgment for defendants, plaintiff appeals. Affirmed in part, and reversed in part.

Ulysses S. Webb, Atty. Gen., Eugene W. Squier, Dist. Atty., Fred H. Schauer, Deputy Dist. Atty., and George H. Gould, all of Santa Barbara, for appellant. Canfield & Starbuck, of Santa Barbara, for respondents.

SLOSS, J. Demurrers to the complaint as amended having been sustained, and the plaintiff declining to further amend, judgment was entered in favor of the defendants. From this judgment the plaintiff appeals.

The facts alleged, taken in connection with certain statutory provisions, present this situation: The defendant Nat Stewart was sheriff of the county of Santa Barbara for a term commencing on the 2d day of January, 1912. The defendant the Title Guaranty & Surety Company was the surety on Stewart's official bond. When Stewart took office his salary as sheriff was fixed by the Political Code at $6,000 per annum. Section 4246, subd. 2, amended 1909. Section 4290 of the same Code provided that:

> "The salaries and fees provided in this title shall be in full compensation for all services of every kind and description rendered by the officers named in this title, * * * their deputies and assistants, * * * and all deputies employed shall be paid by their principals out of the salaries provided in this title, unless in this title otherwise provided."

There was no provision for payment by the county of any compensation to the deputies or assistants of the sheriff.

Section 1616 was added to the Penal Code by act approved April 15, 1911, after the commencement of Stewart's term. This section reads:

> "Whenever any female prisoner or prisoners are confined in any county jail in this state, and no regular jail matron has been appointed, there shall be designated by the sheriff some suitable woman who shall have immediate care of such female prisoner or prisoners. Such female prisoners shall be so kept that they cannot see or be seen by, or converse with, any male prisoners confined in said jail, and it shall be unlawful for any male officer or jailer to search the person of any female prisoner, or to enter into the room or cell occupied by any female prisoner, except in the company of such matron or woman having the care of such female prisoner."

During the years 1912, 1913, and 1914, there were female prisoners confined in the county jail of said county, and no regular jail matron had been appointed to have care of them. The defendant Stewart, as sheriff, designated the defendant Domenica L. Janssens to have the immediate care of said female prisoners, and she performed the required duties in reference to the female prisoners so confined. Thereafter she presented for payment claims against the county for her services, and said claims, which aggregated $1,249, were passed and allowed by the board of supervisors. Warrants for the amount of such claims were drawn by the auditor of said county, and the amounts paid by the treasurer to Mrs. Janssens. Each of the claims was indorsed "O. K., R. D. Smith," or "O. K., R. D. Smith, undersheriff." It is alleged that Stewart, as sheriff, requested the board of supervisors to allow the claims, and that R. D. Smith was a deputy of Stewart, and as such deputy approved in writing the claims as correct.

By the prayer of its complaint, the county seeks judgment against the defendants for $1,249, the aggregate of such demands, together with 20 per cent. damages for the use of said money, and for costs. Pol. Code, § 4005b.

[1] We think the appellant is right in its contention that Mrs. Janssens had no valid claim against the county for the services rendered by her. The question turns, primarily, upon a determination of the legislative intent in enacting Penal Code, § 1616, but a glance at some of our decisions touching the effect of article 11, section 9, of the Constitution, may be of aid in the task of interpretation. The constitutional provision is that:

> "The compensation of any county * * * officer shall not be increased after his election or during his term of office."

Where, as in the case of the sheriff of Santa Barbara county, the law allows a fixed salary, which shall be in full compensation for all services rendered by the officer, and provides that all deputies employed shall be paid by the principal out of such salary, a statute authorizing the appointment of a new deputy to be paid out of the county funds works an increase of the principal's compensation. Dougherty v. Austin, 94 Cal. 601, 28 Pac. 834, 29 Pac. 1092, 16 L. R. A. 161; County of Calaveras v. Poe, 167 Cal. 519, 140 Pac. 23. Such an increase would, it seems clear, be effected by section 1616, if that section had undertaken to put upon the county the burden of paying for the services of the woman to be designated. We may concede, as is claimed by the respondents, that the Constitution does not prohibit the diminution of the duties of any county officer, and the transfer of a part of such duties to some other officer. But nothing of the kind was contemplated by section 1616. The statute does not create an independent office, whose incumbent performs functions separate and distinct from those imposed upon the sheriff. The law had always provided that it was the duty of the sheriff, among other things, to "take charge of and keep the county jail, and the prisoners therein" (Pol. Code, § 4157, subd. 6), and that the sheriff is liable for the escape of prisoners in his charge (Pol. Code, § 4163). We cannot believe that the Legislature intended to affect this duty or this liability by providing—as in substance it did provide—that actual contact between female prisoners and jailers should be through, or in the presence of, a woman. The policy of segregating female prisoners had found expression at the time the Codes were first enacted. Pen. Code, § 1598, subd. 4, § 1599. Section 1616 gave further protection to such prisoners, and was based upon considerations of propriety and decency too obvious to require explanation. The statute did not, however, assume to take such prisoners out of the custody of the sheriff. It merely regulated the manner in which he should perform that part of his duties which had to do with the care of females. We perceive no force in the argument of respondents based on the fact that the section provides that the sheriff shall "designate" some suitable woman. No different meaning could be given to the statute if it declared that the sheriff should "appoint" a woman. Whether "designated" or "appointed," the woman named is an assistant of the sheriff, performing a part of the duties imposed by law upon him.

[2] Section 1616, as it read at the time of the transactions under consideration, was silent with respect to the compensation of the person thus put in charge of female prisoners. We cannot therefore assume that the Legislature intended, if it had the constitutional power so to do, to take the case out of the operation of the statute (Pol. Code, § 4290) providing that the sheriff's salary shall be in full compensation of all services rendered by him, his deputies, and assistants. By an amendment recently made to section 1616 of the Penal Code (Stats. 1917, p. 240), it is provided that the woman designated shall be paid out of the general fund of the county. We are not called upon in the present proceeding to consider whether this amendment has any validity. It follows that the payments made to Mrs. Janssens were without authority of law, and that they may be recovered by the county in this action.

[3] We think, however, that the complaint does not state a cause of action against the sheriff or his surety. Section 4005b of the Political Code, on which this suit is founded, authorizes the district attorney of the county to bring an action against the person or persons to whom money shall have been paid without authority of law. The payments set forth in the complaint were made to Mrs. Janssens. They were not made to the sheriff. It is alleged that the sheriff approved the claims, and requested the board of supervisors to allow them. But this is a very different thing from saying that he received the money. The opinion in County of Calaveras v. Poe, supra, does contain an intimation that money thus paid to an assistant might be regarded as paid to the principal. The statement was not, however, made positively, and was not the ground upon which the decision was, in fact, based. The recovery in the case cited was held to be authorized by other provisions of law. If there was no liability on the part of the sheriff, it goes without saying that no cause of action was alleged against the surety.

The judgment in favor of the defendants Nat Stewart and the Title Guaranty & Surety Company is affirmed. The judgment in favor of the defendant Janssens is reversed.

We concur: ANGELLOTTI, C. J.; HENSHAW, J.; MELVIN, J.; VICTOR E. SHAW, Judge pro tem.

(177 Cal. 119)

LOS ANGELES COUNTY FLOOD CONTROL DIST. v. HAMILTON (ANDREWS et al., Interveners). (L. A. 5201.)

(Supreme Court of California. Dec. 31, 1917.)

1. CONSTITUTIONAL LAW 🔑290(3) — DUE PROCESS OF LAW—POWERS OF LEGISLATURE —FLOOD DISTRICTS.

Due process of law does not require that landowners be accorded hearing on question of inclusion of their land within the flood protection district when the Legislature has determined the benefit.

2. DRAINS 🔑67—SPECIAL ASSESSMENTS—AD VALOREM BASIS.

The Legislature may apply the ad valorem method of assessment on a flood protection project without any judicial inquiry into, or determination of, extent of benefits.

3. DRAINS 🔑67—FLOOD PROTECTION PROJECTS — FINDING OF BENEFITS — PRESUMPTIONS.

Mere passage of St. 1915, p. 1502, creating Los Angeles county flood control district, was an effective finding by the Legislature that the proposed work would answer a public purpose and benefit the land so as to warrant imposition of cost as in the act provided.

4. CONSTITUTIONAL LAW 🔑68(1)—LEGISLATIVE FUNCTIONS—IMPROVEMENT DISTRICTS —POWERS OF COURTS.

Fixing district to bear expense of local improvement and the mode of distribution of expenses are, primarily, legislative questions, with which the courts will not ordinarily interfere.

5. CONSTITUTIONAL LAW 🔑48 — CONSTITUTIONALITY OF ACT—PRESUMPTIONS.

In determining power of Legislature to enact St. 1915, p. 1502, creating Los Angeles county flood control district, the court must view the act with every presumption favorable to its constitutionality, and can consider only such facts as appear on the face of the statute with those which are matters of judicial cognizance.

6. DRAINS 🔑2(1) — ESTABLISHMENT — STATUTES—VALIDITY.

St. 1915, p. 1502, § 2, declaring purpose of Los Angeles county flood control district to be to provide for control of storm waters, conserve such waters for use, and protect from damage from such waters the harbors, waterways, public highways, and property in the district, cannot be declared invalid as embracing lands not subject to overflow; the purpose of the district being broad enough to include and benefit all the lands within it.

7. DRAINS 🔑2(1) — DRAINAGE DISTRICTS — BOUNDARIES.

The mere fact that boundaries of Los Angeles county flood control district created by St. 1915, p. 1502, largely coincided with boundaries of Los Angeles county, did not establish arbitrary and accidental determination of boundaries.

8. DRAINS 🔑2(1)—FLOOD CONTROL DISTRICT —STATUTE—VALIDITY.

Mere fact that St. 1915, p. 1502, creating Los Angeles county flood control district, excepted lands within municipalities from its operation if the city so desired, did not affect the validity of the act.

9. DRAINS 🔑67 — SPECIAL ASSESSMENTS — "TAX."

While a tax levied on all land for flood protection would be unconstitutional, the word "tax" may include special assessments, and as used in St. 1915, p. 1502, creating Los Angeles county flood control district, must be taken to mean special assessments so that the act is valid.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Tax.]

10. MUNICIPAL CORPORATIONS 🔑434(1) — SPECIAL ASSESSMENTS—EXEMPTION.

In the absence of constitutional restriction, the Legislature's power to exempt property from taxation includes power to exempt from special assessments.

11. DRAINS 🔑18 — DRAINAGE DISTRICT — PROCEEDINGS—LEGALIZING ACTS.

If proceedings under St. 1915, p. 1502, creating Los Angeles county flood control district, were defective by reason of insufficient engineers' reports and insufficient preliminary steps to hold an election, the defects were removed by St. 1917, p. 239, ratifying and legalizing the bonds and all acts and proceedings leading up to their issuance.

12. DRAINS 🔑18 — DRAINAGE DISTRICT — CREATION.

An election on the question of issuing bonds for Los Angeles county flood control district, created by St. 1915, p. 1502, not being required by Constitution, the Legislature might have provided for the issuance of the bonds without election, and therefore St. 1917, p. 239, legalizing all acts leading up to execution of bonds, cured any defect in the election.

In Bank. Petition for writ of mandate by the Los Angeles County Flood Control District against John J. Hamilton, as Chairman of the Board of Supervisors of Los Angeles County, ex officio the Board of Supervisors of Los Angeles County Flood Control District, and as Chairman of the Board of Supervisors of said Los Angeles County Flood Control District, wherein Otis Andrews and others intervene. Peremptory writ ordered.

A. J. Hill, County Counsel, Roy V. Reppy, Assistant County Counsel, Hewlings Mumper, O'Melveney, Milliken & Tuller, and Sayre Macneil, all of Los Angeles, for petitioner. Wm. M. Hiatt, of Los Angeles, for respondent. Frederick Baker, of Los Angeles, amicus curiæ. Charles La Verne Larzelere and Edward Winterer, both of Los Angeles, for interveners.

SLOSS, J. Los Angeles county flood control district was created by an act of the Legislature, approved June 12, 1915 (Stats. 1915, p. 1502), and known as the "Los Angeles County Flood Control Act." Steps were taken looking to the issuance of bonds under this act, and the present proceeding is one in mandate to compel the chairman of the board of supervisors of Los Angeles county, as chairman of the board of supervisors of said district, to sign one of such bonds. An alternative writ was issued. The return of the respondent was made by demurrer to the petition. Andrews and others intervened, and filed an answer in opposition to the granting of the relief sought by the petition. The facts are undisputed, the proceeding being submitted upon questions of law alone. The grounds of opposition to the granting of the relief sought may fairly be grouped under two heads. It is contended, in the first place, that the act creating the district is unconstitutional and void, and second, if the validity of the legislation be upheld, that the steps prescribed as prerequisites to the issuance of bonds were not regularly taken.

The act creates a flood control district to be called "Los Angeles County Flood Control District," comprising all of the county of Los Angeles lying south of the north line of township 5 north, San Bernardino base, except the islands off the coast included in Los Angeles county. The objects and purposes of the act, as stated in section 2, are "to provide for the control of the flood and storm waters of said district, and to conserve such waters for beneficial and useful purposes by spreading, storing, retaining or causing to percolate into the soil within said district, or to save or conserve in any manner, all or any of such waters, and to protect from damage from such flood or storm waters the harbors, waterways, public highways and property in said district." The district is declared a body corporate and politic, and is given a number of powers usually conferred upon public corporations. One of the powers so granted is "to cause taxes to be levied and collected for the purpose of paying any obligation of the district in the manner hereinafter provided." By section 3 the board of supervisors of Los Angeles county is designated as ex officio the board of supervisors of the district. The various county officers are made ex officio officers of the flood control district, and are directed to perform without additional compensation the same duties for said district as for the county of Los Angeles. The board of supervisors is given jurisdiction and power, and it is made their duty to employ by resolution "a competent engineer or engineers to investigate carefully the best plan to" carry out the purposes declared in section 2. It is provided that such resolution shall direct such engineer or engineers to make and file a report with the board of supervisors, which shall show a general description of the work to be done, with plans and specifications, a description of the property to be taken or injured, a map showing the proposed work, and an estimate of the cost of such work, of the property to be taken or injured, and of all incidental expenses, stating also the total amount of bonds necessary to be issued to pay for the same. After the filing of this report, the board shall consider the same, adopt it as made or as modified to its satisfaction, stating the amount of the entire estimated cost for which bonds are to be voted. The finding in said resolution as to the sufficiency of the report, and that the same complies with all of the requirements of the act, shall be final and conclusive against all persons except the state.

After the adoption of the report, the board is required to call without delay a special election, and submit to the qualified electors of the district the proposition of incurring a bonded debt in the amount and for the purposes stated in the report. The manner of calling the election is prescribed in detail by the act. If a majority of the votes cast are in favor of incurring such bonded indebtedness, bonds of the district "shall be issued and sold as in this act provided." The bonds are to be signed by the chairman of the board of supervisors, and countersigned by the auditor of Los Angeles county. The act provides for the sale of the bonds at not less than par. Any bonds so issued are declared to be "a lien upon the property of the district," and it is provided that such bonds and the interest thereon shall be paid "by revenue derived from an annual tax upon the real property within said district, and all the real property in the district shall be and remain liable to be taxed for such payments as hereinafter provided." By section 10, the board of supervisors is required to levy a tax each year upon the taxable real property in the district sufficient to pay the interest on said bonds for that year, and such portion of the principal as is to become due before the time for making the next general tax levy, the taxes to be levied and collected at the time and in the same manner as the general taxes levied for county purposes. The board of supervisors is given power, in any year, to levy in like manner a tax upon the taxable real property of the district to carry out any of the objects of the act, such taxes not to exceed 10 cents on each $100 of the assessed valuation of the real property of the district, exclusive of taxes levied to meet principal and interest of bonds. The act then goes on to provide for the doing of work under the act, and declares that the plans and specifications for any work to be done in any municipality must first be approved by the legislative body of such municipality before the commencement of such work, or the letting of any contract therefor. In case such approval is withheld for 30 days, the board of supervisors shall omit the doing of such work within such municipality, "and such omission shall not affect the validity of its proceedings," and the funds which were to be expended in the municipality may be expended elsewhere by the board of supervisors.

There are further provisions which it is not necessary, for present purposes, to set forth.

[1] Of the various objections to the validity of this act, the one urged with the greatest vigor is that the statute violates the provisions of the federal and the state Constitutions prohibiting the taking of property without due process of law. Reduced to its final terms, this claim is founded on the assertion that the boundaries of the district include considerable property which will not and cannot receive any benefit from the contemplated improvement. The scheme of the act is one of local improvement. The warrant and justification for charging the cost of such improvement upon designated lands is to be found, in theory at least, in the benefit to be derived by the lands assessed from the contemplated work. Reclamation Dist. v. Birks, 159 Cal. 233, 241, 113 Pac. 170. Where, as in the act before us, the boundaries of the district are determined by the Legislature itself, the constitutional guaranty of due process does not require that the landowners shall be accorded a hearing on the question of the inclusion of their land within the district. "The Legislature has power to fix such a district for itself without any hearing as to benefits, for the purpose of assessing upon the lands within the district the cost of a local, public improvement. The Legislature, when it fixes the district itself, is supposed to have made proper inquiry, and to have finally and conclusively determined the fact of benefits to the land included in the district, and the citizen has no constitutional right to any other or further hearing upon that question." Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 174, 17 Sup. Ct. 56, 41 L. Ed. 369; Recl. Dist. v. Phillips, 108 Cal. 306, 314, 39 Pac. 630, 41 Pac. 335; People v. Sacramento Drainage Dist., 155 Cal. 373, 386, 103 Pac. 207; Brookes v. City of Oakland, 160 Cal. 423, 117 Pac. 433.

[2] In addition to defining the limits of the district, the Legislature by the act itself prescribed the mode of distributing the burden by assessing the lands in proportion to their value. It is thoroughly settled that the Legislature may apply the ad valorem method of assessment, without any judicial inquiry into, or determination of, the extent of benefits. Recognizing that absolute equality cannot be attained under any system of taxation or assessment, the courts hold that constitutional requirements are satisfied by that approximation to equality which may fairly be thought to result from an assessment of the cost upon the property benefited in proportion to its ascertained value. Burnett v. Mayor, etc., of Sac'to, 12 Cal. 76, 84, 73 Am. Dec. 518; In re Madera Irr. Dist., 92 Cal. 296, 28 Pac. 272, 675, 14 L. R. A. 755, 27 Am. St. Rep. 106; Thomas v. Pridham, 171 Cal. 98, 104, 153 Pac. 933; Fallbrook Irr. Dist. v. Bradley, supra.

[3, 4] The mere passage of the act, then, must be taken to import a finding by the Legislature that the proposed work will answer a public purpose, and that its execution will benefit the land within the district to such an extent as to warrant the imposition upon such land of the cost in the manner provided. The findings thus implied are as fully effective as if declared in express terms in the act itself. San Christina Inv. Co. v. San Francisco, 167 Cal. 762, 769, 141 Pac. 384, 52 L. R. A. (N. S.) 676. The fixing of the district which is to bear the expense of a local improvement, and the mode in which such expense is to be borne and distributed, are, primarily, legislative questions. Hadley v. Dague, 130 Cal. 207, 220, 62 Pac. 500; Glide v. Superior Court, 147 Cal. 21, 25, 81 Pac. 225. Ordinarily the courts will feel themselves bound by the legislative body's determination of these questions. Indeed, there are not a few decisions containing expressions to the effect that the legislative determination that certain land will be benefited, and that the cost of the work should be assessed upon it according to a given plan, is conclusive. But since the imposition of such costs finds its ground of sanction in the benefits conferred upon the lands charged, it may well be that the legislative conclusion should not be upheld where the court can see that it is contrary to any rational view of the facts, and that lands have been included that "plainly could not by any fair or proper view of the facts be benefited." Fallbrook Irr. Dist. v. Bradley, supra; Myles Salt Co. v. Iberia Drainage Dist., 239 U. S. 478, 36 Sup. Ct. 204, 60 L. Ed. 392.

[5] It must, however, be remembered that, in inquiring whether a given act of the Legislature creating a local improvement district does thus transcend the limits of legislative power, we are governed by the rules applicable to any judicial examination of the validity of a statute. Not only must the court view the act in the light of every presumption and intendment favorable to its constitutionality, but it must limit itself to a consideration of such facts as appear upon the face of the enactment, together with such others as are matters of judicial cognizance. Neither allegation nor proof of further facts can be considered. Stevenson v. Colgan, 91 Cal. 649, 27 Pac. 1089, 14 L. R. A. 459, 25 Am. St. Rep. 230; People v. Sacramento Drainage Dist., supra; San Christina Inv. Co. v. San Francisco, supra.

[6] We need not enter into a discussion of the extent to which the court may take judicial notice of the topography of the territory covered by the act. The substance of the claims made by the respondent and the interveners is that the district contains several separate and unconnected watersheds, that it comprises a considerable area of mountainous land, much of which lies above the plane of any flood waters that are to be anticipated, and that a good deal of other land is beyond

the area of possible floods. Much of the argument against the validity of the act seems to proceed on the assumption that the one object sought by the creation of the district is the protection of lands from direct invasion by flood waters. A reference to section 2 of the act, which we have, in part, quoted, will show that the purposes are much broader. In addition to the purpose just stated, the act was designed to conserve the flood waters for beneficial and useful purposes by storing them, or otherwise, and to protect from damage by flood the harbors, waterways, and public highways in the district. To say, therefore, that any given parcel or tract of land is not directly subject to overflow is not to say that it cannot be benefited by the carrying out of the proposed plan. Even if the scope of the act were much narrower than it is, we should, under the decisions, be required to hold that the benefit which would justify the inclusion of land within the district need not be so direct and immediate as is assumed in the argument of counsel opposing the validity of the act. Thus, an incorporated city may be embraced within the boundaries of an irrigation district, although much of the land in the city does not require, and could not use, irrigation. Board of Directors v. Tregea, 88 Cal. 334, 26 Pac. 237; In re Madera Irr. Dist., 92 Cal. 296, 343, 28 Pac. 272, 675, 14 L. R. A. 755, 27 Am. St. Rep. 106; Fallbrook Irr. Dist. v. Bradley, supra. Similarly, in other jurisdictions, it has been held that the inclusion in a drainage district of high lands not subject to inundation does not conclusively show a lack of benefit to such lands. In re Mingo Drainage Dist., 267 Mo. 268, 183 S. W. 611; Mittman v. Farmer, 162 Iowa, 364, 142 N. W. 991, Ann. Cas. 1915C, 1; Butler v. Fourche Drainage Dist., 99 Ark. 100, 137 S. W. 251; Memphis L. & T. Co. v. Levee Dist., 64 Ark. 258, 42 S. W. 763; Miami County v. City of Dayton, 92 Ohio St. 215, 110 N. E. 726. An examination of these cases will show that the courts have regarded an incidental or indirect benefit as sufficient to justify the imposition of a part of the burden of the improvement. Such indirect benefit may result from the improvement of neighboring and surrounding land, and the consequent increase in the value of all land within the district. But, as above indicated, we see in this act other purposes than that of the mere protection of lands privately owned from overflow. So far as the court can know, the flood waters to be stored and conserved may be beneficially applied to lands not themselves subject to inundation. The proper maintenance of the harbors by protecting them from flood damage, the preservation of the means of communication between the different parts of the district by guarding against damage to highways and bridges—these are purposes whose execution may well be of substantial and immediate benefit to all of the lands included within the district. At least, it is impossible, in the light of the facts of which we may take judicial knowledge, to say that the Legislature could not fairly so determine. The mere fact that several watersheds are included within the boundaries of the district does not necessarily require a conclusion that the scheme of protection could not properly be taken up as a unit. In People v. Sacramento Drainage District, supra, the court dealt at some length with the considerations which might properly lead the Legislature to substitute for the ineffective action of numerous small improvement districts a general plan covering a large area whose safety and development are threatened by a common danger. Similar considerations apply here. Certainly, this court cannot say that the protection of this district from the various evils incident to floods could not best be accomplished by a single comprehensive plan. Apart from any other consideration, the protection of the roads in any one of the watersheds, and the maintenance of communication with the others, might be a matter of very direct concern to all of the land embraced within the district. Whether the work could best be done as a whole, or should be committed to the direction of separate districts, is, in reality, a question of engineering, rather than one of constitutional law. It is therefore a question for legislative determination.

[7] Much is made of the fact that, except on its northern line, the boundaries of the district are those of the county of Los Angeles. From this it is argued that the action of the Legislature in fixing the boundaries was founded upon an arbitrary and accidental basis, rather than upon a consideration of the benefits to be derived from the work. But the conclusion does not follow. There is nothing in the nature of things making it inconceivable that the limits of a district specially benefited by a proposed improvement should, in whole or in part, coincide with those of an existing political subdivision.

[8] Before leaving this branch of the discussion, it may be well to say a word about the provision authorizing the board to omit the doing of work within a municipality withholding its approval thereof, and to make expenditure elsewhere. The purpose obviously is to give to the municipalities within the district a certain measure of control over the doing of work within their boundaries. We do not see how the provision affects the validity of the act. The right to impose an assessment upon land within an improvement district is, of course, not dependent upon the doing of work upon or near the land in question. The act contemplates that the board shall expend the money in such manner as to carry into effect a plan which shall benefit the district as a whole. If the plan originally adopted contemplates work within a municipality, and, on account of the objection of the municipal authorities, this partic-

ular work cannot be done, it must be presumed that the board, in applying the money elsewhere, will expend it in such manner as to further the general purpose of promoting the advantage of the entire district. In effect, the provision under consideration merely provides for the modification, under certain conditions, of the adopted plan of improvement.

[9] It is next contended that the act is void because it provides for the raising of funds to pay for the work by means of a tax instead of by a special assessment. If such be the case, the act is a palpable violation of the provision of the state Constitution, requiring that all property be taxed in proportion to its value. Article 13, § 1. Since the act charges only the real, and not the personal, property in the district, it clearly violates this fundamental mandate, if the burden is a tax, strictly speaking. The interveners point to the fact that the Legislature has used the word "tax" throughout the act, and does not anywhere refer to the charge as an assessment. Furthermore, such "tax" is to be levied and collected in the same manner, by the same machinery, and at the same time as general taxes. These facts are not, however, conclusive. The word "tax" is used, with equal propriety, in two distinct senses. In its broad meaning the word includes both general taxes and special assessments. Chicago G. W. Ry. Co. v. Kans. City N. W. Ry., 75 Kan. 167, 88 Pac. 1085, 12 Ann. Cas. 588; 1 Page & Jones on Taxation by Assessment, § 40. See, also, In re Madera Irr. Dist., supra. Taking, as, under the settled rule of constitutional law, we must, that construction which will uphold the act, we conclude that the Legislature must have intended to use the meaning which would admit of the charge being construed as a special assessment. "The very fact that personal property is excluded from bearing the cost of the improvement and that the word 'property' is held to mean by the terms of the act to be real property, forces us to the conclusion that it was the intention of the Legislature to provide for the cost of the improvement by way of assessment, as in other drainage cases." Miami County v. Dayton, 92 Ohio St. 215, 110 N. E. 726. In Doyle v. Austin, 47 Cal. 353, an act (Stats. 1871-72, p. 911), providing for the opening of Montgomery avenue, in the city of San Francisco, was assailed upon the ground, among others, that it imposed a "tax" in a special improvement district without following the provisions of the Constitution with reference to the assessment and levy of taxes. The court answered the contention in these words:

> "It sufficiently appears on the face of the act that the whole scheme contemplates an assessment and not a tax. The two are essentially different in their nature, and designating as a tax that which in its elements is an assessment, can have no effect in determining whether it is one or the other. The question must be decided by the nature of the imposition, and not by the mere name by which it is called."

There are many other instances where the word "tax" has been used to designate a special assessment. Wagner v. Baltimore, 239 U. S. 207, 36 Sup. Ct. 66, 60 L. Ed. 230; Yeatman v. Crandall, 11 La. Ann. 220; Daily v. Swope, 47 Miss. 367. It is true that local improvements may be provided for by means of a tax, instead of an assessment upon the lands benefited. People v. Whyler, 41 Cal. 351; S. P. Co. v. Levee Dist., 172 Cal. 345, 156 Pac. 502. But, in the cases just cited, and others like them, where the charge has been held to be a tax, it has been a burden imposed on personal as well as real property.

[10] It is argued, in this connection, that if the act provides for an assessment, it is open to the objection that it exempts some of the lands which will receive benefits. The argument is that only land subject to general taxation is to be assessed, and that the exemptions from such taxation will relieve certain lands which should be charged. On the other hand, the petitioner contends that the act, properly construed, does not contemplate the exemption of any benefited property (except, perhaps, that devoted to a public use). The proper time to decide this question of interpretation will arrive when the question arises in a case involving the right to assess particular property. There is no occasion to decide it now. It is thoroughly settled that, in the absence of constitutional restriction, the legislative power to exempt property from taxation extends to every form of the taxing power, including special assessments as well as general taxes. 28 Cyc. 1131; 12 Am. & Eng. Ency. of Law (2d Ed.) 314; Cooley on Taxation (3d Ed.) 343; Dyker Meadow Land, etc., Co. v. Cook, 3 App. Div. 164, 38 N. Y. Supp. 222; Milwaukee El., etc., Co. v. Milwaukee, 95 Wis. 42, 69 N. W. 796. See, also, Doyle v. Austin, supra. As was said in the Wisconsin case just cited:

> "Assessments are special taxes, and the power to exempt particular classes or kinds of property from assessments stands on as clear and undoubted ground as the power to make exemptions, in such cases, from general taxation."

The act is also attacked on the ground that it violates subdivision 28 of section 25 of article 4 of the Constitution of California, in that it creates offices by special legislation, and also imposes duties on county officers by special act. In answer to this objection, it is unnecessary to do more than cite the cases of People v. Sacramento Drainage District, supra, and Matter of Bonds of S. J. I. District, 161 Cal. 345, 119 Pac. 198, where similar statutory provisions were under consideration.

Other constitutional objections to the act are urged. Without specifying them, we think it sufficient to say that they are met by the foregoing discussion and citations of authority.

[11] The attack on the proceedings designed to authorize the issuance of the bonds is

put, in the main, on two grounds. It is claimed: First, that the report of the engineers was not sufficiently specific to give the board jurisdiction to proceed; and, second, that the necessary steps preliminary to the holding of an election were not taken. If the proceedings were defective in either or both of these respects, the force of the objections has been removed by an act of the Legislature, approved May 15, 1917. Stats. 1917, p. 239. This act, which became effective July 27, 1917, provides that the bonds in question "and all the acts and proceedings of said district, leading up to and including the authorizing and issuance of said bonds, are hereby legalized, ratified, confirmed and declared valid to all intents and purposes," and that the finding of the board of supervisors in favor of the validity of the bond election should be final and conclusive against all persons except the state of California, which could question the proceedings by suit by the Attorney General within 30 days after the act became effective. This curative act wiped away whatever mistakes there may have been in the procedure attacked by the interveners.

[12] It is said by the interveners that the holding of the election is, by the terms of the flood control act, made jurisdictional. But it is not a step required by any constitutional provision. No election need have been authorized in the first instance. The Legislature might have provided for the issuance of the bonds without giving any voice in the matter to the residents of the district. In re Bonds of San Joaquin Irr. Dist., 161 Cal. 345, 119 Pac. 198; State v. Monahan, 72 Kan. 492, 84 Pac. 130, 115 Am. St. Rep. 224, 7 Ann. Cas. 661. This being so, the Legislature could, by the subsequent act, do away with the necessity of such procedural steps, or with the effect of failure to take them properly. Chase v. Trout, 146 Cal. 350, 80 Pac. 81; Sacramento v. Adams, 171 Cal. 464, 153 Pac. 908; Imperial Land Co. v. Imperial Irr. Dist., 173 Cal. 660, 161 Pac. 113.

Other points are raised which, in view of what has already been said, we do not deem it necessary to mention.

It is ordered that a peremptory writ of mandate issue as prayed.

We concur: MELVIN, J.; HENSHAW, J.; LAWLOR, J.

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177 Cal. 109

MORTGAGE SECURITIES CO. OF CALIFORNIA v. PFAFFMANN. (L. A. 5320.)

(Supreme Court of California. Dec. 31, 1917.)

1. Bailment 🔑18(2)—Common-Law Liens—Repairing Personalty.

Persons making, altering, or repairing personal property had a lien for services rendered at common law.

2. Chattel Mortgages 🔑138(1)—Priority—Lien for Repairs.

Under Civ. Code, §§ 3051, 3052, giving persons repairing personalty possessory liens, with right of sale, and despite section 2897, giving liens priority according to the time of their creation, with certain exceptions, a possessory lien for automobile repairs is superior to a previous chattel mortgage, although such mortgage had been breached when the automobile was delivered to the repairman.

In Bank. Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by the Mortgage Securities Company of California against F. W. Pfaffmann. Judgment for plaintiff, and defendant appeals. Reversed.

Duke Stone, of Los Angeles, for appellant. Tobias R. Archer, of Los Angeles, for respondent.

HENSHAW, J. The Chatts, husband and wife, executed to plaintiff a chattel mortgage on their automobile, the mortgagors retaining the possession and use thereof. They delivered their automobile to defendant to have repair work done thereon. He did this work and held possession of the automobile until payment for it was made. The Chatts violated the terms of their chattel mortgage contract with plaintiff. For this violation plaintiff was entitled to take possession of the automobile and to sell it. Its endeavor to do so was met by the refusal of the defendant to deliver the automobile until payment of his bill; he contending for his possessory lien on account of the work performed. This action was brought to determine the respective rights of the parties and the priorities of their liens. The trial court decreed that the possessory lien of the repairer was subordinate to the chattel mortgage lien of the plaintiff, and gave judgment accordingly. From that judgment this appeal has followed.

[1, 2] No question arises over the validity of the chattel mortgage as such, or over the constructive notice by recordation which that recordation gave to the world. The controlling sections of our Code upon the subject-matter are Civil Code, § 3051, which declares:

> "A person who makes, alters, or repairs any article of personal property, at the request of the owner, or legal possessor of the property, has a lien on the same for his reasonable charges for the balance due for such work done and materials furnished, and * * * may retain possession of the same until the charges are paid."

Here it may be said that this consideration is not complicated, as respondent urges, by the fact that the Chatts were in default under their chattel mortgage at the time they delivered the automobile to defendant for repairs. They were still the legal possessors of the automobile, and their possession continued to be legal until the plaintiff exercised its rights under its mortgage and took unto itself that possession. Section 3052 authorizes a sale in due course of the property held under possessory lien. Section 2897 declares that:

> "Other things being equal, different liens upon the same property have priority according to the time of their creation, except in cases of bottomry and respondentia."

The trial court and the Court of Appeal, not without warrant, held that the lien of the chattel mortgage had priority over the possessory lien of the repairer. Not without warrant, we say, for Wilson v. Donaldson, 121 Cal. 8, 53 Pac. 404, 43 L. R. A. 524, 66 Am. St. Rep. 17, lends strong support to this view. It was because this court was not satisfied with the reasoning and conclusion of Wilson v. Donaldson that a hearing before it was ordered. At the time when Wilson v. Donaldson was decided, the law with which we are concerned was identically the same as it now is, the difference being that section 3051 at the time of the decision in Wilson v. Donaldson dealt only with the first class of lienholders, those "who, while lawfully in possession of an article of personal property, render any service to the owner thereof, by labor or skill, employed for the protection, improvement, safe keeping, or carriage thereof," while section 3052 dealt with the second class of lien claimants, those "who make, alter, or improve any article of personal property, at the request of the owner, or legal possessor of the property." The change that has been made has only been to group both these classes with others in section 3051, and to provide in section 3052 for the identified enforcement of the liens of all of the classes described in 3051. Wilson v. Donaldson, however, cites both sections 3051 and 3052, though the lien which was there declared to exist was a lien of the first of the designated classes; that is to say, a lien depending upon possession, and owned by one lawfully in possession who had bestowed labor for the improvement of personal property, the labor there being the harvesting of grain, the grain itself being subject to the lien of a chattel mortgage prior in time. But while our law to-day, in substance, gives every member of the two classes an identical possessory lien for the value of the service rendered or the work performed, and gives them likewise identical remedies in the matter of the foreclosure of the lien, no such identity of origin exists in the case of the liens themselves. The latter class, those "who make, alter, or repair any article of personal property," always, and in the absence of statute or even in the absence of agreement, at common law had their lien.

> "By the general law, in the absence of any specific agreement, whenever a party has expended labor and skill in the improvement of a chattel bailed to him, he has a lien upon it." Jackson v. Cummins, 5 M. & W. 342.

The reasoning, and, indeed, the quotation, relied on in Wilson v. Donaldson has to do with an agistor's lien, though it was not an agistor's lien the court had before it in Wilson v. Donaldson. But an agistor, in the absence of a special agreement, had no lien at common law, and this is very clearly pointed out in the case cited, supra, where it is further said:

> "Now the case of an agistment does not fall within that principle [the principle of improving personal property] inasmuch as the agistor does not confer any additional value upon the article, either by the exercise of any skill of his own or indirectly by means of any instrument in his possession."

Yet, obviously, this reasoning, perfectly sound in itself, has no application to the facts presented in Wilson v. Donaldson, where the lien by the court conceded to exist was not an agistor's lien at all, but was clearly based upon the "improvement" of the personal property, if with propriety the harvesting of grain can be said to be an improvement. Therefore, under statutes creating agistor's liens, where questions of priority arose, all the reasoning which, as we shall see, goes to support the priority of the repairer's lien was wholly absent. Thus it was said in supporting the superiority of the chattel mortgage lien over the agistor's that it was not in the contemplation of the mortgagee that the mortgagor would put the horse or the cow into an agistor's hands. Further, that when he did so the agistor by his service did not better or improve the chattel, and that as it was not therefore within the contemplation of the mortgagee that his mortgagor should do this thing, and as the agistor had done nothing to improve the chattel, and as the general rule touching liens is that preference goes with priority, and as the mortgagor could not by any contract of his own with the agistor impair the mortgagee's rights, such liens when created by statute, unless the statute itself spoke clearly to the contrary, were to be held subordinate to a pre-existing chattel mortgage lien. But even upon this there is a conflict in authority, some courts holding that it must have been within the contemplation of the mortgagee that the mortgagor would do whatever was necessary to preserve the chattel, and that when in the matter of its preservation it was given to an agistor it would be construed as being within the contemplation of the parties to the mortgage that the agistor, so long as he held the property, did so under a preferential lien. Case v. Allen, 21 Kan. 217, 30 Am. Rep. 425, cited in Wilson v. Donaldson as being a well-considered case upon the subject, is a case dealing only with such an agistor's lien. It is one of the cases in which the rule of construction last enunciated is declared. An examination of the authorities cited in support of the reasoning in Wilson v. Donaldson will disclose that all saving one were cases having to do with agistors' liens. The one exception is that of Storms v. Smith, 137 Mass. 201, where household goods under chattel mortgage were stored by the mortgagor, and the holding of the court was that the mortgagee, in permitting the mortgagor to retain possession of the goods, contemplated only the use of those goods by the mortgagor and not his storage of them, therein distinguishing Hammond v. Danielson, 126 Mass. 294, where a hack under chattel mortgage, permitted by the mortgagee to be used in a livery business, was declared to be subject to the repairer's subsequent lien upon the ground that the mortgagee must have contemplated that the hack would be kept in reasonable condition for use, and Lynde v. Parker, 155 Mass. 481, 30 N. E. 74, treating of an agistor's lien upon a horse under chattel mortgage, where it is held that even in the case of such a lien "all the circumstances surrounding the transaction" may show that it is superior to that of the earlier chattel mortgage.

All this has been said only in illustration of the fact that this important question received inadequate consideration in Wilson v. Donaldson. It remains to be added that the question of priority is wholly controlled by our statutory law. If by the fair intendment of that law these classes now enumerated in section 3051 of the Civil Code are given a preferential lien over the holder of an earlier chattel mortgage, we are not embarrassed in so declaring.

We are well convinced that our law does with intention make the possessory lien of the improver and of the repairer superior to the lien of the pre-existing chattel mortgage. True, it is said in Wilson v. Donaldson that if the Legislature had desired to give such lien claimants priority over chattel mortgage liens it was an easy thing to have said so, but our conviction is that it has said so, and that its declaration has the support of reason and justice. Did the Legislature mean that every artisan and mechanic to whom might be delivered a chattel for improvement and repair must search the records to discover whether that article had been mortgaged, and, failing so to do, be at the peril of the impairment or total destruction of his lien, or did it mean that the money lender who took for security a chattel mortgage should take it with the understanding as part of his contract that improvements and repairs placed upon the article should be subject to a preferential possessory lien? Without hesitation we answer that the second alternative is sustainable as a just interpretation of the legislative enactments. Under the language of the two sections it seems most manifest that such is the true construction. Instancing but one consideration alone, and that the right and power of the possessory lien claimant to sell the property, that right absolute is given him, and he may exercise it so far as the statute reads, without regard to the existence of the chattel mortgage, and without regard to whether or not the chattel mortgage is foreclosable. One would certainly look to see some limiting language in the law if these provisions as to the right of sale and disposition of the proceeds of the sale were to be subordinated to a preferential right on the part of the holder of a chattel mortgage, and it certainly makes more for the protection of society and for the conduct of its business to say that all of these classes of men who preserve, improve, or repair personal property should, like mechanics and artisans under the mechanic's lien law, have their liens declared preferential. Concerning the money lender who holds the chattel mortgage, two suggestions may be briefly advanced; one, that the possessory lien claimant has preserved, improved, or repaired the property upon which he has a lien, and, consequently, has added a value to the security commensurate with his just charge, the other, that the money lender desiring to take the security of a chattel mortgage can with much more readiness reduce the amount of his loan to protect himself against the possible liability of a possessory lien than can the workaday artisan take the time to inspect the records to see whether such chattel mortgage exists against the property.

Besides reason, there is no lack of authority to support this construction of our law. The law of Wisconsin is identical with our own, and in Jesse Smith v. Kaestner, 164 Wis. 205, 159 N. W. 738, the Supreme Court of Wisconsin declares the same construction, and supports it with abundant authority.

The judgment appealed from is therefore reversed.

We concur: ANGELLOTTI, C. J.; MELVIN, J.; SLOSS, J.; VICTOR E. SHAW, Judge pro tem.

177 Cal. 169

C. F. LOTT LAND CO. v. HEGAN.
(Sac. 2453.)

(Supreme Court of California. Dec. 31, 1917.)

1. WATERS AND WATER COURSES ⚿156(8)—EXTENT OF RIGHT UNDER EASEMENT.

Where the servitude imposed on defendant's land by the grant was for the carrying of water only for lot No. 5, and not at all for lot No. 4, the right to have the ditch, conveying the water, enlarged would arise only when more water was needed for lot No. 5, in view of Civ. Code, § 806, providing that the extent of a servitude is determined by the terms of the grant, or the nature of the enjoyment by which it was acquired.

2. WATERS AND WATER COURSES ⚿156(8) — EXTENT OF RIGHT UNDER EASEMENT.

Increasing the capacity of a ditch would be within the purview of a grant giving the right to transport over defendant's land such water as might be necessary for use on the lot specified.

Department 2. Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action by the C. F. Lott Land Company against Eliza Hegan, as administratrix of the estate of James Hegan, deceased, successor of James Hegan. Judgment for plaintiff, and defendant appeals. Reversed.

L. G. Faulkner, of Chico, for appellant. W. H. Carlin, of Marysville, for respondent.

HENSHAW, J. Plaintiff claimed a right of way for a ditch across the land of defendant, and the additional right to carry therein 2,500 inches of water, measured under a 4-inch pressure, for use upon its lands. Defendant denied that her intestate's lands were under the burden of the servitude for such a ditch, denied the capacity of the ditch to carry 2,500 inches of water under 4-inch pressure, and asserted that its maximum capacity was 500 inches. Affirmatively, defendant asserted that the ditch was jointly constructed and was jointly owned by the predecessors in interest of plaintiff and of defendant, and the defendant's intestate's right is to all the water flowing in the ditch which may be needed or desired in connection with his land, for the purpose of irrigation, for watering stock, and for domestic use. The court found the ownership of the ditch in plaintiff and the ownership and right to carry therein for use upon its lands 2,500 inches of water. It found further that the right of way for this ditch was approximately 30 feet in width, and as a part of this right of way was the right to enter upon all the lands traversed by the ditch for the purpose of repairing and operating it. It found that plaintiff's predecessor in interest had alone constructed the ditch, and as to defendant's intestate held that he had no right to the use of any of the waters; but with the knowledge of and without objection upon the part of plaintiff and its predecessor in interest there had been taken from the ditch by defendant's intestate 10 inches of water for irrigation, and, excepting for this permissive use, defendant's intestate had no right to any of the waters. It further found that the reasonable value of this 10 inches of water was $1 per acre for the 20 acres upon which it was utilized, or $2 per miner's inch for the 10 inches so taken. The judgment followed these findings. Upon appeal the principal contention is that the findings are not supported.

To these facts it is necessary for an understanding of the controversy to add that the lands now owned by plaintiff were formerly the lands of C. F. Lott, who appeared as plaintiff's principal witness upon the trial. Big Butte creek, from which these waters are taken, flows southwesterly. All of the lands affected by this litigation were originally held in single ownership. They were divided for the most part into lots and may be numbered for convenience in designation. To the north lay lot 1, riparian to Big Butte creek, purchased and owned by C. F. Lott. To the southward lay lots 2, 3, and 4, and below that an unnumbered tract which for convenience we may call lot 5. This was nonriparian to the stream, and was also purchased by Mr. Lott. With that purchase ran the grant of a perpetual right of way for a water ditch to carry Big Butte creek water across the intervening lots 2, 3, and 4. Subsequently C. F. Lott purchased lot 4, thus leaving between his holdings of lot 1 to the north and lot 4 to the south lots 2 and 3 traversed by the water ditch. The ditch as originally constructed took the water from Butte creek at the northerly end of lot 1, carried it southwesterly roughly paralleling the line of the creek across lots 1, 2, 3, and 4, and onto the unnumbered lot which we have called 5. Unquestionably the easement conferred on lot 5 by this grant and the servitude placed upon lots 2, 3, and 4 were for the construction of a ditch and the carriage of water therein sufficient for the purposes of unnumbered lot 5. This ditch was also used to supply water to the northern lot 1, and of this, of course, defendant cannot and does not complain. But Mr. Lott was not given a right of way over lots 2 and 3 to convey water by this ditch to lot 4 which he acquired after his grant with the easement of a right of way for unnumbered lot 5. The defendant's intestate owned 118 acres of land in lot 2 or 3. It is conceded that this land was traversed by the ditch. In substance the testimony of Mr. Lott is that he exclusively and for his own private use constructed this ditch, aided in the work by certain tenants of his lands, and perhaps —though of this he did not know—by other landowners who were volunteers, but that he always had asserted and maintained his rights as sole private owner. When the ditch carried water, as it frequently did, beyond the needs of his land, he made no objection to his neighbors using this excess water on their own lands, but they never had used such water of right, and he always stopped any undue interference with his exclusive proprietary rights. He estimated that he used and needed for the irrigation of his lands 2,500 miner's inches of water, and in fact had enlarged the old ditch so as to carry that amount.

[1] Appellant contends that the ditch as originally built and as it crossed her land, and as it continued to exist until at or shortly prior to the commencement of this action, was a small ditch incapable of carrying 2,500 inches of water, and in support of this points out the evidence that before the water in this ditch could reach the Hegan lands it had to pass through an iron pipe laid under a public highway, and that the maximum capacity of this pipe was only 500 miner's inches. Still further, that the servitude imposed upon defendant's lands was for the carrying of water only for unnumbered lot 5 and not at

all for lot 4, which, it will be remembered, was acquired by Mr. Lott after the date of the grant to him of the right of way for a water ditch for the use of unnumbered lot 5. Consequently, as there is no evidence to show that unnumbered lot 5 ever has needed or used 2,500 inches of water, it is the imposition of an unjust and unwarranted servitude upon the Hegan lands to decree a right of way for a ditch of that capacity with right of free access and entry upon a strip of appellant's land 30 feet in width. No answer to this is attempted by respondent, other than what is contained in the general statement that plaintiff's evidence was as to the use and need of 2,500 inches of water. It does appear that in 1911, about the time this action was brought, the ditch crossing the Hegan land was enlarged to a capacity of 2,500 inches, but it is not shown that the ditch ever carried that amount of water, and it is affirmatively shown that the pipe above referred to, whose carrying capacity was only 500 inches of water, remained unchanged. Appellant's position in this respect is well founded in the present state of the record. The extent of the servitude imposed upon the Hegan lands is measured by the terms of the grant. Civ. Code, § 806. Under the conditions shown to exist, since respondent's claim of title rests upon grant, and as that grant went only to the use of water and a right of way therefor upon unnumbered lot 5 (not herein including the subsequently acquired lot 4), before the court could justly find and decree a ditch right to 2,500 inches of water, evidence must be given to show the need of this amount for the purposes of unnumbered lot 5.

[2] Appellant relies upon Winslow v. City of Vallejo, 148 Cal. 723, 84 Pac. 191, 5 L. R. A. (N. S.) 851, 113 Am. St. Rep. 349, 7 Ann. Cas. 851, to support the contention that plaintiff's predecessor having selected a right of way and constructed and maintained a ditch of a given size, the servitude upon the Hegan land has thus been defined, without right of respondent to increase the servitude by changing the conditions. But having regard to the nature of the grant, while it may well be that the course of the ditch having been once fixed by its construction, respondent would not be allowed to change its route, yet the grant contemplates the right to transport over the lands such water as may be necessary for the use of unnumbered lot 5, and if the quantity needed by the development of the land should be increased it would be quite within the purview of the grant that the capacity of the ditch should be correspondingly increased.

In the complaint the allegation merely is of ownership of the ditch and its water. The court finds in accordance with the allegation. But the evidence was all directed to an ownership under grant. In the present state of the record it cannot be said that respondent relied upon any other title. It is true that it appears that plaintiff and its predecessor after the acquisition of lot 4 used the water carried by the ditch upon lot 4. But as it appears that at this time the ditch had a carrying capacity of 500 inches, and that the construction and maintenance of this ditch had been acquiesced in by the owners of the land on lots 2 and 3 traversed by it, it became a matter of indifference to them what was done with the water after it passed their lands. A different question is presented when a decree is sought for a ditch with the carrying capacity of 2,500 inches with a right of way 30 feet in width therefor.

Complaint is made of the finding of the court to the effect that appellant had no right to the use of any of the water carried by the ditch for the purposes of the Hegan land, and to the finding that the use which had actually been made of 10 inches of water was permissive merely. But upon this it need only be said that there is a sharp conflict of evidence; the testimony on behalf of plaintiff being that such use was permissively allowed as a neighborly act, and that it was not in the exercise of an asserted right. Complaint also is made of the finding of the court decreeing a permissive right to the use of 10 inches of water at a fixed charge. But, of course, appellant's grievance lies in the fact that she was not decreed this water as a matter of right. Respondent, rather than appellant, is injured by the decree granting a continuance of the use upon payment of the amount named. Appellant is not injured thereby, since there is no obligation upon her or her successors to take any of the waters.

For the reasons given, the judgment appealed from is reversed.

We concur: MELVIN, J.; VICTOR E. SHAW, Judge pro tem.

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177 Cal. 144

EYMANN v. WRIGHT et al. (L. A. 4083.)

(Supreme Court of California. Dec. 31, 1917.)

PUBLIC LANDS 🔑135(1)—DESERT LAND ENTRY—CONTRACT TO CONVEY AFTER PATENT.

While Desert Land Act (Act March 3, 1877, c. 107, 19 Stat. 377 [U. S. Comp. St. 1916, §§ 4674–4678]) allows an assignment of an entry thereunder, contract of entrymen to convey after obtaining patent is against public policy, as allowing nullification of provision as to amount one can hold before patent.

Department 2. Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by Dorothea H. Eymann against Charles D. Wright and others. From an adverse judgment, plaintiff appeals. Affirmed.

Andrew J. Copp, Jr., of Los Angeles, for appellant. Collier & Clark, of Los Angeles, for respondents.

HENSHAW, J. Plaintiff's action was to recover against the defendants for violation of their contract with her; she being protected by an indemnity bond. The gravamen of the action is this: By their contract defendants made to plaintiff an executory assignment of their rights under desert land entries, agreeing to do all things necessary under such entries to perfect them and entitle defendants to patent for those lands, and on issuance of such patents the titles so granted to them were in turn to be conveyed to plaintiff. The complaint charged in several counts, but all to this effect. A general demurrer to it was interposed and sustained, and from the judgment which followed plaintiff has appealed. In argument it is contended that the Desert Land Act expressly permits the entryman to assign his entry. This is true. Still further, it is argued that, if such an executed assignment is valid, an executory agreement to assign is also valid, and that, as fraud is never presumed, it will be held against demurrer that the contract was fair and legal. And, finally, it is argued that this court, in Sanders v. Dutcher, 168 Cal. 353, 143 Pac. 599, has given distinct recognition to contracts of this character. A reading of Sanders v. Dutcher will show that appellant is completely mistaken. The desert land entry in that case was made by Orpha C. Johnson. Her assignment to Sanders was an executed assignment, and under it he appeared as claimant. Thereafter she made a similar sale and assignment to the defendant Dutcher, and it was over these two executed assignments that their controversy was waged. Such manifestly is not the situation here presented. Here the contract was that these defendants should do all things necessary to procure and should procure patents, title under which patents was by virtue of the agreement then to be transferred to plaintiff. The contract was in distinct violation of the decisions of the Land Department, from one of which it may be profitable to quote at length. In the case of Herbert C. Oakley, 34 Land Decisions, p. 383, the Secretary of the Interior thus speaks:

> "While absolute assignments of desert land entries are recognized as valid, it does not follow that the language of the act of March 3, 1891, allowing such assignment, recognizes the right of the claimant to execute an executory contract to convey the land after the issuance of patent and thereafter proceed with the submission of final proof in furtherance of his contract. The result of the recognition of such a right of the claimant is clearly manifest, and the effect thereof might easily operate to nullify that provision of the act which declares that no person or association of persons shall hold by assignment, or otherwise, prior to the issuance of patent, more than 320 acres of such arid or desert land.
>
> "In the case of absolute assignment of such entries, the assignee assumes the position of an original entryman, so far as his qualifications to take are concerned; and he, being the person then charged with the submission of satisfactory proof of compliance with the law, is before the Land Department in his own right, and all future transactions respecting the entry are conducted directly with him. The Land Department, in such case, has before it the actual party in interest, and can deal with him personally. By the recognition of an executory contract to convey after patent, leaving only a nominal party in interest before the Department who would be permitted to submit proof of his own qualifications and compliance with the law, with no requirement as to proof of the right of the real beneficiary to take the land, a far different end may be accomplished, directly contrary to the spirit and intent of the Desert Land Law. By proceeding under such contract, any person or corporation might easily acquire a quantity of land greatly in excess of that allowed under the act. The Department, while recognizing the validity of absolute assignments of desert land entries, is clearly of opinion that any extension of the privileges accorded by the plain terms of the act, especially in the manner contended for by claimant, is entirely unwarranted, and proof of the existence of such contract should prevent the acceptance of the final proof. Otherwise the practical effect of an assignment is realized through the medium of such contract without any of the incidents thereof attaching; and an easy method of evading that portion of the act which prevents a single individual, association, or corporation from holding by assignment, or otherwise, under the Desert Land Law, more than 320 acres, is open to all, and this positive limitation effectively nullified. The clear intent of the Desert Land Law forbids recognition of contracts to convey after patent, and this, too, irrespective of the time the contract was made and regardless of whether or not the original entry was made honestly and in good faith."

Without regard then to the fair or unfair dealing of the defendants, it is manifest that their contract was against the policy of the law (Civ. Code, § 1667), and could not be carried out under the law.

The judgment appealed from is therefore affirmed.

We concur: MELVIN, J.; VICTOR E. SHAW, Judge pro tem.

(176 Cal. 516)

GRAY v. HUFFAKER et al. (S. F. 8074.)

(Supreme Court of California. Nov. 20, 1917. Rehearing Denied Dec. 20, 1917.)

HUSBAND AND WIFE ⚷154—PAYMENT OF WIFE'S DEBT FROM TRUST FUNDS—LIABILITY OF WIFE—KNOWLEDGE.

Where a husband and wife joined in a mortgage on her separate property, the wife getting a part of the money raised, and paying off such part out of her own funds, she is, nevertheless, liable for money she consented to be paid by her husband to discharge the balance out of funds she knew he held in trust for another.

Department 1. Appeal from Superior Court, Alameda County; W. H. Thomas, Judge.

Action by John Gray against Jennie B. Huffaker and E. Huffaker. Judgment for plaintiff, and defendants appealed. Judgment was affirmed by the District Court of

Appeals, First District, and comes before the court for a rehearing. Affirmed.

The following is the opinion of the District Court of Appeals:

This action was brought by plaintiff to recover the sum of $1,105 from Jennie B. Huffaker and E. Huffaker, her husband, on a complaint for money had and received.

The record discloses that the controversy between the parties has been the subject of extended litigation, and shows in substance the following facts: Appellant E. Huffaker is an attorney at law, and was employed by the respondent, John Gray, to defend him upon a criminal charge amounting to a felony. Gray was convicted and sent to the state penitentiary. Upon his conviction Gray executed a deed conveying certain real property to Huffaker in trust for certain purposes not disclosed by the record. Subsequently, and while Gray was serving his sentence, Huffaker mortgaged the trust property and retained the moneys received thereunder, claiming the same as attorney's fees for defending Gray, and also for prosecuting certain civil suits in Gray's behalf. Thereafter demand was made upon Huffaker for a return of the moneys so received, and upon his refusal to pay suit was instituted by Gray for recovery of this sum. The court in that matter found that Huffaker had received $1,800 as trustee for Gray and was entitled to $1,274.15 as attorney's fees, and that he had been paid by Gray the sum of $284, and that out of the $1,800 received as trustee Huffaker was indebted to Gray in the sum of $1,105.32, and gave judgment accordingly. In the present action defendant recovered judgment against Jennie B. Huffaker for the sum of $836.85, which, with interest and costs, aggregated the sum of $1,149.50. This appeal is from said judgment.

The trial court found that defendant E. Huffaker, while acting in the fiduciary capacity of attorney for plaintiff, John Gray, received for his use and benefit the sum of $836.85 and that he (Huffaker) wrongfully and fraudulently turned over and delivered this sum to Jennie B. Huffaker, his wife, which sum was used for the purpose of liquidating an indebtedness represented by a promissory note and mortgage executed by Huffaker and his wife upon her separate property.

The judgment is based upon the theory that, Jennie B. Huffaker having received the benefits of the moneys wrongfully obtained by her husband, E. Huffaker, she should in good conscience be compelled to return the same to plaintiff, from whom it was fraudulently appropriated. It is not denied that the money fraudulently obtained was used for the purpose stated, but the contention of appellant is that, inasmuch as Jennie B. Huffaker did not in fact receive the actual moneys used in the transaction, but was the recipient only of the benefits flowing from the payment of the mortgage, an action for money had and received cannot lie against her. But in answer to this it may be said that an action for money had and received may be maintained whenever an equity arises from the circumstance that one has money which he ought to pay to another. Chung Kee v. Davidson, 102 Cal. 188, 36 Pac. 519; Smith v. Farmers' & Merchants', etc., 2 Cal. App. 377, 84 Pac. 348.

Appellants further contend that, even conceding the application of this rule, nevertheless the money borrowed by them from the bank was the debt of the husband, and not that of the wife, who gave her separate property as security, and that by the execution of the mortgage she became a mere indorser, and that, not having received any benefit from the mortgage at the time of its execution, she was not benefited by the payment thereof. This contention cannot be maintained. Both Huffaker and his wife received a portion of the money borrowed from the bank. Admittedly the money which is the subject of this action was received by E. Huffaker as trustee for respondent while acting as his attorney, and used by Huffaker to liquidate the mortgage in question. Moreover, a reading of the entire record shows some evidence that Jennie B. Huffaker received the benefit of the payment and satisfaction of the mortgage with knowledge on her part that the same was obtained with money received by her husband through the hypothecation of the trust property. Having received the benefit of such money in the manner indicated, she should in good conscience be made to return the same to the plaintiff, from whom it was fraudulently appropriated.

The judgment is affirmed.

E. Huffaker and Rudolph Hatfield, both of Oakland, for appellants. John L. McVey, of Oakland, for respondent.

SHAW, J. Plaintiff recovered judgment for $1,149.20 upon a complaint against the defendants for money had and received to his use. The defendants appeal.

The two defendants are husband and wife. Prior to the transaction in question they had borrowed $2,300 of a bank, upon their promissory note, executed by both, secured by a mortgage upon the separate property of the wife. Seven hundred dollars of this money was used to improve the wife's property, and the remainder was appropriated by the husband to his own use with the wife's consent. The wife paid out of her own funds the $700 applied upon her property. Thereafter the husband paid the remainder due upon the mortgage upon the wife's property. In doing so he used $836.85 of money in his possession belonging to the plaintiff, John Gray, and held by said Huffaker in trust for Gray. The testimony of the wife, although vague and evasive, authorized a finding by the court that she knew that the money so used by her husband in discharge of the mortgage was the money of Gray, and was held by her husband in trust for Gray.

Upon these facts the plaintiff was entitled to judgment for the money of Gray so appropriated to the use of the defendants, with interest from the time of such appropriation. There is no serious dispute over the proposition that the evidence established all of the aforesaid facts except the knowledge of the wife concerning the trust money. While, as we have said, the evidence of the wife is not entirely satisfactory on the point, it is sufficient to support the finding on that subject. There is no force in the claim that the money was not applied to the use and benefit of the wife. The mortgage was an existing lien on her property. Gray's money was used to discharge it, with her knowledge and consent. She received a benefit from his money to the same extent as if she herself had received the money and had applied it to pay the mortgage debt. Standish v. Babcock, 52 N. J. Eq. 628, 29 Atl. 327; 2 Beach on Trusts,

§ 707. There are no other points that require notice.

The judgment is affirmed.

We concur: SLOSS, J.; LAWLOR, J.

177 Cal. 132

SUPREME LODGE OF THE WORLD, LOYAL ORDER OF MOOSE et al. v. LOS ANGELES LODGE, NO. 386, LOYAL ORDER OF MOOSE et al. (L. A. 4069.)

(Supreme Court of California. Dec. 31, 1917.)

1. BENEFICIAL ASSOCIATIONS 🔑16—SUBORDINATE LODGE — FORFEITURE OF LODGE PROPERTY.

The constitution and laws of a Supreme Lodge, an incorporated fraternal organization, provided that the Supreme Dictator might suspend or revoke the charter of any subordinate lodge in which case its property should be forfeited to the Supreme Lodge, and be taken in custody by the Supreme Secretary, and also that any subordinate lodge having been found guilty of violating any provision of the constitution, general laws, etc., might be suspended or have its charter revoked, and thereunder the charter of Los Angeles, No. 386, which had a large membership and provided a meeting place with lodge furniture, etc., was revoked without any notice, charges, hearing, or finding of guilt. *Held*, that such revocation and suspension were ineffectual, and did not work a forfeiture of the property of the subordinate lodge.

2. CONSTITUTIONAL LAW 🔑278(1) — DUE PROCESS OF LAW — FORFEITURE OF LODGE PROPERTY.

In such case the contention that the subordinate lodge and its members assented to the provision under which the Supreme Dictator acted, and that such assent was in the nature of a contract estopping them from complaining of the revocation of their charter and the attempted forfeiture of their lodge property, etc., was invalid, as such forfeiture without notice, charges, or hearing, or finding of guilt, would be contrary to Const. U. S. Amend. 14, forbidding a deprivation of property without due process of law.

3. BENEFICIAL ASSOCIATIONS 🔑17 — FORFEITURE OF LODGE PROPERTY — RIGHT OF NEW LODGE.

Where the Supreme Dictator of a Supreme Lodge suspended and revoked the charter of a local lodge which was taking steps to incorporate, without any notice, charges, hearing, or finding of guilt so as to make a forfeiture of its lodge property ineffectual, the fact that a minority of its members continued their allegiance to the Supreme Lodge and organized a new lodge did not entitle them to the lodge property as against the majority members of the original local lodge, on the ground that the majority were seceders.

4. APPEAL AND ERROR 🔑1151(2)—MODIFICATION OF JUDGMENT—DAMAGES.

In an action in claim and delivery by a Supreme Lodge to forfeit the lodge property of a local lodge whose charter had been suspended or revoked, an award of damages to defendants in an amount greater than that claimed in their answer would be reduced to such amount.

5. BENEFICIAL ASSOCIATIONS 🔑17—LODGE PROPERTY—RIGHT TO POSSESSION.

Where a Supreme Lodge revoked the charter of a subordinate lodge without notice, charges, hearing, or finding of guilt, so that such revocation was ineffectual to forfeit its lodge property, and the majority of the original lodge was a de facto corporation purporting to act as such, it was entitled to the possession of the property.

Department 2. Appeal from Superior Court, Los Angeles County; Chas. Wellborn, Judge.

Action in claim and delivery by the Supreme Lodge of the World, Loyal Order of Moose, a corporation, and others, against Los Angeles Lodge, No. 386, Loyal Order of Moose, and others. Judgment for defendants, motion for new trial denied, and plaintiffs appeal. Modified and affirmed.

Arthur H. Jones, of Indianapolis, Ind., L. S. Arnold, of Los Angeles, and Morganstern, McGee, Henning & Hardee, of San Diego, for appellants. Ingle Carpenter, Charles W. Fourl, and Georgia P. Bullock, all of Los Angeles, for respondents.

VICTOR E. SHAW, Judge pro tem. Action in claim and delivery to recover possession of certain property, consisting of lodge furniture and furnishings, alleged to be wrongfully withheld by defendants from plaintiffs.

The material facts out of which the action arose, in so far as necessary to this decision, are as follows: The plaintiff Supreme Lodge of the World, Loyal Order of Moose, is a fraternal organization incorporated under the laws of Indiana. As declared in the articles of incorporation:

> "The object of the association shall be to organize subordinate lodges throughout the world. Such lodges shall have ritualistic ceremonies as prescribed by the Supreme Lodge of the World, Loyal Order of Moose; to unite in the bonds of fraternity, benevolence, and charity all acceptable white male persons of good character; to educate and improve all members and their families morally, socially, and intellectually; to assist the members and their families in times of need; to aid and assist the widows and orphans of deceased members of the order; to encourage its members in patriotism and obedience to the laws of the country and in the tolerance of religion."

In 1910, under a charter issued to it by said Supreme Lodge, Los Angeles Lodge, No. 386, Loyal Order of Moose, was organized as a subordinate lodge of said fraternity, the membership of which in 1913 was approximately 3,500. With funds obtained from initiation fees and membership dues, said Lodge No. 386 provided suitable quarters for meetings and use of its members, and, at a cost of upwards of $20,000, acquired the property which constitutes the subject of this litigation. In November, 1913, Lodge No. 386, purporting to act under the laws of this state, incorporated under the name of Los Angeles Lodge, No. 386, Loyal Order of Moose, to which lodge, as thus incorporated, all the property theretofore owned by the lodge was, in consideration of the assumption of liabilities of the vendor, transferred by bill of sale.

Section 7 of article 4 of the constitution and laws of the Supreme Lodge provides that:

> "When in the opinion of the Supreme Dictator the conditions of any subordinate lodge are such as to warrant it, he may suspend or revoke the charter of such lodge."

Acting under the authority conferred by this provision, and without notice or the preferring of any charges or according the lodge any hearing, the Supreme Dictator, on February 11, 1914, suspended the charter, and thereafter, on February 20, 1914, likewise without notice, charges, or hearing, revoked defendant's charter, and at the same time, acting under article 17 of the by-laws of the Supreme Lodge, which provides that, "in the event of the suspension, revocation, or surrender of the charter of a subordinate lodge by the Supreme Lodge, Supreme Council, or Supreme Dictator, as provided by the laws of the order, the charter, paraphernalia and all other property of the lodge shall be forfeited to the Supreme Lodge, and the Supreme Dictator, or some member duly authorized by him, shall take possession of said property and place the same in the custody of the Supreme Secretary," authorized certain members of Lodge No. 386 to take possession of the property and assets of the lodge, which, upon demand, refused to surrender the same, and appealed to the supreme forum, which, on April 1, 1914, rendered its judgment that the action of the Supreme Dictator in revoking the charter of Los Angeles Lodge, No. 386, Loyal Order of Moose, "be and the same are hereby approved and confirmed." Thereupon about 700 of the 3,500 members constituting Lodge No. 386 withdrew therefrom and formed a voluntary new lodge, assuming the name "Los Angeles Lodge, Loyal Order of Moose, No. 386," to which the Supreme Lodge issued a charter so designated. This action, in which certain members of the new lodge are joined as plaintiffs, followed, and the property in controversy was, in accordance with the provisions of the statute, delivered into the possession of plaintiffs. Upon trial an alternative judgment, as required in such cases, and wherein damages were adjudged for the wrongful taking and detention, was entered in favor of defendant, from which, and an order denying plaintiffs' motion for a new trial, they prosecute this appeal.

Appellants base their claim of right to the property: First, upon the action of the Supreme Dictator in revoking defendant's charter, as confirmed by the supreme forum, and the by-law of the Supreme Lodge providing that in such event all property of the subordinate lodge should be forfeited to the Supreme Lodge; second, that the property was impressed with a trust in that, notwithstanding the fact it was bought and paid for by the members of the lodge, it was dedicated to the specific purposes of its organization under the jurisdiction of the Supreme Lodge from which it held a warrant for its existence, which trust was repudiated by defendant in seceding from the Supreme Lodge.

[1, 2] In our opinion, neither position is tenable. As to the first proposition, the property in question was lawfully in the possession of defendant, having been acquired by it with funds to which the Supreme Lodge contributed nothing. This being true, it is entitled to retain possession thereof, unless there be some rule or by-law of the order which imposes upon it the obligation to deliver possession to the plaintiffs. The only provision upon which to base a claim of such duty is by-law 17 hereinbefore quoted. The forfeiture so provided for is based upon the action of the Supreme Dictator in revoking defendant's charter. As to this action the trial court, upon conclusive evidence, found that the Supreme Dictator revoked defendant's charter "without any charges having been filed against such lodge or the members thereof, and without notice of charges having been served upon the members of the lodge, and without a hearing upon any charges whatsoever," and that thereafter the supreme forum, upon the appeal had by said Lodge No. 386, by an order made, sustained the action of said Supreme Dictator in revoking the said charter. Not only is there an absence in the by-laws of any provision constituting a waiver of notice of the hearing of a proceeding upon which to base such alleged forfeiture, but article 3 of section 1 of the by-laws of the Supreme Lodge provides that:

> "Any subordinate lodge having been found guilty of violating any provision of the constitution, general laws, rules, and regulations of the order shall be suspended, or have its charter revoked, as may be determined by the Supreme Lodge or the Supreme Council, according to the laws of the order."

In Grand Grove, A. O. of D., v. Duchein, 105 Cal. 219, 38 Pac. 947, it is said:

> "It is well settled that a member of a benevolent association cannot be expelled without being given a hearing, and that a by-law which authorizes such a course is unreasonable and without effect"—citing in support thereof Fritz v. Muck, 62 How. Prac. (N. Y.) 69, Wachtel v. Noah Widows', etc., Society, 84 N. Y. 28, 38 Am. Rep. 478, and People v. Musical, etc., Union, 118 N. Y. 108, 23 N. E. 129, to which may be added Hall v. Supreme Lodge (D. C.) 24 Fed. 450, and Ludowiski v. Benevolent Society, 29 Mo. App. 337.

Continuing, the court says:

> "There is no distinction in principle between expelling a member from a subordinate grove and revoking the charter of the grove itself or suspending its charter."

In Grand Grove, etc., v. Garibaldi, 130 Cal. 116, 62 Pac. 486, 80 Am. St. Rep. 80, it is said:

> "The party accused must also have due notice of the trial of the charge, and an opportunity of being heard in his defense."

Appellants insist that defendant Lodge No. 386 and its members by their acts assented to the provision under which the Supreme Dictator acted, and that such assent is in the nature of a contract whereby they are estopped from complaining of the action of forfeiture taken; that, having agreed that upon a revocation of its charter, its property should be forfeited to the Supreme Lodge, and such revocation, though made without notice, charges, or hearing, having been made, the property ipso facto was transferred to the Supreme Lodge. This contention finds no support in the authorities cited, and is contrary to the provision of the Constitution of the United States to the effect that no one shall be deprived of property without due process of law. Const. U. S. Amend. 14. Moreover, our attention is directed to nothing in the constitution or bylaws of the order giving the Supreme Dictator or the Supreme Lodge the power to act thus arbitrarily without notice or hearing. The provision of the by-law empowering the Supreme Dictator to revoke the charter of a subordinate lodge does not provide that he may take such action without notice to the lodge of the charges upon which he proposes to act, and article 3, section 1, of the bylaws, hereinbefore quoted, provides for revocation of charters of subordinate lodges when they are "found guilty of violating provisions of the constitution, general laws, rules, and regulations of the order." This provision clearly implies notice and hearing of charges preferred. Unless so found guilty of some one or all of these acts, no ground would exist for the revocation of a charter. The action of the Supreme Dictator, confirmed on appeal by the supreme forum, taken without notice, was arbitrary and in violation of the principle of natural justice that no one shall be condemned without an opportunity to be heard in his defense. Moreover, it was in violation of said article 3, section 1, since it was taken without any finding that defendant was guilty of any offense for which either he or the Supreme Lodge was authorized to revoke its charter. Since the Supreme Lodge could only revoke the charter upon a finding, which implies a hearing, that it was guilty of violating some provision of the constitution, general laws, rules, and regulations of the order, it should follow that the Supreme Dictator could not, without express provision of waiver of notice, be deemed to possess greater powers than those of the Supreme Lodge itself.

It is unnecessary to decide whether or not a forfeiture of defendant's property would follow the revocation of its charter if duly made in accordance with law. That question is not before us. Suffice it to say that the purported revocation, since made without notice, charges, or opportunity to be heard, as to which there was no waiver, is ineffectual for the accomplishment of such purpose, and hence no forfeiture of the property could be declared as the result of such illegal and unwarranted act.

[3] As to their second proposition, appellants argue that the new lodge, organized by the 700 members withdrawing from defendant lodge, and for and on behalf of whom the individual plaintiffs sue, was entitled to the property for the reason that after the revocation they continued loyal and steadfast in their allegiance to the Supreme Lodge; in other words, they yielded to the unwarranted action of the Supreme Dictator, withdrew from the lodge, and, under a dispensation issued on March 14, 1914, by the Supreme Secretary, who acknowledged receipt of the charter and authorized the institution of the new lodge, to which, as therein stated, "if the constitution and laws of the Loyal Order of Moose are complied with in the institution of said lodge, a charter granting to the members of the aforesaid lodge all rights and privileges of membership in the Loyal Order of Moose, will be forwarded," formed a new one. The argument is based upon the contention that the members of defendant lodge, having repudiated their allegiance to the purposes for which the subordinate lodge was organized, were seceders therefrom, in support of which authorities are cited to the effect that, where a majority, however large, secede and renounce their allegiance to the supreme body, the minority, however small, who remain steadfast to the purposes of the order, are entitled to the lodge property. See McFadden et al. v. Murphy, 149 Mass. 341, 21 N. E. 868; Union Benev. Soc. v. Martin, 113 Ky. 25, 67 S. W. 38; Gorman v. O'Connor, 155 Pa. 239, 26 Atl. 379; and Kayley v. McCourt, 235 Pa. 304, 83 Atl. 830. Conceding this to be true, how can it be said that the members of defendant lodge are disloyal seceders, when, in protesting the unwarranted action of the Supreme Dictator in the attempted revocation of their charter, they exhausted all remedies in an effort to maintain their relation and allegiance to the Supreme Lodge, which, against its will and consent and over its protest, unlawfully refused to recognize it as a subordinate lodge? How can it be said the members who withdrew, thus severing their connection with defendant lodge, obtained and paid for a new charter, and by authority of the Supreme Lodge organized a new one, constitute a remaining minority of defendant lodge? Defendant and its members were not seceders, but, except for the severance of its relations with the Supreme Lodge due to the latter's action, continued in the use of the property, holding its meetings, collecting dues, and paying sick and death benefits as fully and to the same extent after the revocation of its charter as it had theretofore done.

Neither can its secession be predicated upon a resolution adopted by the lodge nearly a month after the action of the supreme forum, whereby it renounced its allegiance to the Supreme Lodge and declared that it did not recognize its authority. This was no more than an expression of its acquiescence in a helpless situation. Plaintiffs are in no position to complain because defendant, after being knocked down with a club, refuses to get up.

In the absence of a legal revocation of its charter, defendant lodge, as shown by this record, was at all the times a duly created, organized, and existing lodge, and, save and except in so far as prevented by the wrongful acts of the Supreme Lodge, continued in the exercise of its functions in accordance with the purposes for which it was organized, as provided in the constitution and bylaws of the organization. This being true, the withdrawing members who organized the new lodge can have no just right to the property acquired and used by defendant lodge for lodge purposes.

[4] In its answer defendant alleged that by reason of the taking and detention of the property it sustained damages in the sum of $20 per day during the time it was deprived of the use thereof. The property was taken May 25th and the judgment rendered August 18th. For this period of 85 days during which the property was unlawfully detained the court found that by reason thereof defendant suffered damages in the sum of $3,000. This was in excess of the amount demanded in the answer, since the damages alleged for such detention, at $20 per day for a period of 85 days, amounts to $1,700 only. In this respect the finding is erroneous, and the judgment should be modified by deducting therefrom the sum of $1,300.

There is ample evidence to support the finding that by reason of the removal and deterioration of the property, due to such fact, defendant was damaged in the sum of $2,500.

[5] Appellants further claim that the court failed to find that defendant at any time was entitled to possession of the personal property in controversy, or that the plaintiffs wrongfully withheld the same from its possession. In our opinion, there is no merit in such contention. To our minds, the question as to whether or not defendant was a duly incorporated lodge is immaterial. It was at least a de facto corporation purporting to act as such, and whether it be incorporated or a voluntary association would not affect the result of our conclusion. Stockton & L. G. Road Co. v. Stockton & C. R. R. Co., 45 Cal. 680; Los Angeles, etc., Band v. Spires, 126 Cal. 545, 58 Pac. 1049; Baltimore, etc., R. Co. v. Church, 137 U. S. 572, 11 Sup. Ct. 185, 34 L. Ed. 784. The court found that all of said personal property involved in the controversy was in possession and control of the defendant; that all of said personal property described in the complaint was in possession of the defendant Los Angeles Lodge No. 386, Loyal Order of Moose, a purported corporation, at the institution of this action, and was given into the possession of the plaintiffs herein by virtue of an order indorsed upon the complaint, as provided by the Code; that plaintiffs had no right to said property or to the possession thereof.

Other points urged by appellants are disposed of by the conclusion reached herein; hence it is unnecessary to further consider them.

Upon going down of the remittitur, the trial court is directed to modify the judgment by deducting therefrom the sum of $1,300; and as thus modified the judgment and order are affirmed. And it is further ordered that appellants have judgment against defendant for the costs of this appeal.

We concur: MELVIN, J.; HENSHAW, J.

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177 Cal. 174

HARPER v. SLOAN et al. (Sac. 2327.)

(Supreme Court of California. Dec. 31, 1917.)

1. MINES AND MINERALS 🔑97 — "MINING PARTNERSHIPS"—CREATION.

Under Civ. Code, § 2511, providing that a mining partnership exists when two or more persons who own or acquire a mining claim for the purpose of working it and extracting the mineral therefrom actually engage in working it, it is not necessary to the existence of such partnership that the property be owned in fee by the partners, and where plaintiff, under a contract with the owners of mining property, was entitled to the possession of the property, and to purchase it on complying with certain conditions, he had such an interest in the property as could form the subject of a mining partnership.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Mining Partnership.]

2. MINES AND MINERALS 🔑97 — MINING PARTNERSHIPS—CREATION.

Plaintiff had a contract with M. and L., owners of a mining claim, under which he was to take possession and have the privilege of working and developing the claim and of purchasing the property on terms therein specified. He made a contract with defendants, designating defendants as parties of the second part, and providing that whereas plaintiff wished to transfer to defendants two-thirds of his interest "under the aforesaid contract between himself and M. and L. shall pass to and vest in the said parties of the second part"; that defendants would make certain payments before dates therein specified and a further payment if they thought necessary; that the whole amount so paid, with the exception of plaintiff's expenses, should be used in developing and working such mining claim, which plaintiff should direct and control; that if the development and working of the claim should be permanently abandoned and any money paid by defendants should be unexpended plaintiff should return it; that if M. and L. conveyed the claim to plaintiff he would convey to defendants two-thirds thereof; and that thereafter plaintiff should have the management and control of the operation of the mine and be paid an adequate compensation. *Held*, that this agreement, which apparently omitted something, leaving the clause "shall pass and vest" without a subject, was intended to presently vest in defendants a share of plaintiff's interest under the contract with M. and L., and a partnership for the working of the mine was created between plaintiff and defendants; this construction not being defeated by the provisions for conveyance after plaintiff acquired title, and for a return of unexpended moneys.

3. MINES AND MINERALS 🔑97 — MINING PARTNERSHIPS—CREATION.

Even though no partnership existed until defendants became the owners of two-thirds of the claim, the full amount which they agreed to pay having been paid, they became the equitable owners of two-thirds of the property, and such equitable ownership was a sufficient basis for the existence of a partnership from the date when plaintiff obtained his deed from M. and L.

4. MINES AND MINERALS 🔑97 — "MINING PARTNERSHIPS"—CREATION.

Under Civ. Code, § 2511, providing that a mining partnership exists when two or more persons who own or acquire a mining claim actually engage in working it, it is not necessary that each of the partners shall actually perform physical work on the claim, and where defendants supplied money used in working the claim they were engaged in such work so as to create a partnership, though the work was being done by plaintiff alone.

5. MINES AND MINERALS 🔑99(2) — MINING PARTNERSHIPS—RIGHT TO ACCOUNTING.

Where there had been a mining partnership between plaintiff and defendants under which plaintiff expended money and labor, though it later was dissolved or abandoned, plaintiff was entitled to an accounting of the transactions prior to such dissolution or abandonment, in order to settle the relative rights of himself and his copartners.

6. PLEADING 🔑193(4)—DEMURRER—GROUNDS —LACHES.

In a suit for an accounting by a member of a mining partnership, his delay in seeking relief was not a matter which could arise upon a general demurrer to the complaint, as laches is a matter of defense.

7. PLEADING 🔑218(4) — DEMURRER — DISMISSAL OF COMPLAINT.

That a member of a mining partnership suing for an accounting had, in his pleading, sought to charge defendants with more than they were liable for, did not justify the dismissal of the action upon the sustaining of a demurrer for want of facts.

Melvin and Henshaw, JJ., dissenting.

In Bank. Appeal from Superior Court, Sierra County; Stanley A. Smith, Judge.

Action by John Harper against J. T. Sloan and another. From a judgment of dismissal, plaintiff appeals. Reversed.

Frank R. Wehe, of San Francisco, and W. I. Redding, of Downieville, for appellant. Charles F. Hanlon, of San Francisco, for respondents.

SLOSS, J. The plaintiff appeals from a judgment of dismissal entered upon the sustaining of a demurrer to his amended complaint, without leave to amend. The demurrer was based upon both general and special grounds. The court put its ruling upon the single ground that the complaint failed to state facts sufficient to constitute a cause of action, and, in effect, gave this as its reason for refusing leave to amend. We shall therefore limit our consideration to the question actually decided by the court below.

The complaint states these facts: On December 24, 1898, James McGregor and B. B. Lewis were the owners of the Diadem quartz claim, an unpatented lode mining claim in Sierra county. On that day they made a written contract with the plaintiff, wherein it was agreed that Harper should take possession of the property, and should have the privilege of working and developing the same; such work, the extent of which was defined, to commence on or before May 1, 1899. Harper was to have the privilege of purchasing the property for $6,000, of which $3,000 was to be paid on or before November 1, 1899, and $3,000 on or before May 1, 1900. Upon payment of the purchase price in full, Lewis and McGregor agreed to convey the property to Harper. Harper's rights under the contract were to cease in case he should fail to do the work agreed upon, or to make the payments.

Upon the making of such contract the plaintiff took possession of the claim, and commenced negotiations with the defendants Sloan and Dwyer whereby said defendants "became jointly and equally interested with plaintiff in the said contract, and promised to engage with plaintiff in actually working said property and extracting the mineral therefrom." On February 9, 1899, and following the said negotiations, a written contract was made between plaintiff and said Sloan and Dwyer. This agreement, after referring to the contract of December 24, 1898, between Harper, McGregor, and Lewis, went on as follows:

> "Whereas the party of the first part [Harper] wishes to transfer to the parties of the second part [Sloan and Dwyer] two-thirds of his interest in and under the aforesaid contract between himself and James McGregor and B. B. Lewis, shall pass to and vest in the said parties of the second part, and the parties of the second part agree that they will, on or before the first day of March, 1899, pay to the party of the first part, the sum of four thousand dollars (4,000) and the sum of three thousand (3,000) dollars on or before the first day of June, 1899, and if, in the opinion of the parties of the second part, it should be necessary, the further sum of three thousand (3,000) dollars, on or before the first day of September, 1899. That the whole of the money so paid by the parties of the second part with the exception of the expenses of the party of the first part shall be used in the development and working of the aforesaid Diadem quartz claim, which the party of the first part shall direct and control; and if the development and working of the Diadem quartz claim should be permanently abandoned by the party of the first part, and any money paid by the parties of the second part should be unexpended, the party of the first part shall return the same to J. T. Sloan, one of the parties of the second part. That if James McGregor and B. B. Lewis should, according to the terms of their contract of December 24, 1898, convey the Diadem quartz claim to the party of the first part herein, the party of the first part will, within a reasonable time thereafter, make a conveyance to the parties of the second part of two-thirds thereof; and it is further agreed that thereafter the party of the first part shall have the management and con-

trol of the operating of the said mine, for which he shall be paid an adequate compensation."

The complaint goes on to allege that, upon the making of this agreement, plaintiff, on behalf of himself and said defendants, continued in the possession of the said property, and actually engaged in working the same, and commenced to extract the mineral therefrom, and that plaintiff and said defendants actually engaged in the working and development of said claim and extraction of the mineral therefrom, and ever since have continued in the actual working of said claim, and then became and ever since have been mining partners.

The defendants Sloan and Dwyer paid plaintiff the sum of $4,000 on or before March 1, 1899, and the sum of $3,000 on or before June 1, 1899, all of which was expended in the actual working of the property. The payment of the further sum of $3,000 on or before the 1st day of September, 1899, became necessary for the working of the property, and plaintiff requested payment of said sum from Sloan and Dwyer, but they refused to make said payment. Plaintiff and said defendants continued in the possession of the claim, the plaintiff managing and actually working the same for the partnership, until plaintiff had expended on the claim all of the said $7,000, and more than $2,000 additional, advanced by himself. After such expenditure he had extracted from the claim not more than $8,000 gross, out of which he paid the purchase price of the claim to McGregor and Lewis, and on December 8, 1899, said McGregor and Lewis conveyed the claim to plaintiff "in trust for himself and for said defendants Sloan and Dwyer as provided for in said contract." The plaintiff undertakes in his complaint to excuse his failure to make a deed of the two-thirds of the mine to Sloan and Dwyer. For reasons that will appear hereinafter, we need not detail the facts relied on in this behalf. The plaintiff alleges that he has always been ready and willing to execute a deed or deeds to the persons entitled thereto, and ever since the execution of the deed by McGregor and Lewis to him he has held two-thirds of the property in trust for the parties entitled thereto. With the consent of the defendant Sloan, the plaintiff continued the work until the partnership became indebted in the sum of about $2,000 during the year 1900. To meet this indebtedness the plaintiff was compelled to mortgage the property to one Sayles, and thereafter, in order to satisfy the Sayles mortgage, to execute a new mortgage to F. W. Sharon, to secure the sum of $2,250, and further sums. Plaintiff has continued in the possession of the property, and has made the annual expenditure of $100 necessary under the laws of the United States; he has also devoted considerable time to the management and control of the mine, the reasonable compensation for which would be the sum of $2,418. He has also paid taxes on the property aggregating $229.67. Including the sum due to Sharon, the mortgagee, the advances and obligations thus made and incurred aggregate the sum of $6,665.30, no part of which has been paid or contributed by the defendants, or either of them. Finally, the complaint, in order to anticipate a possible plea of the statute of limitations, alleges that Sloan and Dwyer were out of the state for the greater part of the time intervening between the making of the contract and the commencement of the action.

The prayer is for a decree that plaintiff holds the property in trust to the extent of one-third for himself and two-thirds in Sloan and Dwyer, or their successors; that an accounting be had of the affairs of the partnership and of said trust; that plaintiff have judgment against the defendants for their proportion of the said indebtedness and advances of plaintiff; that such sum be adjudged a lien on the property; and that the property be sold to satisfy the same.

The theory of the complaint is that the agreement between the plaintiff, Sloan, and Dwyer, and the transactions had under it, created a mining partnership between the three, and that plaintiff is entitled to an accounting of the affairs of such partnership, together with the incidental relief which would follow such accounting. The main contention of the respondents is that no such partnership was ever created.

Under section 2511 of the Civil Code:

> "A mining partnership exists when two or more persons who own or acquire a mining claim for the purpose of working it and extracting the mineral therefrom actually engage in working the same."

The respondents contend that there was no such partnership, because, at the date of the agreement between Harper, Sloan, and Dwyer, the parties thereto did not own, nor had they then acquired, the mining property, and that they did not "actually engage in working" the claim.

[1, 2] It is true that when the contract was made title was still in Lewis and McGregor. It is not necessary, however, to the existence of a mining partnership that the property which is to be operated be owned in fee by the partners. Under his contract with McGregor and Lewis, Harper was entitled to the possession of the property, and had the right, on complying with certain conditions, to acquire its ownership. This gave him an interest in the property, and such interest could well form the subject of a mining partnership. 3 Lindley on Mines (3d Ed.) § 798. The agreement between Harper, Sloan, and Dwyer was, we think, designed to pass to Sloan and Dwyer an undivided two-thirds of such interest. That agreement reads, in part, as follows:

> "Whereas, the party of the first part [Harper] wishes to transfer to the parties of the second part [Sloan and Dwyer] two-thirds of his in-

terest in and under the aforesaid contract between himself and James McGregor and B. B. Lewis, shall pass to and vest in the said parties of the second part. * * *"

It is evident that, through inadvertence, there was an omission of some words which should have been inserted after the name "Lewis." The clause "shall pass to and vest," etc., is left without a subject. It is followed by a declaration that the parties of the second part agree to certain things. It seems reasonable to assume that the missing words were intended to set forth the reciprocal obligation of Harper; i. e., that the two-thirds interest shall pass to and vest in the parties of the second part. If thus completed, the agreement would read, in substance, as follows:

> "Whereas, Harper wishes to transfer to Sloan and Dwyer two-thirds of his interest in the contract between himself and McGregor and Lewis, Harper agrees that such two-thirds shall pass to and vest in Sloan and Dwyer, and Sloan and Dwyer agree that they will pay to Harper" the sums stated.

This mode of supplying the ellipsis is entirely in accord with the language preceding and following the omission, and indicates, we think, the meaning which the parties designed to express in their agreement. The subject-matter of the transfer mentioned in the agreement was two-thirds of Harper's interest under the McGregor and Lewis contract, and the parties looked to a present passing of such two-thirds. The respondents argue that the subsequent clause, requiring Harper to make conveyance to them of two-thirds of the property, if he should obtain a conveyance from McGregor and Lewis, shows that their interest and any partnership relation were to arise only when Harper should thus have made a deed to them. We cannot agree to this interpretation of the contract. The parties were contracting at a time when Harper could not transfer a legal title to the defendants, because he had not yet acquired it. Under the agreement, the defendants bound themselves to pay $7,000 before Harper should become entitled to a deed from McGregor and Lewis. It is not to be supposed that they were undertaking to make such payments without acquiring any interest in such rights as Harper then had. The provision for a conveyance, when Harper's interest should ripen into a legal title, did not prevent the present passing of two-thirds of Harper's existing rights under his contract with McGregor and Lewis.

The provision for a return to Sloan of unexpended moneys does not require a different interpretation. It merely prescribed a basis of settlement in the event, which did not take place, of an abandonment of the enterprise by Harper. Clearly the parties were dealing with the contingency of an abandonment by Harper before the exercise of his right to claim a conveyance from McGregor and Lewis. He was not, even during the period preceding his election to abandon or to pay the purchase price, operating the property for himself alone. He was to "direct and control" the development and working with the money furnished for that purpose by Sloan and Dwyer. The agreement contemplated that, until Harper should exercise his option or abandon the development, the property should be worked for the common interest of the three. If the operations during this period had resulted in large profits, and Sloan and Dwyer had, after Harper had obtained his deed, demanded a share of such profits, a court of equity would not have listened with much patience to a plea on the part of Harper that there was no partnership because he had not conveyed to his associates the interest in the claim to which they were entitled.

[3] But, if it be said that there was to be no partnership until the defendants had become the owners of two-thirds of the claim, the result would not be different. It is alleged that the defendants paid the $7,000 which constituted the full consideration for their acquisition of two-thirds. (The complaint does not show any default in the payment of the third installment of $3,000, which was to be paid only if, in the opinion of Dwyer and Sloan, it should be necessary.) Upon the payment of the full purchase price, therefore, Dwyer and Sloan became the equitable owners of two-thirds of the property, and such equitable ownership was a sufficient basis for the existence of a partnership, after the date when Harper obtained his deed from McGregor and Lewis. It is unnecessary, therefore, to inquire whether the facts set up by Harper in explanation of his failure to convey to the defendants were sufficient to excuse his omission.

[4] It is further contended, that, under the Code section already cited, the alleged partners must "actually engage in working the mine." While the complaint avers that plaintiff and the defendants continued in the possession of the claim, and actually engaged in working the same, the pleading, read as a whole, shows plainly enough that the work was being done by the plaintiff alone. The contract between the parties provides that the $7,000 to be paid by the defendants is to be used in the development and working of the claim, and it is alleged that this sum was actually so expended. We do not understand that it is essential to a mining partnership that each of the partners shall actually perform physical work upon the claim. Where one of them supplies money which is to be used in working the claim, he is engaged in such work as truly as is the one who devotes his own labor to the enterprise. 3 Lindley on Mines (3d Ed.) § 798; Lyman v. Schwartz, 13 Colo. App. 318, 57 Pac. 735. The cases cited by the respondents are not in point. They have to do with agreements whereby one is to work for another in a mine, receiving as compensation a share of the proceeds, or pro-

viding for the mere acquisition of an interest in a mine.

[5-7] If, then, there was a mining partnership under which the plaintiff expended money and labor, he is entitled to an accounting in order to settle the relative rights of himself and his copartners. If, by virtue of any later transactions disclosed by the complaint, the partnership was dissolved or abandoned, there still remains the right to an accounting of the transactions prior to such dissolution or abandonment. The plaintiff's delay in seeking relief is not a consideration which can arise upon a general demurrer to the complaint. If he was guilty of laches, it is a matter of defense. Nor need we inquire on this appeal whether the plaintiff was entitled to charge the defendants with all of the items of expenditure or indebtedness set up in the complaint. He may in his pleading have sought to charge the defendants with more than they are liable for, but this does not justify the dismissal of his action upon the sustaining of a demurrer for want of facts.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; LAWLOR, J.

MELVIN, J. I dissent.

I adhere to the views expressed in the opinion in department.* Even if we reconstruct the contract between Harper and his vendees by inserting the words furnished by Mr. Justice SLOSS in his opinion it does not contemplate an immediate vesting in them of two-thirds of Harper's interest in his contract with his vendors Lewis and McGregor; and it seems to me that a transfer of present interest in the original contract could not have been in the minds of the parties, because Harper kept the right to abandon the mine at his sole pleasure, as well as to forfeit all rights under his agreement with the original locators. This privilege retained by Harper is not consistent, I believe, with a mining partnership then created between him and Sloan and Dwyer. That part of the agreement which gives to Sloan and Dwyer the privilege of refusing further advances after the exhaustion of their first payments is strongly indicative to my mind of the understanding between them and Harper that they were merely getting an option to purchase two-thirds of the interest which should be his if he could successfully meet the requirements of his agreement with McGregor and Lewis. If Sloan and Dwyer had been purchasing a present interest in Harper's contract with McGregor and Lewis, it would not have been necessary to insert in their agreement the clause to the effect that:

> "If James McGregor and B. B. Lewis should, according to the terms of their contract of December 24, 1898, convey the Diadem quartz claim to the party of the first part herein, the party of the first part will, within a reasonable time thereafter, make a conveyance to the parties of the second part of two-thirds thereof; and it is further agreed that thereafter the party of the first part shall have the management and control of the operating of the said mine, for which he shall be paid an adequate compensation."

I can see nothing in the contract itself which justifies the supplying of a verb of immediate assignment, and I do not agree with Mr. Justice SLOSS in supplying the words "Harper agrees," etc. Why should Harper in one part of the sentence express a wish to transfer his interest in the contract with McGregor and Lewis, and then fulfill the wish by executing an immediate transfer in another part of the same sentence? The words "the party of the first part wishes to transfer," etc., indicate a desire to make the transfer in the future. It seems to me therefore that a more logical reconstruction of the sentence would be as follows:

> "Whereas, the party of the first part wishes to transfer to the parties of the second part two-thirds of his interest in and under the aforesaid contract between himself and James McGregor and B. B. Lewis, and wishes that such interest shall pass to and vest in the said parties of the second part and the parties of the second part agree," etc.

This would give to the agreement a prospective operation so far as the transfer of Harper's interest is concerned, more in consonance with the rest of the instrument. If, after expending the moneys paid by Sloan and Dwyer and their refusal to advance any more, Harper had abandoned his contract with McGregor and Lewis, they would have had no recourse against him because they would have received just what they bargained for—an option to buy an interest in the contract and the mine in case of Harper's success. There was no provision in the agreement binding them to share Harper's losses beyond the payment of his "expenses"—not salary nor "compensation," such as that which was to be his in case they secured a two-thirds interest by assignment—and they were to have no voice regarding methods nor scope of operation. To be sure, there may be partnerships in which one partner has large powers of management and control of the business; but in analyzing this instrument we must remember that laymen signing such a contract would scarcely consider themselves partners if they were not plainly made by it sharers in the profits and losses. As I wrote in the opinion in department I repeat here:

> "The others advanced money for the purchase of Harper's interest in the mine in case he ever acquired any interest. There was no provision by which they were to share in the output, or be responsible for Harper's expenses in the operation of the property, until there should have been an actual conveyance of an interest to them by Harper, after he should have acquired it from the original locators."

I concur: HENSHAW, J.

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*See 181 Pac. 775.

35 Cal. App. 403

HICKOX et al. v. INDUSTRIAL ACCIDENT COMMISSION OF STATE OF CALIFORNIA et al. (Civ. 2352.)

(District Court of Appeal, First District, California. Nov. 24, 1917. Rehearing Denied by Supreme Court Jan. 21, 1918.)

MASTER AND SERVANT 🔑385(1)—INJURY TO SERVANT — WORKMEN'S COMPENSATION — AMOUNT.

Workmen's Compensation Act (St. 1913, p. 289) § 17, subd. 2, declares that, if the injured employé has not so worked in his employment during substantially the whole of such immediately preceding year, his average annual earnings shall consist of 300 times the average daily earnings, wages, or salary which an employé of the same class working substantially the whole of such immediately preceding year in the same or a similar kind of employment, in the same or a neighboring place, earned during the days when so employed. A contracting painter who employed painters at the uniform wage of $2.50 per day engaged a painter who had been working intermittently to work for that wage. Shortly after he was engaged the painter fell and received injuries, and applied for compensation. *Held* that, there being evidence that the ordinary wage for painters paid in that locality was $4.50 per day, the commission was justified in making an award based on such wage instead of that received by the injured painter.

Application by W. J. Hickox and the New Amsterdam Casualty Company, a corporation, for a writ of review against the Industrial Accident Commission of the State of California and R. M. Searle. Writ denied.

Barry J. Colding and Lilienthal, McKinstry & Raymond, all of San Francisco, for petitioners. Chris. M. Bradley, of San Francisco, for respondents.

PER CURIAM. W. J. Hickox was a contracting painter engaged in business in the city of Stockton, in the course of which he employed several other painters to whom he paid a uniform wage of $2.50 a day. The New Amsterdam Casualty Company was the insurer of said Hickox against his liability for compensation of employés under the Workmen's Compensation Act. One R. M. Searle entered the employment of said Hickox on the 24th day of May, 1917, agreeing to work for $2.50 a day. He had prior to that time been working intermittently in several towns of the San Joaquin valley and elsewhere, receiving wages ranging from $2.50 a day to $5, but not staying long in any one place or remaining long in any single employment. On May 26, 1917, while in the employment of said Hickox, he fell from a ladder and received an injury to his arm, in consequence of which he made application to the Industrial Accident Commission for compensation.

The evidence taken before the commission showed the foregoing facts, and also showed from the testimony of another contracting painter exclusively engaged in such work in Stockton that the standard wage scale in that city for painters was $4.50 per day. The commission awarded the applicant, Searle, compensation on the basis of a wage scale of $4.50 per day, and its award in that behalf the petitioners now seek to have reviewed by this court upon the ground that the commission in making said award acted without and in excess of its jurisdiction.

We are of the opinion that it is not within our province to review the award of the commission under the circumstances above stated.

Subdivision 2 of section 17 of the Workmen's Compensation Act reads as follows:

"If the injured employé has not so worked in such employment during substantially the whole of such immediately preceding year, his average annual earnings shall consist of 300 times the average daily earnings, wage or salary which an employé of the same class, working substantially the whole of such immediately preceding year, in the same or a similar kind of employment, in the same or a neighboring place, earned during the days when so employed." St. 1913, p. 289.

It would seem that the facts of this case bring it within the rule for the admeasurement of compensation above enunciated; and, there being a conflict in the evidence before the commission as to what the wage scale of painters is in the city of Stockton, it had jurisdiction to decide that matter, and with its discretion, in that respect we cannot interfere.

The application is denied.

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35 Cal. App. 390

HEBOJOFF v. GLOBE INDEMNITY CO. OF NEW YORK. (Civ. 1918.)

(District Court of Appeal, Second District, California. Nov. 22, 1917. Rehearing Denied by Supreme Court Jan. 21, 1918.)

1. INSURANCE 🔑514—INDEMNITY INSURANCE — DAMAGES INCURRED OR PAID — "PAYMENT"—"PAID IN MONEY."

Under a policy insuring against loss by reason of accident to employés, and providing that no action shall lie except for reimbursement for the amount of a loss actually sustained and paid in satisfaction of a judgment duly recovered, the giving of a promissory note in discharge of a judgment against the insured is a "payment" of the debt when made in good faith and for that purpose; but where the provision is that no action will lie except for a loss actually sustained and "paid in money," the giving of a promissory note does not satisfy the terms of the policy, and the insurer does not thereupon become liable.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Payment.]

2. INSURANCE 🔑514 — GUARANTY AND INDEMNITY INSURANCE—DAMAGES INCURRED OR PAID.

An insurer against loss by reason of accidents to employés may, by a condition of its contract, against liability except for a loss paid in money in satisfaction of a judgment, protect itself against the difficulties which might attend the defense of an action in case payment was permitted to be made in property, the actual value of which would thus be in issue.

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by Knjaz Hebojoff against the Globe Indemnity Company of New York. From a judgment for plaintiff, defendant appeals. Reversed.

J. Karl Lobdell, of Los Angeles (Gurney E. Newlin, of Los Angeles, of counsel), for appellant. I. Henry Harris (Charles A. Bank, of Los Angeles, of counsel), for respondent.

JAMES, J. The appeal in this case is taken from a judgment entered in favor of the plaintiff. The plaintiff here first recovered judgment against a corporation named Pendleton Iron & Metal Company, which judgment was for damages for personal injuries suffered by the plaintiff while in the employ of said corporation. At the time the injuries were suffered a policy of insurance had been issued by this defendant, insuring the Pendleton Company against loss by reason of accident to its employé. After judgment had been entered against the Pendleton Company in favor of plaintiff here, the Pendleton Company issued its promissory note to the plaintiff and thereupon caused the judgment to be satisfied of record, and thereafter an assignment was made by the Pendleton Company of all right of action which it had as against the appellant here under the contract of insurance. This action was then brought on account of such assigned claim.

[1] The principal point argued in the briefs refers to that term of the policy of insurance which reads as follows:

> "No action for the indemnity against loss provided for in insuring agreement 'I' of this policy shall lie against the company, except for reimbursement of the amount of loss actually sustained and paid in money by the assured in full satisfaction of a judgment duly recovered against the assured after trial of the issue, nor unless brought within two years after such judgment shall have been paid. * * *"

Preliminarily it may be stated that the insuring agreement "I" referred to in the above quotation covered all principal loss which might be suffered by the assured. Appellant urges this court to decide, first, that under agreement No. I, providing that loss must be paid in money before an action like this can be maintained: (1) Payment by a promissory note is no payment at all; (2) that if the giving of a promissory note in satisfaction of the judgment debt against the assured constitutes payment in the ordinary case, such conclusion could not be applied here where the contract expressly provides that the loss must be paid "in money." As to whether the giving of a promissory note in discharge of liability of an assured is to be considered as payment of the debt, where made in good faith and for that purpose, is a question no longer open to much difference of judicial opinion. The question is fairly settled by the authorities in the affirmative. This court had occasion to consider the precise contention made here under the first head, in the case of Rodgers v. Pacific Coast Casualty Co., 164 Pac. 1115. In that opinion will be found cited the principal cases, reference to which we also find in the briefs of counsel here submitted. We refer to that decision as fully expressing our present conclusion upon the matter presented. We rest upon that conclusion not without recognizing that a forceful argument may be made on the other side of the question. We recognize that where a promissory note is given in satisfaction of a judgment it may be contended with some logic that no new debt is created; that the transaction assumes the form of substituting different evidence for the same debt, which latter is not in any way changed as to its amount. We think, however, that the law is fairly settled that the giving of a promissory note, where the understanding is clear to that intent, may operate to extinguish a debt and be considered as payment thereof.

Passing to appellant's second proposition, to wit, that the added requirement of the contract obligating the assured to pay "in money" must be actually satisfied before action is brought: The policy of insurance here exhibited is one of indemnity as distinguished from one insuring against liability; that is, the insurer here agrees to indemnify for loss actually suffered by the assured, and not to indemnify for liability incurred which liability would have been complete upon the entry of judgment against the policy holder. In construing the term of the contract to which our attention is now directed, the reason for its insertion in the agreement and the purpose and intent to be served should be examined. It may reasonably be inferred that the insurer, recognizing the law that the assured under an ordinary indemnity agreement might satisfy a claimant's judgment in ways other than by the payment of money, determined to guard against that contingency; this by expressly requiring that the assured should be deemed to have suffered a loss only when he had paid "in money" a liability accrued against him. That this term should be considered as one affecting the contract of the insurer in a material way seems quite plain. The requirement is to make the matter of the amount of loss one which is to be measured by the dollars expended and so place within the reach of the insurer easy proof as to loss actually suffered. Should we construe the term not to be of the substance of the contract and permit the loss to be recovered regardless of the kind of property which the assured parted with, then it might happen that the latter had paid in land, jewelry, or other merchandise, and thus an issue would arise as to the actual value of the thing given in payment of the obligation against which indemnity was claimed.

[2] We have no doubt at all that an insurer can by the condition of its contract relieve itself from the difficulties which might attend such a defense in an action brought upon its policy. Our attention is called by respondent to the case of Herbo-Phosa Co. v. Philadelphia Casualty Co., 34 R. I. 567, 84 Atl. 1093, and we are told that the condition in the policy there considered is the same as that now before the court, and that it was there held that the term "paid in money" was satisfied where promissory notes were given by the assured. It is true that the opinion discloses that the term there considered was the same, but on a close examination of the opinion we are unable to determine that the same question was there made as we have to decide here; that is, the only question that seems to have been decided was as to whether, under a policy of indemnity insurance, payment might be made by the assured giving promissory notes. The court holds that the payment may be so made, which is in consonance with our conclusions heretofore and hereinbefore expressed. We do not regard that case as authority upon the question here particularly urged. The court in Eberlein v. Fidelity & Deposit Co. of Maryland, 164 Wis. 242, 159 N. W. 553, while not deciding the question, suggests that the term requiring the assured to pay his liability in money may be one of substantial effect. Our conclusion upon this branch of the case makes it unnecessary to consider in detail other points urged on behalf of appellant.

The judgment appealed from is reversed.

We concur: CONREY, P. J.; WORKS, Judge pro tem.

35 Cal. App. 422

Ex parte RUST. (Cr. 717.)

(District Court of Appeal, First District, California. Nov. 27, 1917.)

PHYSICIANS AND SURGEONS 🔑6(5) — WHO ARE—OSTEOPATHS.

The act of 1913 (St. 1913, p. 722) regulating the practice of medicine and surgery provides for examinations of persons desiring to follow those professions, and for the issuance of two forms of certificate, one designated a "physician and surgeon certificate," and the other a "drugless practitioner certificate." St. 1913, p. 1097, § 10, relating to the practice of optometry, declares that the provisions of the act shall not be construed to prevent duly licensed physicians and surgeons from treating or fitting glasses to the human eye. *Held*, that an osteopath is not entitled to practice optometry, the examination for license to practice osteopathy being entirely different from that of "physicians and surgeons," and an osteopath being a drugless practitioner, and not embraced in the term.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Physician; Surgeon.]

In the matter of the application of C. G. Rust for a writ of habeas corpus. Writ discharged, and petitioner remanded.

Charles F. Hanlon, of San Francisco, for petitioner. Louis H. Ward, of San Francisco, for respondent Oliver Dibble. John D. Harloe, of San Francisco, for Sheriff of City and County of San Francisco.

PER CURIAM. The return of the sheriff to the writ in this case shows that the petitioner is held upon a commitment of the police court of the city and county of San Francisco for violating the law regulating the practice of optometry. In support of his demand that he be discharged from custody the petitioner contends that by virtue of his being the holder of a certificate entitling him to practice osteopathy he was by the terms of the act itself regulating the practice of optometry excepted from its prohibitory provisions. The exception referred to is contained in section 10 of said act (Stats. 1913, p. 1097), and is in the following language:

> "The provision of this act shall not be construed to prevent duly licensed physicians and surgeons from treating or fitting glasses to the human eye."

The question to be determined, then, is whether an osteopath, licensed under the statute regulating that profession, is within the purview of the optometry law a licensed physician and surgeon.

The act of 1913 regulating the practice of medicine and surgery (Stats. 1913, p. 722) provides for the examination of persons desiring to follow these professions, and for the issuance of two forms of certificate, one designated a "physician and surgeon certificate," and the other a "drugless practitioner certificate." The distinction between these certificates is quite marked, and they are issued as the result of a different examination; and it is very apparent to us that the term "duly licensed physician and surgeon," as used in the section of the act above quoted, has direct reference to the holders of the former class of certificates to the exclusion of the holders of the latter. The cases cited by petitioner from other jurisdictions holding that an osteopath may be said to engage in the practice of medicine and surgery have, in our opinion, no application to the facts of this case, where the question is much narrower and is one of statutory construction. Under our statute we are clearly of the opinion that the petitioner is not a "duly licensed physician and surgeon."

It results from this conclusion that the writ should be discharged. It is so ordered, and the petitioner remanded to the custody of the sheriff.

35 Cal. App. 369

Ex parte NORTHON. (Cr. 577.)

(District Court of Appeal, Second District, California. Nov. 22, 1917.)

1. HABEAS CORPUS 🔑27—GROUNDS—WANT OF JURISDICTION.

St. 1915, p. 1225, § 4d, provides that no person under the age of 18 years at the time of the commission of an alleged crime shall be prosecuted until the matter has been first submitted to the juvenile court. Section 6 provides that whenever a complaint is filed in any other court, and it shall be suggested or shall appear to the judge or justice that the person charged was under the age of 18 years, he shall immediately suspend all proceedings on the charge and examine into the age of such person, and if it appears to his satisfaction that such person was under the age of 18 years, he shall certify the case to the juvenile court. *Held* that, while it was apparently error for a justice of the peace on a preliminary hearing to refuse to hear testimony as to the age of the defendant, the suggestion of under age did not deprive him of jurisdiction so as to justify the discharge of the defendant on habeas corpus, from custody under the justice's commitment, especially as section 6 apparently authorizes the juvenile judge to examine the case and commit defendant for prosecution or certify the case back to the magistrate.

2. HABEAS CORPUS 🔑3—EXISTENCE OF OTHER REMEDY.

On habeas corpus by a person in custody under a writ of commitment, issued by a justice of the peace, holding him to answer for trial on the charge of murder and against whom the district attorney has filed an information charging him with murder, he will not be discharged because of the failure of the justice of the peace to certify the case to the juvenile court, as he will have an opportunity in the proceeding on the information to raise every question affecting the matter.

Original petition by Leslie Northon for a writ of habeas corpus. Writ discharged, and petitioner remanded to the custody of the sheriff.

Lewis R. Kirby, of San Diego, for petitioner. W. F. Schuermeyer, Dist. Atty., and James G. Pfanstiel, Asst. Dist. Atty., both of San Diego, for respondent.

JAMES, J. Petitioner herein seeks to be discharged from the custody of the sheriff of the county of San Diego. The return made to the writ shows that the sheriff claims the right to keep petitioner in custody by virtue of a writ of commitment issued on the 22d day of October, 1917, by a justice of the peace, whereby petitioner was held to answer for trial in the superior court on the charge of murder. The return further shows that following the order of commitment an information was filed by the district attorney in the superior court formally charging petitioner with the crime mentioned, and that proceedings thereunder are pending. The particular ground urged as a reason why the order sought should be granted is that at the preliminary examination of petitioner it was suggested to the justice that petitioner was under the age of 18 years, and that, therefore, the proceeding should have been certified to the juvenile court under the provisions of the act of the Legislature of 1915. Stats. 1915, p. 1225. A transcript of the testimony heard and proceedings had before the justice of the peace is appended to the petition. It appears therefrom that before any witnesses were sworn counsel for defendant stated to the court that the defendant was 17 years of age, and asked that the court certify the case immediately, "not to proceed with the examination, but to certify it to the juvenile court." Counsel then offered the father of petitioner as a witness to confirm the statement as to the age of the defendant, and the justice thereupon replied:

> "At his last appearance before the court the defendant was asked as to his age, and he said he was 17. Let the record show that the court stated he had been advised he was under the age of 18, and the motion to certify is now by the court denied."

This objection, having to do with the age of the defendant, was interposed throughout the examination, and the justice of the peace, at the conclusion thereof, made his order holding the defendant to answer for the crime charged; and it may be remarked that the evidence produced before the magistrate showed that the petitioner, in conjunction with another person, committed a most deliberate, cold-blooded, and dastardly murder.

[1] The argument is here advanced that the order prayed for should be made on the ground that the justice of the peace, after the suggestion was made as to the defendant before him being under the age of 18 years, was without jurisdiction to further proceed in the matter. We have examined the several sections of the juvenile court law and cannot agree with petitioner's counsel in this conclusion. It is true that section 4d of the act referred to first provides that no person under the age of 18 years at the time of the commission of the alleged crime shall be prosecuted until the matter has been first submitted to the juvenile court. Section 6 of the same act provides that whenever a complaint is filed in any court other than a superior court charging a person with a crime—

> "and it shall be suggested or shall appear to the judge, justice or recorder before whom such person is brought that the person charged was at the date the offense is alleged to have been committed under the age of eighteen years, said judge, justice or recorder, shall immediately suspend all proceedings against such person on said charge and examine into the age of such person, and if, from such examination, it shall appear to the satisfaction of said judge, justice or recorder, that such person was at the date the offense is alleged to have been committed under the age of eighteen years, he shall forthwith certify to the juvenile court of his county," etc.

It will be seen that a magistrate is not deprived of jurisdiction of the charge or proceeding where the suggestion is made that the person prosecuted is under the age of 18 years. The act makes it the duty of the magistrate to hear evidence to ascertain the age of the party, where suggestion is so made. The action of a justice in refusing to hear testimony as to the age of a defendant appears to us to be an error, but the magistrate is not divested of jurisdiction in the matter before him. If this position is sound, and we are confirmed in our belief that it is, then the order sought should not be here granted. The juvenile court law does not in terms forbid the prosecution for crime in the superior court of a person under the age of 18 years, for in section 6 of the act above cited there is a provision which would appear to authorize the juvenile judge to examine the case and commit the defendant for prosecution, or to certify back to the magistrate any such case which may have been sent to him under the provisions of the juvenile law.

[2] Moreover, the petitioner herein is now before the superior court under charge made by the information of the district attorney. In that proceeding he will be given opportunity to raise every question affecting the matters which he urges here. People v. Oxnam, 170 Cal. 211, 149 Pac. 165. Our conclusion is that the order of commitment under which the sheriff has justified his detention of petitioner is not invalid or void by reason of the facts shown.

The writ is discharged, and petitioner remanded to the custody of the sheriff of the county of San Diego.

We concur: CONREY, P. J.; WORKS, Judge pro tem.

35 Cal. App. 424

MILLS v. BOARD OF TRUSTEES OF CITY OF WATTS et al. (Civ. 2499.)

(District Court of Appeal, Second District, California. Nov. 27, 1917.)

1. Equity 🔑57—Maxim—Statute.

By Civ. Code, § 3529, the presumption that a thing which ought to have been done will be regarded as done may be indulged only in favor of him to whom and against him from whom performance is due.

2. Intoxicating Liquors 🔑32(2) — Election as to Licensing Sale—Proceedings under Wylie Act.

Under the Wylie Act (Acts 1911, p. 599) §§ 1, 4, 6, no duty was incumbent on the board of trustees of a city, by way of submitting to the people the proposition contained in a petition for an election as to whether the sale of alcoholic liquors should be licensed, until the filing of the clerk's written certificate showing the petition to have been signed by the requisite number of qualified electors, and in order that the board might have been compelled to submit the question at a special election, the certificate must have been filed not later than October 8th, the petition having been filed September 20th, and September 30th having been the last day allowed by the statute for filing by the clerk of his certificate showing the result of his examination of the petition, while the last day before the six-month period preceding the next general state or municipal election, mentioned in section 6 of the Wylie Act, was October 8th.

Original petition for writ of mandate by M. H. Mills against the Board of Trustees of the City of Watts and J. S. Lang and others. Petition for peremptory writ denied.

Nathan Newby, Tanner, Odell & Taft and Gesner William, all of Los Angeles, for petitioner. Neighbours, Hoag & Burke and Paul W. Schenck, all of Los Angeles, for respondents.

WORKS, Judge pro tem. This controversy arises under the provisions of an act of the Legislature familiarly known as the Wylie Act, found in the Statutes of 1911 at page 599 and also printed in Deering's Gen. Laws as Act 1696. Section 1 of the statute provides, to quote so much of it only as bears upon this case, that:

> "Qualified electors of any incorporated city * * * numbering not less than twenty-five per cent. of the number of votes cast for all candidates for Governor," in the city "at the last preceding election for Governor, * * * may petition the * * * board of trustees * * * of such city * * * to call an election to vote upon the question, whether the sale of alcoholic liquors shall be licensed in such city. * * *"

Section 4 is as follows:

> "Upon the filing of said petition the clerk of the body to which it is addressed shall forthwith examine it, and from the great register ascertain whether or not said petition is signed by the requisite number of qualified electors of the territory described therein, and, if necessary, he shall be allowed extra help for that purpose, and within ten days from the date of filing such petition he shall certify in writing the result of such examination and shall file this certificate with the petition. If the clerk finds the number of qualified signers to be insufficient, he shall immediately send a written notice to the person who filed the petition, stating the number of qualified signers he has found thereon, and that they are not sufficient; and the petition may be amended within ten days from the date of such notice by the filing of a supplementary petition. The clerk shall within ten days after such amendment make like examination and certification of the amended petition. If it is still found insufficient he shall notify the person who filed the petition of that fact, without prejudice, however, to the filing of a new petition to the same effect. If the petition shall be certified as sufficient, the legislative or governing body having jurisdiction over the territory described therein shall, within the time prescribed herein, call an election to be held in such territory to vote upon the question whether the sale of alcoholic liquors shall be licensed therein."

Section 6 provides in full:

> "If said petition shall be certified as sufficient within six months and not less than forty days before the holding of the next general state or general municipal election within the territory therein described, such question shall be submitted at said general state or general municipal election; otherwise a special election to vote upon the question shall be called to be held within not less than thirty nor more than sixty days after the petition has been certified as sufficient, provided, that no election under this act shall be held within two years of any previous election held under this act within the same territory."

Pursuant to the provisions of this act, certain electors of the city of Watts, of whom petitioner was one, petitioned the respondent board of trustees, on September 20, 1917, to call an election in the city to determine the question whether the sale of alcoholic liquors should be licensed therein. These facts are disclosed by the petition in the present proceeding, which also alleges, among other things, that upon the filing of the petition addressed to the board, the city clerk forthwith examined it and from the great register ascertained that it was signed by the requisite number of qualified electors under the act; that, within ten days from the date of filing, the clerk certified the result of his examination; that he presented the petition at a meeting of the board of trustees on October 9th, together with his certificate showing it to be sufficient; that at a meeting of the board held October 30th an ordinance calling a special election in accordance with the prayer of the petition was denied passage; that no ordinance calling a special election in the premises has ever been passed; and that the board refuses to call such an election and will not call one unless ordered to do so by this court. The answer shows, and the fact is, that the board has ordered the question submitted at the next general municipal election.

There was very little evidence introduced, as the greater part of the facts involved in the controversy were covered by stipulation. It has been noted that the petition in this proceeding, after alleging that the city clerk certified to the sufficiency of the petition for the calling of the election within ten days after its filing, further states that he "did present to the board of trustees the said petition and his said certificate on October 9, 1917, at a regular meeting of the board." The theory of the petitioner, as explained at the argument, was that the clerk had ascertained the sufficiency of the petition within the ten days next after it was filed, and had thereupon made his written certificate showing its sufficiency, but that he had withheld the paper from the files of the board until October 9. It was contended that this course of events amounted to a filing of the written certificate within the ten days. Whether that argument could have been successfully maintained in this proceeding against the board of trustees need not be considered, for evidence was totally lacking to justify the assumption of fact upon which it was based. The clerk, Virgil R. Franklin, was called to the witness stand by the petitioner. His testimony showed that he had so far examined the petition asking for the election, within the prescribed ten days, as to ascertain its sufficiency, but that he had neither written nor signed any certificate showing the result of his examination prior to October 9. There was no other evidence upon this question. The conduct of the clerk in the respect just mentioned was flagrant and inexcusable, and deserves the stamp of severe condemnation. His course appears to have been followed for no other reason than to thwart the desires and to violate the rights under the law of the signers of the petition to have a special election called at which should be submitted the question contemplated by the statute.

The chronology of the events bearing on this controversy, under the law and the evidence, is as follows: On September 20, 1917, the petition asking for the calling of an election was filed. September 30th was the last day allowed by the statute for the filing by the clerk of his certificate showing the result of the examination of the petition which he says he actually made before that date. Under the Municipal Corporation Bill (Deering's Gen. Laws, Act 2348, § 852) the next general municipal election is to be held in Watts on April 8, 1918. The next general state election will be held in November, 1918. The last day before the six-month period preceding the next general state or general municipal election, which period is mentioned in section 6 of the Wylie Act, was therefore October 8, 1917. The certificate of the clerk was written, signed, and filed on October 9th, one day after the expiration of the period immediately preceding the six months.

The petition in this proceeding alleges that the members of the board of trustees knew, on October 2d, that the clerk had examined the petition asking for an election during the ten days next succeeding its filing, and that he had then found it sufficient, but the allegation is denied in the answer, and no evidence was offered to support it. We must therefore find that the members of the board had no actual knowledge on the subject. Can we say that, under the law, it was their duty to know what the clerk had done in the premises in advance of the filing of a written certificate, and to know what was in his mind as a result of his acts, and that therefore they had a constructive knowledge on the subject? We are unable to see how we can make that assertion. While, under the terms of the act, the petition for an election was addressed to the board and was filed with the board, it is made the duty of the clerk alone to examine such a petition and to certify to its sufficiency or insufficiency. We have already referred in fitting terms to the clerk's amazing dereliction of duty, but the stigma which justly attaches to him can in no way, that we can perceive, be fastened upon the board. We can see no reason why the members of the board should have been or could have been expected to make inquiry into the progress of the clerk's work nor into the state of his mind concerning his work. They were called upon to act only when a written certificate by the clerk should be filed showing the petition sufficient.

[1] The rule that officers are presumed to have done their duty does not assist us out

of the dilemma. We do not reach that point in this case, for the question here is whether there is an unperformed duty resting upon the trustees. It is only after we shall have ascertained that such a duty exists, that we may begin to indulge the presumption as to its proper performance. If we look for help to the maxim that a thing which ought to have been done will be regarded as done, we are reminded that the maxim also includes the proviso that the presumption may be indulged only "in favor of him to whom, and against him from whom, performance is due" (Civ. Code, § 3529); and the question in this action, again, is whether there is an unperformed act due from the board. If that be the case, then we may perhaps begin to regard the act as having been done.

[2] We are not able to escape the conviction that no duty was incumbent upon the board of trustees, by way of submitting to the people the proposition contained in the petition for an election, until the filing of the clerk's written certificate showing the petition to have been signed by the requisite number of qualified electors, and that, in order that they might have been compelled to submit the question at a special election, the certificate must have been filed not later than October 8th. We are not called upon to say what relief, if any, the signers of the petition for an election may have or might have had against the clerk for his shameful violation of official duty; although we should have a different question to decide if proceedings to compel the clerk to issue his certificate had been instituted between September 30th and October 9th.

The petition for a peremptory writ of mandate is denied.

We concur: CONREY, P. J.; JAMES, J.

35 Cal. App. 405

TIDEWATER SOUTHERN RY. CO. v. MERZ. (Civ. 1737.)

(District Court of Appeal, Third District, California. Nov. 26, 1917. On Motion for Rehearing, Dec. 26, 1917. Rehearing Denied by Supreme Court Jan. 24, 1918.)

CORPORATIONS ⟹76—STOCK SUBSCRIPTION—CONDITION—NECESSITY OF ACCEPTANCE.

A subscription for stock, signed, without any payment, on the condition imposed by the subscriber and indorsed on the back of the contract and signed by the company's agent, that the subscriber could return the stock within 10 months and receive back his note or cash, all of which the agent, not purporting to have authority to accept the condition, agreed to submit to the company, for its acceptance or rejection, is not binding on the subscriber, so as to require his seasonable exercise of option to return; his proposition not having been submitted to the company, and so not accepted by it, as was necessary, there having been merely an entry on its books of the subscription without the condition.

Appeal from Superior Court, Kings County; M. L. Short, Judge.

Action by the Tidewater Southern Railway Company against G. Merz. Judgment for defendant, and plaintiff appeals. Affirmed.

Meredith, Landis & Chester, of Sacramento, for appellant. H. Scott Jacobs, of Hanford, for respondent.

CHIPMAN, P. J. This is an action brought by plaintiff to recover the sum of $2,500, together with 7 per cent. interest thereon from November 14, 1911, upon the following contract:

> "Agreement to Purchase Stock. I, the undersigned, hereby subscribed for 2,000 shares of the common stock of the Tidewater & Southern Railroad Company, a corporation, formed and existing under the laws of California, and having its principal place of business in the city of Stockton, state of California. I hereby agree to pay for such stock the sum of $2,500, one year note, the full par value thereof, and to make such payments to said corporation at the time and in the manner following: $2,500 upon the signing of this agreement, and a further payment of $—— on or before the —— until the full purchase price of said shares shall have been paid, when a certificate of stock shall be issued to purchaser. Said corporation, to which I agree to make payments as aforesaid, is hereby authorized to demand, collect, and recover the money hereby agreed to be paid. Payment must be made direct to the Tidewater & Southern Railroad Company, at its offices, Room 4, Physicians' Building, Stockton, California.
>
> "Witness my hand this 14th day of November, 1911.
>
> "Name. G. Merz.
> "Street and Number. Lemoore Bank.
> "City or Town. Lemoore.
> "State. Cal.
> "Written by Avery."

The cause was tried by the court without a jury, and defendant had judgment, from which plaintiff appeals.

It is alleged in the complaint and found by the court that the Tidewater & Southern Railroad Company was a duly organized corporation in 1910, and continued so to be until March 11, 1912; that about the 16th day of February, 1912, and continuously thereafter to and including March 11, 1912, the Tidewater & Southern Transit Company was a railroad company duly organized; that on or about March 11, 1911, "the said Tidewater & Southern Railroad Company duly amalgamated and consolidated its capital stock, properties, roads, equipments, adjuncts, franchises, claims, demands, contracts, agreements, obligations, debts, liabilities, and assets of every kind and description with the capital stock * * * liabilities, and assets of every kind and description of the said the Tidewater & Southern Transit Company," and by such amalgamation and consolidation "there was created a new railroad corporation named Tidewater Southern Railway Company," since which amalgamation the said last-named company has been and now is a railroad corporation duly organized under the laws of this state, with its principal place of business in the city of Stockton, and is the successor of all the several capital stocks, properties, roads, equipments, etc., of the said the Tidewater & Southern Railroad Company and of said the Tidewater & Southern Transit Company, respectively, and that the purposes for which the said companies were formed were the same, and that by virtue of said amalgamation and consolidation the plaintiff, on or about the 11th day of March, 1912, "succeeded to and became the owner of, and ever since has been and now is the owner of, that certain subscription agreement" hereinbefore set forth.

It is alleged in the complaint that prior to said consolidation the said the Tidewater & Southern Railroad Company gave to defendant, and defendant received, due notice of said intended consolidation, "and did not dissent or object thereto, and has, at all times, acquiesced therein and consented thereto"; that at all times since the subscription of defendant for stock in said the Tidewater & Southern Railroad Company, and continuously thereafter to March 11, 1912, the said the Tidewater & Southern Railroad Company was at all times ready, able, and willing to deliver to defendant the said stock in the said the Tidewater & Southern Railroad Company, and that since said consolidation the said the Tidewater & Southern Railroad Company and the Tidewater & Southern Transit Company and plaintiffs have, and each of them has, at all times been and are now and is able, ready, and willing to deliver to defendant the said stock in said Tidewater Southern Railway Company. It is further alleged that on November 14, 1911, the said agreement to purchase stock was accepted by said the Tidewater & Southern Railroad Company, "and it and plaintiff, and each of them, have duly performed all of the conditions of said subscription agreement to be performed by them to this time"; "that said agreement, constituting new articles of association or incorporation, referred to in paragraph III of the original complaint on file herein, provided that all stockholders in each of said constituent corporations, to wit, the Tidewater & Southern Railroad Company and the Tidewater & Southern Transit Company, should forthwith and ipso facto be and become stockholders in the plaintiff corporation to the same extent and in the same amount as they and each of said stockholders respectively held stock in either of said constituent corporations respectively at the time of the consummation of the aforesaid consolidation"; that prior to the commencement of the action the Tidewater Southern Railway Company demanded payment of the defendant of the foregoing mentioned amounts; that defendant has not paid the said sum of $2,500, nor any part thereof, and the whole is due and unpaid; that defendant did not make, execute, or deliver to plaintiff or the Tidewater & Southern Railroad Company the $2,500 note referred to and mentioned in said subscription agreement, or any note, or any writing other than said subscription. Wherefore plaintiff prays judgment, etc.

A general demurrer to the complaint was overruled and defendant answered: Denied on information and belief the averments in the complaint as to the organization of the various corporations and their consolidation and the facts in relation thereto. Denied that plaintiff succeeded to or became the owner of said subscription agreement. Denied that prior to said consolidation or at any time or at all the said the Tidewater & Southern Railroad Company "or any one else gave to defendant, and defendant received, due or any notice of said intended alleged consolidation or amalgamation of the said the Tidewater & Southern Railroad Company with the said the Tidewater & Southern Transit Company, and denies that defendant has, at any or all times, acquiesced therein or consented thereto." Denied that said companies or either of them had, as alleged, or at all, been or now is ready, able, or willing to deliver to defendant the said stock in the said the Tidewater & Southern Railroad Company. Denied that on or about November 14, 1911, or at any other time, or at all, defendant "subscribed or signed the agreement set forth in paragraph IX of said complaint." Denied that the plaintiff, Tidewater Southern Railway Company, demanded payment from defendant of the amount mentioned in the complaint, or any part thereof, and denied that the said sum or any sum, principal or interest, is now due or owing from defendant to plaintiff.

By an amendment to the answer defendant further denied that either of said companies has "duly or at all performed all or any of the conditions of said subscription agreement to be performed by them to this time or at all"; denied that by the agreement constituting new articles of association or incorporation referred to in the complaint, all or any of the stockholders in each of said constituent corporations or either of them "should forthwith, or otherwise or at all, or ipso facto, or otherwise or at all, be or become stockholders in the plaintiff corporation to the same extent or any extent, and in the same amount or in any amount, as they or each or any of said stockholders respectively held stock in either of said constituent corporations respectively at the time of the consummation of the alleged consolidation, or otherwise or at all." For further and separate answer, alleges:

> "That the only contract or agreement to purchase stock that this defendant ever made with said the Tidewater & Southern Railroad Company, was a conditional contract wherein and whereby said defendant had the right to return the stock mentioned in said contract at any time within ten (10) months after receipt thereof, and receive back his note or cash, and that said

subscription contract was in the words and figures following, to wit."

Then follows a copy of the contract as set out in plaintiff's complaint. And it is alleged:

> "And that as a part and portion of said contract, and as the consideration for entering into said contract on the part of the defendant, there was, on said 14th day of November, 1911. Indorsed on the back of said contract, and signed by the sales manager, the following:
>
> " 'Nov. 14/11.
>
> " 'On ten days' notice ten months after date to the Tidewater & Southern Railroad Co., bearer of this contract No. 9489, can return the within named stock and receive his note back or cash back or pay note and keep stock.
>
> " 'Tidewater & So. Railroad Co.,
> " 'By Frank Avery, Sales Mgr.'
>
> "And that said defendant would not have entered into any contract or agreement to purchase any stock whatever from said the Tidewater & Southern Railroad Company had not said sales manager, as a part of said contract and as the consideration therefor, moving to said defendant, signed the said contract above mentioned."

In addition to the findings of the court in accordance with the averments of the complaint relating to the organization and consolidation of the several companies named and the capitalization as therein alleged, and the purposes for which said companies were organized and that plaintiff succeeded to and became the owner of all the interest of the Tidewater & Southern Railroad Company in and to said contract mentioned in plaintiff's complaint, the court found:

> That it is not true that prior to the consolidation of the said companies the said the Tidewater & Southern Railroad Company gave to defendant, and defendant received, due notice of said intended consolidation. "It is true that defendant did not dissent or object thereto, but it is not true that defendant has at all or any times acquiesced therein or consented thereto." That it is true that at all times since November 14, 1911, to on or about March 11, 1912, the date of said consolidation, the said the Tidewater & Southern Railroad Company was at all times able, ready, and willing to deliver to defendant the said stock in said company mentioned in the agreement set forth in plaintiff's complaint, and its certificate or certificates therefor. That since said consolidation of said the Tidewater & Southern Railroad Company and the Tidewater & Southern Transit Company, the said plaintiff has been at all times, and now is, able, ready, and willing to deliver to defendant stock in said Tidewater Southern Railway Company, and its certificate or certificates therefor. That it is true that on or about November 14, 1911, defendant signed "a certain document in writing wherein he agreed to subscribe for 2,000 shares of the common stock of the said the Tidewater & Southern Railroad Company, a corporation, and agreed to pay therefor the sum of $2,500, by giving his note upon the delivery to him of the certificates for said 2,000 shares, but that said agreement to purchase stock was a conditional contract, wherein and whereby said defendant had the right to return the stock mentioned in said contract at any time within 10 months after receipt thereof, and receive back his note or cash, and that said subscription contract was in the words and figures following, to wit." Then follows the contract as set out in the answer, with the indorsements thereon, signed by Frank Avery, as hereinabove shown. "That it is true that said defendant would not have entered into any contract or agreement to purchase any stock whatever from said the Tidewater & Southern Railroad Company, had not said sales manager, as a part of said contract and as the consideration therefor, moving to said defendant, signed the said contract above mentioned." "That it is not true that said agreement to purchase stock was on the 14th day of November, 1911, or at any time or at all, accepted by the said the Tidewater & Southern Railroad Company; but the whole of said contract, including the said portion of said contract indorsed on the back of the duplicate above mentioned, was never submitted to nor presented by said sales manager to said corporation last named and was never accepted by said corporation; and by reason thereof no contract or agreement was ever entered into between said the Tidewater & Southern Railroad Company, a corporation, and the said defendant. It is not true that it, said the Tidewater & Southern Railroad Company and plaintiff, or either of them, have duly or otherwise performed all or any of the conditions of said subscription agreement to be performed by them to this time." That it is true that, by the provisions of the agreement or consolidation referred to in the complaint, all of the stockholders in each of the constituent corporations of said consolidated corporations "should forthwith and ipso facto be and become stockholders in the plaintiff corporation to the same extent and in the same amount as they, and each of said stockholders, respectively held stock in either of said constituent corporations respectively at the time of the consummation of the aforesaid consolidation." That it is true that prior to the commencement of this action, plaintiff Tidewater Southern Railway Company demanded payment from defendant of the foregoing mentioned amounts. That it is true that the defendant has not paid the principal, $2.500, and interest thereon, and it is true that defendant has not paid any part thereof. That it is true, also, that defendant did not make, execute, or deliver to plaintiff or the Tidewater & Southern Railway Company the $2,500 note referred to and mentioned in the agreement set forth in the complaint, or any note or any writing other than said agreement.

As conclusions of law, the court found that the defendant is entitled to judgment against plaintiff and for his costs of suit.

There was evidence sufficient to suppport the findings: That the defendant had no notice of the consolidation referred to in the complaint or that the plaintiff corporation was the result thereof and that defendant did not consent to or acquiesce in said consolidation; that the contract signed by defendant was indorsed by the sales manager of the Tidewater & Southern Railroad Company in the terms as shown by copy thereof, and that said indorsement formed a part of the contract entered into by defendant and as the consideration therefor, and that defendant would not have entered into any contract to purchase said shares had not the sales manager signed the contract as above mentioned; that neither of said companies has duly or otherwise performed all or any part of the conditions of said subscription agreement referred to in the answer to be by them performed.

Defendant testified that he refused to sign the proposed subscription agreement in its then form, and on his refusal the sales manager, Avery, said, "Well, I will send this whole thing in (including the indorsement), and they can accept it or reject it as they see fit;" and the defendant said, "All right; with that I will sign it." He further testified that he was never notified by the Tidewater & Southern Railroad Company that his subscription was accepted; that he was never offered any shares of its stock, nor did any one ever tender or offer to him any shares of the plaintiff company, until counsel for plaintiff at the trial introduced and tendered 2,000 shares of said company's stock. He testified, further, that he visited the office of the Tidewater & Southern Railroad Company at Stockton "within the ten months after November 14, 1911," and saw the secretary, who knew "what he wanted to find out about," but was told that the president, Mr. Bearce, for whom he inquired, was not there; that he then went to San Francisco, to the office of the company there, but failed to meet Mr. Bearce, and was never thereafter in communication with the company until he received a letter introduced in evidence by plaintiff. This was a letter dated April 6, 1914, written by plaintiff's attorneys calling defendant's attention to the contract of November 14, 1911, informing him that plaintiff is the successor in interest of all the property of the Tidewater & Southern Railroad Company, and calling upon him to pay the obligation of November 14, 1911. To this letter defendant's attorney made answer, by defendant's instructions:

> "That the terms of the subscription were never complied with by the company. The stock was never delivered to Mr. Merz, no demand was ever made on him for payment of his subscription or any part of it. Mr. Merz understood that the subscription was canceled."

Some further fruitless correspondence ensued, and on November 9, 1914, three years after the subscription agreement was signed, the complaint in this action was filed.

Mr. Bearce, president of plaintiff corporation, who was also secretary of the Tidewater & Southern Railroad Company when this subscription agreement was signed, testified that Avery was a stock salesman of the latter company in November, 1911; that he was furnished with subscription blanks and literature, which were to be made in triplicate, and "was sent out to solicit subscriptions for that company"; that the agreement set forth in the complaint was sent in to the office and recorded in the subscription book in November, 1911; that he loaned Avery $200 "on account of his commission for this sale"; that these subscriptions were always considered as accepted when sent in, and that there was a form of letter which was sent out, thanking the subscriber (there was no evidence that defendant received any letter acknowledging receipt of the agreement, and he testified he never received from the company any notice of any kind). The witness testified that the salesmen, of whom there were 30, were under his charge; "that agents could sell on time or partial payments; in fact, probably four-fifths of the stock was sold on partial payments." He testified:

> That the writing on the back of the agreement set out in the answer "is Avery's handwriting." "The Court: Q. Did you, when you sent your agents out, give them any written instructions in regard to their authority to sell stock? A. No; when they went to work we gave them a prospectus outlining the proposition, and we gave them a lot of indorsements from Stockton and Modesto—different bankers. The Court: Q. I asked you if they had any written instructions. A. No; except the written contract. There was never any resolution passed other than a general resolution giving me the complete charge of the general management, the handling of the business—charge of the whole company. The Court: Q. Of the sale of the stock and management of everything concerning it? A. Yes, sir; I have not got that written contract here. The Court: Q. Did that written contract provide their powers as agents? A. Well, they were entitled by that contract— The Court: Q. Just answer that, yes or no. A. Yes; they couldn't make any alterations. The Court: Q. You had that in there? A. Yes. The Court: I think that contract ought to be admitted in evidence. Mr. Chester: If there is such a contract, we will get hold of it and mail it to you. The Court: He says there was such a contract. A. There were with agents; not with Avery in particular; most of them we had contracts with."

The contract was not produced, and no other evidence was given upon the question of Avery's authority or instructions. The witness testified further:

> That Avery "turned in about $50,000 worth of business. I cannot remember how many of these little documents he sent in. We sold a million dollars worth of stock and about twenty-five hundred subscribers; if a selling agent used up one book he would get another one. * * * As the subscriptions were received in the office they were entered in this book, and from there they were transferred to a ledger."

Appellant states in its brief:

> "There is only one question presented, and that is whether or not defendant executed the subscription agreement above referred to," the one set out in the complaint.

If this were the only question, there could be but one answer, for it is admitted that defendant signed this agreement. Realizing, however, that there is something more in the case, defendant takes up the question of "the effect of the writing upon the back of the duplicate (given defendant), which was not embodied in the subscription agreement sent to the company." The position taken by appellant is that:

> "In cases of subscriptions for stock any contract, written or oral, which is not made a part of the contract filed with the company and is thereby kept from the knowledge of the other stockholders, is a constructive fraud on the other stockholders and is void, and that the subscription agreement filed with the company will be enforced as if the collateral or so-called secret agreement had not been made."

It is claimed that this precise question was decided in Quartz Glass & Mfg. Co. v. Joyce, 27 Cal. App. 523, 150 Pac. 648. That case was cited by this same appellant wherein it was plaintiff in the action against one

Vance, reported in 31 Cal. App. 503, 160 Pac. 1097, wherein it was pointed out that in the Joyce Case:

> "The question involved was the validity of a stock subscription agreement by the terms of which the promissory note given for the purchase price of the stock was to be paid out of dividends to be thereafter declared by the corporation. The court held that this practically amounted to a gift of the stock in violation of the provision of section 359 of the Civil Code, and that the said agreement of the parties having that effect was therefore void."

It is true that the court in the Vance Case referred to the rule:

> "That secret collateral agreements as to stock subscriptions, by which the subscriber gains an advantage over other subscribers, are void, for the reason that such secret advantages are in the nature of a fraud upon subsequent subscribers and upon persons who afterwards become creditors of the corporation."

It was shown in the Joyce Case that the principle did not apply for reasons there given, among others, equally true in the present case, that it did not appear that there were other subscribers who could have been defrauded by the plaintiff's reliance upon the respondent's subscription, nor did it appear that there was any subsequent creditor of said corporation who could or did rely thereon in dealing with the said corporation, nor was it shown that there was any secrecy contemplated or connived at by the respondent in the making of the collateral agreement "by which he was permitted within 10 months thereafter to cancel his subscription by recalling his note." Nor did it appear that the respondent "had any knowledge of the fact that the authorized agent of the corporation failed to also indorse such agreement upon the original subscription which said agent retained on behalf of the corporation." The court said in the Vance Case:

> "Whatever secrecy there was in respect to this agreement was imparted entirely by the corporation itself through the act or neglect of its authorized agent; and this being so, and no rights of subsequent subscribers or creditors being involved in the case, it would be a manifest fraud upon the defendant to permit the corporation to take advantage of its own wrong by repudiating its agreement while enforcing the defendant's note, which was evidently given only because of the reservation in said agreement permitting its recall."

The court also in that case cited the case of Schulte v. Boulevard Gardens Land Co., 164 Cal. 464, 129 Pac. 582, 44 L. R. A. (N. S.) 156, Ann. Cas. 1914B, 1013, quoting the following language:

> "The right to return the stock and recover the sum agreed to be paid upon such return was a material and indivisible part of the consideration upon which the plaintiff agreed to become a stockholder. As between the parties it would be manifestly unjust to permit the corporation to retain the money paid by plaintiff, and at the same time to repudiate the promise which it gave in exchange for the money. The obligation to pay, upon a return of the shares, the sum agreed to be paid, is not to be viewed as a new undertaking, arising after the plaintiff has assumed the relation of stockholder. * * * The sale to plaintiff was conditional. He never became a stockholder except subject to the qualification that he might return his shares upon the stipulated terms."

In the Vance Case the facts were, as stated in the opinion, that:

> "On December 14, 1911, the defendant executed a subscription for 500 shares of the capital stock of the Tidewater Southern Railroad Company, for which he agreed to pay $625 on or before 10 months after date, giving his promissory note for that amount. The authorized agent of the corporation who solicited and received the subscription had two copies thereof, one marked 'original' and the other 'duplicate,' both of which were signed by the defendant and the agent on behalf of the corporation; the original being retained by him for the company and the duplicate being delivered to the defendant. On the back of the duplicate the following memorandum was written: 'Dec. 4, '11. Ten months after date if holder of this contract is for any reason dissatisfied we agree to return note or cash equivalent. H. C. Coffin, Tidewater Southern Railroad Co.' This writing was not indorsed on the back of the original subscription retained by the agent for the company. Within 10 months of the date of his subscription, the defendant requested the return of his note, which request the corporation refused to comply with, but, on the contrary, transferred the note to the plaintiff herein, who brought this suit. The defendant pleaded the foregoing facts by way of defense to the action, and upon proof of the same judgment went in his favor."

The judgment was affirmed. The action was brought upon the promissory note, and therein differs from the facts in the present case, in which it appeared that no note was ever executed and no shares ever issued until the suit was brought, when the plaintiff came into court and made tender thereof. The Vance Case differs from the present case, also, in that the defendant in that case, within 10 months of the date of the subscription, requested the return of his note. In the present case the defendant made an effort to ascertain something about the matter within 10 months, but saw no one authorized to act with reference to it.

It will be noted that the subscription contract contemplated payment for the shares by the execution of a promissory note, which for some unexplained reason he was never called upon to execute and never did execute. The indorsement on the back of the contract, it is true, contemplated the giving by defendant of notice to the Tidewater & Southern Railroad Company that he desired to return the stock "and receive his note back or cash back or pay note and keep stock." It seems to us that treating the indorsement as an indivisible part of the contract, defendant lost none of his rights by not giving the notice contemplated in the indorsement, and that considering all the facts of this case and the facts upon which the Vance Case was decided, the latter case is here applicable.

A somewhat similar question as here involved was before this court in Tidewater Southern Railway Company (the same plaintiff as here) v. Harney, 32 Cal. App. 253, 162 Pac. 664. In that case the defendant subscribed in writing for 500 shares of the stock of the Tidewater & Southern Railroad Company for which she agreed to pay $500. The subscriptions were made out in triplicate, as in the present case, and at the time of subscribing the defendant executed her note for $500 for said stock. The duplicate subscription, retained by defendant, had written on the back thereof the following:

> "July 25—11. Ten months from date, if holder of contract wishes, we agree to take said stock off purchasers hands at the purchase price of $1.00 per share. Tidewater & Southern R. R. Co., by R. U. Morey, Sec. Dept."

This was not written upon the original subscription retained by the company. Some time after the consolidation of the companies as referred to, and after the organization of the plaintiff corporation, the action was brought on said promissory note. In the opinion written by Mr. Justice Burnett, we held that the main features of the case were similar to those of the Vance Case, supra. It was also held that this collateral agreement was the controlling consideration for the note and could properly be shown by parol. It was also held that:

> "The transaction must be considered, of course, in its entirety, and the effect [of the conditional obligation] is the same as though the contract were fully expressed in one instrument."

Attention is also called to the fact, as exists in the present case, that the interests of no stockholders or creditors are involved. It was also held, and we are satisfied should be so held in the present case, that:

> "Appellant should not be permitted to deny the authority of the agent to enter into such conditional contract. The agents were authorized to sell stock; they had the blank subscription book. In the sale of the stock they represented, therefore, the corporation. The purchaser was not warned nor put upon inquiry as to any limitation to the authority of the agent in receiving subscriptions. The purchaser had the right to assume that the salesman was authorized by the corporation to do those legal acts which the nature of his employment seemed to warrant. The agent, in other words, was ostensibly clothed with unlimited authority, and upon familiar principles appellant should not be heard to disavow and repudiate the contract made by him."

It is further shown in the opinion that there was some evidence justifying the inference that Mr. Bearce, the president of the corporation, had knowledge of this conditional agreement, and while that fact lends support to the conclusion reached, it was not the essential feature upon which the decision rested. Speaking further of the agent, the court said:

> "It was the duty of the agent to make the proper indorsement on the 'original' subscription. If he had done so, the corporation would have had through that channel actual knowledge of the entire contract. But by the fraud of the agent the said indorsement was not made, and as far as respondent is concerned, the case must be viewed then as though said indorsement had been made and acquiesced in by appellant; for the act of the agent under the circumstances is the act of the principal, and the latter must suffer the consequences of the agent's failure to do as he agreed. This particular phase of the case is discussed with great leaning by Mr. Justice Lorigan in Otis Elevator Co. v. First Nat. Bank, 163 Cal. 31 [124 Pac. 704, 41 L. R. A. (N. S.) 529], wherein is an elaborate exposition of the doctrine that 'a principal is liable to third persons not only for the negligence of its agents in the transaction of the business of the agency, but likewise for the frauds, torts, or other wrongful acts committed by such agent in and as a part of the transaction of such business.' * * * It was manifestly the duty of the agent herein to file the original of the actual agreement of the parties with the corporation. He was acting directly within the scope of his authority when he secured the contract and filed it with the principal, and his fraudulent omission of a material part of the subscription must be regarded in the same light as would be a fraudulent addition of a material term. The result is that the status of the parties was fixed as though the agent had done his duty, and appellant is deemed to have ratified the conditional contract."

It is also held in that case that there was no merit in the contention of plaintiff that the defendants should have resorted to an independent action for damages to enforce her claims under the contract for the reason that:

> "The consideration for the note was involved, and of course that can be set up as a defense to an action on said note. Or if we view the element of fraud to which we have adverted, attention may be directed to the established and permissible procedure as set forth in Field v. Austin, 131 Cal. 379, 63 Pac. 692, and other cases, recognizing three methods by which a party defrauded may obtain relief as follows: (1) Cancellation or rescission, whereby the defrauded party procures an instrument to be set aside and himself to be restored to his original position; (2) affirmative relief by an action to recover a pecuniary compensation for the injury sustained by the fraud of the defendant where no cancellation is necessary as the basis of such recovery, and (3) defensive relief (which is in the present case resorted to) whereby the fraud is set up by way of defense to defeat an action brought to enforce an apparent obligation or liability."

We are satisfied with the conclusions reached by the trial court, and the judgment is therefore affirmed.

We concur: HART, J.; BURNETT, J.

On Motion for Rehearing.

PER CURIAM. Appellant has petitioned for a rehearing in the above-entitled cause after decision rendered by this court affirming the judgment of the lower court.

The material facts involved in the controversy clearly appear in the former opinion, and need not here be reiterated. In that opinion it was said:

> "It seems to us that, treating the indorsement as an indivisible part of the contract, defendant lost none of his rights by not giving the notice contemplated in the indorsement, and that considering all the facts of this case and the facts upon which the Vance Case was decided, the latter case is here applicable."

This language, it is claimed, lends itself to some confusion, and petitioner herein takes the position that by the Vance and Harney Cases the option on the back of the duplicate must be regarded as a part of the contract (and those cases so hold), binding upon both parties, though said option was never communicated to petitioner, that thereupon it became the duty of Merz, if he desired to terminate this relationship, to so notify the corporation within the 10 months specified in the said option, and that therefore the court is in error if it intends to say that Merz need not so notify the appellant corporation within the said time.

Even conceding that this contention of petitioner is correct, we are of the opinion, after a very careful re-examination of the record, that petitioner is not entitled to a rehearing, and that the result reached by the trial court was a correct one. It is to be remembered that, upon being solicited for a subscription by appellant's agent, Avery, Merz declined to enter into any agreement unless he was given a 10 months' option to return his stock and receive his money back. It is at once apparent that the negotiations between Avery and Merz constituted at least one of two things: Either they amounted to an offer from the company through its agent to Merz, or constituted an offer from Merz to the company. If the former be the true aspect in which to view the transaction, then we should indeed have a similar condition to that existing in the Vance and Harney Cases, namely, that Avery, as agent, had authority to enter into the contract, as modified by the option, and that therefore said contract was completed, and Merz made a stockholder, upon the signing of said contract. Viewing the case in this light there would be no question but that Merz would have to exercise his option of returning his stock within the period stipulated in said option; that is, 10 months from the date of the signing of the contract, and that not having done so, he has no standing in court.

But appellant overlooks the effect of Merz's testimony as to the negotiations, which is the only evidence upon this phase of the case. Merz was asked:

> "Q. Now, just state to the court what was said by Mr. Avery with regard to the acceptance or nonacceptance of this contract, and what, if anything, Avery was going to do with this contract—whether or not he was to submit it to the company, as was stated."

And his answer was:

> "A. He stated that it was customary to make a payment on this, these subscription agreements for stock, and I refused to make that, and he says, 'Well, I will send this whole thing in, and they can accept it or reject it as they see fit; and I says, 'All right; with that I will sign it.' "

This shows clearly that, in taking the contract, Avery did not purport to act with authority to bind the company or to assume the responsibility of accepting for the company a subscription on the conditions imposed by Merz, but that both parties understood that Merz's proposition was an offer to be submitted to appellant for such action as it might take. Therein does this case differ substantially from the Vance and Harney Cases, where the offer came from the agent acting and purporting to act within the apparent scope of his authority. And in this connection it is now settled that where the proposition or offer does not come from the corporation, but from the subscriber, the subscription must be accepted by the corporation. Appellant then argues that:

> "It has been repeatedly held that the subscription is accepted by the corporation when it makes an entry thereof in its books, spends money on the faith of it, or otherwise treats the subscription as being accepted. Clark & Marshall, Private Corporations, § 439b, p. 1366."

Even assuming this to be a correct statement of the law of this state, it has no application here, for the very obvious reason that the offer or proposition of Merz was never submitted to appellant. The entry upon its stockbook, which it is claimed constitutes an acceptance, was of the original proposition made by Avery to Merz, minus the option feature, and was not the proposition submitted by Merz and intended by him to be submitted to appellant. Merz's proposition, as already pointed out, was fraudulently retained by Avery. Obviously, then, no contract was entered into. The corporation, because of its agent's fraud, received, and thereupon accepted, a proposition essentially different from that submitted by Merz, a proposition that had previously been refused by him. No mutual rights were ever created, and so none could be lost. Viewed in this light, it is a sound conclusion that Merz lost no rights by not giving the notice contemplated in the indorsement.

Whatever is said in our former opinion regarding the application of the Vance and Harney Cases to the instant case must likewise be understood in the light of what is here said. There is nothing at all inharmonious between those cases and this.

The petition for rehearing is denied.